THE UNIVERSITY OF CALGARY

# ENFORCING CANADIAN BROADCASTING POLICY: THE CRTC AND CANADIAN CONTENT REQUIREMENTS

by

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## ABSTRACT

This thesis examines the process of regulatory enforcement by one independent regulatory agency — the Canadian Radio-television and Telecommunications Commission (CRTC). Specifically, this study addresses the application of Canadian content requirements to private television broadcasters in Canada.

This research outlines the mandate of the Commission and some of the constraints in the regulatory environment under which it must operate. The Commission's enforcement efforts are examined through description and analysis of its use of sanctions, instruments of policy implementation and various enforcement strategies. A case-study, finally, illustrates the actual practice of these means of enforcement, as well as the informal activities involved in achieving compliance.

Several findings emerge from this study. The first of these is that an analysis of the CRTC's enforcement activities cannot ignore the influences on that process from the regulatory environment: political constraints, resistance from the private broadcasting industry, and the nature and complexity of the task of regulatory enforcement itself. Secondly, an examination of the CRTC's employment of various elements of the enforcement process indicates as consistently important, informal conciliatory means of bringing about compliance with regulatory standards. A third finding is that the maintenance of a balance between strictness and conciliation is necessary to effective enforcement. Finally, this thesis submits that the fundamental problem of enforcing Canadian content requirements is in addressing the gap between compliance with the letter of regulatory standards and achieving the spirit of Canadian programming goals. The results of the Commission's enforcement efforts can at best fall somewhere between the ideal and what is realistically achievable.

A major implication emerging from this study is that many criticisms of the CRTC confuse the objectives of compliance with ideal policy goals, placing unrealistic expectations on the Commission's enforcement performance. This thesis concludes that when contextual influences, the importance of informal procedures, and the ultimately unresolvable problem of enforcing Canadian programming goals are taken into account, the CRTC's ongoing enforcement efforts appear effective. In the long run, the CRTC achieves the objective of enforcement — compliance with regulation — if not the "spirit" of Canadian programming goals.

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# CHAPTER 1

## INTRODUCTION TO THE STUDY OF THE ENFORCEMENT OF CANADIAN BROADCASTING POLICY

The Canadian Radio-television and Telecommunications Commission (CRTC) is one of Canada's most visible regulatory agencies. The CRTC is responsible for the regulation and supervision of the Canadian broadcasting system. It must exercise this mandate with a view to implementing Canadian broadcasting policy objectives.

The study of how this implementation occurs, like the study of policy implementation in general, addresses the linkage between the "decision and the reality of governmental performance."[1] Understanding the process of policy implementation is extremely important, as it identifies "the factors that contribute to the realization or nonrealization of policy objectives."[2] Effective implementation ensures that the decisions of policy makers are carried out successfully.[3]

The enforcement of regulation is part of the policy implementation process. Regulation, a governmental activity which establishes "sets of rules or standards with which individuals and groups are expected to comply,"[4] functions as an instrument or component of the public policy process as a whole. Enforcement is the attempt, through various means, to achieve compliance with those rules. Regulatory enforcement is crucial to the fulfillment of regulatory goals.

The subject of this study is the CRTC's enforcement of one aspect of its regulatory mandate, specifically the application of Canadian content requirements to private television broadcasters. This work outlines the powers of the Commission and some of the constraints in the regulatory environment under which it must operate. The CRTC's enforcement efforts are examined through a description and explanation of its use of sanctions, instruments of policy implementation and various enforcement

strategies. A case-study is included in this work to illustrate the actual practice of these means of enforcement, as well as the informal activities involved in achieving compliance. Finally, this thesis will discuss and analyze the problem of regulatory enforcement and the way in which the Commission has exercised its mandate in implementing Canadian programming goals vis-a-vis private television broadcasters.

## The Commission's Mandate to Enforce Canadian Content Requirements

The CRTC was created with the enactment of the Broadcasting Act in 1968.[5] The Act empowers the Commission to "regulate and supervise all aspects of the Canadian broadcasting system."[6] This broad mandate is to be exercised with a view to implementing the policy objectives for Canadian broadcasting set out in section 3 of the Act. The specific objectives of section 3 which are relevant to this study are as follows:

> 3(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; ...
>
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources; ...
>
> (j) ... the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.[7]

The Commission's mandate to regulate Canadian content derives from the Broadcasting Act's requirement that the programming provided by each broadcaster use "predominantly Canadian creative and other resources."[8] This requirement has been enforced by the Commission through "regulations, promises of performance, and conditions on licences."[9] Canadian content regulations set quotas of Canadian programming which must be met by licensees. Private television broadcasters must

devote not less that 60 per cent of the broadcast year and 50 per cent of the evening broadcast period (6 P.M. to midnight), to the broadcasting of Canadian programs.[10] Conditions of licence are the "terms of contract entered into between the broadcaster and the public authorities."[11] Conditions are attached to each broadcaster's licence, "related to the circumstances of the licensee."[12] Promises of performance are "commitments made by a licensee in support of the licence application."[13] Conditions of licence and promises of performance are commitments, whether imposed by the Commission or offered by the broadcaster. This "makes them enforceable and makes it possible for the CRTC to supervise them."[14]

The enforcement of Canadian programming goals is central to the CRTC's regulatory mandate. It has been called the "fundamental test regarding the degree of success (or lack thereof) achieved by the CRTC in pursuing its objectives."[15] According to the Commission itself, Canadian content is its "unwavering commitment" and "the key to maintaining a distinctive Canadian presence in broadcasting."[16] The objective of Canadian content requirements is to

> provide and exhibit in all broadcasting time periods, including the most popular viewing hours, a wide range of high-quality, Canadian-produced programs that a significant number of Canadians will choose to watch.[17]

Yet in spite of the high priority the Commission attaches to its mandate to promote Canadian content, the fulfillment of Canadian programming goals is extremely difficult. The difficulty with enforcing Canadian content has to do with the nature of the regulatory environment itself. The CRTC has attempted to amalgamate two conflicting principles in its regulatory efforts: "broadcasting as an instrument of national social and cultural policy, and as a business enterprise."[18]

## The CRTC and the Problem of Enforcing Canadian Content

There is a fundamental economic tension between cultural regulatory goals and the profit-seeking motives of the commercial broadcasting industry. It is much less expensive for private television broadcasters to buy American programming than to produce their own. Further, "advertising revenues generated from popular American programs often exceed those from Canadian productions."[19] Private television broadcasters in Canada find it more to their advantage to buy programming cheaply from U.S. sources "than to themselves engage in quality domestic productions, a much more expensive proposition."[20]

Because profit-making is in direct conflict with Canadian content policy goals, Canadian English-language private television broadcasters

> offer virtually no Canadian entertainment programming in peak viewing periods and next to no Canadian drama - light or serious - at any period in their schedule.[21]

The CRTC has noted that "English-language Canadian television programming has not attracted a significant audience":

> [F]oreign programs account for 77 per cent of the total viewing of English-language television programs over the entire day and 85 per cent between 7:30 p.m. and 10:30 p.m. While news and public affairs account for about half of the viewing of Canadian programs, Canadian - produced entertainment programs only attract 4 per cent of the audience over the total broadcast day.[22]

Overall, Canadian content regulations and requirements have not met their objective of popularizing Canadian programming. Instead, Canadian programming is scheduled outside of peak viewing hours on private television, and what exists under-represents the areas of entertainment and children's programming.[23]

It is important to note that this situation exists while broadcasters are in compliance[24] with the minimum quantitative Canadian content requirements (60 percent overall and 50 percent in the evening broadcast period, between 6 p.m. and midnight).

The present Canadian content regulations "can be met without a commitment to expensive Canadian programs which would act to reduce profits."[25] Further, the "average broadcaster has not felt that his licence is unduly threatened by a minimal performance which meets the letter of the regulations."[26]

There is a gap between compliance with the letter of the law and the achievement of Canadian programming goals. The CRTC has recognized this difficulty:

> Experience of the past several years shows clearly that simple compliance with the minimum quantitative requirements under the current regulation has not been enough to achieve this [Canadian content] objective. Widespread practices have evolved which are at odds with the spirit of the Canadian content regulations.[27]

The fundamental problem of enforcing Canadian content requirements lies in addressing the gap between fulfillment of the letter of regulation and achieving Canadian programming objectives in the spirit of the Broadcasting Act. As Salter has observed, whether or not Canadian content policies "have been successful is a matter of debate":

> The assessment depends largely on the standard of success being used. Compared to a situation of having no content regulation, the regulations have been very successful. Are private broadcasters now actively pursuing excellence in Canadian production for the majority of their broadcast hours? Of course not. Would other approaches be more successful? Perhaps.[28]

The question of relevance to this study is to what extent the difference between the objective and the fulfillment of Canadian programming goals is the result of ineffective enforcement by the CRTC. Some critics have argued that Canadian content requirements have failed to bring about the increased viewing of Canadian programming, because they have not been vigorously imposed.[29] Criticisms of the CRTC's enforcement efforts will be discussed in more detail later in this thesis, and so a brief summary will be sufficient here.

In the Commission's attempt to deal with the conflicting interests of culture and profit, it has been argued, economics have dominated and strict enforcement of Canadian

content requirements by the CRTC has been "more the exception than the rule."[30] Critics have noted that the regulation of Canadian broadcasting has operated to the benefit of private broadcasters, who receive "state protection from American competition in return for undemanding levels of Canadian content."[31] Further the Commission has been accused of "giving in too often to the interests of those it regulates."[32] And above all, the CRTC has been "criticized for doing nothing when undertakings repeatedly fail to meet their commitments."[33] No "television licence has ever been terminated, whatever the record of the broadcaster in meeting promises of performance."[34] One of the strongest advocates of increased strictness in the enforcement of Canadian broadcasting policy has concluded on the basis of the Commission's infrequent use of formal and stringent sanctions, that the CRTC is "lax in enforcement."[35]

An awareness of these criticisms is important to both understanding and assessing the CRTC's enforcement activities. These criticisms, however, share a "tendency to equate enforcement with highly formal adversarial proceedings."[36] But do such formal procedures address the full range of enforcement practice? Joskow and Noll submit that there is a significant informal aspect to regulatory enforcement, and that this day-to-day contact between agencies and the firms they regulate "has often been overlooked in analyses of the effects of government regulations on industry behavior and performance."[37] Much of the compliance accomplished routinely, they argue, is the "result of moral suasion and behind-the-scenes bargaining"[38] between the commission and the firm concerned.

If in fact there is an important informal element to the enforcement of regulation, criticisms of the CRTC's enforcement efforts which are based only on the Commission's use of formal methods do not address the entire enforcement process. This neglect of the informal aspect of enforcement is not surprising since it is a "low visibility activity"[39] and therefore difficult to study. Still, the effort should be made, according to Joskow

and Noll, as informal regulatory processes are "extremely important for understanding both agency behavior and performance of regulated firms."[40]

Just as informal activities should be considered when studying the enforcement of regulation, it is equally important that such assessments take into account the requisites of the policy implementation process, of which regulatory enforcement is part. The enforcement of regulation, like policy implementation, is a complex matter and cannot be "accomplished in a routine fashion."[41] A sizable gap "often exists between a policy decision and its implementation."[42] The existence of such a discrepancy between a policy mandate and its achievement is not necessarily a failure of implementation, because "literal implementation is literally impossible":

> Unless a policy matter is narrow and uninteresting (i.e. preprogrammed), the policy will never be able to contain its own consequences. Implementation will always be evolutionary; it will inevitably reformulate as well as carry out a policy.[43]

## Purpose of the Study

This thesis attempts to illuminate both the informal aspect of regulatory enforcement by the CRTC and the complexities of the policy implementation process, in addition to examining the Commission's formal powers and procedures. Attention to these factors provides a fuller, more balanced picture of the enforcement process and a better basis on which to assess its effectiveness. It is also important to understand the context in which the Commission makes decisions. The CRTC's independence from government and the private broadcasting industry will be addressed as part of the environment in which enforcement occurs, as well as a potential influence on that process. This research will outline the Commission's mandate, its instruments of policy implementation, constraints in the regulatory environment under which it must operate, and regulatory enforcement strategies to which the Commission could potentially resort. This work will then describe and analyze the way in which the CRTC has put its powers

and elements of these enforcement strategies into practice, in the enforcement of Canadian content requirements vis-a-vis private television broadcasters.

In short, this research is guided by two general and related questions: how does the CRTC enforce its mandate, and why does this enforcement occur the way it does? From this line of inquiry more specific questions emerge:

- What is the process by which regulation is enforced?
- What are the environmental factors which influence regulatory enforcement?
- What are the elements of the enforcement process?
- How does the CRTC employ these elements?
- What are the formal enforcement powers available to the Commission?
- How does the CRTC put its powers into practice on an informal basis?
- What makes the enforcement of Canadian content goals a problematic undertaking?
- How effectively does the CRTC implement its mandate to promote Canadian content?

## Significance of the Study

This study, which explores the process by which the CRTC enforces its regulatory mandate, is significant on three different levels of generality. First and most broadly, this work adds to the body of knowledge about the policy implementation process. Examination of this process, which occurs between the conception and result of a policy, is crucial to effective policy-making. Where a policy is a theoretical plan, the implementation process reveals how and why a policy operates effectively or ineffectively in practice. The practical experience of regulatory enforcement by the CRTC can have implications for the more general process of policy implementation.

Secondly, this thesis makes a contribution to the understanding of implementation within the regulatory process itself. Bernstein has noted that the "least explored area in

governmental regulation of business is the enforcement of regulation."[44] Like policy in general, regulation must be enforced to be effective. Hawkins and Thomas advise that "high on any agenda for research on the regulatory process should be the study of enforcement practice as a part of agency behavior."[45] Further, any proposals for change should be "informed by an understanding of the way regulatory bureaucracies carry out the essential tasks of enforcement."[46]

Finally and most specifically, this research responds to problems identified by the recent Report of the Task Force on Broadcasting Policy. The Task Force initiated a comprehensive reappraisal of Canadian broadcasting policy, and reported its findings in 1986. It notes that a close look at the work of the Commission "shows that it has not developed any clear strategy to ensure compliance with regulations and licensing conditions."[47] The report goes on to point out the dangers of the present situation:

> Regulation constantly flouted or enforced haphazardly is self-defeating. Worse still, it is harmful: its costs are greater than its benefits and it tends to discredit the very objectives it is intended to protect.[48]

The Task Force concludes that "studies on regulatory methods and compliance strategies are lacking"[49] and that research is the key to the effective implementation of Canadian broadcasting policy.[50] This thesis will attempt to further such research by analyzing the CRTC's enforcement of Canadian broadcasting policy — specifically the application of Canadian content regulations to private television broadcasters.

## Limits of the Study

This thesis limits its scope to the regulatory relationship between the CRTC and privately-owned, English-language television broadcasters. A more comprehensive study of the enforcement of Canadian content in television would also include the Commission's regulation of the Canadian Broadcasting Corporation (CBC) and French-language television broadcasters. These elements of the television broadcasting system

are not addressed in this study because they do not present the same enforcement problem as do English-language commercial broadcasters. The publicly-owned CBC is partially supported in its Canadian production, and so does not rely exclusively on advertising revenues for its survival as do the private companies. Canadian production in the French language has a strong market in Quebec, and so does not present to its broadcasters a profit problem. This thesis addresses enforcement by the Commission where it is problematic — where there is a tension between cultural regulatory goals and the profit-making imperative. It is therefore private English language television broadcasters, not the CBC or French-language broadcasters, that are of interest to this study.

Further, while there are a number of groups and private citizens involved in the process of broadcast regulation, the focus of this study will remain limited to the primary regulatory relationship between the CRTC and the commercial broadcasting industry. It will also address government intervention as it affects that primary enforcement relationship.

Finally, this thesis explores the process by which the CRTC enforces Canadian content requirements in television broadcasting. It does not deal with the Commission's responsibilities in other areas of regulation. Nor does this research address regulatory reform or the substantive merits of the regulations themselves. As the Report of the Task Force on Broadcasting Policy points out, a confusion of these goals creates a circular argument which diverts discussion from the issue of enforcement:

> Debate on broadcasters' failure to comply has often been diverted to the rules themselves ... It is in fact easier to argue about whether or not a rule is inappropriate than it is to reflect upon ways of ensuring that undertakings comply with them. [sic] Many studies of regulations fall into this trap ... The question is therefore not whether one ought to deregulate or regulate but rather, a matter of deciding how principles are to be enforced once they are approved.[51]

These are the boundaries of this study in terms of subject matter and relevant regulatory actors. Within these limits a diversified research methodology is employed in this work.

## Methodology

Methodology as defined by Bogdan and Taylor refers to:

> the process, principles and procedures by which we approach problems and seek answers. In the social sciences the term applies to how one conducts research.[52]

Yin points out that the form of the research questions suggests the appropriate research strategy to be pursued.[53] As noted previously, this research is guided by two general and related questions: how does the CRTC enforce its mandate, and why does this enforcement occur the way it does? In order to answer the questions posed by this study description and explanation are required. Because these questions deal with "operational links needing to be traced over time,"[54] the research strategy which emerges involves more than one level of analysis, multiple data sources, a qualitative method of inquiry and the use of a case study.

This research is simultaneously directed at two levels of analysis.[55] It involves a dual emphasis on "the individual engaged in the decisional process and on the systematic properties of the process as a whole."[56] The broad framework of the study includes a general classification of the regulatory process, the mandate and functions of the CRTC and the formal relationship of the Commission to government. Within this broader framework or context, specific questions emerge. How effectively does the CRTC implement its mandate? How does the Commission put its powers into practice on an informal basis? Does the possibility of political review of CRTC decisions affect the process of regulatory enforcement?

The conduct of research on two levels — general to specific — requires the use of a wide variety of information sources. This thesis will include an analysis of both

primary and secondary materials. Primary sources are "basic works with little or no annotation or editing."[57] In this study primary materials will include the relevant legislation and regulations, as well as published government documents, reports, and policy statements. Publications of the CRTC — decisions, public announcements and notices, policy statements, annual reports, and transcripts of public hearings — are the key primary documents of this work. Interviews with informed personnel in the CRTC and in the broadcasting industry will provide another primary resource.

This thesis also draws upon a large body of secondary analysis from a variety of sources. Secondary materials are those which "derive from primary materials and include analysis, interpretation, and commentary on primary materials."[58] The fields of political science and public policy analysis, administrative law, economics, public administration, and communications studies all make important contributions to the study of agency behavior and the regulatory enforcement process.

This use of diverse sources of data, and analysis at two levels which deals with both context and specifics, and a general concern with description and explanation leading to a comprehensive understanding of a phenomenon, are all characteristics of qualitative research. The descriptive and explanatory emphasis of the qualitative methods employed in this study - as opposed to quantitative techniques such as experiments or survey research - are uniquely suited to the study of policy implementation. Qualitative researchers use "inductive, theory-building rather than deductive, theory-testing technology."[59]

> They do not search out data or evidence to prove or disprove hypotheses they held before entering the study: rather, the abstractions are built as the particulars that have been gathered are grouped together.[60]

Specific hypotheses are avoided upon entering a qualitative investigation as they may "impose preconceptions and perhaps misconceptions on the setting."[61]

The context and the actor within it are inseparable in qualitative research. This approach "directs itself at settings and the individuals within those settings holistically."[62]

> [T]he subject of the study, be it an organization or an individual, is not reduced to an isolated variable or to an hypothesis, but is viewed instead as part of a whole.[63]

The qualitative researcher's concern with context is based on the idea that actions are best understood in the setting in which they occur: to "divorce the act, word or gesture from its context ... is to lose sight of its significance."[64]

Finally, qualitative research assumes a dynamic reality[65] rather than focusing on stable, measurable results. It is concerned with process "rather than simply with outcomes or products."[66] This concern with process allows the day-to-day practice of policy implementation to be explored in detail. Combined with an inductive technique and holistic approach, the process orientation of qualitative research allows understanding of a problem or phenomenon at a deep and comprehensive level.

The case study is a characteristic design of qualitative research.[67] A case study can be defined as follows:

> the essence of a case study, the central tendency among all types of case study, is that it tries to illuminate a decision or set of decisions: why they were taken, how they were implemented, and with what result.[68]

The critical features of the case study are enumerated by Robert K. Yin. A case study:

- investigates a contemporary phenomenon within its real-life context; when
- the boundaries between phenomenon and context are not clearly evident; and
- multiple sources of evidence are used.[69]

Of the multiple sources of information used to construct a case study, one source — the in-depth interview — is exceptionally important. An interview is a "purposeful conversation, usually between two people ... that is directed by one in order to get

information."[70] Interviewing allows a case study to explore "facets of people, events, and settings which are not directly observable."[71] From interviews it is possible to gain an informal "intimate view of organizations, relationships, and events from the perspective of one who has experienced them."[72] This is crucial to the development of an in-depth, realistic understanding of a decision-making process.

This thesis employs the case-study method, concentrating attention on the regulatory relationship between the CRTC and one licensee over a period of time. The case-study provides "a connected body of information about a particular situation."[73] This allows a careful, detailed look at the process of regulatory enforcement in one "whole, self-contained unit."[74]This focused attention permits the tracing of the "imprint of process on outcome."[75] By presenting information about how things "actually happened," a case-study gives a fuller picture of the informal nature of the enforcement process. The case-study method provides the concrete data necessary to assess the strengths and weaknesses in the CRTC's implementation of its mandate. Combined with knowledge of the broader context of regulatory enforcement, a case-study rounds out understanding to the level necessary for determining not only the effectiveness of the Commission's enforcement efforts, but why enforcement occurs the way it does.

The methodology or approach to conducting this research involves multiple sources of data, and the use of different perspectives in analyzing that data. This process of combining differing perspectives and a broad range of information sources is called triangulation.[76] Since all sources and perspectives in research have different strengths and weaknesses,[77] triangulation is a means of "strengthening the validity of conclusions reached."[78] The rule is that the "greater the triangulation, the greater the confidence in the observed findings."[79] The methodology employed in this thesis — a qualitative method of inquiry on two levels of analysis, using a variety of information sources and a

case study — should provide a thorough and reliable understanding of the CRTC and the regulatory enforcement process.

## Organization of the Study

Chapter One has introduced the subject of this thesis — the enforcement of Canadian content requirements with reference to private television broadcasters by the CRTC. Chapter Two discusses enforcement and the regulatory process. Since the enforcement of broadcasting policy by the CRTC takes place within the context of the regulatory process in Canada, an understanding of this process is essential to an analysis of the CRTC's implementation activities. This chapter surveys the literature on regulation and enforcement, providing a framework for the study of the CRTC's efforts to fulfill the objectives of its mandate. It outlines the concepts involved in regulation by independent agencies and the elements of the regulatory enforcement process as they apply to regulatory agencies in general.

In Chapter Three, these concepts are applied specifically to the CRTC and its enforcement of Canadian content requirements. This chapter outlines the legislative mandate and functions of the CRTC, as well as its relationship to government and the private broadcasting industry. The third chapter also examines the Commission's instruments of policy implementation, characterizes the CRTC's enforcement strategy, discusses the problems of enforcing Canadian content, and addresses these enforcement problems as part of the policy implementation process.

Chapter Four addresses specifically the ways in which the CRTC has put its powers into practice in one case. This chapter presents and analyzes a case-study of the regulatory relationship between the CRTC and one private television licensee: CKVU-TV Vancouver. This study provides a detailed examination of the means by which the CRTC attempts to obtain regulatee compliance with the Canadian content requirements.

This section of the thesis, particularly, provides insight into the informal elements of the regulatory enforcement process, an important means by which to assess the effectiveness of the Commission's enforcement efforts.

The enforcement of Canadian content goals vis-a-vis private television broadcasters is a complex process. To assess the Commission's efforts in this regard, the influence of the broader regulatory context, the complexity of policy implementation and the importance of informal means of achieving compliance must be understood. Chapter Five, in conclusion, will draw together and analyze the findings of this thesis in relation to these themes.

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# CHAPTER 2

# ENFORCEMENT AND THE REGULATORY PROCESS IN CANADA

> The problem of enforcement is an acute one in regulation for reasons that are intrinsic to the nature and task of regulatory control.[1]

The enforcement of broadcasting policy by the CRTC takes place within the context of the federal regulatory process in Canada. A basic understanding of this process is essential to an analysis of the Commission's enforcement of regulatory goals. This chapter will survey the literature on regulation and enforcement, providing a framework for the study of the CRTC's efforts to fulfill the objectives of its mandate.

Regulation and enforcement are interdependent activities. Regulation must be enforced to be effective, yet the nature of the regulatory process itself has an impact on the style in which that enforcement is carried out. Chapter Two begins with a discussion of regulation, the unique characteristics of independent regulatory agencies, and the tensions inherent in the regulatory process. This provides a basis for understanding the process of regulatory enforcement, addressed specifically in the second half of the chapter. This later section describes the elements of the regulatory enforcement process: sanctions, instruments of policy implementation, and strategies of enforcement.

## The Canadian Regulatory Process

The Economic Council of Canada defines regulation as "the imposition of constraints, backed by government authority, that are intended to modify economic behaviour of individuals in the private sector significantly."[2] These constraints or rules can be established in statutes and all subordinate legislation such as regulations, directives and guidelines. Regulation is also implicit in administrative and quasi-judicial decisions.[3]

Regulation is a choice, writes Doern, "of one instrument of governing from a range of other instruments."[4] Governing instruments are the "major ways in which

governments seek to ensure compliance, support and implementation of public policy."[5] The other main instruments of government — aside from regulation — are exhortation, expenditure, taxation and public enterprise. The sum of these instruments, note Doern and Phidd, represents the outputs of government.[6]

As a governing instrument intended to modify private economic activity, regulation is "unavoidably political."[7] Regulation is a process, observes Bernstein, which is inseparable from its political and economic environment — an environment, which "remains founded on the efforts of organized groups to utilize public power to promote either private ends or the public welfare."[8] Regulatory decisions must address "competing ideas, individuals, and often organized interests."[9] Because of its essentially political nature, the regulatory process is a complex form of public action "which is neither automatic in execution nor simple with respect to technique and procedure."[10]

Whether regulation is effective in modifying economic behavior is "highly dependent upon enforcement strategy and the effort devoted to enforcement."[11] Salter notes that the regulatory process can employ varying levels of coercion to obtain regulatee compliance:

> As is the case with other governing instruments, regulators have access to [a] number of measures — ranging from education programs, persuasion and exhortation, to active efforts to enforce policies, impose penalties for non-compliance, or to initiate particularly desirable activities.[12]

Aside from the private companies and individuals of whom compliance is required, there are a number of key government players in the Canadian regulatory system. Among these are Parliament, the Cabinet, government departments, the courts and independent regulatory agencies. Individually or collectively these players determine regulatory policy — its "content, interpretation and implementation."[13] Regulation is carried out or implemented by government departments or independent regulatory

agencies.[14] Regulatory agencies, alternately described as "boards, commissions, and tribunals,"[15] are the actors of primary interest to this study.

## Independent Regulatory Agencies

Independent regulatory agencies or commissions have a unique role within the regulatory system. Their operation in the implementation of regulation is distinctive in a number of ways. First, regulatory bodies are usually legally mandated with a potentially large scope for discretion in the exercise of that mandate.[16] Secondly, regulatory authorities are in a unique position, "simultaneously inside and outside the government."[17] Although they are mandated to enforce governmental policies, regulatory bodies are usually, at least to some extent, independent in status. While no regulatory body is ever fully insulated from political pressure, its function is separate from other government institutions — the executive, legislature and government departments. This creates the expectation, if not the full reality of independent decision-making.[18]

The role of an independent regulatory agency is also distinguished by the continuing relationship between the regulator and the regulated. A regulatory agency makes decisions which "affect a discrete segment or sector of the economy."[19] The regulated interest must continually return to the same authority for sanction of its activities.[20] The interactive nature of this relationship creates its own dynamics:

> The continuing interaction of regulator and regulated creates an inevitable mutuality of concern, a common definition of issues and problems and of the process of decision-making....[21]

Some observers have viewed this closeness between regulatory agencies and those they regulate as a negative compromise of the regulator's original mandate. It is a common criticism of regulators that they serve "the interests of regulated industries to the neglect or harm of more general, or 'public' interests."[22] This perception of excessive

industry influence on regulatory commissions is referred to as "clientelism" or "agency capture."[23] Notable in this regard is Bernstein's theory of the life cycle of independent regulatory commissions.[24] Bernstein argues that regulatory agencies follow a pattern of evolution from birth to decay. Agencies are born of demands on government for corrective action to a problem of public policy. While the agency ordinarily begins its career aggressively determined to implement the goals laid out for it by the government's executive, "its real and potential capacities contrast sharply with those of the regulated groups."[25] Armed with what is often a vague, untested mandate, the regulatory body must confront an organized industry with vital interests to protect.

Inevitably, writes Bernstein, the pattern of decay sets in. As the "spirit of controversy fades out of the regulatory setting,"[26] the approach of the commission changes. It becomes less of a regulatory "policeman" and more like a manager of industry. The agency's concern becomes the industry's financial well-being, and it tries to prevent changes that would do the industry harm. Finally, the regulatory commission becomes "captive of the regulated groups."[27] In old age the agency has declined to the point where its objective becomes "the maintenance of the status quo in the regulated industry and its own position as recognized protector of the industry."[28]

Close interaction between regulator and regulated does not necessarily, however, indicate agency capture by industry interests. As Doern points out, regulatory agencies may be intended to function "as managers and quasi-promoters" of industry rather than merely as "strict regulatory policemen."[29] Further, given the fact that regulatory agencies are often provided broad and non-specific mandates, it is both inevitable and necessary that they "seek out day-to-day, case-by-case"[30] means of functioning.

In continuing and interactive regulatory relationships, negotiation becomes the dominant regulatory style. Recurrent dealings between the regulator and regulatees allows the former to "trade goodwill about one decision for compliance with another."[31]

This compromise is seen as a practical necessity in the regulatory process. A regulator of limited resources that has many responsibilities within a given sector cannot force compliance on a continuing basis, especially when the regulated party may have significant economic power to resist this effort. As a result, the attempt is made to achieve a relatively harmonious relationship between the regulator and the regulated.

In the Canadian regulatory process, independent regulatory agencies with their unique characteristics have become increasingly important. Roman notes that operating as they do outside of the traditional governmental mode, regulatory agencies have three major advantages.[32] First, they reduce the workload of Cabinet, which is increasingly overburdened. Secondly, they develop "a cumulative technical expertise."[33] This expertness and mastery of technical detail, provide policy with continuity and stability.[34] And finally, regulatory agencies de-politicize the regulatory process,[35] allowing for impartial, non-partisan decision making.

The need to insulate regulatory decisions from the political arena provides the rationale for the independent status of regulatory agencies in the Canadian governmental system. The functions these agencies perform, such as adjudication, arbitration, and the exercise of statutory discretion, call for specialized, impartial determination free from partisan politics and political influence.[36] This independence from the executive branch of government is meant to ensure impartial decision-making by regulatory agencies, and can be conferred by several means. First, an agency has greater independence when the persons making up its decision-making body "are appointed for a fixed term," and cannot be removed from office without cause.[37] Independence is also implied in an agency's ability to

> make adjudicative and other decisions that may have a significant impact on individuals, firms or groups and from which there is no appeal or only a limited right of appeal.[38]

Finally, more autonomous agencies can, within the boundaries of their enabling legislation, create new regulation without the approval of Cabinet or the legislature.[39]

This independence or autonomy, which is necessary to fulfilling the specialized functions expected of regulatory agencies, is also a source of tension in the regulatory process. Agency independence is in apparent conflict with our "traditions of ministerial accountability to the legislature in a parliamentary system."[40] The Lambert Commission of 1976 notes that the right of Parliament to "hold ministers both individually and collectively answerable for their actions"[41] is central to our system of government in Canada. The members of Cabinet are "collectively responsible to Parliament for the overall performance of government."[42] Further, a minister is "personally responsible for the activities carried out under his authority and he must answer to Parliament for the actions of his department."[43]

Ministerial responsibility, then, becomes what Hodgetts terms a "device for bridging the gap between parliament ... and the public service organization."[44] Its purpose is to hold "accountable those who exercise power"[45] — both politicians and administration. According to the Lambert Commission, all those who exercise authority must

> account for the manner in which they have fulfilled responsibilities entrusted to them, a liability ultimately to the Canadian people owed by Parliament, by the Government and, thus, every government department and agency.[46]

The "liability" of ultimate accountability to the people, however, is not assumed by independent regulatory agencies as it is by executive departments responsible to a minister. Hodgetts has labelled independent agencies "structural heretics"[47] because of their departure from "the principle of ministerial responsibility."[48] There is an inherent tension between independence and accountability in the autonomous status of regulatory agencies.

Lacking in the political legitimacy of accountability to the elected legislature through Cabinet, legitimacy for independent regulatory agencies lies in the public perception of de-politicized decision-making. Vandervort explains:

> The public interest is safer when left to be interpreted by an independent body who can weigh all legitimate conflicting interests including those of the executive from a less partisan perspective than would be taken either by Cabinet or by Parliament as we know it.[49]

This public perception of de-politicization, however, may be illusory according to Vandervort, because few regulated matters are free from content that is highly political.[50] Cutler and Johnson argue that regulatory agencies are often "deeply involved in the making of 'political' decisions in the highest sense of that term":[51]

> between competing social and economic values and competing alternatives for government action-decisions delegated to them by politically accountable officials.[52]

To the extent that regulatory agencies are not engaged in strictly regulatory activities, but political ones as well, the justification for their independent status is eroded.[53] As Schultz points out, the fact that "responsibilities have been delegated to independent authorities which frequently engage in what are essentially political activities" raises fundamental questions about "democratic responsibility and political control."[54]

Within the regulatory process it is difficult to reconcile agency independence and agency decision making that is fundamentally political in nature. Our political traditions connect accountability and legitimacy — power and responsibility should be placed in the hands of elected officials. The legitimacy of independent regulatory agencies performing a role analogous to that of the elected legislature is not clear. The tension between political accountability and agency autonomy has led to questions about the proper relationship of independent regulatory bodies to government, and to efforts by the government to limit agency independence and impose tighter political controls.

## The Regulatory Paradox: Political Controls on Agency Independence

The Economic Council of Canada's Responsible Regulation notes a number of methods by which government can assert political control over regulatory agencies. At the most basic level, government can clearly articulate its policy objectives in the legislation outlining the regulatory agency's mandate. Agency policy-making is less likely a grab for political power than it is an attempt to fill a policy vacuum in a broad and unspecific regulatory mandate.[55] The government is also responsible for appointments to regulatory commissions and for the approval of their budgets. While these are crude tools for exercising control except in the most general sense, they are a possible factor in the influencing of regulatory agencies by government.[56]

While legislative authority, appointments and the requirement of budgetary approval by government have some impact on the functioning of regulatory agencies, government has at its disposal far more powerful and direct instruments of political control. These are Cabinet directives and Cabinet review. Not all agencies are subject to these controls, but where they do apply, their potential influence can be profound. Critics of these measures have argued that they "unduly compromise an agency's independence and the integrity of its process."[57]

In the Law Reform Commission of Canada's report Independent Administrative Agencies, "policy directions" or "directives" are defined as

> instructions specifically authorized by statute to be issued by Cabinet or a minister and issued in a formal instrument to bind the agency to the policy the Government intends to see followed on a given question.[58]

The Report goes on to note that directions are used to "resolve real or perceived policy differences between the executive and the agency."[59]

Although they are not often used, policy directions from the government to a regulatory agency are considered problematic by some. Janisch points out that the power of direction exercised by Cabinet does not account for the manner in which regulatory

policy is usually created. Such policy is "most often the product of experience based on trial and error and an understanding of the front line realities of the regulatory process."[60] In addition to running "counter to the realties of regulation,"[61] there is a risk that directions will "interfere with the administrative process, undermine the expectations of at least some of the parties, and raise questions about who is really in charge."[62] If directions are used responsibly, these risks are minimized, but their existence means that agency independence is not absolute.

A further political control on regulatory agencies is the possibility of Cabinet review or appeals to Cabinet. The Law Reform Commission defines this process as:

> A statutory right given to a person to apply to Cabinet, or to a minister, to review the decision of an agency, and a correlative power in Cabinet or the minister to determine the outcome of the matter.[63]

Cabinet review has two main purposes. First, it permits a "party to an administrative proceeding to request a review of the merits of a decision."[64] Secondly, it offers the Government a chance to "keep a check on the agency and to influence its direction where it appears to have gone astray."[65]

There is a strong case against Cabinet review of agency decisions. It is noted in Responsible Regulation that Cabinet appeals occur only after a decision has been made, following a full hearing where issues have been developed and agency time and resources have been spent. At this point review by Cabinet "is disruptive and possibly destructive, and can only serve short-term political ends at the expense of the entire regulatory system."[66] Quirk notes that "regulated industries and firms may be able to reward or punish regulatory agencies through their access to higher political authorities."[67] The expectation of such rewards or punishments may "dissuade an agency from taking strong regulatory action,"[68] and result in agency protection of industry interests. Since the use of Cabinet appeals has been relatively frequent in recent years,[69] this form of political

intervention is a potentially serious threat to agency independence and the integrity of the regulatory process.

Where critics of political controls base their arguments on protecting agency autonomy, supporters of these controls justify them as legitimate and necessary sources of political input into the regulatory process. The Lambert Commission, even as it acknowledges the need to preserve agency independence, takes the position that regulatory agencies, as "instruments of declared public policy", "must ultimately be subject to the direction of Government ... though less directly than ... departments."[70] Government "must accept responsibility for the interpretation to be placed on public policy,"[71] and political controls provide a mechanism for that.

The imposition of political controls on regulatory bodies reflects what Cutler and Johnson call the basic paradox in regulatory philosophy:

> We respect the non-political independence of the regulatory process, yet when we dislike independently made agency decisions, we invoke the political process to change them.[72]

Living with this regulatory paradox requires the simultaneous acceptance of two conflicting principles — independence and accountability. As a practical matter the government cannot possibly deal with "all of the numerous and complex questions necessarily involved in any attempt to regulate the economy."[73] Regulation by independent agencies "requires full-time, detached professionalism that can only be obtained by giving such bodies a considerable measure of autonomy."[74] Their independence is necessary to prevent "covert, short-term political interests from affecting almost all regulatory decisions on specific cases."[75]

Commitment to agency autonomy, however, should not exclude Cabinet ministers from

> the process of establishing strategic objectives, from specifying the framework for decision making, from making the difficult, but necessary,

> value choices or from being able to specify the result in specific cases of great national ... import.[76]

Political controls can provide a limited means of ameliorating regulatory agencies' lack of accountability. The challenge for the regulatory system is to find the proper balance between "control for the purpose of ensuring accountability and independence for the purpose of fulfilling specialized functions expected"[77] of regulatory agencies.

It was noted at the outset of this chapter that there is an interdependent relationship between regulation and enforcement. Regulation must be enforced to be effective, yet the way in which a regulatory policy is enforced has a great deal to do with the nature of the regulatory process itself. Regulation as an instrument of governing is unique. Because of its essentially political nature, the regulatory process often operates as a "form of negotiation that requires a high level of cooperation"[78] between regulator and regulated, in order to achieve compliance with public policy goals. Independent regulatory agencies, the actors of primary interest to this study, are responsible for implementing or carrying out regulation. It is logical then, to expect agencies enforcing regulation to employ negotiation as an enforcement tool.

The extent to which agencies operate autonomously from both industry and government is another important factor in enforcing regulation. If the influence of regulated industries is too strong, agencies might hesitate to take forceful enforcement action against them. Similarly, excessive government control over regulatory agencies could compromise the integrity of those agencies' decision-making processes and bind them to the "demands of powerful interest groups."[79] This would have negative ramifications for the consistent and firm enforcement of agencies' regulatory mandates. An agency may also be undermined by the "implied lack of trust"[80] political intervention represents. The Law Reform Commission has argued that political controls "can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities."[81] The unique characteristics of regulation and independent regulatory

agencies, as well as the tensions inherent in the regulatory process, provide a basis for understanding the process of regulatory enforcement.

The study of regulatory enforcement, according to Hawkins and Thomas, provides a "valuable framework for understanding the ways in which governments intervene in everyday social and economic life."[82] The remainder of this chapter will deal with how regulatory mandates are enforced by independent regulatory agencies. It will provide a basic organizational framework for the concepts involved in regulatory enforcement. The next section will discuss the nature of regulatory enforcement, the instruments involved in policy implementation, and the various strategies of enforcement by regulatory agencies.

## Enforcing Regulation

In the mind of the general public "regulation is only as effective as its enforcement."[83] From this point of view the enforcement of a regulatory mandate is a straight-forward process:

> the agency establishes rules and regulations to govern the behaviour of the regulated and to further the public interest. The threat of sanctions is thought to be sufficient to deter violations; but if any occur, violators, it is believed, are quickly brought to justice.[84]

When the enforcement process does not follow this pattern, questions about its effectiveness are raised. The average citizen might ask why the government does not prosecute all violators, or why licences of known transgressors are not suspended.[85]

These questions, while valid, may also reflect misconceptions about how public policy is implemented. In reality, regulatory agencies have a substantial amount of discretion in the interpretation and application of their mandate and enforcement powers. A regulator has discretion "whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[86] This discretion results in what Davis calls the "power of selective enforcement."[87] Selective enforcement allows

for some discrepancy between what an agency is empowered to do, and what it in fact does. Bardach and Kagan note the value of agency discretion in enforcement:

> No system of detailed regulations ... can adequately capture the diversity of experience; fixed rules and noncompliance penalties will sometimes be too lax, sometimes too strict. Thus enforcement officials must be given broadly worded grants of discretion that will allow them to order regulated enterprises to do whatever seems necessary and prudent under the particular circumstances, as well as discretion to relax the rules and tailor their enforcement procedures to the situation.[88]

Because regulatory agencies have discretionary power to decide "whether and how sanctions will be applied,"[89] not all violations will be met with formal and strict sanctions. Instead, regulators may utilize "less formal methods of inducing compliance, such as negotiations, warnings and persuasion."[90]

To focus exclusively on the use of formal and strict sanctions by regulatory agencies, such as prosecutions or licence revocation, is to ignore the largely informal nature of the enforcement process. Hawkins has noted that in "the enforcement of regulation, a distinct aversion is noticeable to sanctioning rule-breaking with punishment."[91] Regulatory enforcement is more accurately characterized as a bargaining process than as a strict and inflexible application of the rules. Regulatory agencies and the interests they regulate may bargain over whether or not a violation has occurred, who is responsible, and how infractions will be corrected.[92] Informal negotiations, warnings and persuasion operate beside and even within more formal measures in the enforcement process. Assessing an enforcement system on the basis of its use of strict sanctions alone may indicate whether or not legal instruments are being employed by regulators, but "tell little about the extent to which compliance has occurred."[93] Recognizing the informal as well as the formal methods of enforcing a regulatory mandate allows a fuller understanding of the process and a better basis on which to judge its effectiveness.

Enforcement Defined

As previously stated, regulatory enforcement is part of the policy implementation process. Implementation is the "carrying out of a basic policy decision."[94] As part of this process, enforcement is the attempt, through various means, to achieve compliance with rules and regulations set by government, or the regulatory agency itself.

In working toward the achievement of policy objectives, an agency will employ regulatory sanctions in various ways. A sanction can be defined as an "administrative action authorized by law; taken to achieve client compliance with policy; and perceived by the client as significantly affecting his interests."[95] The objective of sanctioning in the enforcement process is to narrow the gap between the goals of the system, and the current state of affairs.[96]

A regulatory agency may utilize a broad range of sanctions that are more or less formal in nature. Activities such as meetings, inspections, advice, reporting requirements, and expectations or praise expressed at a public hearing between regulator and regulated, make up the less formal end of the sanctioning spectrum.[97] The more formal legal sanctions available to a regulatory agency are found in the mandate provided the agency in its enabling legislation. Examples of formal sanctions are the ability to initiate prosecution for regulatory offence, licence revocation, suspension, short-term or non-renewal of licence, or the imposition of licence conditions.[98] These sanctions, both formal and informal, are used in various ways within the instruments of policy implementation discussed next.

Instruments of Policy Implementation

The Law Reform Commission of Canada's report, Policy Implementation, Compliance and Administrative Law, outlines three instruments of relevance to this study: regulatory offence prosecutions, licensing and persuasion. The first two

instruments are known as "command-penalty" instruments because compulsion is a central element of each. Theoretically, non-compliance could "result in a financial penalty, imprisonment or withholding of permission to engage in an activity."[99] The third instrument, persuasion, may use less formal techniques such as education or advice-giving "to alter or influence private sector behaviour."[100] Each of these instruments has unique characteristics, strengths and weaknesses. They may be employed in "combination or in sequence"[101] within the enforcement process.

Prosecution for Regulatory Offence. This first "command-penalty" instrument can be defined as follows:

> administrative attempts to prohibit or control a certain behaviour through the use of legislated, non-criminal command-penalty provisions. A monetary or other type of penalty (for example imprisonment) is attached to the offence.[102]

Unless specifically compelled by imperative language in the legislation, however, regulators in the Canadian system are not bound to prosecute every detected transgression.[103] Regulatory agencies "exercise discretion as to when and how to apply legislation."[104] Prosecutorial discretion allows the enforcement agency

> to distinguish between serious and nonserious violations, between the basically well-intentioned regulated enterprise that can be brought into line with a warning and the recalcitrant firm that clearly deserves punishment.[105]

Among the factors affecting the decision to prosecute might be:

> the behaviour and attitude of the alleged violator, his current efforts to correct the problem, the receptiveness of the court toward convictions for offences of this or a similar kind, and the probability or preference for another enforcement authority carrying out a prosecution.[106]

Although an enormous number of regulatory offences appear in statute form, comparatively few of these provisions have resulted in prosecutions.[107] There are problems associated with prosecutions that explain their infrequent use. Prosecution can be initiated by the regulator, but "the courts decide whether an offence has been

committed and determine the sentence."[108] Regulators may feel that "courts lack technical knowledge in a particular area and that this reduces the likelihood of a conviction or significant penalty."[109] Bernstein has pointed out that in some cases judges may "express a strong lack of sympathy with certain regulatory programs and be unimpressed with the need to deter violators by imposing stiff penalties in flagrant cases."[110] Kagan and Bardach have also observed this problem. They note that many regulators complain of public prosecutors and judges failing "to treat violations and violators as seriously as the enforcers believe necessary."[111] Even if a conviction is secured, regulatory agencies may be skeptical about its effects on the behavior of the convicted party or the larger industry.[112]

Where a reading of statutes may leave the impression that "regulatory offences are in the foreground of policy implementation,"[113] much regulatory activity is less confrontational. It is possible, argues Hawkins, "to conceive of the law being enforced even though the formal apparatus of prosecution is hardly ever used."[114] Regulators frequently adopt a compliance strategy which focuses on the attainment of the "broad aims of legislation, rather than sanctioning its breach."[115] Given this approach, prosecution may be considered by agencies to be an interruption of their main purpose, jeopardizing "otherwise harmonious and constructive relations."[116] Although the threat of prosecution remains in the legislation, recourse to the legal process tends to be a matter of last resort,[117] reserved for when other means of regulatory enforcement have failed.

Licensing. The licensing process is the second "command-penalty" instrument. A licence can be defined as a "grant of permission, a power or authority to do some lawful act."[118] Licences are used to "regulate occupations, trades and activities" as well as to allocate the "use of public property, such as natural resources and the air waves."[119] They "convey authorization and are issued for persons, things and activities for specified terms."[120] A licensee, "one to whom a licence has been granted,"[121] is

governed both by "generally applicable legislated standards and by specific conditions included in his licence."[122] As long as the licensee complies with the legal requirements placed upon him, he is free to pursue the regulated activity. There is no right, however, to renewal or tenure of the licence, "unless it is expressly so stated."[123] A licence "can be seen as a conditional reward...so long as one conforms, one is licensed."[124]

Licensing is a useful instrument in enforcing regulation because it can accommodate both the general needs of the public, as well as those specific to individual licensees.[125] There are "generally applicable licence conditions, statutes and regulations"[126] to which all licensees are subject. Yet the licensing process also allows for individualized treatment of licensees, through the attachment of unique conditions to licences. These specific conditions enable the regulator to "address the particular circumstances of the individual licensee and the market in which he operates."[127]

The licensing power allows regulatory authorities to translate "general goals into working policies."[128] The licensing process reflects the ongoing nature and broad range of responses involved in policy implementation. Once a licence is issued, an ongoing cycle of relations between regulator and regulated begins:

> During the cycle, which usually leads to a licence renewal application, the licensing authority needs information about licensee conduct vis-a-vis the applicable legislation and conditions of licence. As well, the authority needs to analyze information about licensee conduct to determine whether such conduct is in compliance with legislation and licence conditions. Administration may then decide what to do within the legal limits of licensing, on the basis of information and analysis of licensee conduct.[129]

Decisions in the licensing process are typically graduated in character, and only rarely settled by adjudication.[130] Where the instrument of prosecution is in use, enforcement relationships "tend to be compressed and abrupt."[131] The licensing process, however, "is marked by an extended, incremental approach."[132]

The ongoing cycle of relations in the licensing process often provides a context for bargaining and "bilateral persuasion"[133] between regulator and regulated. The opportunity for this is especially clear given the fact that "so many of the requirements governing a licensee's behaviour are particular to the licensee."[134] The licensing process allows bargaining to occur:

> in connection with the formal processing of applications, in rule-making and policy-making, and commonly in consultations between the licensing authority and a licensee.[135]

Bargaining is possible "only because the law need not be formally enforced."[136] The licensing process provides a number of opportunities for informally working toward compliance with rules, conditions and regulations. When it makes decisions on applications, for example, the regulator can praise or criticize the licensee for past performance "and can set binding prescriptions and other requirements for future conduct."[137] These decisions can also establish strict reporting requirements, which allow a check on the regulator's analysis as well as providing a constant reminder to the licensee "of the conditions with which it must comply."[138] By responding to problems or non-compliance in a less authoritarian manner than that which is legally mandated, the regulator can expect in return earnest efforts and future conformity from the licensee.[139] Bargaining in the licensing process can promote goodwill, which is considered by enforcement officials to be "a matter of profound importance in open-ended enforcement relationships which must be maintained in the future."[140]

The flexibility of the licensing process and the fact that it addresses the whole picture of a licensee's behavior — past, present and future — make it a valuable instrument in enforcing a regulatory mandate. It has advantages over regulatory offence prosecutions as an instrument of policy implementation because of the range of problems with which it can deal. It is non-adversarial in style, and it does not require, as

prosecution does, "precision as to the nature of the prohibited conduct and a higher 'quality' of evidence relating to private party behaviour."[141]

While the importance of informal negotiations cannot be overlooked, there are formal sanctions available for enforcement in the licensing process. Non-compliance with licence conditions theoretically results in the use of strict formal sanctions such as revocation or suspension of licence, or refusal to renew. In some licensing schemes, regulatory compliance is made a condition of licence so that breach of the licence can "give rise to licensing action, prosecution for regulatory offence, or both."[142] Normally, however, harsh sanctions such as licence revocation are rarely invoked, "even if non-compliance is detected."[143]

The reason usually given for "not taking away a licence when the incumbent has been found derelict is that the community will lose its local service."[144] This reflects a common problem for licensing tribunals — their limited range of usable formal sanctions. On the subject of sanctions and licensing, Janisch, Pirie and Charland note the following:

> [A]lthough regulatory agencies are granted draconian powers allowing for the suspension or cancellation of licences, they lack lesser powers that might be more appropriate to most situations in which licensees fail to meet their legal obligations. In practice it is extremely difficult to suspend or cancel a licence that has been granted in recognition of a public need (except in those rare cases where a licensee is providing no service at all) because of the inevitable adverse affect on the public.[145]

Arens and Lasswell point out that in connection with regulatory codes, the soundest means of dealing with non-compliance is a "strategy of graduated sanctions."[146] If there is a wide gap between mild and severe sanctions, "a regulatory authority will be severely handicapped."[147] This creates a situation where the regulator can use "a penknife or a meat ax, but most situations are appropriate for neither."[148]

There is, however, one very useful intermediate formal sanction available to regulators in the licensing process: short-term renewal of licence. This sanction adjusts "the penalty to the offence without losing sight of the objective that the rules should hold

sway."[149] Short-term renewal refers to the process of increasing the "frequency of formal review, by shortening the licence term."[150] This operates as a sanction since the "licensee must commit significant resources to the preparation of applications."[151] Further, a short-term licence means more frequent contact with the licensing authority in preparation for public hearings, and the necessity at a hearing of justifying "its past performance and the degree to which it has or has not improved."[152]

Still, in spite of the utility of short-term licence renewals and the broad range of informal activities used in the licensing process, regulators using this instrument of policy implementation have been criticized for failing to invoke strict formal sanctions when warranted. If there is not a real potential for the use of formal sanctions, the "integrity of the licensing system" may be undermined:[153]

> The licence must therefore be more than a context for relations: there must be a real possibility that the licence will be lost for non-compliance. Failing that, the regulatory program may atrophy: non-compliance addressed only by raised eyebrows, persuasion, nudges and minor administrative burdens may lead to more non-compliance and the ultimate deflation and withdrawal of policy goals.[154]

Persuasion. The third and least formal instrument of policy implementation, persuasion, involves the use of activities or techniques intended to "alter or influence private sector behaviour."[155] In their attempt to persuade regulated interests to "act or refrain from acting,"[156] regulators might make use of a wide range of activities such as education, disseminating information to the public, giving advice to regulatees, or publishing information about prosecutions.[157]

Bernstein points out that regulated groups ordinarily

> do not comply voluntarily with regulations that require changes in managerial policies and methods of doing business unless the advantages of complying with the regulations seem to outweigh the predicted disadvantages.[158]

Persuasion, through various means, can provide the "incentive" needed to secure voluntary compliance.[159]

Persuasion can be a principal instrument of policy implementation, or can support the operation of other instruments.[160] Persuasion functions as a discrete instrument when a regulator very deliberately gives out information or elaborates its policies in a program of education designed to persuade "its constituency to change behaviour."[161] This education and dissemination of information is important in two ways. First, public understanding and support for the goals of regulation and regulatory policy "are essential to effective regulation of economic affairs."[162] Secondly, if regulators make efforts to explain why regulations have been issued and what regulated groups must do to conform with them, they can expect understanding of and compliance with the rules by regulated interests to increase.[163]

Persuasive activities are also "commonly undertaken in conjunction with other implementation activities."[164] Public hearings in the licensing process offer good opportunities for persuasion in the form of chastisements, praise, warnings and public encouragement to "do more and to do better."[165] Regulators might also publicize prosecutions or "other information about alleged non-compliance."[166] A press release, for example, can provide a major incentive for the non-compliant regulated interest to "institute the appropriate programs."[167] Such publicity can have persuasive effects on the "party concerned, if not the whole constituency."[168] Further, this adverse publicity can be directed very specifically, according to Bardach and Kagan, to

> insurance companies, banks, valued customers, and suppliers that have leverage on the regulated enterprise in question and that do not want to be seen as having aided a non-compliant firm.[169]

Persuasion can "greatly improve the efficiency of implementation,"[170] and may be necessary to the effective use of command-penalty instruments.[171]

In spite of the fact that the formal legal structure of enforcement is "heavily weighted to framing and constraining the use of coercion,"[172] incentives and persuasion are resorted to increasingly.[173] Part of the reason for this is that persuasion can

influence private behaviour "at less social and economic cost than other instruments."[174] Persuasion gives the regulator the ability to "economize coercion", and this according to Bernstein is basic to regulatory success:

> If regulation is consistent with the values of the community and becomes established as reasonable and legitimate, the costs of compliance are reduced and a higher level of compliance will be achieved.[175]

Persuasion is immediately available, informal, flexible, reversible, shows concern, and can help change attitudes and improve efficiency.[176] When regulators are mandated to "supervise" interests under their authority, "implicit in that power is the exercise of persuasion."[177] But whether or not a regulatory body's enabling legislation authorizes the practice, the instrument of persuasion is resorted to extensively in policy implementation.[178]

Persuasion cannot, however, replace the use of other instruments of policy implementation. While persuasion may at times function independently, compliance with regulation is unlikely unless there exists the potential for the use of more formal measures. The three instruments discussed — regulatory offence prosecutions, licensing and persuasion — have unique characteristics, strengths and weaknesses. They make use of different sanctions, or use the same sanctions differently. The process of regulatory enforcement may employ all of these instruments, in combination or in sequence, in order to effect private sector compliance.

Regulatory Enforcement Strategies

Just as the various sanctions available to regulatory enforcement are utilized in the instruments of policy implementation, these sanctions and instruments operate within the broader strategies of enforcement exercised by regulatory agencies. This section will deal with four regulatory enforcement strategies: strict enforcement, negotiated compliance, the consultation/education approach and self-regulation. These enforcement strategies are

subsumed under two broad styles of regulatory enforcement — the strategy of strict enforcement under a deterrent style, the final three strategies under a style of conciliation. It is useful, therefore, before looking specifically at the four enforcement strategies, to compare briefly these two enforcement styles.

Reiss notes that the principal objective of a deterrent style of enforcement is to

> secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by those who might do so were violators not penalized.[179]

A conciliatory style, by contrast, has as its objective to

> secure conformity with law by means of insuring compliance or by taking action to prevent potential law violations without the necessity to detect, process, and penalize violators.[180]

Hawkins submits that the choice by a regulator to employ one or the other of these styles depends on the usual form non-compliance with regulatory requirements takes in the area of concern. Where non-compliance is typically a discrete activity or isolated event and "has a categorical, unproblematic quality,"[181] the use of a deterrent style is likely. But when there is an ongoing relationship between the enforcement agent and the regulated interest and non-compliance has a "continuing, repetitive, or episodic"[182] character, a conciliatory approach will come into play. Further, an enforcement style of conciliation is commonly practiced when non-conformity with regulatory rules is regarded as a problem or state of affairs rather than a clear-cut blameworthy act.[183]

While it may be characteristic of both of these enforcement styles to employ regulatory sanctions in response to non-compliance, the rationale behind their use differs substantially. A deterrent style is punitive in "orientation and approach"[184] and "assumes penalties have a causal effect the principle of which is to deter future violations."[185] In a conciliatory style, penalties are generally used as "threats rather than

as sanctions to be carried out."[186] Penalties are assessed as a form of leverage to secure compliance,"[187] and are usually withdrawn once compliance is demonstrated.[188]

A deterrent enforcement style is typically accusatory and adversarial, leading "to a routine reliance on formal legal processes."[189] Enforcement is reflective in this style, in that it is a matter of determining the harm done, and "fixing the appropriate sanction."[190] A conciliatory style of enforcement is prospective: it is "primarily concerned with preventing violations and remedying underlying problems."[191] The focus of conciliatory enforcement is on "repair and results, not retribution."[192] This approach is practical, and centers on the "attainment of the broad aims of legislation rather than sanctioning its breach."[193] In conciliatory enforcement, primary reliance on the "strict, uniform application of formal sanctions is considered less effective than negotiation as a method of securing compliance."[194]

The strategies of enforcement which evolve from these two broad enforcement styles provide a framework for the concepts involved in regulatory enforcement at an operational level. While these strategies are separated here for the purpose of explanation, they are not mutually exclusive categories. In practice these enforcement strategies may be used in varying combinations, although one approach may clearly dominate at a given time.

Kagan and Scholz have identified three typical methods of enforcement by regulatory agencies, based on the assumed motivations of regulated industries. Given the motives of industry, a theory of non-compliance emerges. This theory, in turn, suggests the appropriate enforcement strategy to be employed. The fourth strategy is derived from the work of Grumbly and Stone.

Strict Enforcement. The first of these regulatory enforcement strategies emphasizes strict enforcement and is typical of a deterrent style. The corporation is characterized here as an "amoral calculator". In the interest of profit, the firm will violate

regulations "when the gain derived from the crime exceeds the potential pain of being caught and punished":[195]

> Motivated entirely by profit-seeking, they [regulated firms] carefully and competently assess opportunities and risks. They disobey the law when the anticipated fine and probability of being caught are small in relation to the profits to be garnered through disobedience. Non-compliance stems from economic calculation.[196]

If the corporation is seen as an "amoral calculator", the regulator should respond as a "policeman", strictly enforcing its mandate:

> the regulatory agency should emphasize aggressive inspection of all firms and promptly impose severe legal penalties for any violations, lest the firm be tempted to try to "get away with more". The goal, in short, is deterrence. The governmental inspector, accordingly, should be a strict policeman; indifferent to the businessmen's manipulative excuses.[197]

According to the enforcement strategy suggested by this view of the regulated industry, leniency toward the regulatee by the enforcement agency is foolish. The industry will violate regulations unless faced with the deterrent effect of certain and severe legal sanctions.[198] In fact, leniency under these conditions probably indicates the "capture" of the regulator by the industry it seeks to regulate.[199] Protests by the industry about technological or financial impediments to compliance, according to this strategy, should be "treated with extreme skepticism or as irrelevant."[200] Standards are useless if not enforced.

This strategy of strict enforcement, however, has its drawbacks. One of these is the fact that "general rules often make little sense if applied rigidly to all particular cases."[201] Further, when regulators cannot make exceptions or grant extensions of time, the system becomes legalistic and can divert regulators from their primary goals. This inflexibility stimulates opposition.[202] Overly strict enforcement may "create an atmosphere of resentment and distrust and result in less cooperation from regulated industries."[203]

Negotiated Compliance. An alternative strategy of regulatory enforcement is negotiated compliance, which reflects a conciliatory style. In this approach the corporation is seen as a "dissenting citizen", and non- compliance the result of perceived regulatory unreasonableness. The corporation is

> a political citizen, ordinarily inclined to comply with the law, partly because of belief in the rule of law, partly as a matter of long-term self-interest. That commitment, however, is contingent. Business managers have strong views as to proper public policy and business conduct. At least some law breaking stems from principled disagreement with regulations or orders they regard as arbitrary or unreasonable.[204]

If the corporation is a reasonable "citizen", the regulatory agency should respond as a politician, using persuasion and compromise to illicit compliance with regulation. The regulatory inspector

> should be concerned with persuading the regulated firm of the rationality of the regulation in question. But he also should be willing to suspend enforcement, to compromise, to seek amendments to the regulations. In short, he should be responsive to the "citizen's" complaints, ready to adapt the law to the legitimate business problems created by strict enforcement.[205]

From this perspective, the industry may be in non-compliance with the law because it feels that it has been treated arbitrarily or had unreasonable burdens imposed upon it.[206] Voluntary compliance is considered essential. Regulators must be willing to compromise among values and adjust regulations to changing circumstances, where strict enforcement would impose unreasonable costs.[207]

Hawkins notes that compliance "takes on the appearance of voluntariness by the use of bargaining."[208] Bargaining is possible "because the law need not be formally enforced."[209] Rules "may be given up, as well as given use."[210] In a compliance strategy, where responding to a regulatory problem involves negotiating future conformity, bargaining is essential.[211] It is not only an effective and inexpensive method of achieving compliance, it is also a means of promoting goodwill between the regulator and the regulated. Goodwill is a matter "of profound importance in open-ended

enforcement relationships which must be maintained in the future."[212]

This approach of negotiating compliance does not negate the use of strict enforcement and legal sanctions. These may be appropriate in the case of "unjustifiable violations" even within a "cooperative enforcement strategy."[213] The "inspector-as-politician" strategy calls for "discriminating as opposed to legalistic rule enforcement."[214] The recourse to legal penalties in a compliance system is often a matter of "last resort"[215] after a "long negotiation process."[216] Yet even at this point, the assessment of a penalty is not for the purpose of punishment, Reiss points out, but as "a form of leverage to secure compliance."[217] The violator "has a choice between bearing the costs of compliance or the costs of the penalty."[218]

This enforcement strategy of negotiating compliance, however, has some limitations. There is no way of predicting when a firm will comply with regulations in response to compromise and flexibility, as opposed to simply taking advantage of this "softness" on the part of agency officials.[219] Further, what constitutes "reasonable regulation" is entirely subjective, and so there is "no clear distinction between 'amoral' and 'principled' violations."[220] Between the regulator and industry, and between members of the industry itself, there may be strong but sincere differences in what is considered reasonable and important in regulation, depending on the point of view represented. It is quite likely under these circumstances that mistakes will be made. The regulator may treat the "amoral calculator" as though he were a "good corporate citizen", "granting extensions of time when he promises to come into compliance, only to find that he fails to keep the bargain."[221] If this happens often enough, not only do the standards set for the industry begin to slide, but the credibility of both the regulations and the agency responsible for them suffer.[222]

Consultation/Education. The third strategy of regulatory enforcement introduced by Kagan and Scholz, is also the product of a conciliatory enforcement style. The

consultation-education approach comes into play when non-compliance is the result of ignorance, internal conflict or inattention, rather than deliberate willfulness:[223]

> In the third image, the business firm is seen as inclined to obey the law but as a potentially fallible or organizationally incompetent entity. Many violations of regulations are attributed to organizational failure — corporate managers fail to oversee subordinates adequately, to calculate risks intelligently, to establish organizational mechanisms that keep all operatives abreast of and attentive to the growing dictates of the law.[224]

In the enforcement strategy suggested by this image of the corporation, the regulator should act as consultant to industry, actually helping the firm come into compliance:

> If regulated business firms are thought to be prone to incompetence and regulatory violations due to organizational failures, the regulatory inspector should serve in large part as a consultant. His responsibility would be to analyze informational gaps and organizational weaknesses in the regulated firm, and to educate businessmen concerning feasible technologies and management systems that would best ensure compliance in the future.[225]

Resort to the consultant strategy, then, rests on the enforcement official's assessment of the firm's blameworthiness in the non-compliant behavior.[226] Kagan and Scholz have found that both regulators and business executives often mention the "contribution of corporate ignorance, incompetence, inattention, and internal conflict to regulatory violations."[227] Corporations may fail to "develop organizational units responsible for studying and implementing regulatory requirements."[228] They might also allow "established precautionary routines to slip gradually into disuse."[229] Further, violations may stem from corporate mismanagement — mistakes, short-cuts and illegal maneuvers may be actively hidden from supervisors.[230] Official corporate policy may also be distorted by internal conflicts and the "struggle for resources among different departments, and between management and labour."[231] The extent to which violations are seen to stem from incompetence rather than willfulness affects the practical application of the law — a strict sanctioning strategy is not likely to be invoked.[232]

While it could be argued that the threat of heavy legal penalties would encourage corporations to more carefully police their own internal control systems,[233] strict enforcement and prosecution are not considered an effective strategy with which to deal with corporate incompetence. The adversarial nature of prosecution is unlikely to gain the commitment, will and energy of management needed to work toward compliance in the long run. Formal prosecution and legal penalties

> are clumsy tools. They are cut too broadly, seem unnecessarily punitive, and alienate potential allies inside corporations rather than winning their cooperation.[234]

Bernstein argues that an agency can gain more public support and understanding if it "undertakes vigorous campaigns to teach those subject to its regulations how to comply before it investigates violations for the purpose of imposing sanctions."[235] Because of this, regulatory agencies may act as consultant when faced with corporate incompetence. The agency may hold meetings or seminars for business officials to alert them to regulatory problems.[236] Regulators may also seek to educate the corporation and help it to achieve compliance. Like a business consultant, the agency may

> attempt to analyze the causes of the violation, to locate weaknesses in the company's control system, to point out cost-effective ways of complying with regulations.[237]

The development of this close consultative relationship between regulator and regulated, however, has drawbacks. First is the problem of "agency capture," where the corporation gains excessive influence over the regulated agency. An agency using the consultant-educator approach has worked hard to win industry trust and cooperation. The agency must be on guard "lest it fail to take vigorous enforcement action for fear that such action would dispel friendly relations."[238] In addition, it is difficult to determine "whether a firm is an amoral calculator or a well-meaning but ineffectual blunderer."[239] Regulators using a consultative approach, when confronted with a deliberate offender, may be "duped into not penalizing intentional violations."[240]

Self-Regulation. The final conciliatory strategy is self-regulation. Grumbly acknowledges the potential involvement of not only corporate incompetence, but economic calculation and principled disagreement as well, in regulatory violations. But he notes that at the heart of almost any compliance strategy "lies the assumption that most businesses will comply with most of the regulations most of the time."[241] In apparent recognition of this, regulatory agencies are beginning to "turn consciously to regulation that depends greatly on the willingness of the regulated to police themselves."[242] The enforcement strategy implicit in this development is "self-regulation" or "voluntary compliance". The success of this strategy depends on the goals of the regulator and the regulated roughly coinciding:

> through the practical necessities businesses face in protecting themselves from liability, or through a publicly encouraged recognition of what constitutes the public interest.[243]

In its most common form, self-regulation is the development by industry of common standards or a code of conduct. This "voluntary" consensus on standards may be stimulated by a regulatory agency threatening to impose regulations from without. Regulators might make it clear that "regulation will follow unless an industry is willing to take action itself."[244] And so regulatory agencies can employ the threat of direct regulations "explicitly to prod trade and professional associations to prepare self-regulatory standards and procedures"[245] as an alternative to agency prescriptions.

Self-regulation requires what Stone terms "corporate responsibility". This concept involves a notion of responsibility beyond merely carrying out rules. "Corporate responsibility" refers to the more complex, mature and open-ended activity of making autonomous choices from a range of socially appropriate alternatives.[246] Stone suggests that responsible self-policing by corporations could augment other strategies for controlling industry behavior. It may be "part of the solution that is preferable to across-the-board, and possibly futile or even self-defeating legal measures."[247] In appeals to

"corporate responsibility", regulatory agencies may find a more effective means of keeping corporations in bounds than traditional legal machinery:[248]

> Trusting to responsible behaviour through some measure of self-control is often a preferable solution to some of the most difficult and perhaps otherwise insoluble problems of social organization.[249]

Grumbly cautions, however, that the advantage of self-regulation is also its weakness, in that the whole exercise depends on voluntary compliance. Although "voluntarism" may be supported by regulatory pressure, non-compliance is always a possibility.

> Businesses that willfully violate rules can, of course, spoil the whole self-regulatory effort, forcing government to resort to detailed command-and-control regulation for well-intentioned firms as well.[250]

The possibility of regulators having to invoke command-and-control regulation in a self-regulatory scheme points to the fact that there can be no absolute distinction between voluntary and coerced compliance. Diver acknowledges that "no regulatory command will succeed without substantial voluntary compliance,"[251] yet that compliance depends on the existence of strict enforcement.

> Enforcement is necessary not only to control the aberrant lawbreaker, but also to defend the legitimacy of governmental intervention that sustains voluntary compliance ... regulators must maintain some threshold of enforcement effectiveness and consistency to prevent a wide-spread breakdown in voluntary compliance.[252]

These regulatory enforcement strategies — strict enforcement, negotiated compliance, the consultation/education approach, and self-regulation — have been separated here for the purposes of explanation. A regulatory agency may employ all of these strategies, in combination or in sequence, in order to achieve compliance with regulation. Given the diverse sources of non-compliance, an indiscriminate use of any particular strategy of enforcement "is likely to be counterproductive."[253]

## Conclusion

According to Bernstein, an enforcement program's vigor and character are derived from a variety of sources, including:

> the commission's attitude toward the role of enforcement, investigation of cases of alleged violations, imposition of sanctions, and educational and publicity campaigns designed to promote voluntary compliance.[254]

All of the elements of the regulatory enforcement process — various strategies, instruments, and sanctions, both formal and informal — are utilized by what Bardach and Kagan call the "good inspector". The "good inspector" is a sophisticated enforcement official, "one who would retain strong, modern enforcement tools" but would use them "flexibly and selectively."[255] This inspector serves as "model to which enforcement might evolve."[256]

Regulatory agencies must have and be willing to use powerful tools of coercion for two reasons. The first is that there is always a possibility that the regulated enterprise will try to evade regulatory requirements, mislead the regulator, or "exaggerate the costs or technical difficulties of compliance."[257] A commission "cannot expect to secure compliance unless it is prepared to punish those who repeatedly and willfully violate its regulations."[258] Secondly, the possibility of cooperation and flexibility in a regulatory relationship derives ultimately from an agency's "power of threat and coercion."[259] The regulator has the industry's attention by virtue of its ability to "cause trouble for the regulated enterprise by issuing citations, threatening legal penalties, and creating the risk of adverse publicity."[260] The possibility of strict enforcement, then, is necessary both to punish recalcitrant firms in the industry, as well as to maintain the performance of generally compliant firms.[261]

An excessive use of strict enforcement, however, can be counterproductive. If regulatory enforcement becomes legalistic, indiscriminate or unresponsive, it provokes resistance in industry and fosters uncooperative attitudes.[262] To maintain cooperation in

the enforcement process, the regulator must establish a relationship of "reciprocity or exchange" with the regulated industry.[263] According to the "good inspector" model, there are several things the regulator can trade for greater compliance and responsibility on the part of regulated interests. The first of these is responsiveness. This means giving business a fair hearing, taking seriously its arguments and problems, and if strict compliance must be insisted upon, providing business with reasons for this action.[264] The regulator can also give industry advice or information "that reduces the difficulty or cost of compliance, or at least makes required compliance measures seem understandable and justifiable."[265] Finally, the regulator can offer forbearance. Forbearance involves overlooking minor violations or not enforcing especially disruptive requirements on a selective basis. It can also mean "granting reasonable time to come into compliance", accepting "substantial if not literal compliance", and "making allowance for good faith efforts on the part of the regulated enterprise."[266]

By giving some leeway to industry, a regulatory agency acknowledges the exchange relationship in the enforcement process. In exchange for its responsiveness, advice and forbearance, a regulator can expect the industry's goodwill, cooperation, and conformity with regulatory requirements.[267] Flexibility is the key to avoiding the errors of both "undue leniency" and "excessive strictness."[268] The ongoing process of regulatory enforcement must continuously balance strictness and conciliation — "demanding penalties and strict compliance when violations present serious risks, dealing more leniently with less serious violations."[269]

This chapter has surveyed the literature on regulation and enforcement. It has explored the unique characteristics of regulation, and the independent regulatory agencies which are responsible for enforcing it. Regulation is a process "which is neither isolated in its relation to the general political and economic environment nor self-contained in its evolution."[270] The independence of regulatory agencies, it has been shown, is a matter

of degree. There is an inherent tension in the regulatory process between agency autonomy and political accountability. This tension has resulted in statutory provisions for Cabinet direction and review. Even if these controls are rarely applied, the potential for their use is evident to regulatory commissions, and can affect the confidence and consistency with which they approach their enforcement responsibilities. Nor can agencies be considered to be fully independent of the interests they regulate. Regulation is realistically conceived of as a "two-way process in which the regulatory agency and the regulated group try to control each other's behavior,"[271] even without accusations of agency capture by regulated industries. These environmental factors are important to this study in their capacity to affect the enforcement process.

At an operational level, achieving compliance with regulations is a complex process involving a flexible use of various instruments, sanctions and strategies. An understanding of these elements of regulatory enforcement provides a necessary background to, and framework for, the examination of the CRTC's enforcement of Canadian broadcasting policy. This chapter presents the context in which the CRTC's broad statutory mandate, its instruments and strategies of policy implementation, and the problems of putting these into effect, can be more fully understood.

## NOTES TO CHAPTER 2

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# CHAPTER 3

# THE CRTC AND THE PROCESS OF REGULATORY ENFORCEMENT

The previous chapter discussed regulation, agency independence and regulatory enforcement in relation to regulatory agencies in general. This chapter applies the framework developed in Chapter Two to the examination of enforcement by one independent regulatory agency, the CRTC. Addressed specifically is the application of Canadian content requirements to private television broadcasters.

Chapter Three outlines, first, the Commission's relationship to, and independence from, government and industry. This provides the context in which enforcement occurs. This chapter also describes the CRTC's mandate, instruments of policy implementation, strategies of enforcement and finally, the problem of enforcing Canadian content requirements as part of the policy implementation process.

## The Independence of the Commission

In discussing broadcasting and the regulatory process in the American context, Krasnow and Longley have observed that the regulation of broadcasting is often mistakenly "portrayed as if it takes place within a cozy vacuum of administrative 'independence'."[1] In reality, they argue, the federal broadcast regulator operates within an "immensely political process."[2] This process involves the interaction of a number of participants, including government, regulated industries, the public, as well as the regulatory commission itself.[3]

This observation is equally true of the regulation of broadcasting in Canada. Although the CRTC is an "independent" regulatory agency, its decision-making activities are not entirely insulated from the demands and influences of other actors in the regulatory process. Before turning to a specific discussion of the CRTC's mandate and

enforcement methods, it is appropriate to examine briefly the Commission's relationship to, and level of independence from, government and industry.

Independence from Political Control

The independent status of the CRTC is established in its enabling legislation, the Broadcasting Act. Section 3(j) of the Act declares that

> The objectives of the broadcasting policy for Canada ... can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

The Commission also has characteristics typical of a relatively independent regulatory agency. First, its nine full-time members have a fixed seven-year tenure in office on "good behaviour" and are only removable "for cause."[4] Secondly, the Commission's mandate to regulate and supervise all aspects of the Canadian broadcasting system is extremely broad, guided by the expansive policy objectives in the Act. The CRTC has also been given "considerable authority to develop this policy further through rules, policy statements and individual decisions."[5] Finally, the Broadcasting Act empowers the CRTC to "make regulations applicable to all persons holding broadcasting licences."[6] The fact that the Commission can create regulations without the approval of Cabinet or Parliament, makes it one of the more autonomous regulatory agencies in Canada.[7]

The independence of the CRTC is not absolute, however. The Broadcasting Act provides two methods by which the Cabinet can intervene in the operations of the Commission. First, Cabinet has the power to issue directions to the CRTC. Section 27 of the Act authorizes the Cabinet to issue directions to the Commission from "time to time". This power is limited, in section 22, to a specific number of matters: the maximum number of channels or frequencies in one region, the reservation of channels for the use by the CBC, and the classes of applicants ineligible for licences.[8] The second method of political control over the CRTC in the Act is the power of Cabinet review. The

Cabinet, under section 23, can set aside or refer back to the Commission for reconsideration within sixty days of its making, any decision dealing with the "issue, amendment or renewal" of a licence that in Cabinet's opinion "the Commission failed to consider adequately":

> 23(1) The issue, amendment or renewal by the Commission of any broadcasting licence may be set aside, or may be referred back to the Commission for reconsideration and hearing by the Commission, by order of the Governor in Council made within sixty days after such issue, amendment or renewal.[9]

These limitations on the Commission's independence are not often invoked. Because the direction power is "narrowly circumscribed by the Act,"[10] its intrusive impact on the Commission is limited. Similarly, the Cabinet's power to set aside CRTC decisions is used sparingly in broadcast matters.[11] It has been suggested that there are roughly eight to ten petitions filed for Cabinet review each year, and less than that result in the application of section 23.[12]

In spite of their infrequent use, the potential threat of these political controls to the autonomous functioning of the CRTC is considerable. Political control by direction occurs in advance of individual Commission decisions. The legitimacy of the elected government determining policies and adjusting them to circumstances is generally accepted. The problem lies in exercising this power without "encroaching where an arm's length relationship is called for."[13] The Law Reform Commission of Canada points out that the risks of interference with agency autonomy are reduced if "directions are not used as instruments of political control over agency decisions, but only as formal means of guidance."[14] Yet, they caution, "to a greater or lesser degree, all policy directions are intended to affect decisions", and in this respect are considered a challenge to "the independence of agencies and the integrity of the administrative process."[15]

Cabinet review of agency decisions is an even more obtrusive measure of political control. According to Janisch, this involves the government "in exactly the wrong part of

the regulatory process (individual adjudication), whereas the proper place for government involvement is policy formulation."[16] Further, there are no procedures or guidelines governing the exercise of Cabinet review.[17] There is nothing requiring the Cabinet "to hold hearings, to explain its decisions, or acknowledge requests."[18] The government's right to set aside or refer back the Commission's decisions is carried out in a "totally secret manner", notes former CRTC Chairman, Bureau, where not even "the other interested parties...know that an appeal has been filed."[19] Even if interested parties did have this knowledge, "there is no mechanism which allows their views to be voiced and taken into consideration."[20] Because Cabinet review occurs after a decision has been reached and there are no guidelines governing its exercise, it creates the potential risk of allowing short-term political considerations to affect regulatory decisions on individual cases.[21] Another former CRTC Chairman, Meisel, has argued that this form of political intervention undermines "the benefits and advantages sought in the creation of independent regulatory agencies."[22] The process of Cabinet review, he cautions, is an

> invitation to vested interests and lobbyists to converge on ministers in an effort to undo, behind closed doors, decisions reached by the Commission and based on public hearings where interested parties can react to one another's arguments openly.[23]

The Task Force on Broadcasting Policy maintains that the power to set aside or refer back to the CRTC, "can have far-reaching implications even if the government does not avail itself of it":[24]

> It could keep the CRTC from relying on its own judgement or cause the CRTC to try and anticipate what the government wants, thus avoiding interference with its own authority.[25]

These provisions for political control over the CRTC, especially section 23, show the drafters of the Act to have been grappling with the "basic paradox" of the regulatory process — attempting to balance the conflicting needs of agency independence and

political accountability. The effort is to find

> the proper balance between the direction and control of regulatory agencies by elected officials and the degree of autonomy or independence deemed necessary to carry out their adjudicative and other functions.[26]

In creating the CRTC, Johnston notes:

> Parliament thought it important to create an independent licensing body free from political interference because of the potential for misuse of the airways for partisan ends.[27]

And yet, according to Kaufman, Parliament

> was not prepared to give complete control to this new body, and it therefore reserved unto the Governor in Council the right to alter the regulatory process on purely political grounds.[28]

The balance established between agency independence and political accountability is not a static one. The CRTC's level of independence in exercising its mandate can be more or less, depending on the usage by government of sections 23 and 27. Further, there have been a series of attempts over the years by the federal government to broaden its power of direction over the CRTC, so that it can, "impose general policy directions on the regulatory authority."[29] This broadened power of direction would swing the balance to greater accountability at the expense of agency independence.

One of the first examples of these government initiatives to broaden the directive power was in April, 1975. At this time, the Minister of Communications published Communications: Some Federal Proposals. This document proposed the authorization of the Governor-in-Council to

> give formal direction to the Commission on the interpretation of statutory objectives and the means for their implementation ... to ensure that the development of policy would be clearly seen to be under the control of elected representatives of the people.[30]

A similar argument was put forward by the Department of Communications in its 1983 publication Towards a New National Broadcasting Policy. The document contends that except "for certain limited powers of direction by the government, the CRTC acts with

complete independence."[31] The proposed strategy would preserve the authority and independence of the CRTC while giving the federal government the power to issue legally binding directives to the Commission on policy matters:

> the Commission will continue to play its central and independent role in the system by establishing regulations and issuing licences .... The fundamental policy-making role, however, belongs properly to government and to Parliament, both of which are directly responsible to the Canadian people.[32]

In 1984, Bill C-20 went even further to expand the power of direction. It proposed to allow Cabinet to issue directions to the CRTC on "any" matter falling within the Commission's jurisdiction, not just broad policy matters.[33] This bill would have authorized "intervention that would discredit the regulatory process by making it appear arbitrary,"[34] reducing considerably the independence of the Commission. Although none of these changes have been effected (Bill C-20 died on the order paper in 1986),[35] these moves to expand the power of direction are important. They point to the continuing tension between the CRTC's independent status and government efforts to achieve more control over broadcast matters, which is pursued in the name of increased accountability or ministerial responsibility.

The latest effort to redefine the balance between agency autonomy and political control is in the proposed new Broadcasting Act, 1988. Whereas the present power of direction is limited to a specified number of matters, the projected legislation allows for the Cabinet to issue directions to the CRTC "of general application on broad policy matters."[36] This change is contemplated to ensure that in the day-to-day "regulation and supervision of the broadcasting system, the policy established in the Broadcasting Act remains the guiding principle for Canadian Broadcasting."[37] In addition, the proposed Act retains Cabinet review of the CRTC's licensing decisions. Section 27 of the projected legislation provides that where the Commission has made a decision to issue, amend or renew a licence, the Cabinet may, within one hundred and twenty days, "set

aside the decision or refer the decision back to the Commission."[38] This review may take place if the decision is contrary to the broadcasting policy objectives, or a direction issued to the Commission by Cabinet.[39]

In retaining both Cabinet direction and Cabinet review, the proposed legislation departs from the recommendations of the Task Force, which initiated the reappraisal of Canadian broadcasting policy, reporting its findings in 1986. The Task Force Report suggests that if the "CRTC's independence is to be preserved at the same time as ministerial responsibility for policy, there ought to be only one intervention mechanism in the Act."[40] Their recommendation is that the power of direction should be kept, while Cabinet should "lose the power to set aside or refer decisions back to the CRTC."[41] The CRTC's response on the subject of government directions is similar. While the Commission recognizes the right of Parliament to make broad national policies, it does not believe that government should have the power to issue directives to the Commission on policy matters and the power to set aside or refer decisions back to the Commission at the same time. If both powers are kept, the CRTC argues:

> there will be a public perception that the Commission is not an independent body and that it is "looking over its shoulder" to the government on every decision that it makes. This will not foster public confidence in the Commission or in its decisions and will tend to put decision making squarely into the political arena.[42]

If the government is someday given this general power of direction over the CRTC on policy matters, it will, in the opinion of the Commission, represent a profound change to the broadcasting system. In the absence of "clear and tight safeguards," the direction power could inject into the system the partisan political intervention that the development of an independent tribunal to regulate and supervise broadcasting sought to avoid:

> It is probably the most profound change that is envisaged in the system and one that has the potential, if not scrupulously scrutinized, to turn back

> the clock to a time when unanimously decried occult or even not so occult interventionism reigned...[43]

The Commission finds essential the "independent character of the regulatory agency, which indeed, guarantees the independence of the system."[44]

The debate over the appropriate level of political intervention in the CRTC's activities, is part of the effort to find the balance between control for the purpose of ensuring political accountability, and independence for the purpose of fulfilling the mandate and functions of an independent regulatory agency.[45] The above discussion reveals that CRTC's independence is qualified by political controls. It is important to recognize that these controls potentially influence the CRTC's operations. According to Meisel, political controls can inject "delays, uncertainty and confusion"[46] into the broadcasting industry. McCabe, president of the Canadian Association of Broadcasters, has expressed the concern that the provision for increased control over the CRTC in the proposed new Broadcasting Act, will "lead to politicization and fragmentation of decision-making."[47] Whether or not such negative occurrences result, political controls over the CRTC have the capacity to affect the consistency and confidence with which the Commission approaches the enforcement of its mandate.

Independence from Industry

Just as it is important to recognize the potential for political controls to affect the CRTC's operations, it is also useful to examine the interests and influence of the industry it regulates. The private television broadcasters are the regulated group of interest to this study. The Commission's relationship to this industry is addressed here as an important factor in the enforcement process discussed later in the chapter.

According to Bernstein, regulation is "a two-way process in which the regulatory agency and the regulated group try to control each other's behaviour."[48] Looking at the regulation of Canadian broadcasting in this way, the CRTC's objective is to promote the

cultural goals of the Broadcasting Act, by motivating private television broadcasters "to produce Canadian content for the broadcasting system."[49] The objective of the broadcasters is to "sell audiences to advertisers, thereby earning revenue which enables them to broadcast programs and make a profit."[50]

The profit motives of broadcasters and the cultural objectives of the CRTC are not easily reconciled. Canadian programming is not in the financial interests of private broadcasters whose capacity to make a profit depends primarily on the scheduling of American programming. Canadian content not only costs "more to procure than American programming, it also attracts smaller audiences and hence decreases revenues."[51] The Commission has noted this difficulty:

> Canadian broadcasters can purchase such expensively-produced programs at a fraction of what it would cost them to create comparable programs in terms of audience appeal. Furthermore, advertising revenues generated from popular American programs often exceed those from Canadian productions, providing a further incentive for Canadian broadcasters to purchase American entertainment programs.[52]

In order to reach its programming goals, the CRTC must counteract the "economic forces in the area of programming decisions by private broadcasters."[53] Private broadcasters have had to accept

> that in return for the genuine — and often lucrative — privilege of being granted a broadcasting licence, they are obligated to perform certain services for the system that are not necessarily in the best immediate self-interest of their enterprise.[54]

At the same time, given the economic realities behind programming decisions, there is a practical limit to the Canadian content requirements that can be made of private broadcasters if the industry is to remain viable.[55] The question has always been what balance should be struck in the regulatory process between the private needs of commercial broadcasters and their public responsibilities.[56]

Private broadcasters have not been complacent in the face of regulation. As the CRTC has attempted to promote the production of Canadian content, it has been

confronted by an organized industry with "vital interests to protect against the onslaught of the regulators."[57] The industry's intention to pursue its interests despite cultural regulatory goals is made clear by the Canadian Association of Broadcasters (CAB):

> Above all it must be stressed that in Canada Private Broadcasting is a business .... By their nature, private businesses are profit-oriented and, cultural objectives of the Government notwithstanding, broadcasters will always maintain a strong profit motive.[58]

Yet broadcasters have also recognized, in principle, the need to reconcile successful commercial operation with their licensing obligations to Canadian content.[59] The CAB has declared its support for the concept that the private broadcasting sector "should make a meaningful contribution towards the achievement of the cultural, social and economic goals of Canada."[60] More recently, Robert Bonneau, Chairman of the Television Board of the CAB, made the following announcement:

> The Canadian broadcasting system must be preserved to respond to Canadian interests, priorities, and opportunities. There must be no compromising on that assertion. Canadians must have choice, but, moreover, the right to choose Canadian.[61]

As a practical matter, however, the reconciliation of culture and profit has meant that Canadian content is "seen as the price to be paid for obtaining and holding a licence."[62] There is no financial motivation for a broadcaster to go beyond minimally acceptable standards of performance. Private television broadcasters

> are never happy with content regulations, with requirements to spend money on community programming or with standards of performance beyond those which they have become used to providing.[63]

The reason television broadcasters have not taken a stand in principle against the Canadian content requirements placed upon them by the CRTC, is that they seek and receive a "strong measure of protection"[64] in return for these obligations. The CRTC has protected private broadcasters in a number of ways. Broadcasters have been sheltered from competition by the Commission's practice of limiting the number of network and station licences.[65] The CRTC has only "permitted new stations where no seriously

adverse financial effects on existing stations could be expected."[66] The private companies also look to the CRTC for "protection when technological or economic changes threaten their industry with takeover or injury from another sector of the economy."[67] The Commission further safeguards the interest of private broadcasters

> by licence renewal hearings which hear no competitive applications, and by receiving applications for transfers of licence only from the party proposed by the vendor.[68]

This practice of non-competitive renewals of licence effectively institutionalizes "de facto private property rights within the broadcasting system."[69] Finally, an extremely important mechanism for the protection of private broadcasting is the CRTC regulation concerning simultaneous substitution.[70] The simultaneous substitution policy operates as follows:

> In order to protect the rights of Canadian broadcasters to the Hollywood shows they buy each year, if a Canadian and an American station are both telecasting the same program at the same time, the CRTC allows the Canadian broadcaster to have its signal substituted on cable for that of the American broadcaster...whether you are tuned to the American or the Canadian station, you are watching the Canadian station — and ... the commercials being run on the Canadian station.[71]

Simultaneous substitution is "highly desirable for the commercial needs of television broadcasters."[72] But it actually contributes to the viewing of American programming in the peak viewing hours, and so is in fact "a form of industrial protection with results inimical to the goals of the Broadcasting Act."[73] These measures are "all tremendous safeguards to private broadcasters,"[74] but do nothing in themselves to foster Canadian content on television.

This situation has led to charges that "regulation in Canada has largely been to the benefit of private broadcasters."[75] Hoskins and McFadyen argue that in "return for undemanding levels of Canadian content, which in any case have not always been met,"[76] the CRTC has protected the interests of private broadcasters. To the extent that the CRTC protects the interests of the commercial broadcasting industry "to the neglect or

harm of more general or 'public' interests,"[77] it is open to the charge of being "captured", or excessively influenced by the industry.[78]

Certainly, the Task Force's summary of what it calls the CRTC's "response to the culture vs. industry dichotomy,"[79] is highly reminiscent of Bernstein's "agency capture" theory. Bernstein argues that an independent regulatory agency follows an inevitable path of decay, from aggressively attempting to implement the goals laid out for it by the legislature, to concern for the industry's health, to seeing itself, finally, as protector of the industry and maintainer of the status quo.[80] The Task Force maps out the following stages of decay in the CRTC's regulatory activities:

> Initially it acts for the sake of cultural goals, then it ensures the economic viability of the industry so that the broadcasters will be able to afford to cross-subsidize from their profits on American programming the production and scheduling of Canadian programs. Finally, the CRTC protects the industry for its own sake, as an end in itself.[81]

The close and continuing interaction between regulator and regulated does not necessarily result in agency capture. Further, regulatory agencies may be intended to function "as managers and quasi-promoters" of industry, rather than just as "strict regulatory policemen."[82] The line, however, "between gaining familiarity with an industry's problems and becoming biased thereby in favour of that industry is perilously thin."[83] Meisel expressed such a concern during his tenure as Chairman of the Commission:

> Fairness and impartiality may be unwittingly affected when some broadcasters of carriers maintain constant contact with members of the Commission or staff while others, who may be their competitors or have opposing interests or viewpoints, have no such links with the regulatory agency.[84]

In the "two-way process" of regulation, the CRTC and the private broadcasters have a number of opportunities to influence each other. The pattern of industry-Commission relationships is likely to be "dynamic, ever-changing, with shifting degrees of industry control."[85] The private television broadcasters seek "maximum protection at

minimum cost."[86] The fact that broadcaster's interests are basically at odds with the CRTC's effort to promote Canadian programming, combined with the reality that they have significant power to promote those interests (as evidenced by the concessions they receive from the CRTC), has obvious implications for the Commission's regulatory enforcement efforts. The CRTC does not operate in a benign atmosphere, where it can simply impose standards and have them met. Enforcement is not that straight-forward a process in a regulatory environment where the regulated group influences the system as much as the regulator does.[87] The CRTC must work to effect the goals of its mandate vis-a-vis broadcasting businesses wishing to "minimize their costs of complying with standards imposed by policy implementation."[88]

This discussion of the independence of the Commission is meant to function as background to the CRTC's enforcement of its regulatory mandate. Just as the opportunity exists for government (through political controls) to affect the CRTC's operations, private television broadcasters can exert influence over the Commission within their regulatory relationship. It is in this context that the CRTC must enforce its mandate to promote Canadian content.

## The CRTC's Mandate to Regulate Canadian Content on Television

The Broadcasting Act provides for the regulation and supervision of the Canadian broadcasting system by a "single independent public authority" — the CRTC. Section 15 of the Act authorizes the Commission to

> regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act.[89]

The CRTC's regulation of Canadian content derives from the provision in section 3, that the programming provided by each broadcaster use "predominantly Canadian creative and other resources."[90]

The CRTC has attempted to implement this mandate by placing Canadian content requirements on Canadian television broadcasters. The purpose of these content requirements is to bring about "increased viewing of Canadian programs."[91] The logic behind the Commission's regulatory efforts is outlined in the CRTC's 1979 Canadian Content Review:

> By requiring the production of a significant amount of Canadian programming, Canadians would in time, attain a higher degree of professional competence in the different types of television programming. This, in turn, would result in a wide range of high-quality, Canadian-produced programs which would be enjoyed by significant numbers of Canadian viewers in all broadcasting time periods including peak viewing hours.[92]

In the effort to bring about "predominantly Canadian" programming in the Canadian broadcasting system, the main group requiring the CRTC's regulatory attention is the private English-language television broadcasters.[93] Canadian content regulation is the "primary mechanism by which government has attempted to bring private broadcasting within the ambit of the goals set for broadcasting."[94]

### The CRTC's Instruments for Implementing Canadian Content Requirements

The Broadcasting Act provides the Commission with a number of powers to ensure that "undertakings involved in the Canadian broadcasting system act so as to comply with the principles stated in the Act."[95] Of particular interest to this work are the mechanisms which assist the CRTC in enforcing Canadian content. The Commission has three such instruments of policy implementation, which have their foundation in the Act: the power to make regulations having the force of law, the licensing function, and the instrument of persuasion.

#### Regulatory Power

In section 16 of the Broadcasting Act, the CRTC is granted the power to make regulations on any matters it "deems necessary for the furtherance of its objects."[96]

Among these matters is the provision for regulations respecting "standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3 (d)"[97] — the provision for "predominantly Canadian programming."

It is on this basis that quantitative Canadian content regulations for television were imposed in 1970 by the CRTC.[98] The "main purpose of the television regulations is to ensure that more than half the programming provided by station and network licences is Canadian in content."[99] The most recent of these regulations are the Television Broadcasting Regulations, 1987. In these regulations, the following requirements are placed on private television broadcasters:

> section 4 (6) ... a licensee shall devote not less than 60 per cent of the broadcast year and of any six month period specified in a condition of licence to the broadcasting of Canadian programs.
>
> .....
>
> section 4 (7)(b) a licensee holding a private licence shall devote not less that 50 per cent of the evening broadcast period (6:00 - 12:00 p.m.) to the broadcasting of Canadian programs.[100]

Since 1984, the CRTC has defined Canadian programming for the purpose of fulfilling this content quota on the basis of a point system. A Canadian program must have a Canadian producer, and then earn a minimum of six production points. These production points reflect the participation of Canadians in key creative roles, such as directors, writers, performers, and music composers.[101] In addition, at least seventy-five per cent of payments to individuals (other than the key creative personnel) must be paid to Canadians, as must at least seventy-five per cent of processing and post-production costs be paid for services provided in Canada.[102] The system is complex, with a number of special provisions, but the attempt is to provide "explicit and objective guidelines"[103] based on the "two observable aspects of any program: performance and production."[104]

Licensees in non-compliance with the Canadian content regulations can be prosecuted. The Broadcasting Act, in section 29 (1), specifies that violation of a regulation is an offence:

> Every licensee who violates the provisions of any regulation applicable to him made under this Part is guilty of an offence and is liable on a summary conviction to a fine not exceeding twenty-five thousand dollars for the first offence and not exceeding fifty thousand dollars for each subsequent offence.[105]

Quantitative rules have on the whole been observed by private broadcasters,[106] and so the practice of prosecution for violation of Canadian content regulations is rare. There have been no such prosecutions since 1980.[107] The CRTC's experience with the difficulties of a prosecutorial approach prior to 1980 may also explain the infrequent use of that sanction today.

In 1976, the Commission initiated a policy of prosecuting television licensees more than one percent short of the quantitative Canadian content requirements.[108] Between 1976 and 1980, only eleven television licensees were prosecuted for content regulation violations, and not all successfully.[109] Clifford outlines the problems encountered by the CRTC in using regulatory offence prosecutions as a compliance mechanism:

> From that experience the difficulties in preparation, submission and acceptance of evidence, together with difficulties in securing convictions and significant fines undoubtedly affect the Commission's willingness to rely on prosecution for regulatory offence as a principal compliance mechanism. Unfamiliar and often non-legal terminology, lengthy trials, reluctant magistrates and the spectre of a federal agency prosecuting a popular local broadcaster all operate to discourage prosecutions.[110]

Prosecution for Canadian content violations is in virtual disuse. As a mechanism for enforcing Canadian content, it can only be employed in response to the violation of quantitative regulations (as opposed to promises of performance and conditions of licence discussed next). Because most broadcasters comply with the letter of the law, this sanction of prosecution is largely unnecessary. Further, prosecution is considered by the

Commission to be an unproductive approach to the promotion of Canadian content.[111] Yet despite its infrequent use, the threat of prosecution may "serve some minor deterrent function"[112] in enforcing Canadian content.

The Licensing Process

Licensing is the second instrument available to the CRTC in the implementation of its mandate. Whereas the quantitative content regulations apply to all private television broadcasters without distinction, the licensing process offers an individuated approach to enforcing Canadian content. The grant of a new broadcasting licence is the "temporary and conditional alienation of an important public asset which, by is very nature, cannot be shared with others."[113] In issuing a licence the CRTC "gives an undertaking the right to use a public resource for its own benefit."[114] In return for this privilege, the "licensee is committed to operate in a manner compatible with the principles defined by Parliament."[115] The licensing process determines who may or may not enter the industry and on what terms.[116]

The CRTC's licensing function is "central to the regulation of broadcasting."[117] The Broadcasting Act sets out the elements of this power in section 17. In "furtherance of its objects", the Commission may "issue broadcasting licences for such terms not exceeding five years and subject to such conditions related to the circumstance of the licensee."[118] Licences are to be awarded as the CRTC "deems appropriate for the implementation of the broadcasting policy enunciated in section 3."[119] Section 17 empowers the Commission to attach conditions to, amend, renew, suspend, and exempt from the requirement of holding a licence.[120] The Act also authorizes the CRTC to suspend or revoke a licence, the holder of which "has violated or failed to comply with any condition thereof."[121]

The CRTC licences new broadcast undertakings "through a competitive application public hearing process."[122] In this process the Commission will consider economic and social factors such as

> the financial viability of the applicant; the potential economic impact on existing licensees; demographic, regional and cultural needs; and categories of programming.[123]

Once a licence is issued an ongoing regulatory relationship between the CRTC and the licensee begins. The broadcaster must return to the Commission for renewal of licence, which allows for the continuous monitoring of performance. Each licensing application — whether for a new licence or renewal — gives the CRTC an opportunity to "penalize or reward a licensee for its failures and successes in complying with the regulatory scheme."[124] The licensing function allows both the Commission and its licensees "formal and informal opportunities to negotiate the substance of and progression towards compliance."[125] Clifford has noted that the licensing process is licensee-specific, and "each Commission - licensee relationship is a micro-regulatory regime."[126] Many of the bargained elements of a licence are particular to that regulatory relationship, "even though the formal process, within which the elements are negotiated, is common to all licensees."[127] Two elements of the licensing process in particular highlight the Commission's ability to deal with licensees on a individual basis — conditions of licence and promises of performance.

Conditions of licence "are in a sense the terms of contract entered into between the broadcaster and the public authorities."[128] The Act empowers the CRTC to attach special conditions to licences, "related to the circumstances of the licensee."[129] This power is very broad, encompassing any means the Commission "deems appropriate for the implementation of the broadcasting policy"[130] set out in section 3. Conditions of licence allow the CRTC "to supervise on a case-by-case basis, and to tailor its requirements to the capabilities of the particular licensee."[131] The Commission is

making increasing use of these conditions, as they can be flexibly applied "to take into account the financial capabilities of individual licensees and the particular needs and resources of each community."[132]

Licensing conditions are a powerful tool for the CRTC in enforcing its regulatory mandate, in that their breach can result in suspension or revocation of a licence. They are also important to the enforcement process because they can place obligations, including expenditure requirements, on a licensee over and above the quantitative regulatory requirements. This provides one solution to the problem that broadcasters are not motivated by the content quotas to go beyond minimal, legally acceptable standards. On the utility of attaching specific conditions to licences the CRTC has commented:

> [T]he Commission believes that it must have the ability to issue licences that take into account the unique circumstances of each licensee. Experience has shown that this is one of the most useful tools at the Commission's disposal. The achievement of the objectives of the Act frequently require the expenditure of money, and the Commission must be able to require such expenditures in appropriate cases.[133]

Unlike conditions of licence, promises of performance are not imposed by the Commission, but are "commitments made by a licensee in support of the licence application."[134] Martin and Walter Romanow explain the process as follows:

> At the time of licence assignment or renewal, station owners offer assurance, in an agreement with the CRTC, that they will provide a specified schedule of programming activities and services with respect to their audiences' and community's needs and expectations.[135]

The promise of performance made by broadcasters is attached to their licensing applications. It provides the CRTC with a "standard against which to measure adequate or inadequate performances by broadcasters."[136] It is stated on the application for licence form that it is a

> policy of the Commission that applications for amendment or renewal of a broadcasting undertaking licence should not be considered unless the licensee of the broadcasting undertaking is in compliance with the regulations applicable to the undertaking, the Promise of Performance...and licence conditions.[137]

Following this, however, is the provision for explaining non-compliance — the reason behind it, and how long the broadcaster expects it will take to "operate in full compliance."[138]

This opportunity to explain non-compliance indicates a flexible approach on the part of the Commission to enforcing promises of performance. As Clifford points out, unless the Commission specifically prescribes a licence condition, "it cannot rely on its arsenal of formal sanctions."[139] A promise of performance is not a condition of licence, and so is not an absolute requirement. However, the Commission points out that it "cannot be acquiescent when the end result of the performance falls significantly short of what has been promised."[140] The CRTC has noted that while it is not a condition of licence, the promise of performance must ultimately be met:

> Although the Promise of Performance of a television station is not a condition of licence, it is an important consideration of the Commission in awarding a television licence. The Commission has generally adopted an understanding attitude towards newly licensed television undertakings who have not been able to completely fulfill their promises in the first years of operation, due to special or unforseen circumstances of an adverse nature. Nevertheless, the Commission expects television licensees to have fulfilled their Promises of Performance, prior to licence renewal.[141]

The instrument of licensing, in its use of licence conditions and promises of performance, offers the CRTC a flexible means of enforcing Canadian content requirements. It allows for the individualized treatment of different licensees on a case-by-case basis. Licence renewals are key to this approach, because at renewal the undertaking is "assessed in terms of its commitments and its contribution to the achievement of the general broadcasting policy objectives."[142]

If confronted with non-compliance within the licensing process, the CRTC has a number of sanctions available to it. These include:

> suspension, licence revocation, nonrenewal, attachment of specific conditions to licences, [and the] issuance of reprimands either privately or by public notice....[143]

Practically speaking, the measures at the stricter end of this sanctioning spectrum such as suspension, revocation and non-renewal of licence go unused by the Commission. They are considered too heavy a penalty, "out of all proportion to the usual kind of regulatory offence committed by the broadcaster."[144] To date "no television licence has ever been terminated."[145] The revocation of a licence is reserved by the Commission as a measure of last resort. Revocation would be considered only where there is a blatant misuse of a public licence and "obvious disregard or contempt for the rules."[146] Because revocation involves "depriving a community of services,"[147] this sanction would not be invoked unless the broadcaster in question was making absolutely no contribution to the Canadian broadcasting system.[148] Clifford notes that ultimately,

> the Commission does not revoke or suspend a licence for violation of content requirements. Licensees therefore enjoy de facto tenure in FM radio and television licences ... it actually expresses its disapproval about noncompliance in the language of decisions by granting short-term renewals and by changing content policies.[149]

At the intermediate level, the CRTC has available to it the sanction of short-term renewal of licence. This practice of "renewing for terms shorter than the 5-year maximum has allowed calibrations based on merit."[150] Short-term renewals are a particularly useful sanction, because they are not so severe as to be unreasonable, but have significant effects on the interests of licensees. They are very effective in inducing compliance. Licensee "efforts to satisfy the Commission's licensing application requirements are costly in time and money."[151] Preparing for licence renewal takes months of hard work by several employees of the licensee. Short-term renewal which increases the frequency of applications substantially increases costs to the broadcaster.[152] Short-term renewals also threaten the bank's confidence in the broadcasting firm they are financing. In the interest of offsetting risk to their investment, bankers "are one of the first groups to put pressure on the television station to do whatever it takes to comply."[153] A broadcaster with a short-term licence will not get a

long-term loan.[154] By invoking the sanction of short-term renewal, the CRTC not only places a financial burden on the licensee, it also finds "the natural allies it needs to dissuade and curb effectively those who are tempted by the rewards of non-compliance."[155]

In spite of the effectiveness of short-term renewals in inducing compliance, they have not been heavily-used in the sanctioning of Canadian content violations. Short-term renewals represent a very small fraction of licence renewal decisions.[156] The Task Force reports however, that the CRTC is making increasing use of this sanction.[157] Given its utility, increased use of short-term renewals bodes well for the implementation of Canadian programming goals.

The sanctions most often used by the Commission are those at the least-severe end of the range of choices. For example, the CRTC commonly employs methods such as "requiring weekly reports from a licensee until the Commission is satisfied they are in compliance,"[158] or "the threat of adding more stringent conditions if a renewal is given."[159] Measures such as these, along with warnings and reprimands form the bulk of the Commission's sanctioning activity. In this soft sanctioning strategy pursued by the Commission, licensing decisions

> reduce most prescriptions to "requirements" or "expectations"; in many instances the Commission uses "gentle persuasion" and merely "notes" a licensee's statements or state of affairs.[160]

While the instrument of licensing "appears to carry grave consequences for non-compliance,"[161] in fact the CRTC has "entrenched tenure in licences"[162] and loss of a "licence for failure to meet content requirements is a remote possibility at best."[163] The CRTC's licensing practices are clearly part of a conciliatory as opposed to deterrent law enforcement system — more focused on preventing than punishing violations. In former

Chairman Bureau's words:

> We're not interested in penalizing people. We are interested in having them be fair to their competitors and serving their community.[164]

The Commission's third instrument of policy implementation, persuasion, is further evidence of a conciliatory enforcement style. In exercising persuasion, the CRTC does not employ punitive sanctions but guides and encourages compliance by informal means.

Persuasion

As outlined in Chapter Two, the instrument of persuasion attempts to provide the incentive needed to secure voluntary compliance with regulatory goals, through means such as education, disseminating information to the public, and giving advice to the regulated. Persuasion is important to compliance in that it gathers public support for regulatory goals and increases understanding by the regulated industry as to what is expected of it.

The CRTC is given the authority to "supervise" all aspects of the Canadian broadcasting system in section 15 of the Broadcasting Act. Implicit "in that power is the exercise of persuasion."[165] Public hearings and published policy statements provide two good examples of persuasion in CRTC operations.

The Commission is required by the Broadcasting Act to hold public hearings in connection with the issue, suspension and revocation of a broadcasting licence.[166] In all other matters, the Commission holds hearings at its own discretion.[167] Public hearings are considered by the CRTC to be a vital part of its function as a regulatory agency and "essential for openness and understanding."[168] Hearings provide an opportunity for both the public and broadcasters to "comment on and discuss proposed policies."[169] In addition to this broad educative function, hearings publicly assess the compliance record of the applicant licensee. The broadcaster is "quizzed by Commissioners and counsel about past performance, the application itself, future plans and other undertakings."[170]

Further, any "non-compliance with content regulations and licence conditions must be explained."[171] Performance is assessed against promises, and the licensee is chastised, praised and encouraged "to do more and to do better."[172] All of this can be seen as a persuasion exercise, intended to influence licensee behavior and encourage voluntary compliance.

Policy statements also facilitate voluntary compliance and "encourage greater consistency in decision-making."[173] When a regulator does not provide explanatory material describing the reasoning behind regulations and what conformity on the part of the industry entails, it makes understanding of and compliance with those regulations more difficult.[174] It has been noted that Canadian regulatory agencies rarely "articulate the general policy considerations which underlie"[175] their individual decisions.

The CRTC, in contrast, "has been very active in formulating policy principles as a guide to its licensing decisions."[176] In its policy statements, public announcements and even in the text of decisions themselves, the Commission attempts to form generalizations from the experience of many individual cases.[177] In this way, it provides information to broadcasters in the regulatory process which encourages compliance.

It is the Commission's practice to "publish in a policy statement the direction it intends to take on particular issues, usually after public hearings."[178] These statements are not formally binding on licensees, but have an indirect standard-setting effect

> because the regulatory authority reveals the reasoning that it will base its decisions upon, for example in issuing licences, and because undertakings are obviously interested in preparing themselves accordingly.[179]

A policy statement is therefore a way of "informing undertakings what the CRTC expects of them."[180] The principles set out in a policy statement will "take shape in promises of performance and conditions of licence."[181]

The instrument of persuasion operates in conjunction with the CRTC's other instruments of policy implementation — the power to make regulations having the force of law and the licensing function. By encouraging voluntary compliance — whether through exhortation or advice — persuasion can improve the efficiency of the other instruments, and may be necessary to their effective use.[182]

The CRTC's use of instruments and sanctions clearly demonstrates a conciliatory as opposed to a deterrent enforcement style. Formal or strict sanctions such as prosecution for regulatory offence, licence revocation, suspension or non-renewal of licence have been used sparingly or not at all. The Commission has made limited but increasing use of short-term licence renewal and specific conditions of licence. Primarily, the CRTC has relied on informal sanctioning activity such as increased reporting requirements, warnings and persuasion to enforce Canadian content requirements.

## The CRTC's Enforcement Strategy

The Commission does not focus on deterrence in its day-to-day enforcement activities, and because of this it makes little use of the strategy of strict enforcement. Instead, the CRTC employs all three of the strategies typical of a conciliatory enforcement style. The Commission has consistently made use of negotiated compliance and the consultation/education approach in its efforts to obtain compliance with Canadian content requirements. More recently, it has adopted a supervisory approach which involves greater self-regulation on the part of the broadcasting industry.

### Negotiation and Consultation

The CRTC has generally utilized the strategy of negotiating compliance in the licensing process. While the formal process of issuing and renewing licences is common to all licensees, specific relationships provide an opportunity for "informal bargaining

about content,"[183] and "bilateral persuasion."[184] The Commission has been willing to bargain with and offer forbearance to licensees, especially with reference to their promises of performance, in an effort to secure their goodwill and energy in future conformity. The CRTC and licensees negotiate many other aspects of their relationship, from "ground rules (conditions of licence and regulations) to the degrees of permissible non-compliance and timetables for changing private behaviour."[185]

This flexibility is important to ongoing enforcement relationships. In negotiating compliance, as one author observes, enforcement is not a "once-and-for-all prospect."[186] This strategy of enforcement follows

> a serial pattern, a loosely structured but none the less organized process relying heavily upon negotiated conformity, with a gradual increase in pressure being applied to the uncooperative.[187]

The Commission's use of negotiated compliance in the licensing process does not preclude the use of strict and formal sanctions. Strict enforcement is retained as a last resort, however, and its use would signal the failure of the negotiated strategy. Problems do not usually go that far, according to the Commission. By maintaining informal communication with licensees between licensing applications, the CRTC is aware of what licensees are doing over time and whether there is a compliance problem. If such a problem arises, the Commission works with the licensee to resolve it. Because the Commission works on a continuing basis with the industry, problems are generally resolved as they occur. Should this process fail, however, the issue ends up in public hearing, and more formal licensing activity will come into play.[188]

It is especially in this informal problem-solving that the Commission's strategy of consultation and education becomes evident. Informed "advice and persuasion by Commission staff have been important in the Commission's efforts to gain compliance."[189] According to CRTC staff, informal meetings "have often served educative functions and have had noticeable persuasive effects."[190]

The Commission is clearly less interested in penalizing licensees for non-compliance than correcting it. Former CRTC Chairman Bureau has stated that the Commission is "predisposed to helping broadcasters when trouble arises."[191] He has encouraged broadcasters experiencing difficulty in meeting their commitments to "come back to the Commission and ask for help."[192] Enforcement is not, according to Bureau

> a question of threatening anybody or wanting to be perceived as a tough guy. It's a question of fairness to all parties .... we are serious about enforcement of our own regulations .... We will see that promises are met.[193]

Self-Regulation and the Supervisory Approach

In addition to the strategies of negotiated compliance and the consultation/education approach, the Commission has been moving, since 1983, towards a supervisory role in regulatory enforcement, requiring increased self-regulation on the part of the broadcasting industry.[194] In this new approach the CRTC has sought to reduce the regulatory burden on broadcasters, "opting for a more general role of monitoring and supervision."[195] The goal is to streamline regulatory procedures and eliminate "all but the essential regulations necessary to achieve the objectives of the Broadcasting Act."[196] Minimum content requirements remain the same, but the reduction of regulatory burdens such as detailed reporting requirements is meant to free the resources of licensees to make "strong commitments ... to produce and air high quality Canadian programming."[197]

Within this supervisory orientation, the Commission has encouraged the broadcasting industry "to develop standards for self-regulation in some areas."[198] These standards "may consist of certain criteria or guidelines that are agreed to and applied on a voluntary basis."[199] Self-regulation by definition, notes the CRTC, "requires the industry to demonstrate maturity and responsibility."[200]

> Reliance by the Commission on voluntary standards is only possible if broadcasters accept a greater degree of responsibility for ensuring that the

> objectives of the Broadcasting Act are met and that the Canadian broadcasting system operates in the public interest.[201]

The supervisory role of the Commission has been critical in the development of the Canadian Association of Broadcasters' Broadcast Code for Advertising to Children and the Voluntary Code regarding Sex-Role Portrayal in Television Programming.[202] Adherence to these codes "has been made a condition of licence."[203] The Commission's supervisory approach has in fact gone hand in hand with its increased use of conditions of licence. Rather than relying only on the blanket content regulations applicable to all licensees, requirements are being made of "individual broadcasters on the basis of their capabilities and reinforced through conditions of licence."[204]

The CAB has found it contradictory for the Commission to "ask the industry to draw up voluntary guidelines and then impose those rules as conditions of licences."[205] However, this points to the fact that "voluntary standards" ultimately depend on the Commission's capacity to support this approach with sanctions. The CRTC has emphasized that a supervisory approach does not mean abandoning its responsibilities as regulator. The Commission has vowed to be "resolute" in the application of the remaining rules that are essential to fulfilling its mandate, and "rigorous in enforcing adherence."[206] As has been noted, the strategies pursued by the CRTC in the enforcement of Canadian content — negotiated compliance, the consultation/education approach, and self-regulation under the supervisory approach — all reflect a results-oriented conciliatory style. Most criticisms of the CRTC's enforcement efforts are in fact criticisms of this style, and call for stricter enforcement of Canadian content requirements by the Commission. The final section of this chapter will outline this criticism and the problem of enforcing Canadian content as part of the policy implementation process.

Criticism of the CRTC's Enforcement Efforts

The CRTC has attempted to implement Canadian programming goals through quantitative content regulations, promises of performance and conditions of licence.[207] There is general agreement that content regulations have not met the objective for Canadian programming in that there is still a "preponderance of foreign entertainment programs [mainly American], especially in the mid-evening viewing hours"[208] on Canadian television. The present Canadian content regulations "can be met without a commitment to expensive Canadian programs which would act to reduce profits."[209] Further, the "average broadcaster has not felt that its licence is unduly threatened by a minimal performance which meets the letter of the regulations."[210]

Some critics have argued that Canadian content requirements have failed to bring about the increased viewing of Canadian programming because they have not been vigorously imposed.[211] A common criticism is that because the CRTC does not make television licences conditional on the promise of performance, it has "not effectively used the licensing process to influence Canadian programming on television."[212] Clifford has noted that the "licensing mode for regulation of broadcasting content is a game wherein the minimum standards set by the regulator are treated as maximums by private regulatees."[213] Babe and Slayton have phrased the problem as follows:

> When licensed initially, and in an effort to attain the licence, applicants submit programming and other plans to the CRTC. It is on the basis of such plans and promises that the Commission issues the licence. Although such Promises of Performance are often not fulfilled, the CRTC's licence renewal proceedings have been such as to virtually guarantee licence renewal, irrespective of performance.[214]

The reason, according to Beke, that broadcasters' performance often falls short of their promises, is that the commitments made are unrealistic:

> In practice, applicants, not unlike politicians trying to win the favor of voters, promise what they feel will impress the members of the regulatory authority. If the applicant is not familiar with the biases and program philosophy of the members of the regulatory authority, he hires experts

> who are. The result is that in a large number of cases the promises have no relationship to what is economically feasible in the market...[215]

The competitive situation in which broadcasters are originally licensed, notes the Task Force on Broadcasting policy, encourages applicants to "overstate their case."[216] If they are licensed on the basis of these "rash promises", they may "beg to be released from them several months later when they are faced with financial problems."[217] These contradictions in the behavior of undertakings "have almost become the rule: they promise the CRTC the moon and come back with much less."[218] The CRTC has been strongly criticized for "doing nothing when undertakings repeatedly fail to meet their commitments."[219] Hardin argues that by not denying renewal when promises are not fulfilled, the CRTC has "created an Americanized broadcasting structure that was never intended and never envisaged in the legislation"[220] that the Commission was created to implement. The Task Force adds that what suffers in cases of unmet licence promises is "the credibility of the regulations."[221]

The promise of performance has been considered "fundamental not only in selecting the broadcaster initially, but in evaluating his performance thereafter."[222] The Commission's job, points out the Task Force, is "to assess accurately the assumptions that are hidden from it as well as those loudly advertised for its benefit."[223] Hardin adds that

> licences awarded from the public domain to private parties should stand or fall by whether the licensees fulfil the promises on which the licences were granted.[224]

The Commission has not "exhibited a significant degree of determination to use the powers of revocation and suspension available to it."[225] This is understandable, however, as most non-compliance is a product of "many small actions, no one action being sufficient to cause a response from the CRTC with respect to the status of a licence."[226] For this reason, the CRTC's increased use of conditions of licence may prove difficult to enforce. The "too blunt" sanction of removing a licence is the "only

penalty available for breach of a condition of licence."[227] The Standing Committee on Communications and Culture has pointed out that if the CRTC continues to make heavy use of these conditions, it will not have "appropriate remedies available for addressing cases where the broadcaster fails to comply."[228]

The Committee finds that more "effective use should be made of existing CRTC powers."[229] While it is not the Commission's practice, it does have the "power to call for new applicants at the time of licence renewal."[230] The Committee argues that the unused sanction of non-renewal of licence should become a possibility:

> We believe that where a licensee has failed repeatedly to comply with regulations or conditions, others should be given a chance to do a proper job.[231]

Babe and Slayton also criticize the CRTC's failure to hear competing applications at renewal and transfer of licence proceedings. They argue that competitive licence renewal procedures "would induce present licensees to live up to their obligations to a greater extent than is now the case."[232]

The principal formal sanction imposed by the CRTC for licensing violations is short-term renewal of licence. This is an extremely persuasive sanction because of the costs to the licensee of frequent appearances before the Commission, nor is it too extreme a response to non-compliant behavior. But even broadcasters have admitted that the CRTC has not made great use of the "short-term whip."[233] The Standing Committee has noted that this sanction "constitutes quite a satisfactory deterrent for many licensees"[234] and recommends that the "CRTC should make more frequent use of its power to award or renew licences for short terms."[235]

The Commission makes little or no use of the formal sanctions available to it, such as prosecution for regulatory offence, licence revocation, suspension or non-renewal of licence. It has made sparing use of short term renewal of licence. In response

to this limited use of formal sanctions by the Commission, Babe has made the following observation:

> In view of the high rate of automatic licence renewals and relative lack of short-term renewals, therefore, one could conclude either that licensees carefully observe the regulations and conditions or that the CRTC is lax in enforcement.[236]

Since Babe goes on to describe a number of cases of non-compliance, he clearly sides with the latter hypothesis.

Babe's comments highlight the fact that criticisms of the Commission's enforcement efforts are often a rejection of its conciliatory enforcement style. Such criticisms equate effective enforcement with the use of strong deterrent enforcement measures. In responding to such criticism, the CRTC has likened its role to that of a police force. The most visible evidence of the police doing their job is when they are arresting someone. But a better indication of their effectiveness is the maintenance of law and order.[237] The same way, the enforcement of Canadian content is often a low-visibility activity and may be operating effectively without an obvious use of strict sanctions and formal procedure. Most compliance problems are handled by the Commission by working with licensees to correct problems as they occur, before the need for more formal punitive action. Many critics of the enforcement process overlook such informal problem-solving activity, much of which is effective in obtaining compliance with Canadian content requirements.

Further, some of the suggestions for improving the CRTC's enforcement procedures have been found unworkable by the Commission. The proposal that licences be revoked when broadcasters fail to fulfill their promised performance is an example. The Commission maintains that revocation of licence would only be justifiable in a case where the licensee is making no contribution whatsoever to the Canadian broadcasting system, and there are virtually no such cases.[238] Were a licensee to perform so

dismally, the CRTC would not have to pull the licence; the broadcaster would fail on its own, as bankers and viewers withdrew their support.[239] Revocation, a member of the Commission points out, has no advantages. The investment already committed to Canadian resources in the television production field is lost. Taking away licences is likely to "penalize the public as opposed to the industry."[240]

Similarly, there are good reasons why the CRTC does not hold competitive licence renewal hearings. First, licensees who do not have a reasonable expectation of having their licence renewed, have no incentive to invest in their stations. Instead, faced with the prospect of losing their licence to another bidder at renewal time, broadcasters "might be tempted to try to make short-term gains rather than long-term plans."[241]

Further, it has been noted that the competitive situation in which broadcasters are originally licensed, encourages prospective licensees to overstate their case and make unrealistic promises to the Commission. There is no reason to believe that new applicants at competitive renewal hearings would not do the same thing. The Commission would then be faced with the difficulty of how to compare these competitors with no performance record to the incumbent licensee.[242] As one Commission staff member has pointed out, the CRTC would have no guarantee that the "wild-eyed unknown, waving wild new promises"[243] would perform better than the existing holder of the licence.

The most useful criticisms of the enforcement process are not those which promote the use of licence revocation or competitive renewal of licence, but those which recognize the fact that "regulators must maintain some threshold of effectiveness and consistency to prevent a widespread breakdown of voluntary compliance."[244] The Law Reform Commission has noted that the consistent failure to invoke strict sanctions, and heavy reliance on activities such as persuasion and minor administrative burdens, "may lead to more non-compliance and the ultimate deflation and withdrawal of policy

goals."[245] Similarly the Task Force has cautioned:

> Regulation constantly flouted or enforced haphazardly is self-defeating. Worse still, it is harmful: its cost are greater than its benefits and it tends to discredit the very objectives it is intended to protect.[246]

Enforcement and the Policy Implementation Process

While the criticisms of the CRTC's enforcement efforts point to weaknesses in the process, the gap that exists between meeting the letter of the regulation and the fulfillment of the spirit of the Canadian programming goals should be expected. The Law Reform Commission observes that

> ultimately, the task entrusted to the CRTC may be an impossible one: to serve all the interests set out in the Broadcasting Act may be beyond the human and other resources of any governmental entity.[247]

Simple compliance, which is substantially observed, is not the same as the fulfillment of the goals for, or the spirit of, Canadian content. Enforcement will always fall somewhere between the ideal and what is realistically achievable.

In this respect, enforcement is typical of the policy implementation process of which it is a part. Implementation is the carrying out of policy decisions. Edwards notes that a sizable gap "often exists between a policy decision and its implementation."[248] Pressman and Wildavsky, further, point out that this gap should be expected:

> Our normal expectation should be that new programs will fail to get off the ground and that, at best, they will take considerable time to get started. The cards in this world are stacked against things happening, as so much effort is required to make them move. The remarkable thing is that new programs work at all.[249]

There is another aspect of the policy implementation process important to the enforcement problem. Implementation may sometimes "require formal reactions to discrete incidents, or invocation of coercion or punishment in instances of non-compliance."[250] This approach, however, does not reflect "actual implementation

practices."[251] Penalties are not always invoked for regulatory infractions. Regulators, using discretion, may decide that

> although transgressions are taking place, private action seems to be "improving" or "coming into compliance," and thus enforcement action is not necessary.[252]

The same way, criticisms of the CRTC's enforcement efforts, based on the perceived inadequacy of the Commission's use of formal sanctions, do not address the entire enforcement process. The use of formal sanctions is not the only criterion by which to assess the effectiveness of regulatory enforcement. It is important to understand that a great deal of enforcement effort never reaches the stage of strict formal legal action. Procedures used in the practice of enforcement are often "highly informal and only partially recorded."[253] As was noted earlier in the chapter there are several regulatory enforcement strategies which rely primarily on informal means to secure conformity with regulatory requirements. This informal regulatory process is "important for understanding both agency behavior and performance of regulated firms."[254] Where this chapter has described some of the informal means by which the CRTC works to achieve compliance, the next chapter will illustrate some of these informal enforcement activities in a case-study of the regulatory relationship between the CRTC and one licensee.

## Conclusion

The previous chapter of this thesis developed a framework for the discussion of regulation, the independence of regulatory agencies and the process of regulatory enforcement, as these concepts apply to regulatory agencies in general. This chapter has applied this framework to the CRTC and its enforcement of Canadian content requirements, vis-a-vis private television broadcasters.

Although the CRTC is an independent regulatory agency, its decision-making activities are not entirely insulated from the demands and influences of other actors in the

regulatory process. This chapter has addressed the CRTC's independence from government and industry as they affect the enforcement process. Political controls open the way for the lobbying of Cabinet by broadcasters to change behind closed doors, decisions which are made by the CRTC in a public forum. Even if directions and review are used sparingly by Cabinet, the potential for their use is evident to the Commission and can affect the consistency and confidence with which it applies its mandate.

Similarly the CRTC's operations are inevitably affected by the needs of the private television broadcasters it regulates. The fact that broadcasters' interests are basically at odds with the Commission's effort to promote Canadian programming, combined with the reality that they have significant power to promote those interests, has obvious implications for the CRTC's regulatory enforcement efforts. To a broadcaster motivated by profit-making, Canadian content requirements are seen as the cost of obtaining a licence. There is a practical limit to the content requirements that can be placed on private broadcasters if they are to remain viable financially and contribute anything at all to Canadian programming goals.

The issue of independence demonstrates that the CRTC does not operate in a benign environment where it can simply impose standards and have them met. It functions in a highly political atmosphere where it must deal with at least the potential for political interference, as well as a degree of resistance from an industry with its own interests to protect. The CRTC's level of independence from both government and industry should be recognized as an important contextual influence on the process of enforcement by the Commission.

This chapter has also examined the CRTC's mandate to promote Canadian content, and the instruments and strategies it employs in that effort. Overall, the Commission has approached its mandate in a results-oriented, conciliatory style, and has made limited use of the more formal and strict sanctions available to it. This approach has

led to questions about the Commission's seriousness with respect to enforcement, and demands for stricter enforcement of Canadian content requirements.

These criticisms, however valid, often neglect the informal aspect of regulatory enforcement, and so do not address the entire enforcement process. Further, the difference between the objective and the fulfillment of Canadian programming goals cannot be attributed solely to weak enforcement of those goals by the Commission. Enforcement is the effort to obtain compliance with regulatory goals. Even if full compliance with content quotas, promises of performance, and conditions of licence is achieved, it is unlikely that "predominantly Canadian" programming fulfilling the spirit of the Broadcasting Act will be attained.

Chapter Four will add to this discussion of the CRTC's enforcement of Canadian content requirements, by presenting a case-study which examines the regulatory relationship between the Commission and one licensee over time. It will illuminate the actual practice of some of the formal means of enforcement, as well the informal activities involved in achieving compliance.

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# CHAPTER 4

## ONE CASE OF ENFORCING CANADIAN CONTENT: THE CRTC AND CKVU-TV VANCOUVER

The earlier chapters of this thesis have dealt with the process of regulatory enforcement and its exercise by one independent regulatory agency — the CRTC. The Commission's mandate to enforce Canadian content vis-a-vis private television broadcasters has been examined, as have its means of enforcement, including its instruments, sanctions and strategies.

This chapter addresses the actual practice of enforcing Canadian content by the CRTC in one case. A case study tries to

> illuminate a decision or set of decisions: why they were taken, how they were implemented, and with what result.[1]

This case will describe the regulatory relationship between the Commission and one licensee — CKVU-TV Vancouver — over a period of fifteen years. It will demonstrate some of the elements of the enforcement process previously discussed, as well as providing insight into the informal aspect of regulatory enforcement. The case-study will be constructed from a number of primary sources: CRTC decisions, Annual Reports, Public Announcements, as well as transcripts of public hearings, licensing applications, correspondence between the CRTC and the licensee, periodicals and personal interviews.

According to Virginia Krapiec, Director General of the CRTC Regional Office in Vancouver, CKVU-TV is a very "typical" station with a very "typical" history.[2] In its start-up, compliance problems, development and eventual achievement of stability, CKVU-TV has been "a normal growing station."[3] Because of this, its licensing history is a good example of how the process of regulatory enforcement in broadcasting really works.

## The Licensing of CKVU-TV

Prior to the licensing of CKVU-TV, the Vancouver television market was already very competitive, served by a CBC and CTV service, a private CBC affiliate, and several American television signals, received "either off-air or by cable television."[4] In August, 1973, the CRTC denied applications from three different private groups to provide a third English language television service for the city of Vancouver. The Commission noted that the applicants fell short in not adequately reflecting "the potential of a rapidly growing city with unique cultural possibilities in its location and people."[5] The CRTC was convinced of the potential for a service that would provide "valuable cultural, educational and entertainment programming", giving greater scope to the "interests, views and concerns" of the people in the Vancouver area.[6] It resolved to call at a later date for applications which would address these needs.

In 1975 four new applicants bid for a licence to provide a third English language service for the Vancouver area. Against these competing applications, Western Approaches Ltd. was granted the licence to operate CKVU-TV Vancouver, for a term of almost 4 (out of a possible 5) years.[7] The Commission found Western's application ambitious and unique.[8] It also found it to be the most "realistic" proposal, with the best possibilities of achieving the objectives it had previously outlined, without threatening to undermine the existing licensees in the area.[9]

The applications were heard at a public hearing, held April 22, 1975. Western Approaches' representatives emphasized the fact that their "program priorities would be based on the needs of the Vancouver audience":

> An innovative and flexible approach in coverage of local events and encouraging community access to the new station would provide alternative viewing to what is now available on commercial television channels in the city.[10]

Western proposed a "new concept" in broadcasting which would include a "large local station, realistically conceived, and created" to serve a "local audience with programs

devoted primarily to subjects of community-wide interests."[11] In emphasizing the realistic nature of their proposal, Western was anticipating the criticism of prospective licensees who make enormous promises to the CRTC to obtain a licence but fail dismally in the execution of their commitments once they have obtained it. Western noted:

> Too often we have seen new licensees overestimate their requirements and over reach their capabilities. An overcapacity can be a monster that devours you in its need. An orderly growth is both realistic and attainable within a growing financial capability.[12]

Should Western Approaches be granted a licence, explained a representative, it would be given an opportunity to bring Vancouver a television station that would "fulfill completely" its commitments to the Commission.[13]

In its application, Western defined its conception of public service broadcasting:

> It being generally agreed in Canada that broadcast channels are public property, granted for the use of private or public corporations on specified terms for specific periods, it can be said that all broadcasting in the country is to some extent public service broadcasting.[14]

Such broadcasting, they argued, is that which "fulfills the requirements of the Broadcasting Act, and which, in the private sector, meets the commercial needs of the licence holder's enterprise."[15] To "perform his public service the broadcaster must regard many factors in a new light."[16] The new need in broadcasting, according to Western Approaches was "to be local and particular."[17]

To this end, Western promised 26 hours weekly of locally-originated programming. Their flagship program was to be the "Vancouver" show, a "free-form, studio-originated electronic journal telecast 'live' Sunday to Saturday inclusive, 7:00 to 9:00 P.M."[18] This program would "encompass Vancouver life, local news, civic affairs, politics, business, the environment and the arts."[19] By purchasing Canadian programming in addition, Western promised to meet the required Canadian content percentages of 60% overall and 50% in prime-time.[20]

The Commission was persuaded by this promise of extensive local programming, as well as by the program production experience of the founding group of Western Approaches Limited — Daryl Duke, Norman Klenman, and William Bellman. These individuals combined local, national and international experience in broadcasting and had each "worked extensively in the kind of local and station programming"[21] they planned for Vancouver. The ownership of Western was primarily based in Vancouver, and this was in keeping with the Commission's practice of encouraging strong local ownership. The Commission also took into account, in considering the application, "the fact that the founding group of shareholders, including experienced broadcasters,"[22] would manage and control the company. In awarding Western Approaches the licence to operate CKVU-TV, the Commission expressed the expectation that the applicant would "make full use of its professional experience"[23] to develop its programming.

## CKVU's Compliance Problems

CKVU-TV, Vancouver went on the air on September 1, 1976, as an independent station (not affiliated with a network). Commission monitoring in late 1977 "revealed that in its first broadcast year, CKVU-TV had failed to meet the minimum Canadian content level"[24] as prescribed by the Television Broadcasting Regulations. Nor was the licensee in compliance with its Promise of Performance.

On November 15, 1977, Norman Klenman, Vice President, Programming and Production for CKVU, wrote a lengthy letter to the CRTC's Broadcast Programmes Directorate, detailing and explaining the station's non-compliance. Klenman began by saying that Western had not changed its viewpoint on what a local station in Vancouver should accomplish, but had "not achieved every goal and aim as yet."[25] He noted the difficulty of building up local content in prime time, especially in the competitive Vancouver area. Klenman added that the first year had been low in sales, and the

company had a cash-flow problem. He concluded that it was "absolutely necessary" to make spending cutbacks if CKVU-TV was to "survive as a station."[26]

Klenman recalled to the Commission Western Approaches' promise of performance of 26 hours of local production per week which was to consist

> of 14 hours of the Vancouver Show, two hours per night, seven nights per week. Seven hours of local sports making 21 hours and 5 hours of a noon show for consumers.[27]

Western, he said, had decided to cut the Vancouver Show on the weekends, as these productions were expensive and were lowering the average ratings of the show for the entire week. This drastic decision was not the choice of the licensee, but forced upon it by economic necessity. Local production of the station at the time of the letter, according to Klenman, was 22 hours, and the company hoped to reach 26 hours in the near future.[28]

Klenman also mentioned in his letter that CKVU was not meeting its Canadian content requirements. He explained the station's difficulties as follows:

> [W]e were not able to meet our complete Canadian content requirements for year one. Not only had we difficulty in producing enough of our own shows, but we found it almost impossible to buy enough good Canadian programming to fill in...We began year two very close to 50% Canadian content in prime-time and approximately 57% Canadian content overall.[29]

Mr. Klenman felt confident that with new Canadian programming purchases being made available, the situation could be rectified by August 31, 1978.

Klenman ended the letter by saying that it was no surprise to the licensee or to the CRTC that any new station would have its problems, and CKVU had been luckier than most. He assured the Commission of the company's sincere efforts "to put a good schedule to air" and noted with appreciation "all the great cooperation" the licensee had received from the CRTC.[30]

Indeed, according to the Director of the CRTC's Regional Office in Vancouver, the CRTC was not surprised by CKVU's programming shortfall. Krapiec notes that in

almost every case where the CRTC issues a licence, the station experiences financial difficulties after a year or two. CKVU was licensed in a very competitive situation, and so made an ambitious application. Western Approaches Ltd., the company holding the licence for CKVU-TV, promised a great deal of local (therefore Canadian) programming, including the Vancouver Show, which made their application unique. After Western received the licence, however, it found that programming costs and the capital involved in starting up a station were high, and that costs in general were going up. When the licensee came back to the Commission with difficulties, it was almost expected.[31]

The Commission responded to CKVU's programming difficulties by calling the licensee to a public hearing. On December 16, 1977, the CRTC issued a notice which stated as the purpose of the hearing a discussion of Western Approaches' progress

> in implementing its programming plans and obligations including those relating to Canadian content, local programming and ... other matters.[32]

At the hearing, held on February 23, 1978, an intervention by D. R. West — a member of the Committee for Communications in B. C. which had intervened in support of Western's original application — was now extremely critical of the licensee's performance. The Vancouver Show was the backbone of Western's application said West, and one of the main reasons it had received the Committee's support. West also pointed out that Western Approaches was "granted a licence to provide Vancouver with an alternate form of programming."[33] The intervenor felt that if the licensee were "allowed to throw away their original program proposals, proposals on which their licence was granted, the alternate programming source"[34] would be lost. Vancouver, stated West:

> will have nothing more than a third commercial station reflecting nothing more than the station's greed to make money. If Western Approaches can't provide the service that it originally said that it could provide I feel that the licence now held by Western Approaches should be awarded to some other party more capable of providing the service.[35]

CRTC Chairman, Camu, was less emphatic, noting only that the Commission was "not quite satisfied" with CKVU's progress.[36] Daryl Duke, President of CKVU, attributed the station's problems to "extreme costs" and difficulties starting up the station. These setbacks, he explained, meant that CKVU had to make changes in its plans and how quickly it achieved its goals.[37]

On the subject of local production Norman Klenman told the Commission that the weekly programming breakdown was now 9 1/2 hours of the Vancouver Show, 7 hours of Sports-page and 3 hours of Sunday night sports: a total of 19 1/2 hours. He felt this level of local production was commendable, even if not the amount promised:

> ... we do 19 1/2 hours original, local Canadian production between 6 PM and midnight....I doubt very much if there's another station in Canada that does that much local, live production, especially in prime-time.[38]

Chairman Camu noted that CKVU was below the Canadian content average for both full day and prime-time. He then acknowledged the fact that CKVU was a new station and compared to other stations, the licensee was "not that bad."[39] He emphasized, on the other hand, the importance of meeting standards, and asked how CKVU could assure the Commission that it would achieve the Canadian content requirements. Klenman offered the date of August 31, 1978, for the fulfillment of the stations commitments as he had in his letter to the CRTC. Apparently satisfied, the Chairman noted that this assurance would be on the record and remembered.[40]

The Commission assessed the results of this hearing in a Public Announcement dated April 11, 1978. This announcement reiterated the problem of CKVU's non-compliance with Canadian content quotas and local production, which totalled 23 rather than the promised 26 hours per week. However, the Commission considered it "noteworthy" that "19 1/2 of these 23 locally produced hours"[41] were currently in prime-time. The lowering of hours devoted to the Vancouver Show from 14 to 9 1/2 hours weekly was considered more of an issue. The Commission expressed concern

that this reduction signified "a reduced commitment to the concept by the licensee."[42] This was a serious problem as the Vancouver Show "was the licensee's major local programming commitment and a major factor in the grant to it of a licence."[43]

The Commission recognized the difficulty of launching a new independent television station, "not only in terms of money but even more so in terms of organization."[44] It noted, however, that it is vital

> that the effort to meet the initial commitments be genuine and sustained, and that such commitments in fact be met well before the expiry of the first licence term.[45]

The Commission was satisfied from its examination that the licensee was "making a genuine and sustained effort" and that the effort would continue. Further, the Vancouver Show and the "very high proportion" of local production in prime-time were "two achievements reflecting credit on the licensee."[46]

In spite of these concessions, the language of the Announcement became increasingly strict. The Commission found that given the circumstances of CKVU's case, "no useful purpose would be served by prosecution proceedings relative to the Canadian content shortfall."[47] But it warned the licensee that "failure to reach the required level in the current programming year" would result in prosecution.[48] The Commission added that "while the regulation speaks only of quantity, it is equally a question of quality."[49] In conclusion, the Commission cautioned that it would "continue to monitor closely the progress of the station."[50] The threat of prosecution was not lightly made, and was taken seriously by CKVU.[51] The fact that prosecution was raised at all, according to Virginia Krapiec, indicates that the Commission was issuing "a strong warning" to the licensee.[52] She notes that especially in a competitive situation such as the one in which CKVU was licensed, the CRTC has a responsibility to make sure that the winner lives up to the commitments made.[53]

In advance of its licence expiry date in March, 1979, Western Approaches filed an application for licence renewal with the Commission on April 28, 1978. The licensee's promise of performance offered full compliance with Canadian content requirements. On the subject of local programming, however, the licensee made no apologies for producing less than the 26 hours expected by the Commission. Having reached 23 1/2 hours, the licensee argued that it had actually met its commitment to the CRTC.[54] This argument was based on a difference with the Commission dating back to Western's original licence hearing. At the hearing Western was granted a UHF licence rather than the preferred VHF, which reaches a broader audience. This fact, the licensee explained, actually affected their rightful commitment:

> We should recall to the Commission our original commitment to it when we sought our licence. The applications submitted were for a VHF licence because of the broader audience a VHF station would reach, but otherwise for a UHF station....our commitment for local production if we were granted a VHF licence was 26 hours per week. However, upon questioning we indicated that if granted a UHF licence, our expenditures would have to be 10% less. Our goal of 23 1/2 hours was reached last year.[55]

In response to what Western considered being granted the UHF licence and charged with the responsibilities of a VHF licence, the licensee seemed to expect some forbearance from the CRTC on the issue of local programming. Except for the fact that CKVU was not prosecuted for its Canadian content shortfall, which Klenman considers the CRTC's concession to this issue,[56] little forbearance was forthcoming. In the next licence renewal decision regarding CKVU-TV, the Commission imposed the sanction of short-term renewal of licence.

## The Imposition of Sanction and Return to Compliance

In Decision CRTC 79-191, dated February 27, 1979, the Commission renewed CKVU-TV's broadcasting licence for only 18 months, expiring September 30, 1980. In

reviewing Western Approaches "revised Promise of Performance", the CRTC found it to

> represent an unsatisfactory retreat from the commitments made in the licensee's original Promise of Performance on the basis of which it was granted a licence.[57]

Of particular concern to the Commission was the fact that changes in CKVU's programming were reflecting "a substantial departure from the licensee's original mandate to provide a 'Vancouver - oriented' local television service."[58]

Again, the Commission commented on the reduction in the Vancouver Show. Not only had this major commitment, the Commission noted "with concern", been reduced to 9 1/2 hours and taken off weekends, but the production had been "preempted on numerous occasions."[59] Secondly, the Commission found CKVU to be broadcasting excessive foreign programming. In its initial licensing period, CKVU's performance in this regard was poor:

> of all the independent television stations, [CKVU] provided the least amount of Canadian programming over the full broadcast day and ranked only midway among the other independent stations in the scheduling of Canadian programming between the hours of 6:00 PM and midnight during the fall season.[60]

The CRTC also expressed concern over "the excessive amount of repeats of locally produced programs", and "a substantial increase in sports content coupled with a relative decrease in information content."[61] CKVU-TV was also in the practice of "broadcasting as its 'CKVU First News', the Global News feed almost in its entirety."[62] In this matter, the CRTC ordered CKVU to reflect more adequately the needs of the Vancouver audience in these news casts.

The Commission summarized by emphasizing that although "a Promise of Performance of a television station is not a condition of licence,"[63] it cannot be

continuously flouted with impunity. The Promise of Performance, noted the Commission:

> is an important consideration of the Commission in awarding a television licence. The Commission has generally adopted an understanding attitude towards newly licensed television undertakings who have not been able to completely fulfill their promises in the first years of operation, due to special or unforseen circumstances of an adverse nature. Nevertheless, the Commission expects television licensees to have fulfilled their Promises of Performance, prior to licence renewal.[64]

The Commission found this to be "particularly important with regard to stations like CKVU for which licences were granted in the face of other serious competing applications."[65] While this decision recognized the need for flexibility in the regulatory process, the CRTC announced its intention to draw the line where "the end result of programming falls significantly short of what has been promised."[66]

Therefore, the Commission imposed a relatively strict sanction on the licensee in the form of short-term renewal. By the time of licence expiry, September 30, 1980, the Commission declared its expectation that CKVU-TV have "fulfilled its original Promise of Performance, and to have made significant enrichments to its programming schedule in accordance with section 3 of the Broadcasting Act."[67]

Less than a year later, on December 31, 1979, CKVU filed a new Promise of Performance with the Commission. In that application and in an addendum to it on March 26, 1980, CKVU answered the criticisms made by the CRTC in Decision 79-191. The licensee assured the Commission that if it was granted its licence renewal, CKVU would "continue to provide a significantly alternative television service for is signal area."[68] After year two of its licence, noted Western, it was in compliance with Canadian content percentage requirements and by September 30, 1979 was achieving 26 hours per week of local production. Of this programming CKVU was now meeting the commitment of 15 1/2 hours of information programming and 7 hours of sports. In addition, the licensee committed to 10 hours per week of the Vancouver Show. In

response to the Commission's order that CKVU modify its News program with local input, CKVU pointed out that this requirement was already being met by the station "some weeks before the Public Announcement."[69] Western also explained that preempting the Vancouver Show had been a necessity in order for the station to take advantage of CRTC's simultaneous substitution policy:

> The Commission raised the matter of pre-emptions of the Vancouver Show. These occurred frequently in the first years of CKVU, when major motion pictures and television programs required to be scheduled for simulcast in conformity with U.S. network changes. CKVU was not alone in such schedule changes, which plagued both the CTV and the CBC networks.[70]

The preemptions had to be made, argued Western, or else the station would have faced "serious financial loss on programs priced to us on the basis of simulcast."[71] Since the U.S. network changes had declined dramatically, and because CKVU was now a "relatively mature station...in a stronger position to resist pre-emptions,"[72] the problem would be reduced. Finally, the licensee promised to make reductions in repeats and lower its sports programming content.

This application ended in an appeal to the responsiveness and forbearance of the CRTC. Western expressed hope that its progress would be seen by the Commission "as proof of its continued dedication to provide an attractive and flexible Vancouver - oriented television service."[73] Western also thanked the Commission for its indulgence of CKVU's non-compliance in its early years. CKVU believed itself at this point to be "in compliance with all the regulations of the Commission and with its Promise of Performance."[74] Further, it was confident that its programming innovations had achieved the "significant enrichment of schedule as required by the Broadcasting Act."[75]

It appears that the Commission's enforcement tactics which include short-term renewal, strong expression of dissatisfaction, warnings and encouragement, as well as allowing the station some time to mature, were effective in this case. In its next licensing

decision, the CRTC found that the licensee had "responded positively" and its programming commitments had been met. The Commission renewed the licence of CKVU-TV for 4 years, expiring September 30, 1984.[76]

Changes at CKVU-TV and in the Broadcasting Industry

Over the next few years a struggle for control of CKVU-TV dominated the regulatory agenda between the Commission and the station. This ownership struggle was resolved with the eventual transfer of control of Western Approaches Ltd., licensee of CKVU-TV Vancouver, to Canwest Pacific Television Inc. in 1987.[77] This case does not focus on the ownership issue. However, the ownership dispute provides an explanation, in part, for the fact that CKVU's programming goals and compliance were not discussed in licensing decisions until after the transfer. According to interview information CKVU was in compliance over this period of time.[78] At the same time as this upheaval at CKVU, great changes were occurring in the regulatory system as a whole. This became evident as the CRTC conducted its 1983 Canadian content review.[79] In this review the Commission stressed the fact that "simple compliance" was not achieving content policy objectives. Further it noted the evolution of widespread practices in the broadcasting industry "at odds with the spirit of the Canadian content regulation."[80] The Commission resolved to make increased use of "conditions of licence to stimulate improvements in Canadian television programming."[81] Implementation of this approach, noted the Commission, would begin with the next licence renewal of each licensee.

> As current licences are considered for renewal, the licensees will be expected to bear in mind the overall goals set out in this policy paper. At the same time they will be expected to outline, in a separate statement attached to their Promise of Performance, in realistic and achievable terms, the specific commitments they are prepared to undertake with respect to the production and scheduling of Canadian programming during the licence period.[82]

The new emphasis on the condition of licence approach would take into account each licensee's ability to contribute more to Canadian programming by assessing the "licensee's present and projected financial capacity and the particular needs of, and resources available, in the community."[83]

As a result of this content review, the CRTC renewed en masse, television station licences from October 1, 1984 to September 30, 1985. CKVU-TV Vancouver was among this group of stations. This decision by the Commission, dated January 11, 1984, noted that this short term renewal was for the purpose of allowing stations to take the recent policy developments into account "in preparing their Promises of Performance for the next licence renewal term."[84] Again in 1985, the CRTC granted CKVU-TV, along with other private commercial stations, including the CTV network, an automatic 2 year licence renewal. The purpose of this move was to postpone public hearings until the recommendations of the Task Force on Broadcasting Policy were known.[85] This would also give stations a chance, according to the Commission, to respond to the current review of broadcasting policy on a number of matters, including the Broadcasting Act's provision that the "programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources."[86] The Commission yet again extended television licences and delayed hearings until the fall of 1988 in a decision announced September 2, 1987. This delay was to give television licensees time to consider the results of the network renewals (for the CBC, CTV and Global) to be held in the fall of 1987, and adjust their plans and commitments accordingly.[87]

Meanwhile, at CKVU-TV, the transfer of ownership and effective control of Western Approaches Limited to Canwest Pacific Television Inc. was completed. The CRTC's approval of the transfer was based on substantial programming commitments made by Canwest. These included a commitment by Canwest to increase by a minimum

"of $3.2 million annually, the budget for programming, over and above CKVU-TV's present 5-year projected programming budget."[88] This money would be used largely as follows:

> for the production of 12 one-hour specials per year ....13 half-hour musical programs and 13 half hour children's shows, as well as business and arts programs.[89]

The result would be 28.5 hours weekly of local programming compared to CKVU-TV's present 26 hours.[90]

CKVU-TV officially changed hands on July 13, 1988. Israel Asper who ultimately owns and controls Canwest, noted that the acquisition had taken "eight, long, rather difficult years."[91] He added that Canwest was assuming full control from the shareholder group headed by Daryl Duke and Norman Klenman, who would "no longer have any involvement with Western Approaches Limited or CKVU."[92] Asper announced that Donald Brinton, "a former Chairman of the Canadian Association of Broadcasters and President of Canwest Broadcasting Ltd.", would take over CKVU-TV as President and Chief Executive Officer.[93]

In its decision, dated April 6, 1989, the Commission renewed CKVU's licence until August 31, 1994 — a full five-year renewal — subject to specified conditions.[94] The Commission made few concessions to the licensee, while at the same time making fairly exacting demands. It held the licensee to the promises made at the time of transfer, making the financial commitments conditions of licence.

It appeared at the hearing for this licensee in October of 1988 that the common problem of new licensees making promises they could not keep was going to surface. The licensee wanted to vary somewhat the commitment it had made at the time of transfer approval (1986). The licensee explained that a reduced commitment was

necessary

> since CKVU-TV's new owners had only recently been able to assume control of the station and since drama projects often require years to develop, it would have difficulty meeting this commitment, particularly in the first year of the new licence term.[95]

Western (now controlled and owned by Canwest), therefore asked for the Commission's understanding of these realities. Among other things, the licensee requested that the Commission "accept an expenditure commitment for the first year of the new licence term of $1.5 million rather than $3.2 million."[96] The licensee planned to meet the $3.2 million per year for the remaining five years of the licence term. Western also asked that it be permitted to vary the promised categories of programming.[97]

The Commission responded by saying that it expected "the licensee during the course of the new licence term to honour fully its 1986 commitments."[98] It would not let CKVU off with the $1.5 million expenditure in year one of the licence. The Commission did, however, allow the licensee to postpone the expenditure, adding the unspent $1.7 million to year two's expenditure of $3.2 million. It also allowed Western some flexibility in numbers and types of programs, but expected the licensee to "broadcast an average of at least one original special per month" — drama, musical or documentary.[99] The programming expenditures were made conditions of licence, along with adherence to "the Broadcast Code for Advertising to Children published by the Canadian Association of Broadcasters", and adherence to the CAB's "self-regulatory guidelines on sex-role stereo-typing."[100]

The President of CKVU, Donald Brinton, notes that this specific attachment of dollars to conditions of licence is not popular with broadcasters. He explains:

> Nobody likes to be tied down in a straight-jacket. You like to think that as an efficient, smart business operator you can do the best thing by your choices.[101]

The effectiveness of the "condition of licence" approach may lie in the broadcasters fear of demands in this form increasing to an almost "rate of return control."[102] In the interest of maintaining as much flexibility as possible, broadcasters are likely to comply with these conditions.

## Summary and Conclusions

The regulatory relationship between the CRTC and CKVU-TV provides an illustration of the enforcement process. This case demonstrates some of the elements of regulatory enforcement discussed earlier in the thesis — instruments, sanctions, and strategy. It also provides insight into the informal aspect and practice of enforcement by the CRTC.

Firstly, the case reflects the operation of the strategy of negotiated compliance in the licensing process. The CRTC was responsive to CKVU-TV's problems as a new station. The Commission offered the licensee forbearance in the first minor violations, accepted "substantial if not literal compliance,"[103] and granted CKVU "reasonable time to come into compliance."[104] There were informal communications between the CRTC and the licensee between hearings, the CRTC asking for information and CKVU providing explanations of its problems. This was a method of resolving issues and working toward compliance. At public hearings persuasion came into play, as the Commission required CKVU to explain its non-compliance with Canadian content regulations and its failure to meet its promise of performance. While CKVU was chastised for these shortcomings, it was given credit for its successes in providing substantial prime-time local programming. The Commission also issued a strong warning in its threat to prosecute. This threat was part of an effort to bring CKVU into line with its commitments. The CRTC noted its willingness to be flexible with respect to CKVU's promise of performance, but warned the licensee of its expectation that these

commitments be met within a licence term. Bargaining and negotiated compliance were evident throughout the licensing relationship in exchanges of information, hearings and application procedures. Western Approaches pointed out its difficulties and defended its position on various issues. The licensee asked for concessions from the Commission based on its real accomplishments in unique and extensive local programming. The CRTC, noting these achievements, extended time and held back on formal sanctions, but for its part demanded improvements in weak areas of performance.

When the Commission was not satisfied with the pace of improvements brought about by warnings and persuasion, it imposed the relatively strict sanction of short-term renewal of licence. This sanction, combined with the CRTC's earlier enforcement tactics, was effective. CKVU was in full compliance within a year of its invocation, and received at its next licence renewal a four-year licence term. Because CKVU was never flagrantly in violation of its commitments, a heavier penalty would have been inappropriate. This is a good example of the more general enforcement problem of adequate sanctions mentioned in Chapter Three. Strict measures such as revocation of licence are not usually "in proportion with the level of non-compliance involved."[105]

The final events of the case, concerning the renewal of CKVU-TV's licence after the transfer of ownership, demonstrate the Commission's increasing use of specific conditions of licence under its supervisory role. The station's new owners were held firmly to the commitments they made at the time of transfer. The promised expenditures of the licensee were made conditions of licence. The President of CKVU has indicated that the station will carefully adhere to these conditions in the interests of maintaining as much flexibility as possible at future licence renewals.[106]

Overall the case provides a good example of the Commission's results-oriented conciliatory enforcement style. It also demonstrates the continuing and incremental nature of this style of enforcement. If informal methods fail to achieve compliance,

formal sanctions will likely be invoked. The use of formal measures, however, is not for the purpose of punishment, but as leverage to secure future conformity.

Norman Klenman, the station's former Vice President, observes that the regulatory enforcement process worked well in the case of CKVU, largely due to the Commission's reasonableness.[107] Certainly the station was in non-compliance in the first years of its licence, but after giving CKVU some time to get on its feet, the Commission made clear the limit to which it would stretch the rules by imposing a short-term renewal. The CRTC did not meet every incidence of non-compliance with a strict sanction. According to Virginia Krapiec, Director of the CRTC's Vancouver Regional Office, the system does not "operate that way, nor is it in the public interest that it operate that way."[108]

Krapiec notes that CKVU had a "rough ride coming into the Vancouver market," but the station found its rightful place by providing the local programming that it had promised.[109] The Commission was impressed with the fact that over its early years CKVU carefully tracked its programming problems and had clear ideas about how to deal with them. The CRTC found the licensee to be making a "genuine and sustained" effort. Further, the Commission was in constant contact with the licensee, and they with the Commission. By maintaining this informal communication, argues Krapiec, "you know from month to month whether a station is in compliance."[110] If there is non-compliance, the solution is usually not punishment but problem solving. This problem solving is carried out on an informal basis, day-to-day. The Commission's job is to work with licensees to resolve compliance issues. If the licensee does not cooperate the issue ultimately ends up in a public hearing after which more formal action may be taken.[111]

Norman Klenman, former Vice President of CKVU-TV and Donald Brinton, CKVU's current President, both express a healthy respect for the Commission's

enforcement powers.[112] Referring to CKVU-TV's recent licence renewal, Donald Brinton notes the seriousness with which their initial commitments were taken. CKVU has no choice, adds Brinton, but to stick to those promises. The Commission made it very clear that Western's new owners were granted approval for takeover based on certain commitments. At licence renewal the CRTC expected the licensee to "sing the same song."[113] If something goes wrong, Brinton admits, you can go back to the Commission for concessions — "that has become a pattern."[114] But especially in a situation where there were a number of competing applications for the licence, you cannot make promises you do not intend to keep.[115]

CKVU-TV's performance in terms of Canadian content requirements was very typical, according to Virginia Krapiec. Its start-up problems, non-compliance and return to compliance were all very normal.[116] As an illustration of the CRTC's regulatory enforcement efforts the case of CKVU indicates that this process operates fairly well at meeting compliance with the letter of regulatory standards, if not a flawless execution of the broader goals of the Broadcasting Act. The case also points to the fact that there is a significant informal aspect to enforcing Canadian content with respect to private broadcasters, and that compromise and negotiation are quite effective in handling the average issue of non-compliance.

This chapter has addressed specifically the ways in which the CRTC has exercised its enforcement powers in one case. The concluding chapter will draw together and analyze the findings of this thesis — from this case, as well as the more general discussion of the regulatory enforcement process and its practice by the CRTC.

## NOTES TO CHAPTER 4

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[2]Personal Interview with Virginia Krapiec, Director General, CRTC Regional Office, Vancouver, B.C., 1 November 1988.

[3]Ibid.

[4]CRTC, Decision CRTC, 73-398, Ottawa, 10 August 1973.

[5]Ibid.

[6]Ibid.

[7]CRTC, Decision CRTC, 73-304, Ottawa, 18 July 1975.

[8]Ibid.

[9]Ibid.

[10]CRTC, Transcript of Public Hearing, Vancouver, B.C., 22 April 1975.

[11]Ibid.

[12]Ibid.

[13]Ibid.

[14]CRTC, License Application, Western Approaches Ltd., Vancouver, B.C., Examination file no. 750068900, 22 April 1975.

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# CHAPTER 5

# THE CRTC AND THE ENFORCEMENT OF CANADIAN CONTENT REQUIREMENTS: CONCLUSIONS AND IMPLICATIONS

This thesis has examined the process of regulatory enforcement by the CRTC — specifically the application of Canadian content requirements to private television broadcasters. It has discussed the Commission's mandate to promote Canadian content in the Canadian broadcasting system, along with the constraints under which it must operate. This study has also described the elements of the regulatory enforcement process — instruments of policy implementation, regulatory sanctions, as well as strategies of enforcement — and how the CRTC has put these into practice. This final chapter will draw together and analyze the findings of this study under several themes: the contextual concerns in regulatory enforcement, the largely informal nature of the enforcement process, flexible enforcement — balancing strictness and conciliation, and finally, the problem of enforcing Canadian content — between "simple compliance" and fulfilling the "spirit" of programming goals.

## Contextual Influences in Regulatory Enforcement

Several important contextual or environmental factors emerged in this study which influence or limit the CRTC's enforcement efforts from the outset. These are: political controls on the CRTC's independence, the interests and influence of private television broadcasters, the nature of regulatory enforcement itself and the "evolutionary" tendency of policy implementation. These factors will be discussed in turn.

A regulatory agency is very much a part of its political environment. Although the CRTC is an independent regulatory agency, its decision-making activities are not entirely insulated from the demands and influences of other actors in the regulatory process. This work has addressed the CRTC's level of independence from both government and the

broadcasting industry as important environmental influences on the Commission's enforcement efforts.

This study has highlighted the inherent tension in the regulatory process between agency autonomy and political accountability. This tension has resulted in statutory provisions for Cabinet direction and Cabinet review. These measures affect the CRTC's enforcement of broadcasting policy directly, by exposing its decisions to political interference. But even if these political controls are used sparingly, their very existence is a threat to the CRTC's independent status, which indirectly affects the enforcement process. The CRTC cannot fully exercise its own judgement if it must anticipate the needs of the government in order to avoid "interference with its own authority."[1] Further, the Commission itself has recognized that its authority in the eyes of the public and the broadcasting industry is diminished if it appears to be "looking over its shoulder"[2] to the government, as it makes regulatory decisions. Political controls can have a demoralizing effect on the CRTC and its enforcement efforts. The Commission might well hesitate to take strong enforcement action, even when called for, if it suspects that its decision will be appealed to Cabinet and overturned. The regulatory paradox of political controls on agency independence can affect the consistency and confidence with which the Commission applies its mandate.

Similarly, the CRTC's enforcement decisions are affected by the private television broadcasters it regulates. As described in Chapter Three, the private broadcasters' financial interests are at odds with the Commission's efforts to promote Canadian programming. This basic conflict, combined with the fact that broadcasters have significant power to promote their interests (as is evidenced by the protection they receive from the Commission in return for their content obligations), has implications for the CRTC's enforcement efforts. Without raising the spectre of "agency capture", or excessive industry influence over the Commission, the constant efforts of broadcasters to

protect their own interests must be considered a given in the regulatory relationship. For this reason, the CRTC cannot simply impose standards and have them met. To a broadcaster motivated by profit-making, Canadian content requirements are seen as a cost of doing business. There is a practical limit to the content requirements that can be placed on broadcasters if they are to remain financially viable. Enforcement of Canadian content requirements is a two-way process, where some concessions to the industry must inevitably be made by the Commission.

These contextual constraints — political controls and the influence of the private broadcasting industry — demonstrate that the CRTC does not operate in a benign atmosphere where enforcement is a straight-forward process. It is exposed to at least the potential for political interference on one hand, as well as a degree of resistance from the commercial broadcasting industry on the other. It is in this very political environment that the CRTC must enforce its regulatory mandate.

Another important contextual influence on the CRTC's activities is the nature of regulatory enforcement itself. There is a tendency to see regulatory enforcement as a very direct process where rules are established and any violation of those rules is automatically punished in order to deter future violations. This leads to a focus on formal and adversarial proceedings and the swift and sure imposition of sanctions in cases of non-compliance.

Such a perception, however, distorts the reality of regulatory enforcement and neglects its complexity. Regulatory agencies may have a great deal of discretion in the interpretation and application of their mandates. One result of this discretion is that enforcement may be selective. Agencies may respond flexibly to differing situations, and often choose not to impose strict measures when problems arise, but employ less formal means of inducing compliance, such as negotiation, warnings, encouragement and persuasion.

Regulatory enforcement is more accurately characterized as a bargaining process than it is a strict and inflexible application of the rules. Formal measures are often used as a last resort in the enforcement process, and much enforcement activity does not reach this point. Informal negotiations and persuasion operate along with more formal activities. Compliance may be the result of a largely unseen problem-solving approach. Compromise is a practical necessity in regulatory enforcement, because compliance cannot be forced on a continuing basis. As a result, the attempt is made to develop relatively harmonious and constructive relationships between the regulator and the regulated. To fully understand the process of regulatory enforcement, the practical, non-coercive, behind-the-scenes aspect of the process must be appreciated.

Finally, an important understanding of the CRTC's enforcement activities can be gained through an awareness of the "evolutionary" tendency of policy implementation. Given the complex nature of policy implementation, the existence of a gap between the conception and the implementation of a policy is not only common, but should be expected. The same way, the discrepancy between Canadian content requirements and the achievement of Canadian programming goals should not surprise observers of the process. The carrying out of policy in any difficult area is likely to be "evolutionary" — redirecting itself to goals that are realistically achievable in day-to-day practice.

Many criticisms of the CRTC's enforcement efforts ignore these contextual influences, judging the Commission only on its use of formal procedures. Predictably, such critics find the Commission's performance lacking in vigor. By placing the CRTC in context as the enforcer of a regulatory mandate, sharing the tendencies of the policy implementation process, and subject to political constraints, a more complex and less critical picture of the Commission's activities comes to light. An awareness of these contextual influences allows a fuller understanding of the CRTC's enforcement efforts

and a better basis on which to judge its effectiveness. These influences are important not only to understanding what the Commission does, but what it can be expected to do.

The Largely Informal Nature of the Enforcement Process

In addition to a neglect of contextual influences and constraints, studies have given little attention to the informal aspect of the enforcement process. Previous chapters of this thesis have examined the means by which the CRTC attempts to obtain regulatee compliance with Canadian content requirements. This has been accomplished through a description of the Commission's use of the various elements of the enforcement process — instruments, sanctions and strategies — and how these have been put into practice in one case. This examination has indicated that the CRTC's enforcement activities consistently reflect the importance of informal means in bringing about conformity with regulatory goals.

The primary mechanisms used in the Commission's attempt to obtain compliance with Canadian content have been quantitative content regulations, promises of performance made in support of licensing applications, and conditions on licences. A number of sanctions, more or less formal in nature, are available to the CRTC as a response to non-compliance. Formal or strict sanctions include prosecution for regulatory offence, licence revocation, suspension, or non-renewal of licence. Intermediate-level formal sanctions include short-term renewal of licence and the imposition of special conditions of licence. At the informal end of the sanctioning spectrum are activities such as communication between the Commission and licensees, warnings and advice, expectations or praise expressed at public hearings and reporting requirements.

How these sanctions are employed in support of regulatory goals depends on the regulator's enforcement strategy. None of the strategies employed by the Commission —

negotiated compliance, consultation and education, and self-regulation under the supervisory approach — make heavy use of the formal end of the sanctioning spectrum.

The CRTC has generally adopted a strategy of negotiating compliance in the licensing process. This strategy involves long-term negotiation, persuasion and compromise to effect compliance. The Commission has been willing to bargain with and offer forbearance to licensees, especially with reference to their promises of performance, in an effort to secure their goodwill and energy in future conformity. In negotiating compliance the Commission has made little use of formal sanctions. Sanctions, when they are employed, are not for the purpose of punishment, but as leverage to secure compliance.

The Commission has also employed a strategy of education and consultation in its enforcement efforts. The CRTC has constant informal contact with licensees. This consultation not only alerts the Commission to compliance problems as they occur, but allows many problems to be worked out on an informal basis. Compliance problems are often remedied without resort to formal sanctions.

More recently, the Commission has initiated a supervisory approach to regulation. While it has sought to reduce the regulatory burden on broadcasters, the Commission has expected these freed-up resources to address a stronger commitment by licensees to the production of Canadian programming. Using this approach, the CRTC has encouraged broadcasters to develop self-regulatory codes. This whole process depends on corporate responsibility — the efforts of a mature industry to take more initiative in the implementation of the goals of the Broadcasting Act.

The Commission's use of all of the elements of the enforcement process — instruments, sanctions, and strategies — is characteristic of a conciliatory enforcement style. Conciliatory enforcement involves a practical, results-oriented approach, which centers on the "attainment of the broad aims of the legislation rather than sanctioning its

breach."[3] While a conciliatory approach does not negate the use of formal sanctions, it tends to use such sanctions as a last resort measure when less-formal, negotiated techniques fail. Informal means are basic to a conciliatory style.

Why has the CRTC made use of a conciliatory enforcement style relying primarily on informal sanctioning activity, rather than a deterrent style focusing on the imposition of strict formal sanctions in cases of non-compliance? First, the objective of sanctioning is "to narrow the gap between the goals of the system, and the current state of affairs."[4] If compliance can be substantially achieved with informal measures which maintain a constructive and harmonious working relationship, it makes little sense to make heavy-handed use of formal sanctions which may only serve to upset constructive regulatory dealings. Secondly, the choice between conciliatory and deterrent styles of enforcement is based on the form non-compliance with regulatory requirements usually takes in the area of concern. In the case of enforcing Canadian content, non-compliant behavior on the part of private broadcasters is rarely an isolated incident where clear-cut blame can be assigned. Non-compliance is often repetitive or continuing and considered part of the complex "problem" of implementing Canadian content on television. Enforcement is not a "once-and-for-all response ... but a serial, incremental, continuing process."[5] The nature of the job to be performed demands a flexible conciliatory style.

The case-study presented in Chapter Four provides a good example of the utility of this results-oriented approach. The regulatory relationship between the CRTC and CKVU-TV Vancouver illuminates the less-visible, informal side of the regulatory enforcement process. The case provides an illustration of how informal communication and persuasion become mechanisms for ensuring compliance. Problem-solving activities were carried out on a regular basis as the licensee came to the Commission with its problems, and explained its perspective. The Commission offered the licensee

forbearance and time to come into compliance. When this process failed to produce the desired results, the CRTC renewed CKVU's licence for only 18 months.

In this "typical" case, the incremental use of sanctions, from informal communications, warnings and persuasion to short-term renewal of licence, was ultimately effective. CKVU-TV met both its original promise of performance and the Canadian content regulations, within 5 years of receiving its first licence. Critics of a conciliatory approach might find this too generous on the Commission's part, and ask why formal sanctions were not imposed sooner, and perhaps more strictly. The licensee, however, appeared to be making a genuine effort to meet its commitments, and was providing significant and unique local programming. The revocation of Western Approaches' licence would have seemed an inappropriate response to the level of non-compliance involved, as well as denying Vancouver what was eventually a valuable service. A stricter strategy of sanctioning would have served no useful purpose in this case, while it may have placed undo hardships on the station and reduced its commitment to regulatory goals.

The licensing history of CKVU-TV was not exceptional. For this reason it provides a useful illustration of the practice of enforcement by the CRTC. The case reveals the Commission's avoidance of a deterrent enforcement style. It also confirms the practicality and effectiveness of a conciliatory approach to enforcement and informal methods in working toward and maintaining compliance.

The informal aspect of regulatory enforcement represents the larger part of the process. Much of the compliance that is accomplished routinely is the "result of moral suasion and behind-the-scenes bargaining."[6] Critics who base their assessment of the CRTC's enforcement efforts on formal and adversarial proceedings are neglecting an important part of its enforcement activities. Such criticisms interpret a failure to invoke strict sanctions as a failure of enforcement on the part of the regulator. This could more

accurately to termed a failure to use a deterrent enforcement style and a strategy of strict enforcement. While the CRTC has clearly made little use of formal measures, it does not necessarily follow that no enforcement action is taking place. To focus exclusively on the use of formal and strict sanctions is to ignore the largely informal nature of the enforcement process.

An important point, however, emerges from the criticisms of the Commission's limited use of formal procedures and sanctions. The informal activities of negotiation and bargaining in a regulatory relationship, are sustained ultimately by the authority of the CRTC to take stronger action. The formal powers and sanctions available to the Commission, then, must be perceived as more than regulatory symbolism by broadcasters and the public. There must be a real potential for the use of strict measures, should more cooperative measures fail. Diver explains:

> Enforcement is necessary not only to control the aberrant lawbreaker, but also to defend the legitimacy of governmental intervention that sustains voluntary compliance.... regulators must maintain some threshold of enforcement effectiveness and consistency to prevent a widespread breakdown in voluntary compliance.[7]

The "threshold" which sustains voluntary compliance is at the balancing point of strictness and conciliation in regulatory enforcement.

## Flexible Enforcement — Balancing Strictness and Conciliation

Maintaining the balance in regulatory enforcement between strictness and conciliation, is central to Bardach and Kagan's "good inspector model" outlined in Chapter Two. It will be recalled that the "good inspector" is a sophisticated enforcement official that has strong enforcement powers, but uses them "flexibly and selectively."[8] The "good inspector model" is a useful measure against which to assess the CRTC's ability to maintain its "threshold of enforcement effectiveness" with respect to Canadian content requirements.

According to this model, regulatory agencies must have and be willing to use powerful sanctions or tools of coercion for two reasons. First, there is always the possibility that the regulated enterprise, in pursuit of its own interests, will try to evade regulatory requirements.[9] A commission cannot expect to secure compliance "unless it is prepared to punish those who repeatedly and willfully violate its regulations."[10] Secondly, the possibility of cooperation and flexibility in a regulatory relationship derives ultimately from an agency's "power of threat and coercion."[11] The possibility of strict enforcement, then, is necessary both to punish flagrant regulatory violations, and to keep generally compliant licensees in line.

The Broadcasting Act provides the CRTC with several formal sanctions. These are: prosecution for regulatory offence, licence revocation, suspension, short-term renewal and the imposition of licence conditions. The question is whether the Commission is willing to use these sanctions. In terms of Canadian content, the only offence punishable by prosecution is violation of the quantitative content regulations (60 percent overall and 50 percent in the evening broadcast period). Since these quotas are generally met by private broadcasters, prosecution is unnecessary. Sanctions need still address, however, the problem areas of compliance with promises of performance and conditions of licence. From the absence of revocation of licences or suspension of licences, it must be assumed that the Commission considers these sanctions to be a disproportionate response to the typical act of non-compliance. Assuming this attitude to be reasonable, has the Commission employed the sanction of short-term renewal? This sanction may have the desired effect of improving licensee performance. This study has indicated that the Commission has not often used short-term renewals. More effective practice could be made of this sanction to address failure to meet promises of performance. Finally, the Commission is making increased use of specific conditions of licence. These measures may prove difficult to enforce, at least by formal means, as the

penalty for failure to meet conditions of licence is the suspension or revocation of licence, which for the reason explained go unused. Still, licence conditions are a useful enforcement tool, as they provide a means of making firm demands on broadcasters over and above the minimum quantitative regulations.

The CRTC should make greater use of short-term renewal where promises of performance go unmet, and should continue to address Canadian programming goals through specific conditions on licences. These formal measures are firm but reasonable. The use of such measures not only induces compliance with regulatory standards, but maintains the credibility of the regulations and the Commission as their enforcer.

Bardach and Kagan's "good inspector model" also points to the need for flexible and selective sanctioning in regulatory enforcement. An excessive use of strict enforcement can be counterproductive. If enforcement becomes legalistic, indiscriminate or unresponsive, they argue, it provokes resistance in the industry and fosters uncooperative attitudes.[12] To maintain cooperation in the enforcement process, the regulator must establish a relationship of "reciprocity or exchange" with the regulated industry.[13]

Certainly, the CRTC has acknowledged this exchange or two-way relationship in its enforcement of Canadian content requirements on private television broadcasters. The Commission has been willing to trade its responsiveness, advice and forbearance in return for the industry's "goodwill, cooperation and... conformity to the law."[14] This reciprocity is demonstrated in a number of ways. First, the CRTC offers protection from competition to the private broadcasting industry in return for their Canadian content obligations. An exchange relationship is also evident in all of the enforcement strategies employed by the CRTC. Negotiated compliance in the licensing process has by definition allowed informal bargaining about content requirements. The Commission has also considered the provision of education and advice to broadcasters important to its efforts to

secure compliance with regulatory standards. Finally in its more recent initiative to promote self-regulation in the broadcasting industry, the CRTC has been willing to reduce regulatory burdens in order to free these companies to make a stronger commitment to Canadian content goals. By exercising this reciprocity in the implementation of Canadian programming goals, the CRTC has been fairly successful at avoiding the errors of both "undue leniency" and "excessive strictness."[15]

The ongoing process of regulatory enforcement must continually balance strictness and conciliation in a flexible enforcement style — "demanding penalties and strict compliance when violations present serious risks, dealing more leniently with less serious violations."[16] Examining the whole picture of the CRTC's enforcement efforts, both formal and informal, reveals that as a result of these efforts over time, compliance with the letter of the requirements, if not the spirit of Canadian content goals, is achieved. Virginia Krapiec, regional Director-General of the Commission in Vancouver, has noted that enforcement is a difficult job, and as a regulatory body, the CRTC cannot avoid criticism whether or not it is generally effective:

> It is difficult in the short-term for the CRTC to have any good words said about it. I think you can only go back in time and look at the record, see the progress, and then ask yourself whether the Commission is headed in the right direction — whether over a space of time we have accurately reflected the intentions of the Act.... You will never be seen to be doing everything you could be doing — it's the nature of the business.... You can only do the best job you can do and hope that over time history will show that you have been effective, and have made the proper decisions at the proper time.[17]

## The Problem of Enforcing Canadian Content — Between "Simple Compliance"and Fulfilling the "Spirit" of Programming Goals.

According to the CRTC, the goal of Canadian programming requirements is to

> provide and exhibit in all broadcasting time periods, including the most popular viewing hours, a wide range of high-quality, Canadian-produced programs that a significant number of Canadians will choose to watch.[18]

The Commission has also noted that "simple compliance" with regulatory requirements has not been enough to achieve this objective. Practices have evolved, it comments, "which are at odds with the spirit of the Canadian content regulations."[19]

The objective of popularizing Canadian content has failed, because it is not in the financial interests of the private television broadcasters. The tension between the Commission's Canadian programming goals and the profit-making motive of the commercial broadcasters, has resulted in the predominance of American programming on Canadian television, especially in peak viewing hours.

It is important to note that this situation exists while broadcasters are in compliance, at least with the minimum quantitative Canadian content regulations. Simple compliance, which is substantially observed, is not the same thing as fulfillment of the goals for, or the spirit of, Canadian content. The fundamental problem of enforcing Canadian content requirements, then, is in addressing the gap between compliance with the letter of the regulation and achieving the spirit of Canadian programming goals.

The question of relevance to this study is to what extent the difference between "simple compliance" and the fulfillment of the "spirit" of Canadian programming goals is the result of ineffective enforcement by the CRTC. The findings of this study indicate that this difference cannot be attributed solely to the enforcement process. Enforcement, it will be recalled, is the effort to obtain compliance with regulatory goals. The Commission can enforce compliance with limited goals, but it cannot enforce "spirit", or efforts beyond compliance. Many criticisms of the Commission confuse these objectives. Even if full compliance with content quotas, promises of performance, and conditions of licence is achieved, it is unlikely that "predominantly Canadian" programming fulfilling the "spirit" of the Broadcasting Act will result. The broadcast performance enforced by the CRTC can at best fall somewhere between the ideal and what is realistically achievable. The Commission's effectiveness can only be measured

against its ability to maintain compliance in the industry with regulatory goals in the long run. In this more limited sense, the CRTC has generally been successful.

## Conclusion

This thesis has examined the CRTC's enforcement of Canadian broadcasting policy — specifically the application of Canadian content requirements to private television broadcasters. The findings of the study have been drawn together under several themes. The first of these is that an analysis of the Commission's enforcement activities cannot ignore the influences on those efforts from the regulatory environment and the complexity of the task of regulatory enforcement itself. These contextual concerns are essential to understanding what an agency does, and perhaps more importantly, what it can be expected to do. Secondly, an examination of the CRTC's employment of various elements of the enforcement process, reveals as consistently important, the informal, conciliatory means of bringing about compliance.

Another finding of this work is that the effectiveness of informal enforcement derives ultimately from the regulator's powers of coercion. Flexible enforcement which balances strictness and conciliation, provides a model for maximum regulatory effectiveness. Overall, the enforcement of Canadian content requirements by the CRTC compares favorably to this model.

Finally, when contextual influences, the importance of informal procedures and a reasonable standard of success are applied to the assessment of the Commission's activities, the CRTC's ongoing enforcement efforts appear effective. In the long run, the CRTC achieves the objective of enforcement — compliance with regulation — if not with the "spirit" of Canadian programming goals.

# NOTES TO CHAPTER 5

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[3]Keith Hawkins, Environment and Enforcement (Oxford: Claredon Press, 1984), p.4.

[4]Richard Arens and Harold D. Lasswell. In Defense of Public Order (New York: Columbia University Press, 1961), p. 199.

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[6]Paul L. Joskow and Roger G. Noll, "Regulation in Theory and Practice: An Overview," in Studies in Public Relation, ed. Gary Fromm (Cambridge, Mass.: The MIT Press, 1981), p. 52.

[7]Colin S. Diver, "A Theory of Regulatory Enforcement," Public Policy, 28, No. 3 (1980), p. 260.

[8]Eugene Bardach and Robert A. Kagan, Going by the Book (Philadelphia: Temple University Press, 1982), p. 123.

[9]Ibid, p. 124.

[10]Marver H. Bernstein, Regulating Business by Independent Commission (Connecticut: Greenwood Press, Publishers, 1955), p. 220.

[11]Bardach and Kagan, op. cit., p. 131.

[12]Ibid., p. 123.

[13]Ibid., p. 130.

[14]Hawkins, op. cit., p. 122.

[15]Robert H. Kagan, "On Regulatory Inspectorates and Police," in Enforcing Regulation, Eds. Keith Hawkins and John J. Thomas (Boston: Kluwer-Nijhoff Publishing, 1984), p. 55.

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[17]Personal Interview with Virginia Krapiec, Director General, CRTC Regional Office, Vancouver, B.C., 1 November 1988.

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