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HOW REGULATORS REGULATE: A GUIDE TO REGULATORY PROCESSES IN CANADA

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The Federal Government

I. Introduction

1. Every regulation flows from a particular Act of Parliament. Collectively, regulations are known as "delegated" or "subordinate" legislation because they gain their legal status from one or more Acts of Parliament.

2. The *Statutory Instruments Act*¹ (SIA) defines "regulations" and dictates the legal process for making them. It defines regulations as legal instruments:

- that departments and agencies² use to exercise legislative power they have been given under an Act of Parliament;
- that govern judicial or quasi-judicial processes; or
- that have the potential to either significantly "regulate" behaviour (i.e., change the way people do things, or significantly affect the economy).

Procedural requirements - some highlights

The *Statutory Instruments Act* also establishes the basic legal process the federal government must follow in developing regulations. Among the requirements (with certain minor exceptions) are the following:

- The Privy Council Section of the Department of Justice must examine proposed regulations to assess their legality (particularly with respect to the *Charter of Rights and Freedoms*).
- Regulations must be registered with the Registrar of Statutory Instruments within seven days of being approved.
- The government must publish its regulations in the *Canada Gazette*, Part II, within 23 days of registration.
- Regulations become law as soon as they have been registered. However, they can be enforced only after they have been published in the *Canada Gazette*, Part II, or after the government has directly notified those whom the regulations will affect.

¹R.S.C., 1985, C. S-22

²"Agencies" refers to Crown corporations, boards and other organizations that make regulations on behalf of the federal government.

II. Regulatory Policy and Process - General Goals and Principles

3. In 1986, the federal government introduced certain requirements covering the policy and process for making regulations, and a minister was made responsible for regulatory affairs. Broadly speaking, these requirements reinforce the government's commitment to the principles of fairness and effectiveness and had the following goals:

- to improve the way the government was managing the federal regulatory process;
- to help ministers control the regulatory process more effectively;
- to allow the public to become more involved in federal regulatory activities; and
- to make regulations more effective and equitable, and place the least possible regulatory burden on the economy and society.

4. The heart of this policy was expressed in the form of the Citizen's Code of Regulatory Fairness. The Code committed the federal government to certain principles vis-à-vis regulation:

- to interfere as little as possible with individual freedoms, while protecting the interests of the Community;
- to enable individuals, businesses and other governments to provide input into the federal regulatory process;
- to fully explain regulations and their effect in clear language;
- to ensure that regulations do not affect particular people or groups unfairly;
- to match the penalties for not complying with regulations with the seriousness of the violations;
- to ensure that the decisions of regulatory agencies and departments are made in an efficient, prompt and predictable manner; and
- to regulate only when there is clear evidence that a problem exists, government intervention is justified, regulation is the best alternative, and the benefits exceed costs.

Administering the process

5. In February 1991, the government designated the President of the Treasury Board of Canada as minister responsible for Regulatory Affairs.

6. The Regulatory Affairs Directorate of the Treasury Board Secretariat (TBS) is responsible for ensuring that departments and agencies follow the government's regulatory policy. The Directorate monitors regulatory proposals from departments and agencies for consistency with policy and tries to help them develop the best possible regulations, or devise alternatives that meet the same objectives.

III. The approval process

7. The process of making a regulation starts when a department or agency authorized by Parliament to make regulations decides that a regulation is necessary. A regulation falls into one of three categories:

- Governor-in-Council (GIC) regulations (most regulations fall into this category);
- Ministerial Regulations (regulations that a minister is authorized to make under an Act); and
- GIC or Ministerial Regulations that directly affect the government's spending.

8. The process described on the following pages applies to typical GIC regulations. As noted above, GIC regulations account for most regulatory activity. The process for Ministerial Regulations

and regulations that have to be approved (as opposed to merely being reviewed) by the Treasury Board vary slightly, as described on page 5.

Planning

9. Through the annual Federal Regulatory Plan the originating department can indicate that it plans to make a regulation. (*See also page 6.*) Part of the planning process includes scrutinizing a proposed regulation to assess whether it is necessary or if there is some other way to achieve its planned objective. (Note that part of the federal government's regulatory policy is to reduce the amount of regulation.)

Drafting the Regulation

10. The department that originates the regulation is responsible for drafting it. The originating department also drafts a Regulatory Impact Analysis Statement (RIAS), which explains the purpose of the proposed regulation, the alternatives considered and the expected effects. It also summarizes the results of consultations with interested parties and outlines the department's responses to concerns raised.

Submission

11. The deputy minister of the originating department sends the proposed regulation and supporting documentation to the head of the Privy Council Section of the Department of Justice. A copy is also sent to the Regulatory Affairs Directorate of the Treasury Board Secretariat and the Privy Council Office.

Review by the Central Agencies

12. The term "central agencies" refers to the Treasury Board Secretariat and the Privy Council Office. They review the regulation, the RIAS, and the communications plan for the regulation.

Review by the Secretariat

13. The Secretariat reviews all proposals against the following criteria:

- The regulation must not impede the government's operations.
- The regulation must contribute to meeting the government's objectives, rather than merely adding to the proliferation of regulations.
- Alternatives have been considered.
- The benefits clearly outweigh social and economic costs.
- There has been adequate consultation with the public to allow people to understand the proposed regulation and participate in the process.
- The originating department has co-operated with the provinces to help ensure that federal and provincial regulations do not duplicate and overlap with each other, so that the regulatory burden on Canadians is kept to a minimum.

Review by the Privy Council Office

14. The Privy Council Office also reviews proposals to satisfy itself that they meet the following requirements:

- They mesh with government initiatives in the broad sense.

- The originating department has adequately considered the communications aspects of the proposed regulations.
- The proposals will be considered by the appropriate committee of Cabinet (usually the Special Committee of Council).

15. In addition, the Privy Council Office Section of the Department of Justice must examine proposed regulations to ensure that they have a proper legal basis, particularly with respect to the *Charter of Rights and Freedoms*.

Ministerial Approval

16. The sponsoring department's minister approves the regulation and supporting documentation and submits both to the Privy Council Office (Order-in-Council Section) for consideration by the Special Committee of Council (SCC).

17. Usually, the President of the Queen's Privy Council chairs the SCC. At the moment, however, it is the Government House Leader. The Minister of Justice is Vice-Chair. Ten other Cabinet ministers sit as members of the Committee.

18. The information available to ministers in making decisions on proposed regulations includes at least the RIAS and a communications plan. The RIAS describes:

- the objective of the regulatory proposal;
- the alternatives to regulation that were considered;
- the extent and outcome of consultation;
- the likely social and economic effect if the regulation is implemented; and
- the mechanisms for enforcing the regulation.

Prepublication

19. The regulation and the RIAS are then prepublished in draft form in the *Canada Gazette*, Part I, to permit further consultation with the public. (See also item IV.)

Final Submission

20. After prepublication, the sponsoring department's minister submits the final regulation and the RIAS to the Privy Council Office for final approval by the Special Committee of Council. The same type of information is again provided to Committee members, as noted on page 3.

21. If the Special Committee approves it, the regulation will be registered. Usually the regulation becomes effective as soon as it is registered, unless a later date is specified. Long delays after prepublication could trigger another round of prepublication.

Registration and publication

22. Both the regulation and the RIAS are published in the *Canada Gazette*, Part II. As noted above, a department cannot enforce a regulation before it has been published unless everyone affected has been notified directly.

Parliamentary Approval

23. Finally, the Standing Joint Committee for the Scrutiny of Regulations reviews all regulations. It can recommend changes to the government, report to Parliament on problems with regulations that members of the Committee have discovered, or propose to Parliament that a regulation be overturned.

Variations in the Process

24. The approval process described above applies to Governor-in-Council (GIC) regulations. The two other kinds of regulations have slightly different processes, as explained below.

Ministerial Regulations:

For certain cases, legislation authorizes Ministers of the Crown to prescribe regulations. For Ministerial Regulations, Governor-in Council (or Special Committee of Council) approval is not required. However, the Privy council Office Section of the Department of Justice and the Treasury Board Secretariat must still review proposed Ministerial Regulations.

Regulations that need Treasury Board Approval:

Ministerial and GIC regulations must be submitted to the Treasury Board if they involve direct financial implications. For example, a regulation involving imposing a new user fee (or raising, lowering or eliminating an existing one) would directly affect government revenues. Therefore it would normally require the Treasury Board's approval. Note, however, that a GIC regulation (but not a Ministerial Regulation) must be submitted to the Special Committee after the Treasury Board has approved it.

IV. Notifying and Consulting with the Public

25. Long before a regulation is conceived, active discussion often takes place between the public and the originating department. In fact, it is often groups or individuals who call the government's attention to matters that might need regulating in the first place.

26. Similarly, discussions take place about an existing regulation that might need to be changed. These discussions may be based on past experience with the regulation. For example, they might focus on why it has or has not worked, or how it could be improved or made unnecessary.

27. Once a department or agency has decided to regulate, the principles of fairness and effectiveness require that a consultative process be followed. The federal consultative process is outlined below:

- A department can provide an early indication that it intends to regulate by including a proposal in the annual Federal Regulatory Plan published by Treasury Board Secretariat each December. Including the regulation in the Plan does not necessarily indicate that the department will be proceeding with it that year.
- Any department can publish a "Notice of Intent" to regulate, signed by the Minister, in the *Canada Gazette*, Part I. Such notices invite participation at the outset, and request data, technical specifications, expert commentary, and other information that would help define issues relating to any proposed regulation.
- Interdepartmental and intergovernmental consultations are encouraged.

- Departments have their own mechanisms for consulting with the public on proposed regulations. Newsletters, consultative committees, informal discussions, etc., are all used. Such consultation is documented and included in the formal Regulatory Impact Analysis Statement (RIAS), explained earlier on page 3.
- The draft regulations and RIAS then go to the Special Committee of Council for approval to republish.
- Draft regulations and RIAS are republished in the *Canada Gazette*, Part I, at least 30 days before they go before the Special Committee for final approval. (See also Item III, *Prepublication*.) If the originating department did not include the regulation in the Federal Regulatory Plan, 60 days is recommended.
- Usually, most identifiable groups that might be affected by the proposed regulation will have been consulted before the prepublication stage. Nevertheless, prepublication ensures that they all receive written notice of the government's intentions, have had access to the legal wording of the regulation, and have had a final opportunity to comment. Depending on the type of response and comments, the draft regulation could be substantially changed (or even withdrawn) and the prepublication process repeated.

28. In any case, the RIAS will have been modified for final publication to reflect the comments received as a result of prepublication. Included is a response or feedback to those who have commented earlier.

29. Regulations subordinate to the Canada U.S. Free Trade Agreement or the *Canadian Environmental Protection Act* must be republished for 60 days before being submitted to the Special Committee of Council for final approval. Regulations affecting standards that products must meet must be republished for a minimum of 75 days, and Canada's trading partners must be notified through the World Trade Organization (WTO) Enquiry Point at the Standards Council of Canada.

V. Evaluating Regulations

30. Government policy states that departments must evaluate their regulatory programmes as they would any others, i.e., these programmes are to be evaluated for efficiency and effectiveness at least once every seven years.

31. Certain events could also trigger an evaluation. For instance, a review policy could affect the regulations associated with that policy. The Auditor General could also identify a regulatory programme that needs to be improved.