JUSTICE
RESEARCH NOTES

Making the Justice System More Accessible to Canadians

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In this issue of *Justice Research Notes* we highlight some of the recent work of the Research Section on **access to justice** and **public law**, touching on topics that range from providing better legal services for people in the remote reaches of Canada's north, to making regulations on activities such as pollution control acceptable to corporations and individuals.

The first broad area, **access to justice**, covers a number of current issues in which the Department has been active over the years — such as improved access to legal aid and the provision of legal information to the public. We present three such articles here: one examining a program to make legal aid more accessible to low-income working people; another presenting the results of a survey aimed at helping to identify the public's legal information needs; and a third studying the use of paralegal workers in remote regions.

Another avenue of access-related research is the alternative resolution of disputes of all kinds, focussing on community-based, as well as court-based, techniques. In the past we have initiated projects on various procedures for divorce mediation, for example, and recently we have begun work on the question of alternative dispute resolution in general. In the 1970s, pilot projects on unified family courts were conducted which, for the first time, brought together provincial and federal court systems to resolve marital property and other issues in divorce proceedings. We look forward to reporting on the results of our dispute-resolution work in future issues of this newsletter.

Public law research embraces the many complex socio-legal issues surrounding the application of the *Canadian Charter of Rights and Freedoms* and regulatory law.

Recently, a major focus for research has been the relationship of the Charter to national unity issues. The Department has been actively seeking ways to improve Canadians' understanding of the implications of the Charter for their rights and responsibilities as citizens. Research is ongoing on such topics as the use of extrinsic evidence in Charter cases (social science data-analysis material, for instance, which is now considered relevant by the courts) and the impact of the Charter on the policy-making process.

Research on regulatory law has concentrated on compliance with regulations, particularly the exploration of "positive compliance" techniques that avoid the traditional command-penalty approach to enforcement. A comprehensive study of these techniques in three countries (the United Kingdom, Australia, and the United States), with implications for improved Canadian systems, has recently been published and we are pleased to present a summary here.

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The Carrot, Not the Stick: How to Foster Compliance with Economic and Social Regulations

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Individuals and corporations in Canada concerned about regulation in fields ranging from occupational health and safety to environmental pollution will be interested in suggested new improvements to regulatory techniques based on a cooperative rather than an adversarial approach.

This approach, known as "positive compliance," is outlined in a recent report from the Department of Justice Canada. It is based on the conviction that the purpose of regulation is to prevent or redress harm (to people, to the environment) caused by non-compliance with regulations, and to create incentives that encourage those being regulated to act responsibly.

Prosecution is employed only as a last resort

Under this system, the interest of the private sector is aroused in the regulatory procedure and the parties are continually involved. Enforcement then becomes continuous, and prosecution is employed only as a last resort. It is suggested that non-compliance results, in fact, not from ill intent but rather from lack of knowledge of regulations, unfairness within the system, and ineffective auditing by regulators.

The positive compliance approach, the report notes, is concerned with avoiding those unreasonable regulations which advocates of deregulation in Canada have sought to eliminate. It addresses the minimal (or non-existent) controls in the system and the gaps in implementation and enforcement that have traditionally plagued regulation in this country.

Positive Compliance Programs in the U.K., the U.S.A., and Australia — How Much? How Little? How Good?

In an attempt to improve Canada's regulatory systems, the Department of Justice initiated in 1987 a Compliance and Regulatory Remedies Project, in cooperation with the federal Office of Privatization and Regulatory Affairs and the government departments administering regulatory legislation.

In line with the objectives of the project, particularly those for improving remedies, sanctions, and procedures in regulatory systems, the Department commissioned Professor Ellen Baar of York University to study the use and effectiveness of positive compliance programs in the United Kingdom, the United States, and Australia.

This study comprises two reports. The first report addresses the nature and goals of regulation and positive compliance, including discussions of the theory of control and its balance (too much control or too little); the role played by regulators under various programs; approaches taken in different regulatory sectors (such as occupational health and safety and consumer protection); and factors affecting the design of regulatory strategies. The study also includes an analysis of data such as interview materials and preliminary reports from leaders in the field of regulatory scholarship in the three countries. These materials were supplemented by telephone interviews with regulators and parties subject to regulation.

The second report, prepared by Liora Salter, consists of an initial inventory of more than 150 programs and other initiatives designed to achieve preventive or positive compliance with regulations. It provides a comprehensive survey of these activities in the three countries, including (where available) a brief description of each program and an assessment of its success.

Professor Baar's analysis of all areas of regulation for which profiles were developed for this study shows that the United States has given the most attention to developing incentives to encourage risk-creators to take responsibility for their actions. The British and the Australians, on the other hand, have devoted more energy to developing incentives to encourage risk-bearers, regulators, and employees of risk-creating firms to provide information on non-compliance. Only in the area of environmental regulation has the U.S. adopted the Australian and British approach.

In the United Kingdom — Public Participation Lacking

The British model of regulation is one in which performance standards are valued over design standards and compliance is preferred to sanctions — that is, it is a self-regulation strategy. There is a "tight coupling" of regulators with the private sector, and minimal input from the public sector. Hence, the interests of the private sector override those of the public sector. In the author's view, the result is too little (or inappropriate) regulatory control, which is termed *undercontrol.*

In addition, the public is not given responsibility for overseeing the implementation of technologies and does not share in monitoring and development. Because of this lack of public participation, particularly in monitoring, the control of harm resulting from non-compliance may not be a first priority. In essence, the British system lacks the monitoring that would make its approach flexible and effective in enforcing standards and achieving the goals of positive compliance. The British disregard for balance of control among the parties suggests that they do not, in theory or in fact, employ a positive compliance approach to regulation.

In the United States — An Accent on Monitoring and Enforcement

Regulation in the United States has been characterized as a situation of *overcontrol* — too much, or inappropriate, control — and regulatory inspectors are used primarily to monitor and collect data on compliance. Consequently, resources have sometimes been diverted from the tasks of developing systems and standards to those of enforcement and monitoring. This, in turn, has resulted in adversarial relations among interested parties and the underdevelopment of standards and of control technologies. Despite these shortcomings, evidence suggests that the U.S. system has become more flexible over time and that innovative and varied enforcement techniques are being used. The research suggests that there is also a redirection of the focus on enforcement toward remedying harm resulting from non-compliance.

The U.S. has devoted considerable attention to improving the design of incentives for compliance, and in this area it relies extensively on administrative penalties.

In Australia — Monitoring by Private Citizens

Australian regulatory agencies have developed a wide variety of procedures for authorizing non-standardized definitions of responsible action by regulated parties and for promoting broad public participation in the authorization process. This approach ensures that all interested parties participate in the regulatory process, thereby resulting in a balance of control. However, while the Australians have devoted a great deal of attention to authorizing custom-designed definitions of responsibility, they

have spent considerably less time on enforcement. This approach to regulation reduces the number of regulatory resources consumed by a given program, but it increases the probability that non-compliance will go undetected or be disregarded. The result is a state of *undercontrol*. Hence, private citizens rather than regulatory agencies must develop programs to monitor compliance. Although private monitoring helps in enforcement, it should supplement rather than replace regulatory monitoring.

Heightening Regulatory Effectiveness

The research identifies a number of factors that must be considered in order to increase the effectiveness of regulatory measures.

- A clearer definition of the elements of regulation is needed — that is, whether it involves criminal law, civil law, or a combination of the two.
- There should be greater emphasis on monitoring effects and mitigating the harm resulting from non-compliance with regulation.
- Consideration of the type of liability, with an increased emphasis on procedural and substantive fairness, is essential.
- There should be more effective control of forgivable non-compliance, as well as consistent application of appropriate sanctions based on the level of risk and compliance history.
- Administrative penalties should be used to increase the consistency and certainty with which sanctions are employed and to speed up the response to non-compliance.
- Criminal sanctions should not be eliminated.
- Penalties for non-compliance should be graduated and should escalate rapidly. They should be employed with reference to compliance history and the severity of risk created so that risk-creators can accurately calculate the savings to be realized from investing in prevention.
- Self-regulation should be viewed as a technique designed to supplement rather than to replace regulatory control.
- A range of measures should be employed as a means of promoting innovation.
- Public participation in the regulatory process is an essential element for increasing fairness.
- The public should have right of access to valid and reliable data on effects, and parties failing to provide such data should be held accountable.
- To exercise its responsibilities effectively, the public must have instruments available to curb lax control — such as temporary prohibition orders and court-ordered restructuring of activities for enforcement and for mitigation of harmful effects.
- The public at large should supplement public sector expertise and design capability, provide suggestions about how targeting might be improved, and engage in additional private sector monitoring and enforcement.

Improving Canada's Regulatory System

The report concludes with a series of recommendations for consideration by Canadian regulators. Briefly stated, the author's views are that:

- Achieving positive compliance requires a fundamental change in the assumptions underlying federal regulatory design.
- The structure of incentives, inducements, and penalties promoting compliance needs to be redesigned, with substantial investment in monitoring effects.
- Positive compliance requires substantive reform designed to eliminate the traditional bias in

favour of risk-creators. Openness, substantive and procedural fairness, and improved accountability are needed to increase regulators' responsiveness to risk-bearers' concerns about ensuring effective reduction of harm.

Although the research did not include an examination of positive compliance programs in Canada, the experience with regulation in the three countries studied provides information about alternative approaches to regulation and ways to improve Canada's regulatory system.

The study concludes that positive compliance programs are unlikely to significantly reduce regulatory costs or intrusiveness. However, it demonstrates the potential of these programs for improving the quality of regulation by reducing the probability of both overcontrol and undercontrol. The research also suggests that positive compliance programs are likely to increase procedural and substantive fairness, thereby reducing the probability of outrage and litigious conflict.

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Positive Compliance Programs: Their Potential as Instruments for Regulatory Reform, by Ellen Baar. Department of Justice Canada, Working Document [WD1991-12a].

An Inventory of Positive Compliance Programs in the U.K., Australia and U.S.A., by Liora Salter. Department of Justice Canada. Technical Report, 1991.

CROSSING THE BORDERS OF PRIVACY

by Albert Currie *Research Section*

About 21 percent of the largest public organizations and private firms in Canada are involved in the international transfer of personal data. *Crossing the Borders of Privacy: Transborder Flows of Personal Data from Canada*, an exploratory study published in 1990 by the Department of Justice Canada, outlines the sectors from which international transborder flows of personal information occur; the type and volume of the information; the purposes for which it is intended; the practices of conveying it; and how the information is protected. The research is essentially descriptive, intended to document and describe the situation.

This study is one of the most original and best documented in the field of international transfers of data and the legal protections applied to it. Comparison with other studies suggests that Canadian firms are moderate exporters of computerized personal information. The main kinds of information transferred are the traditional personal identifiers such as name, age, sex, date of birth, and address. Social insurance and health insurance numbers are frequently transferred. Quite often, information about employment status and education is also exported. The information is used for personnel management, determination of eligibility for a service, and clientele management such as the production of statistics for marketing. In the authors' opinion, the data are well protected in most instances, but the scope of legal protection varies from country to country.

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Crossing the Borders of Privacy: Transborder Flows of Personal Data from Canada, by René Laperrière, René Côté, Georges A. Le Bel, Pauline Roy, and Karim Benyekhlef. Department of Justice Canada, 1990.

Department of Justice - Research Publications Order Form

The following research reports have been described in this issue of *Justice Research Notes*. Please check off the items you would like to receive, and mail a copy of this form, along with your name and address, to: **Research Section, Department of Justice Canada, Ottawa K1A 0H8.**

☐ *Evaluation of the Legal Aid Manitoba Expanded Eligibility Project*, by Prairie Research Associates, Winnipeg. Department of Justice Canada, April 1991. (Copies of 25-page summary now available. Full report to be available in 1992.)

☐ *Northern Paralegal Project Evaluation, Final Report*, by Working Margins Consulting Group, Winnipeg. Legal Aid Manitoba, 1989.

☐ *An Evaluation, Fort Nelson Legal Information Services*, by Focus Consultants, Vancouver. Department of Justice Canada. Working Document [WD1991-9a].

☐ *Positive Compliance Programs: Their Potential as Instruments for Regulatory Reform*, by Ellen Baar. Department of Justice Canada, Working Document [WD1991-12a].

☐ *An Inventory of Positive Compliance Programs in the U.K., Australia, and U.S.A.*, by Liora Salter. Department of Justice Canada. Technical Report, 1991.

☐ *Focus Groups on Public Legal Information — Needs and Barriers to Access*, by Gallup Canada, Inc. Department of Justice Canada. Working Document [WD1991-1a].

The following item may be obtained by contacting Communications and Public Affairs, Department of Justice Canada, Ottawa, K1A 0H8.

☐ *Crossing the Borders of Privacy*, by René Laperrière, René Côté, Georges A. Le Bel, Pauline Roy, and Karim Benyekhlef. Department of Justice Canada, 1990.

For further information concerning these or other departmental research documents, please contact the Research Section at: (613) 941-2266.