OECD REVIEWS OF REGULATORY REFORM

REGULATORY REFORM IN CANADA

GOVERNMENT CAPACITY TO ASSURE HIGH QUALITY REGULATION

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Government capacity to assure high quality regulation* analyses the institutional set-up and use of policy instruments in Canada. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Canada* published in September 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, on specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Sue Holmes, Rex Deighton-Smith, Cesar Córdova-Novion and Rolf Alter in the Public Management Service of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Canada. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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1. REGULATORY REFORM IN A NATIONAL CONTEXT

Canada has enjoyed high levels of income, quality of life and economic growth over the 1990s and continues to accommodate diverse cultures and traditions within a relatively harmonious whole.[1] Canada was one of the first OECD countries to adopt a regulatory reform programme and has pursued ever broader and deeper reforms for the past 25 years. The quality of its regulatory governance is almost certainly a key contributor to its successes in terms of both economic performance and the achievement of its social goals.

1.1. The administrative and legal environment in Canada

Canada is a huge country, with a widely dispersed population. Constitutionally, it is a federation, comprising ten provinces, three territories and 5593 municipalities.[2] It has a parliamentary system of government, based on Westminster traditions including Ministerial responsibility and accountability. This, in turn, implies that there is a strong "vertical" element to the operations of government.

Although, constitutionally,[3] Canada was created as a centralised federation, since 1867, the courts have interpreted the Constitution in such a way as to shift the balance of powers from the federal to the provincial governments.[4] For example, federal powers over trade and commerce have been interpreted as applying solely to inter-provincial and international trade and commerce.[5] Moreover, while the federal government wields a wide range of regulatory powers by convention, jurisdiction in some fields has come to be shared between federal and provincial governments, while a wide variety of working relationships between federal and provincial powers have evolved, including some delegation of programme administration from federal to provincial levels.[6]

An important legacy of the early settlement of Canada by both French and British colonists are the British common law and the French system of civil law. This "bijural" heritage of the country means that both common law and civil law systems are accommodated in the federal legislative and judicial processes.[7] The 1867 Constitution requires federal laws to be enacted in both official languages and gives both versions equal standing. All federal acts and regulations must accommodate both the common law and civil law legal systems. Drafting takes place in both languages concurrently to ensure that the law reflects the traditions of both systems rather than simply be translated from one language to the other. This is intended to ensure that laws express equal intent in both languages.[8]

Another facet of the development and evolution of the regulatory environment concerns the retention of strongly distinct cultural identities, such as defining concepts of Aboriginal self-government and entitlement. In addition, as in the case of other federal states, Canada's history has been marked with periods of heightened demands for greater provincial autonomy. Moreover, anchored in its historical heritage, Canadians have tended to be strong believers in the role of government and the use of regulations.

Lastly, Canada, as an open economy which lies adjacent to the world's largest economic power, the United States, has been a forerunner in integrating and developing capacities to manage regulation in a globalised world. Its traditionally extensive economic and trade linkages with the United States have evolved toward even greater integration in recent years as a result of successive free trade agreements – first the Canada/United States Free Trade Agreement (CUSFTA) and, subsequently, the North American Free Trade Agreement (NAFTA). In addition to embracing Mexico, the move from CUSFTA to NAFTA saw a substantial broadening in scope of the agreement and expansion of its scale. These linkages have influenced recent developments in Canadian regulatory systems, standards and approaches. Important regulatory harmonisation issues have arisen and been addressed in diverse areas, from patent law to food safety.

Box 1. **Good practices for improving the capacities of national administrations to assure high-quality regulation**

The OECD Report on Regulatory Reform, which was welcomed by Ministers in May 1997, includes a co-ordinated set of strategies for improving regulatory quality, many of which were based on the 1995 Recommendation of the OECD *Council on Improving the Quality of Government Regulation.* These form the basis of the analysis undertaken in this Chapter, and are reproduced below:

A. BUILDING A REGULATORY MANAGEMENT SYSTEM

1. Adopt regulatory reform policy at the highest political levels.

2. Establish explicit standards for regulatory quality and principles of regulatory decision-making.

3. Build regulatory management capacities

B. IMPROVING THE QUALITY OF NEW REGULATIONS

1. Assess regulatory impacts

2. Consult systematically with affected interests

3. Use alternatives to regulation

4. Improve regulatory co-ordination

C. UPGRADING THE QUALITY OF EXISTING REGULATIONS

(In addition to the strategies listed above)

1. Review and update existing regulations

2. Reduce red tape and government formalities

Given all these aspects and challenges to the regulatory environment, it is perhaps unsurprising that Canada should have become one of the first countries to develop explicit policies on regulatory management and reform, seeking since the late 1970s to define the key aspects of the regulatory state and exercise conscious control over the manner in which regulatory powers are exercised.

As well as being one of the first OECD countries to adopt a regulatory reform programme, Canada has continued its policy efforts in this area for over twenty-five years, progressively broadening and deepening its policy approaches, adopting new tools and refining them in the light of experience with their use (see Table 1). It has remained at the forefront of the development of regulatory reform over this time, being among the first countries to move from the initial focus on deregulation, toward regulatory reform, then regulatory management approaches, and it is now prominent in developing the regulatory governance agenda.

Some of the earliest reform initiatives in Canada date back to 1950, with the introduction of the *Regulations Act*, which required that every regulation be published in the Canada Gazette and subsequently tabled in Parliament. The *Statutory Instruments Act* (1971) was largely a continuation of the 1950 Act, with the added requirement of legal review of all proposed regulations by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice and the referral of all regulations to parliamentary committee for review after they have been made (now the Standing Joint Committee on Scrutiny of Regulations).

Box 2. **Canadian legal instruments**[9]

- *Constitutional law* in Canada is an amalgam of statutes (such as the 1867 and 1982 Acts, including the Charter of Rights and Freedoms), orders in council, as well as 'unwritten' or 'common law' aspects of the constitution.
- *Quasi-constitutional statutes* such as the *Official Languages Act*, and the *Canadian Human Rights Act 1985*
- *Federal primary parliamentary law.* The Parliament is the supreme legislative authority for the Government of Canada. A bill becomes federal law when it is passed by both houses of Parliament and given Royal Assent by the Governor General.
- *Provincial primary Parliamentary laws.*
- *Federal and provincial subordinate regulation.* Depending on the authorising statute, subordinate regulations may be made by the Governor in Council (in practice, the Cabinet), the Lieutenant Governors in Council, a minister, an independent regulatory agency, or an official. These may take several different paths for approval within the government, but most[10] must comply with the basic process established by the Statutory Instruments Act.[11] *Ministerial regulations* are subordinate regulations but they do not require approval by the Special Committee of Council, but must have a legal review by the Department of Justice and a review by the Treasury Board Secretariat, if there are financial implications.
- *Standards developed by a recognised standards development organisation or professional* body. Once approved and published, these standards can be referenced in whole or in part in regulations, making them mandatory rules. While the Standards Council of Canada assesses standards, developed by four accredited organisations,[12] to determine if they meet specified criteria, they are not explicitly subject to RIA, even when referenced in regulations and may be altered subsequently. *Policies, guidelines and operating procedures to supplement standards referenced in regulation* can also be developed by a regulatory authority.
- *Orders, regulations, and licensing decisions* made by independent federal agencies, such as Crown corporations and boards, for activities they oversee. These agencies include, among others, the National Energy Board, the National Transportation Agency, and the Canadian Radio-television and Telecommunications Commission. Some of these regulations are exempt from the requirement for Cabinet approval.
- *Administrative regulations made at lower levels in the government.* Catch limitations, for example, are set by fishery officers. Administrative guidelines, manuals, and internal procedural instruments may also have regulatory effects. These kinds of actions are not defined as "regulation" by the Statutory Instruments Act and are not subject to the legal scrutiny, ministerial approval, and parliamentary review established for more formal kinds of regulation.

Table 1. **The Evolution of Canada's Regulatory Policies**

Date	Objective	Focus of Reform	Mechanisms
1978	• ensure social regulations were justified given all impacts	• ex ante assessment of social regulations • private sector involvement in development of social regulations	• Socio-Economic Impact Analysis for major health, safety and fairness regulations required in 13 designated departments
1983	• To increase public involvement in the consultative process	• Provide early notice of proposed changes in regulatory activity	• Regulatory agenda published twice a year
1986	• fairness and efficiency • regulating smarter • reduce regulations where warranted	• aspects of the rule-making process, *e.g.* public consultation, early notice and political control of regulatory decisions • Federal-provincial regulatory co-operation • improve the efficiency and effectiveness of existing regulatory programmes	• 10 Guiding Principles • Citizens' Code of Regulatory Fairness • appointment of a Minister responsible for regulatory affairs and a secretariat • Regulatory Plan • pre-publication of draft regulations • RIAs • systematic review of regulatory programs over a 7 year recurrent cycle
1992	• greatest net benefit to Canadians • innovation and flexibility • cost-effectiveness • national single market • competitiveness	• system-wide issues, such as compliance and competitiveness • alternatives	
1993	• *Responsive Regulation* to make the regulatory system more flexible, accountable and responsive	• meet regulatory requirements • increase administrative responsiveness • equivalency and operational agreements with other levels of government	• risk management framework • change to the federal Regulatory Plan to include information on costs and benefits
1995	• greatest net benefit to Canadians • reducing regulatory burden on small business	• oversight • consultation/working in partnership with stakeholders • compliance and enforcement policies • alternative compliance • inter-governmental co-ordination	• Regulatory Process Management Standards
1997	• Demonstrate links between policies (including regulations) and actual outcomes.	• Performance assessment of regulations.	• Under the *Improved Reporting to Parliament Project*, requirement for two annual departmental Reports: (1) Plans and Priorities and (2) Performance Reports, both tabled in Parliament.

1999	• improve the regulatory management system and raise compliance by departments.	• To consolidate regulatory policy, process and decision making responsibilities with a single Cabinet Committee • To consolidate support for these responsibilities with a single central agency • Explicitly link the Regulatory Policy to other Cabinet Directives.	• Regulatory Policy transferred from the Treasure Board Secretariat to the Cabinet Special Committee of Council (SCC). • Establishment of the Regulatory Affairs Division in the Privy Council to support regulatory processes, the regulatory policy and brief the SCC.
2000	• *Results for Canadians*	• introduce a management approach, focussing on: (1) citizens; (2) clear set of values; (3) achievement of results; & (4) responsible spending.	• promotion of core initiatives: • Citizen-centred Service Delivery • Government of Canada On-Line • Modern Comptrollership; • Improved reporting to Parliament, • Program Integrity • Developing an Exemplary Workplace

Note: An explicit Regulatory Policy was issued in 1986, and revised in 1992, 1995 and 1999. The other two policies, *Responsive Regulation* in 1993 and *Results for Canadians* in 1997, were not designated Regulatory Policies but had just as profound effects on the government's approach to regulation-making.

Source: OECD/PUMA

The next significant reform was the 1977 order by the Treasury Board Secretariat that regulatory agencies should undertake periodic evaluation of regulatory programmes.[13] This order was based on a view that audit type controls should be imposed on the use of regulatory authorities in the same way that review and evaluation of spending programmes is conducted through the budget process. Thus, this initiative was important in being predicated on the fundamental recognition that the use of regulation constitutes an appropriation of the citizen's resources to serve public goals, just as do taxing and spending programmes. It was also supplemented, in 1978, by a requirement that "Socio-Economic Impact Analysis" should be applied to major new regulations in the areas of "health, safety and fairness". This represents one of the earliest uses of a form of systematic regulatory impact analysis in an OECD country.

The next step in regulatory reform, taken in July 1978, saw regulatory reform being taken up at the highest political level. The Government of Canada made a formal reference to the Economic Council of Canada to undertake a series of specialised studies on the processes of regulation and its effects on the economy. This approach to reform was also important in that the Economic Council was an independent advisory body to government, and was external to government *per se*. Thus, in contrast to the 1977 initiative of Treasury Board Secretariat (TBS), a body outside the regulatory agencies themselves was charged with assessing performance.

The Council spent three years on this reference, issuing several influential reports calling for procedural and substantive changes and delivering its final recommendations in 1981. In 1979, it reported that the number of federal regulations had risen by almost 350% between 1955 and 1975.[14] The Council's recommendations embraced both the need to review and reform the existing stock of regulations and the need for improvements to regulatory process.[15] Thus, it recognised both the dynamic context of regulatory reform and the need for systematic and process driven approaches to ensuring regulatory quality.

Important institutional reforms were implemented in conjunction with the work of the Council and these constituted a major step in terms of embedding regulatory reform within the structure and processes of government. In 1979, the Office of the Co-ordinator of Regulatory Reform was established in the Treasury Board Secretariat. It was the first entity within the federal government to have regulatory reform as its primary mandate. Thus, a capacity was created for overall management and co-ordination, research and review of horizontal and generic regulatory policy issues,[16] although this was not immediately followed by substantive or procedural changes in the regulatory process.[17]

At the same time, the President of the Treasury Board was assigned responsibility for reviewing the government's regulatory activities, providing an important element of political accountability for progress and leading to the launch of several major deregulatory initiatives. Parliamentary involvement in regulatory reform was also established at this time, with 1980 seeing the release of 29 recommendations for improving regulatory management by the House of Commons' Special Committee on Regulatory Reform.

The adoption of a comprehensive regulatory reform strategy, or regulatory policy, followed in 1986 and constituted the government's response to the Task Force on Program Review. This was a major investigation into how service delivery and programme management could be improved while reducing the cost of programme delivery – including that of regulatory programmes. The review was commenced in 1984 and found that the regulatory system was neither "efficient nor adequate".

The regulatory policy included a Regulatory Process Action Plan, key elements of which were the adoption of principles for regulation, increased ministerial involvement and accountability, the establishment of central agency responsibility for regulatory oversight, greater public participation, and systematic regulatory analysis. To this day, these represent many of the core elements of regulatory reform policy.

Two sets of principles were adopted to guide regulatory decision-making under the 1986 Policy. The first set, the *Guiding Principles of Federal Regulatory Policy*, was directed at ministers and departments, and provided a framework for the regulatory reform strategy. They began with the government's commitment to "regulate smarter", followed by recognising the vital roles of an efficient market place, the need to limit the growth of new regulation, a statement that there would be no "wholesale deregulation" but that existing regulations would be assessed and removed on a case-by-case basis where warranted, that benefits should exceed costs, that the public should have greater access to the regulation-making process, and that the focus of the strategy will be on addressing the overall regulatory burden, in co-operation with the provinces. The second set of principles are included in the *Citizen's Code of Regulatory Fairness*, which was directed at Canadian citizens, and set standards of fairness and accessibility and accountability in the government's use of its regulatory powers. These principles were intended to hold regulators publicly accountable for both the substance of regulations and the management of regulatory responsibilities. A programme of systematic review and evaluation of regulatory programmes over a recurrent seven year cycle was also announced but this was never fully implemented.

A revised Regulatory Policy was announced in 1992 and was notable, in particular, for the explicit adoption for the first time of the overarching objective of "maximising the net benefit to Canadians". Thus, Canadian regulatory governance has been guided for the past decade by this, a challenging regulatory reform goals – that of maximising social welfare. The revised policy also implemented changes to institutional responsibilities and supported two government goals: the international competitiveness of Canadian industry and creating an internal single market by removing inter-provincial trade barriers. Also notable was the adoption of a specific focus on the importance of compliance issues, including the publication of a comprehensive guidebook for regulators and the inclusion of compliance issues within RIA[18] requirements.[19] Even a decade later, few other OECD countries' regulatory reform policies include substantial compliance related elements.

Further changes occurred in 1993, in response to the report of an all-party parliamentary sub-committee.[20] The report highlighted weaknesses in the regulation-making process including bias in the choice of policy instruments, deficient compliance mechanisms, regulatory duplication and inconsistency, inadequate Parliamentary overview and insufficient co-ordination and centralised management. The government's response, entitled *Responsive Regulation in Canada* lead to changes to the Federal Regulatory Plan to include information on costs and benefits, impacts and outlines of future initiatives, while the Treasury Board Secretariat began working with regulatory departments to develop a risk management framework for regulatory programmes. A number of more ambitious proposals were never implemented, including an annual assessment of the overall impact of proposed major regulations and a proposal to improve parliamentary scrutiny by requiring major regulations to be brought to the attention of the of the relevant Standing Committee at the time that draft regulatory proposals are pre-published in the government's official *Canada Gazette*.

In 1994, the government introduced its *Jobs and Growth Agenda: Building a More Innovative Economy*. The government argued that too many regulations were developed with little consideration for their impact on competitiveness of small business. Regulatory reforms were put in place to unleash business energies. Its announced Federal Regulatory Reform Agenda included:

- improving regulatory efficiency in six selected sectors: biotechnology; health, food, and therapeutic products; mining; the automotive industry; forest products; and aquaculture — intended to be the first group under review;

- introduction of the Business Impact Test to assess the impact of proposed legislation on the private sector;

- a commitment to reduce paper burden;

- a commitment to implement standards to for managing the regulatory process — the Regulatory Process Management Standards; and

- others, including improving federal/provincial co-operation, increasing the use of plain language, better complaint handling, and speeding up access to information.

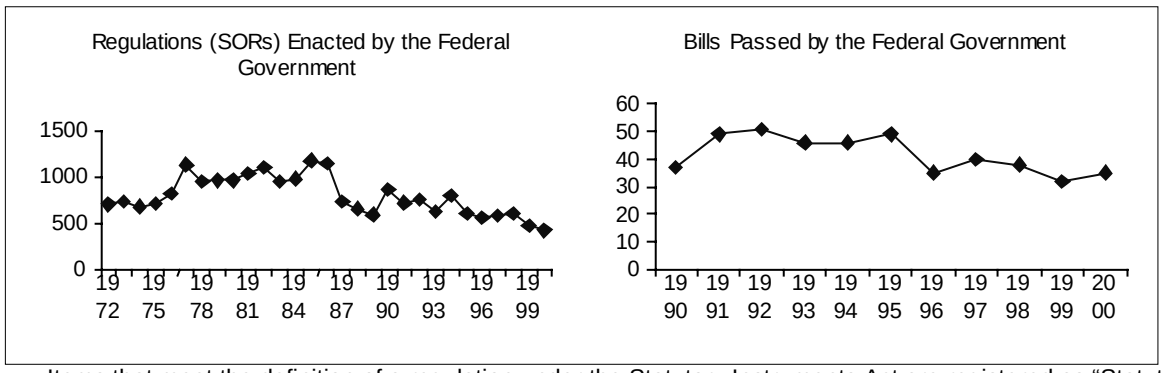
Revised regulatory policies were issued in 1995 and, most recently, in 1999 (see Section 2). The 1995 Regulatory Policy was particularly notable for formally incorporating the *Regulatory Process Management Standards* (RPMS) for policy development and analysis, consultation, notification and training in regulatory affairs. The RPMS were intended to increase capacity and to enhance compliance with the requirements of the Regulatory Policy. The first departmental review occurred in the mid-1990s with respect to the implementation of the policy. The Treasury Board Secretariat, which at this time exercised responsibility for the co-ordination and management of the policy, moved toward a more co-operative and facilitative approach to policy implementation, emphasising training, guidance and capacity building, and, gave less prominence to the "challenge" function that had been central to that time. A review of the RPMS was completed in July 2000, which identified areas of strength and areas of further development. A unique aspect of the report was the consolidation of departmental reviews into a capacity check tool, which identifies five levels of capacity for each of the compliance criteria. Regulatory departments were then rated on a government-wide basis.

The results of this sustained process of reform over some twenty-five years are apparent. They can be seen in a number of dimensions, including the impact on regulatory inflation, the transformation of the regulatory culture within the administration and the society more generally and the broader impact of Canada's policy innovations on the OECD's work on regulatory reform and, through it, on regulatory reform in a range of other Member countries.

The most visible effects are the impacts on regulatory inflation. Canada differs from most OECD Member countries in exhibiting a declining trend in the quantity of new legislation being passed, at both primary and subordinate levels. Figure 1 shows the number of subordinate regulations passed by the federal government in the period 1972 – 2000. It indicates that, like most countries, Canada experienced strong "regulatory inflation" during the 1970s and early 1980s, with the peak number of regulations – 1169 – being passed in 1985. Since that time, however, there has been a declining trend that has continued, and perhaps even accelerated to the present day. The number of regulations passed during 2000 was 418, or little more than one third of the peak number.

This substantial reduction in the rate at which new subordinate regulations are being passed in Canada is also evident in the case of primary laws, though the trend is less pronounced. Figure 2, below, shows the trend in the number of primary laws passed by the federal government over the decade of the 1990s. It shows a peak of 51 laws being passed in 1992, with a low of 32 being reached in 1999 and only a slight rise, to 35, in 2000. Thus, the 1999 figure represents a drop of 37 % on the peak figure of 1992.

Figure 1. **Trends in regulation making in Canada**[1]



1. Items that meet the definition of a regulation under the Statutory Instruments Act are registered as "Statutory Orders and Regulations" (SORs). The first figure captures Governor in Council regulations, Ministerial regulations and Proclamations that are registered as SORs. What is depicted in the figure is the flow of federal regulatory transactions and, as such, it includes entirely new regulations as well as items that amend, repeal or revise an existing regulation.
Source: Government of Canada.

These parallel trends in the rates at which primary and subordinate laws are being passed suggest that Canada has been successful in pursuing one of the major objectives of successive regulatory policies, being to control overall regulatory burdens, or the trend of "regulatory inflation" as experienced in most OECD countries. There are difficulties in interpreting raw data such as this. For example, declines in overall numbers may be explained by a trend to use more consolidated regulatory instruments, or to revise and replace laws less frequently due to the adoption of performance based standards. Similarly, a decline in the use of formal regulatory instrument could be offset by increasing use in "quasi law and regulation", which can occur particularly if quality controls over formal regulation are seen as unduly onerous. In many OECD countries as well as in Canada, the increase in guidelines and codes is related probably to the search to find more flexible governmental instruments.[21] Furthermore, some regulations might have been devolved to other levels of government (see Section 1.1.).

More importantly, measurable observations need to be interpreted in the light of supporting qualitative information. Here, there is data to support the contention that there has been a substantive change in the regulatory culture within the Canadian administration. For example, a recent review of the impact of RIA on decision-making and the development of regulations concluded that it had "changed the decision-making process", with greater attention being paid to benefits and costs and to alternatives. It found a "core of expertise" was available in several departments and that, in general, "officials were sensitive to RIA requirements".[22]

Similarly, a recent review of Canadian regulatory reform as a whole argued that "…by the mid 1990s, the rise of regulatory management had helped ensure that regulation was connected in a fairly explicit way to the broader context of government. On the domestic front, policy-makers increasingly assessed regulation in terms of its capacity to address government-wide priorities".[23] This too represents an important cultural transformation, from the common observation of regulators confining their perspectives to those of the particular regulatory sector for which they have direct responsibility.

Regulatory reform in Canada has achieved much since its genesis in the late 1970s, but substantial challenges remain on the horizon for future regulatory governance efforts. While "regulatory inflation", representing the flow of new laws, seems to have been addressed unusually successfully, there are still concerns at the cost of the stock of existing regulations. Any estimate of regulatory costs can only be indicative, as their measurement is extremely difficult and all estimates must be treated as indicative approximations. However, an evaluation of regulatory burdens is not only essential but provides an important signal of the success of a regulatory policy. In Canada different attempts in this field have been tried since the 1970s. The most recently available is a 1998 study estimating that regulatory compliance costs stemming from all three levels of Government were equivalent to CAD 103 billion, or 12% of GDP for 1997/1998.[24] The costs deriving from federal regulations were $49 billion in 1993/1994.[25] These costs, while substantial, are at a comparable level as a percentage of GDP with those of other developed economies. Moreover, the costs of regulations are relative and should be compared to the benefits to provide a comprehensive picture of their impact.

In many countries, regulatory burdens have been linked to barriers to innovation and entrepreneurship, which in turn impinge on productivity growth and standards of living.[26] A question at issue is whether regulatory costs are a major contributor to the "productivity gap" in Canada. A central element of the debate is that Canada's measurable standard of living (GDP per capita) is 25% below that of the US. The extent, or even the existence, of this "gap" is, however, contested both on technical grounds relating to measurement inconsistencies and by reference to various intangible "quality of life" factors that are said by many to favour Canada.[27] The marked slowdown in Canadian economic activity, which began in late 2000 after strong performances through the late 1990s, has also tended to highlight this question. Moreover, the OECD found in 2000 that the late 1990s expansion in potential output remained "below that observed in the 1970s", with recent economic performance, while comparing favourably with most G7 nations, not as strong as that of the United States. It also noted the "innovation gap" weighting down its growth potential.[28] From the regulatory reform perspective, these comparisons pose the question of what is the scope for further improvements in regulatory policy as a means of addressing issues of relative and absolute economic performance. Differences in performance between Canada and the US reflect differences in the industrial structure of the two countries, with software, information technology and advanced manufacturing sectors explaining much of the superior performance of the US. Recent research suggests that regulation is perceived as a relatively small barrier to advanced technology adoption and innovation in Canada.[29] However, not all elements of the productivity puzzle are understood. More research on the link between regulation and productivity would be helpful. This is not an issue specific to Canada and other OECD countries may wish to consider this too. The Canadian government has not, to date, carried out such research and might consider doing so. Canada's efforts are focussed on encouraging innovation, as a means of spurring productivity growth is focussing on tax incentives for R&D, investment

in human capital (*e.g.* skills and training) and leading edge technological infrastructure. This does not preclude the need for Canada to continue its vigilance to ensure that regulation does not hamper innovation and productivity growth and the Government's recently released consultation paper on its Innovation Strategy sets goals, targets and priorities for government action on existing and new regulatory regimes.

In addition, issues of improving regulatory co-ordination between levels of government remain. International agreements have, arguably, been among the important drivers of Canadian reform, and have led to substantial regulatory co-operation though not necessarily harmonisation. However, these issues will remain important, particularly in the context of the negotiation of new trade agreements and the progressive implementation and deepening of existing agreements. There are also concerns that progress in harmonising regulations within Canada may not have matched that made internationally.[30] Despite the negotiation of the Canadian Agreement on Internal Trade, and efforts to achieve its full implementation over a number of years, there appears to be substantial scope for further progress.

1.2. Recent regulatory reform initiatives to improve public administration capacities

In common with several other OECD Member countries, Canada has undertaken a substantial re-engineering of the public administration in recent years, with many of these changes necessarily having important implications for regulatory governance. Concepts of the "New Public Management", have changed perceptions of the role of government and had profound effects on the structure and management of the Canadian administration Adoption of the precept that governments should "steer and not row" has combined with moves toward fiscal consolidation to produce strong pressures to reduce the size of the public sector. Indeed, by the end of 1996, the size of the federal public service had been reduced by 30 000 to approximately 195 000 employees/civil servants. This resulted in human resources management issues, such as competency gaps and the ageing workforce. This profound rationalisation of departments and agencies tasks has had a critical and positive side-effect by leading regulators to reassess their regulations in light of stricter priorities and real enforcement capacities, sometimes ultimately leading to a reductions in regulation. On the negative side, there are challenges for maintaining and enhancing capacities to conduct quality analysis when developing or amending regulations.

Another element of the adoption of New Public Management approaches was the introduction, in Parliament in March 2000 of *Results for Canadians - A Management Framework for the Government of Canada*. This framework is based on four "management commitments" for government: citizen focus, values driven management, results orientation and responsible public spending. Some of the ways in which it seeks to operationalise these commitments is by appropriate delegation of decision-making and administration within a framework of clear goals, sound risk management and control systems and strong accountability mechanisms. Notably, the Treasury Board of Canada Secretariat has produced guidance on the development of frameworks for programs, policies, statutes and regulations, including *ex post* performance assessment and feedback loops to inform future action. In July 2001, a Lexicon on Results-based Management and Accountability was published to help standardise terminology used across the government.[31] These initiatives have the potential to improve capacities to systematically make high quality regulation by systematising the policy process, particularly the performance assessment and feedback elements, which are often largely neglected in most OECD Member countries. More broadly, the *Results for Canadians* document can be expected to strengthen accountability for the use of regulatory powers and so enhance incentives for higher quality regulation.

Also contributing to the development of regulatory capacities is the 1997 adoption of the *Policy Research Initiative* (PRI). The PRI is intended to enhance the government's policy research capacity by bringing together policy professionals from a wide range of federal and provincial government agencies, think tanks and universities, both Canadian and foreign.[32] The PRI has three primary objectives: to advance

knowledge, to build research capacity, and to promote a spirit of community among researchers and analysts. The last objective is in response to the growing need for integrated policy development and execution.

Greater recognition of the importance of competitive markets has been a key theme of much of Canada's regulatory reform activity over many years, and the role of competition policy and advocacy has continued to grow in recent times. The Competition Bureau now wields significant advocacy powers and uses these in a number of ways. Notably, in those sectors subject to independent regulators, the Bureau supplements the functions of the sectoral regulators through interventions before the industry-specific regulator, either on its own initiative or on request from the regulator.[33] It can file submissions in support of greater competition and in some cases participates in regulatory hearings and consultations conducted by the regulators.

An important development has been that the Competition Bureau has articulated a set of principles regarding the respective roles of itself and the various sectoral regulators. This has led to the signing of one formal agreement with a sectoral regulator – the 1999 *Interface Agreement* between the Bureau and the Canadian Radio-television and Telecommunications Commission. The purpose of this agreement was to provide industry stakeholders, including the general public, with greater clarity and certainty as to the overall regulatory and legal framework governing the telecommunications and broadcasting sectors. The agreement describes the authority of the CRTC under the *Telecommunications Act* and the *Broadcasting Act* and that of the Bureau regarding the telecommunications and broadcasting sectors. In transport, electricity and natural gas, the Bureau has also played an important role in bringing about pro-competitive regulatory reform, notably by making submissions to various reviews and enquiries looking at the future of the regulatory architecture for various sectors, as well as by providing policy advice to Parliament and to the government departments overseeing the industry in question (see Chapter 3).

This approach is consistent with the Regulatory Policy's increased emphasis on the "whole of government" perspective and should improve regulatory capacities by ensuring that competition expertise is made available to a wide range of players in the regulatory process. It can thus be expected to improve regulatory quality by ensuring that general competition principles are better integrated into policy debates and better reflected in the resulting regulation. However, it should be noted that Chapter 3 indicates a number of concerns relating to the capacities of the competition authority, related to its governing legislation, perceived independence and authority and level of resourcing.

Trade liberalisation efforts have constituted an increasingly significant driver of regulatory reform in Canada in recent years (see Chapter 4). Efforts to harmonise domestic regulations with those of trading partners and with international standards are a necessary element of such agreements and increasing efforts have been made within Canada as the number and scope of these agreements have increased. Initially this began with the Canada/United States Free Trade Agreement, subsequently replaced by the substantially expanded North American Free Trade Agreement (NAFTA). Subsequent agreements have also been concluded with Israel, Chile, and Costa Rica while other ambitious proposals such as negotiations for a Free Trade Area of the Americas continue, though they have not to date been realised. It is worth noting that since 1995, the Canadian Regulatory Policy emphasises the importance of regulatory harmonisation in this context, stating that when developing or changing regulations, federal regulatory authorities must ensure that regulatory officials are aware of, and adhere to, obligations set out in international and intergovernmental agreements and accords.[34]

2. DRIVERS OF REGULATORY REFORM: NATIONAL POLICIES AND INSTITUTIONS

2.1. Regulatory reform policies and core principles

The 1997 *OECD Report on Regulatory Reform* recommends that countries adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.[35] The 1995 *OECD Council Recommendation on Improving the Quality of Government Regulation* contains a set of best practice principles against which reform policies can be assessed. Canada was one of the countries that was most involved in the dialogue that led to the creation of the OECD principles and has been one of the leading countries formulating and implementing regulatory reform and regulatory management systems. With sustained efforts and capacity building over a number of years, the regulatory policy (in its successive editions) and related initiatives have been implemented throughout the Government of Canada. Even so, there is room to improve in particular in terms of the number and consistency of appraisal criteria for different regulations (*i.e.*, primary vs. secondary instruments).

A key strength of Canadian regulatory reform is that it is based on a model of constantly evolving policy and implementation tools. Thus, the scope of the policy has broadened and new tools have been adopted over time to better empower regulators to achieve its underlying objectives. There is a willingness to learn from experience, both Canadian and international, and feedback loops appear to be timely. As Table 1 above illustrates the development of Canadian regulatory reform policies over time and highlights the changes that have occurred in objectives, the focus of reforms and mechanisms.

Table 2. **Comparison of Canadian policy and law-making requirements with the 1995 OECD Recommendation on Improving the Quality of Government Regulation**

1995 OECD Recommendation	Policy-making criteria	Law-making criteria	Subordinate regulations criteria*
1. Is the problem correctly defined?	Has the problem been adequately identified? Provide assessment of the risks.	The problem behind the recommended solution	**Description of the problem.**
2. Is government action justified?	A legitimate and necessary role for government?	Consequences if recommendation not adopted	**Why action is necessary.** Assessment of need for regulation.
3. Is regulation the best form of government action?	Consider a range of options to achieve the objective, and partnership with the private or voluntary sector.	Analyse all realistic options: a thorough and balanced exploration of the pros and cons of each.	**Alternatives: list non-regulatory and regulatory options.**
4. Is there a legal basis for regulation?		Whether likely to be subject to serious constitutional challenges; impact on other federal laws.	Assess legal basis for the regulation.
5. What is the appropriate level (or levels) of government for this action?	Federal involvement test. Urging partnerships test.	Federal-Provincial considerations – to work in partnership	Regulatory authorities must co-ordinate with other governments and agencies, determining which the level of government.
6. Do the benefits of regulation justify the costs?	Is it in the public interest? How do overall societal benefits compare to the costs? Is it efficient?	Will there be obvious winners and losers? Who? By how much? Government resource requirements.	**Quantify the impacts –benefits and costs.** Analyse alternative solutions. Does the proposal provide the greatest net benefit? Minimise the regulatory burden and adverse impact on international competition.
7. Is the distribution of effects across society transparent?	Is it in the public interest?	Will different sectors of the economy or areas of the country be affected differently?	List which groups will be affected.

1995 OECD Recommendation	Policy-making criteria	Law-making criteria	Subordinate regulations criteria*
8. Is the regulation clear, consistent, comprehensible, and accessible to users?		Requires legal analysis using the Cabinet Support System, drafting in both languages and respect for common and civil law systems. Plain language drafting requirements	Developing Regulations: The Basic Steps and Plain Language Approach.
9. Have all interested parties had the opportunity to present their views?	Have all Canadians been given the opportunity for meaningful input?	Who has been consulted and their views and processes for future consultations over the longer-term.	**Who was consulted and the results.** Ensure Canadians are consulted, and can participate in developing regulations.
10. How will compliance be achieved?	Accountability test. Incorporate a feedback mechanism into policy and programme design. Mechanisms for monitoring, measuring and reporting on outcomes and performance.	Identify problems and strategies associated with implementation. Provide of a communications overview and plan	**Compliance and enforcement: explain the policy on conforming to the regulations and tools to achieve this**. Communicate regulatory amendments. Address performance assessment and accountability, and complaint and dispute resolution.
Additional criteria			
Is the objective defined?	Are the goals and objectives clearly defined?	What will the government achieve by resolving this issue? How will Canadians benefit?	The intended solution and the context.
Compatibility with international and intergovernmental agreements		Advise whether raises division of powers issues.	Ensure regulations meet obligations in international and intergovernmental agreements and accords.
Revenue impacts	Is it affordable, given fiscal constraints?	Government expenditures or revenue generation involved.	Apply the Government's cost recovery and charging policy.
Inter-departmental co-ordination	Involve other departments with the development of the proposals and identify synergies.	State departmental positions – show all disagreements.	
Evaluation criteria		Have adequate evaluation criteria been developed?	
Interdependencies	Are there interdependencies with other priorities or programmes? Contribution to these. Consistency with current legislation?		Requirement to co-ordinate with other agencies and develop regulations consistent with the existing regulatory environment, avoiding duplication and overlap.
has a feedback mechanism been established	Has a feedback mechanism been incorporated into policy and program design to allow for evaluation, fine-tuning and updating?		Information on compliance is fed back into the regulation development process.
Prioritising			Filtering and prioritising of problems and issues so that regulatory development efforts are also prioritised.

*. Bolded items are RIA requirements. Unbolded are requirements required either by the 1999 Regulatory Policy and/or the Regulatory Process Management Standards. Where the requirements, essentially overlap only the RIA requirement is included.

Source: OECD Secretariat based on *Good Governance Guidelines* for the Policy-making criteria (column 2), *Cabinet Directive on Law-Making* and *Memoranda to Cabinet: A Drafter's Guide* for the Law-making criteria (column 3), and *Regulatory Policy 1999, RIA and Regulatory Management Process Standards* (RPMS) requirements for the Subordinate regulations criteria (column 4).

The result of this process of constant evolution over more than twenty five years is a policy framework that is among the most comprehensive among OECD Member countries and which demonstrates a high degree of consistency with the above-mentioned OECD Recommendations. The 1999 Regulatory Policy's stated objective of "ensuring that use of the government's regulatory powers results in the greatest net benefit to Canadians" expresses the broadest regulatory reform goal of maximising social welfare. It is supported by a three part "policy statement" which emphasises the positive role of regulation in serving social objectives, the need to ensure public monies are spent wisely and the principle of participative decision-making.

Exemption of primary law does not imply lack of quality controls. A range of disciplines in respect of primary legislation are contained in the newly released *Good Governance Guidelines (2001)* and in the *Cabinet Directive on Law-making (1999).* The former document poses a number of questions and conducts tests in relation to policy-making in general in the following areas:

- Policy basics
- Public interest
- Government themes (*i.e.* legitimate and necessary role for government)
- Appropriateness of federal involvement
- Accountability
- Possibility of delivery in partnership with the private or voluntary sector
- Efficiency and affordability

These tests demonstrate a generally high degree of consistency with the Regulatory Policy requirements (see Table 2 above). A notable inclusion is the reference to the voluntary sector. While a number of OECD countries, including the United Kingdom and Australia, have moved toward substantial use of the voluntary sector as agents of service delivery for a variety of government programmes, this policy may be unique in formally requiring consideration of this as an option in all policy deliberations.

The *Cabinet Directive on Law-Making* seeks to ensure that Cabinet has the necessary information for sound decision-making about proposed laws, and that officials who are involved in law-making activities understand their roles and have the knowledge and skills they need to perform their roles effectively. The Directive includes requirements as to the decision-steps that should be taken prior to presentation of a legislative initiative for Cabinet approval and specifically requires departments to:

- analyse the matter and its alternative solutions;
- engage in consultation with those who have an interest in the matter, including other departments that may be affected by the proposed solution;
- analyse the impact of the proposed solution; and
- analyse the resources that the proposed solution would require, including those needed to implement or enforce it.

Thus, reading this document in conjunction with the *Good Governance Guidelines* adds a formal requirement to consider alternatives, as well as a requirement to consult. However, neither document explicitly requires verification that benefits exceed costs. This is a notable exclusion, given that past Canadian policies explicitly required the application of RIA to proposed primary legislation (see Section 3, below). The requirement to include the detailed RIA statement as an annex to legislative and regulatory policy proposals to Cabinet was replaced a few years later by a summary of analysis as the Cabinet Secretariat was concerned that the length of the RIA statement being sent to Cabinet was too detailed. This new requirement, though, continues to be primarily based on the *Good Governance Guidelines* and the *MC Drafters Guide*.

This requirement was apparently abandoned after

Some countries like the United Kingdom and Mexico have incorporated as an explicit objective of the policy to ensure that existing regulation is kept updated. These and other countries have launched initiatives and created institutions in charge of advocating high quality regulation in that sense.[36] In the past 20 years, Canada has launched different reviews of existing regulation and regulatory regimes (see Section 4.1). A notable gap, is thus the lack of regular review of existing regulation — even though it was announced in 1986 but never fully implemented as part of the Regulatory Reform Strategy. This may be achieved under the Government's Innovation Strategy that sets a target to complete systematic expert reviews of Canada's most important stewardship regimes by 2010.

Overall, at the policy level, Canada shows an extremely high level of consistency with the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* and, in many areas has adopted additional requirements that go beyond those of the recommendation to provide more robust quality assurance. Table 2, above summarises the Canadian requirements as they apply to general policy-making, development of primary legislation and development of subordinate regulations. These requirements compared in each case with the relevant parts of the 1995 OECD Recommendation. The second half of the table sets out the other important quality assurance measures that go beyond the requirements of the recommendation.

As the table demonstrates, apart from the explicit net benefit test, Canada has established the equivalent of a RIA analysis for policy-making and for making primary and secondary legislation. The requirements for each contain almost all the criteria listed in the OECD 1995 Recommendation and others. Certain criteria merit attention:

- a statement of the objective. If decision-makers are clear and agree about the objective, then it is easier to focus on an assessment of options and impacts;
- compatibility with international and intergovernmental agreements;
- assessment of relation with other government priorities and programmes indicates that the Canadian regulatory management system is sophisticated and mature, as both are about managing regulatory systems to reduce overlap and burdens and increase consistency; and
- feedback mechanisms is concerned to achieve continuous improvement.

An important basis for the future development of the Regulatory Policy is found in the April 2000 report entitled *A Summary of Discussions Held by the Deputy Minister's Challenge Team on Law-Making and Governance*). This report based on discussions held in 1997 and 1998 by the *Deputy Minister's Challenge Team (*DMCT), highlighted the tendency of current regulatory policy to treat statutes and regulations differently, when they have similar effects. Hence, it recommends the use of a single list of

questions to determine whether to use any legal instrument (*i.e.* either laws or subordinate regulations). The list bears a strong resemblance to the list of questions contained in the current Canadian RIA requirements for subordinate instruments.

DMCT also suggested that policy-making in general would be enhanced by:

- challenging the traditional choice of instrument;
- setting clear, objective outcomes and reporting on their results;
- co-ordinated cross-departmental and even cross-jurisdictional responses in order to address the growing overlap of policy areas (for example, bio-technology, health, food, agriculture and trade);
- attention to risk management;
- putting greater emphasis on a balanced analysis; and
- finding the most appropriate ways to engage and consult the public

Departments have agreed on the need to assess the state of regulatory performance measurement to determine what improvements are required, although no results of this assessment are yet available. Two further initiatives were the commissioning by RAOICS of reviews of the Regulatory Process Management Standards and of the RIA process.[37] These were delivered in July and August 2000 respectively. The RPMS review identified 13 areas where improvements could be made, including better prioritising of regulatory proposals, improved capabilities to assess regulatory and non-regulatory alternatives and in conducting cost-benefit analysis, and more training. As well, need for improvements in resourcing of programme delivery, better performance measurement of outcomes and a more formal approach to review and improvement. The RIA review concluded that RIA had successfully changed the decision-making process, but recommended substantial changes to improve its performance, including a tiered system of RIA to better target efforts and improve understanding of requirements, issue of guidelines on analytical and methodological techniques, improvements in RIA transparency, training for authors, expert support for authors and ex post analysis of RIA and policy development processes.[38] Certainly, the current edition of the RIAS writers' guide provided on-line by PCO dates from 1992.

Measures have been taken by RAOICS and by departments in response to these recommendations. For example, improved guidance and training on-line such as a simplified process guide (April 2001) and a web-based interactive learning tool on the government (August, 2001) have been provided. RAOICS is partnering with the Canadian Centre for Management Development on best practices seminars directed at regulators and regulatory managers and has contributed to training courses to introduce the Regulatory Policy dimension of the regulatory process to the government legal community. Departments have also addressed some of the issues raised in the RPMS reviews. For example, hiring cost benefit specialists to improve the quality of analysis, strengthening internal co-ordination and priority setting in departments through enhanced regulatory affairs units and internal regulatory affairs committees and improving departmental process manuals and training programs. The RIAS review resulted in a proposed work plan, which is currently being considered by the DMCT.

In sum, Canadian regulatory governance policy is detailed and extensive and consistent with OECD best practices. The government continues to recognise the need for continuous updating and refinement of policy and has consequently commissioned a number of reviews that have pointed out areas for further improvement or development. It currently has a range of initiatives in development to ensure that the policy continues to meet its objectives into the future. The previous sections detailing the evolution of the policy and its current status suggest that one criticism of the Canadian approach may indeed be that it is too comprehensive, in the sense that drafters are subject to a larger number of quality criteria and

procedural requirements than can reasonably be understood and implemented. For example, the Privy Council Office Web site lists a total of 16 publications, with seven relating to different requirements of the Regulatory Policy such as cost benefit analysis, compliance strategies, writing a RIA statement.

The question of whether regulators can be expected to assimilate all of this material effectively necessarily arises. Moreover, there may be issues in terms of the ability of the centre of government itself to keep up to date with this range of material. For example, the document *Regulatory Co-operation Between Governments* dates from 1994, notwithstanding the substantial initiatives that have been taken in terms of internal and external co-operation since that time. Moreover, a rationalisation of the policy – involving a harmonisation of the requirements contained in the various documents and, possibly, their organisation into thematic areas – involving some criteria becoming subsidiary elements, while others set out "core" requirements – could be worthy of consideration. On the other hand, an expansion in the scope of some requirements would be likely to yield substantial benefits by improving consistency and predictability. As well, a clear objective to review existing regulations is absent for the policy. A task, covered only partially by the Office of the Auditor General (OAG). For instance, in 2000 OAG recommended that the Regulatory Policy be clarified with regard to health and safety regulatory programmes, through the identification of priorities among the several conflicting demands of citizens, the strengthen the credibility of science, and the establishment of a code of values.[39]

The government has developed mechanisms to ensure that sound scientific advice is taken into account in formulating policy and regulations. In March 2000, PCO released a report entitled *Risk Management for Canada and Canadians - Report of the ADM Working Group on Risk Management*. The members of this group were primarily from science and regulatory departments, and their report provides context in which to discuss, examine and seek out interrelationships between issues associated with public policy decisions in an environment of uncertainty and risk. Subsequent to this, and reflecting one the recommendations from the report, the government published, in April 2001, "The Integrated Risk Management Framework", a guidance document to help strengthen risk management practices across the public service by providing a comprehensive approach to better integrate risk management into strategic decision-making. A third initiative is a RAOIC-led process involving science-based regulatory programs to develop a principles-based framework for the application of the precautionary approach. The precautionary approach is a distinctive approach within science-based risk management. It recognises that the absence of full scientific certainty shall not be used as a reason to postpone decisions where there is a threat of serious or irreversible harm. While guidance and assurance are required as to conditions governing decisions, it is particularly important that this guidance and assurance be clearly conveyed and applied when a decision must be made about a risk of serious or irreversible harm and the scientific uncertainty is significant.

The government has released a discussion paper, "*A Canadian Perspective on the Precautionary Approach/Principle*", to outline broad guiding principles to support consistent, credible and predictable policy and regulatory decision making when applying the precautionary approach. These principles reflect current Canadian practices. An enunciation of the principles would clarify how Canada makes decisions in such circumstances and give Canada a firm basis to more actively engage in international discussions in a clear, coherent and consistent manner. The focus is on those sectors with the greatest need for guidance and clarity—science-based areas of public health and safety, the environment, and natural resources management. The government is now assessing feedback and will use the information as a basis for revisions to a federal framework.

2.2. Mechanisms to promote regulatory reform within the public administration

Reform mechanisms with explicit responsibilities and authorities for managing and tracking reform inside the administration are needed to keep reform on schedule, and to avoid a re-emergence of poor quality regulatory practice. It is often difficult for departments to reform themselves, given countervailing pressures, and maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based. Considerable experience across the OECD has shown that central oversight units are most effective if they are independent from regulators (that is, not closely tied to specific regulatory missions), if they work under a clear regulatory policy endorsed at the political level, if they are horizontal (cut across government), staffed with experts (have information and capacity for independent judgement), and are linked to existing centres of administrative and budgetary authority (*i.e.* centres of government and/or finance ministries). Mechanisms to promote regulatory reform within the public administration, however, are not only about imposing explicit responsibilities on reform agencies and authorities, but also about designing and evaluating the overall architecture of the regulatory system.

In order to ensure Cabinet is fully informed about decisions made on draft statutes, Memoranda to Cabinet must address specific requirements (see law-making criteria in Table 1) and are rejected by the PCO if they are not. There are six broad stages to the development of statutes: (1) preparation of the draft; (2) review and approval of the bill by the Minister; (3) review by Government House Leader and approval by Cabinet; (4) tabling, reading and amending in the House of Commons; and (5) tabling, reading and amending in the Senate, (6) finally receiving Royal Assent if it is passed by both Houses of Parliament. Box 3 outlines the ten broad stages involved in creating subordinate legislation. In general, the stages and the requirements for subordinate legislation are stated more explicitly than those for primary legislation. Notable features include: the extensive use of consultation with stakeholders throughout the process; the use of pre-publication to formally ensure the provision of a "notice-and-comment" procedure and that the RIA is a cabinet document which is also made public.

Canada has a number of long-established oversight bodies with horizontal responsibilities for aspects of regulatory governance. The roles and responsibilities of each are summarised in the following sections, followed by a discussion of trends in their operation over time.

The Special Committee of Council (SCC), is a Cabinet committee, responsible for the oversight, review and overall government co-ordination of regulations. The approval of the SCC is required before Governor-in-Council regulations[40] can be made. The mandate of the SCC has also expanded in recent years. In 1997, it became responsible for legislative planning and review, and for issues relating to legislative policy and process. In June 1999, responsibility for the Federal *Regulatory Policy* was transferred to the SCC from the Treasury Board (which is also a Cabinet committee), further consolidating responsibility and accountability for regulatory governance. The SCC oversees both maintenance and development of this policy, and its effective implementation through the review, challenge and approval of every GiC submission.

The Regulatory Affairs and Orders in Council Secretariat (RAOICS) of the Privy Council Office (PCO) was established in September 1998 to enhance support for Cabinet decision-making on regulations and regulatory policy. The Secretariat contains two divisions. One, Regulatory Affairs, has functional responsibility for the Federal Regulatory Policy, including assessing RIAs, and assuring that regulatory submissions from departments comply with the Policy's provisions, and providing analysis, briefing and advice to SCC. It also guides work on horizontal regulatory issues in the federal and international spheres, including the provision of secretariat support to the Deputy Ministers' Challenge Team (see Box 3). It has 11 professionals with diverse qualifications and professional training including law, economics, engineering, business and public administration, health and social sciences. The other division, Orders in Council, a long-standing institution in the Privy Council Office, is responsible for

preparing submissions to the Governor in Council, as well as registering and preparing regulatory submissions for publication in the Canada Gazette. It has 14 fluently bilingual employees with a range of qualifications and specialisations, who are all knowledgeable about the structure of the Government of Canada. Some of the key functions – and in particular RIA oversight of the Regulatory Affairs Division were originally exercised within the Treasury Board Secretariat. RAOICS was established at the time of the transfer of these functions to the Privy Council Office. The transfer of functions was intended to strengthen oversight of the regulatory policy, creating a new secretariat RAD, and combining it with OiCD to form the new RAOICS, which is responsible for submitting regulations to the Cabinet for approval, thus also improving integration with regulatory processes as a whole.

The Treasury Board Secretariat is responsible for providing guidance to regulatory authorities on how to include regulatory information in their annual departmental Reports on Plans and Priorities and in the annual Departmental Performance Reports, which are both tabled in Parliament. It is also responsible of assuring that regulators demonstrate the effectiveness of their regulatory programmes[41] and for reviewing regulations with financial implications.

The Department of Justice drafts legislation and reviews draft regulations to promote internal consistency and overall quality. It has a statutorily mandated role to oversee the legal aspects of regulation-making. Pursuant to the *Statutory Instruments Act* the Department of Justice ensures that proposed regulations are authorised by the enabling statute, are consistent with the Charter of Rights and Freedoms, and are drafted in accordance with established standards. It also provides legal advice to regulatory authorities in relation to matters such as alternative regulatory solutions, harmonisation of regulatory requirements, compliance and enforcement techniques, and use of performance and international standards.

Box 3. **The process of creating regulations in Canada**[1]

Step 1: **Conception and Development of a Regulation**

The *Regulatory Policy* sets out criteria for determining whether regulation making is warranted, justified and that regulation is the best alternative

Potential impacts of the proposed action must be considered.

The public should be involved in defining the problem and identifying a solution.

Step 2: **Departmental Drafting of a Regulation, RIAs, and other Documents**

The draft regulation should ensure effective regulation through clear instructions dealing with who, when, where, and how issues of implementation and enforcement are being addressed.

Step 3: **Examination by the Department of Justice – Regulations Section and Preliminary Assessment by RAOICS)**

This legal examination ensures that the proposed regulation is authorised by the enabling statute, consistent with existing rights and freedoms, and is in the form and drafted in accordance with established standards.

RAOICS analyses draft RIAs against the requirements of the Regulatory Policy and ensures that appropriate departmental consultation and co-ordination takes place.

Step 4: **Ministerial Approval for Pre-publication**

If approval is granted, the department prepares a regulatory package for submission to the Special Committee of Council (SCC).

The sponsoring department(s) fill in a *Request for Insertion in the Canada Gazette* form in order to have their regulatory proposal pre-published

Step 5: **Pre-publication Review by RAOICS and the SCC**

The usual practice it that the **RAOICS** requires a complete set of documents 10 working days before the SCC meeting.

RAOIC analysts review the RIAs and write a briefing note for the ministers of SCC.

Step 6: **Pre-publication in the Canada Gazette, Part I, with Comment Period**

If approved by the SCC, the draft regulations and the RIAs are pre-published in the *Canada Gazette*, Part I.

Step 7: **Departmental Preparation of Regulatory Proposal for Final Submission to the SCC**

In preparing the regulatory proposal for final submission to the SCC, the department updates it including an updated RIAS, and a formal Ministerial Recommendation to the Governor in Council is signed by the sponsoring minister. Departments must also indicate the nature of the comments received and how they were dealt with. Blue-stamped copies of the Order in Council, a *Request for Insertion in the Canada Gazette* form, and a Resolution.

Step 8: **Final Review by the RAOICS and the SCC**

RAOICS reviews the regulatory submission to ensure that comments received during pre-publication are appropriately reflected in the RIAs and writes a briefing note to SCC ministers on the proposal being submitted for final-approval.

The SCC considers the results of pre-publication along with the rest of the information in the regulatory package and decides whether to grant final approval, request a second pre-publication, postpone the item pending further information, or reject the proposal.

Copies of Orders in Council are mailed to sponsoring departments or agencies within a week of their approval by the SCC.

Step 9: **Making, Registering, Publishing in *Canada Gazette*, Part II, and Distributing Regulations**

A regulation is 'made' if it is officially approved by SCC and signed by the Governor General.

The regulation is registered, and thus enters into effect.

Most regulations are published in Part II of the *Canada Gazette* within 23 days after their registration.

Step 10: **Parliamentary Review by the Standing Joint Committee for the Scrutiny of Regulations**

The Committee checks the bill against the criteria approved by the Senate and the House of Commons at the beginning of each session of Parliament.

1. This process is for regulations approved by the Cabinet only (*i.e.* Governor in Council), which are the majority. The process varies for ministerial regulations.

Source: Government of Canada, (2001), *Guide to the Regulatory Process: Developing a Regulatory Proposal and Seeking it Approval*, April.

The Deputy Ministers' Challenge Team on Law-Making and Governance (DMCT), was originally established in 1996 to provide direction on regulatory reforms in the six targeted sectors of the economy included in the *Building A More Innovative Economy Initiative*. The DMCT currently functions as an internal forum meeting two to three times a year for senior officials to discuss regulatory policies and propose broad directions for the improvement of regulatory governance. It has led significant work in horizontal issue management in the area of regulations and law-making cutting across departmental responsibilities. An important output of the DMCT were recommendations/challenges that came from discussion held in 1998 and published in 2000 as: *A Summary of Discussions Held by the Deputy Ministers' Challenge Team on Law-Making & Governance*.

Sponsoring departments are responsible for drafting the regulations, in both official languages, drafting the RIAs and other documents. Departments have set up one or two units in charge of these tasks. They vary in size and access to departmental decision making structures. They also employ a variety of mechanisms to ensure regulatory quality. For example, some departments submit their regulatory agendas to a rigorous internal review and review by a senior management committee before any proposal is presented to their Minister for consideration. The seven major regulatory departments/agencies are: Environment Canada; Canadian Food Inspection Agency; Canada Customs and Revenue Agency; Health Canada; Fisheries and Oceans; Transport Canada; and Industry Canada.

The trend toward placing greater responsibility on individual departments extends beyond the issue of quality control of RIA to the larger question of the implementation and enforcement of the Regulatory Policy. One example of this change is the shift from the publication of a single Regulatory Plan to the current arrangement whereby each department presents two reports to Parliament, one covering plans and priorities and the other covering performance or outcomes.[42]

In addition to these governmental bodies, two bodies independent of the executive branch of the government also have significant roles in relation to regulatory governance. These are:

The Standing Joint Committee for the Scrutiny of Regulations (SJC), comprises Members of both Houses of Parliament, and provides parliamentary oversight of subordinate regulations pursuant to the *Statutory Instruments Act* (SIA). The Committee reviews final regulations, as published in the *Canada Gazette*, to ensure they meet a variety of criteria, including that they are authorised by the enabling statute, do not conflict with the Charter of Rights and Freedoms, and are not deficient in terms of drafting. The focus of the Committee's review is on legality and drafting. The SIA provides no basis for review of the adequacy of RIA and related procedural requirements as occurs, for example, in a number of Australian States. The Committee can recommend to Parliament that it disallow regulations that fail to meet its review criteria.[43] The Committee may also recommend changes to the government and may report to the Parliament on problems that it has discovered with regulations without recommending disallowance.

The Office of the Auditor General[44] conducts independent audits and examinations that provide information, advice and assurance to Parliament. The *Auditor General Act* and the *Financial Administration Act* are the enabling legislation for the functions of the office. The role of the office is to promote accountability and best practices in government operations. It, thereby, plays an important review role in assessing the effectiveness of selected regulation in meeting the government's stated policy objectives, and reports to Parliament.

The general performance of this structure can be considered in regard to three broad functions; management of the regulatory process, provision of advice and support to regulators and enforcement of the requirements of the regulatory policy.

Managing the process. Performance in this area is very strong, due to a widely understood and clearly specified regulation-making process. Contributing substantially to this outcome may have been the establishment of the Regulatory Affairs and Orders in Council Secretariat in 1998, which consolidated responsibility for regulatory affairs and support to SCC within PCO.

Advice and support. The combination of extensive written guidance material and access to expert assistance, means that the Canadian system scores highly in this regard. Recent innovations such as the establishment of a new internet- based advice source being developed by RAOICS and the development of a new project on "Instrument Choice" indicate that active efforts are still being undertaken in this area. It should be noted, however, that the recent review of RIA included a recommendation that the PCO should work more closely with regulators from the early stages of the development of major regulations to ensure that all information required to meet government guidelines is developed and incorporated in the RIAs. The implicit conclusion that such efforts should be enhanced could potentially be seen as a result of efforts during the late 1990s to reorient the policy balance and return a greater degree of responsibility for compliance with the regulatory policy to regulators. The recommendation that innovative methods to strengthen linkages between regulators to share best practices and advice on technical issues, made in the same review, provides a potential means of enhancing outcomes within the framework of a more "decentralised" policy.

Enforcement. A central pillar of a regulatory policy is the concept of an independent body assessing the non-legalistic quality of the existing and new regulation and providing incentives to departments to comply with the assessment criteria. The regulatory challenge function centres on the contestability by the oversight body of the technical quality of RIA and regulatory proposals. For these tasks, the oversight body needs the technical capacities to verify the analysis of impacts and the political power to reduce the risk of being overridden.

For many countries, this is achieved by locating the challenge function at the centre of the government. A further development of the challenge function that may be considered is how to provide even greater objectivity to the regulatory assessment. Assuring a proper distance between the examiners, examinees (*i.e.* the regulators) and political decision-makers is key to achieve this goal. A too close and sustained contact of examiners and regulators due to the advisory function can reduce objectivity. A parallel risk consists of a lack of distance between the technical advice and the political decision to accept or not the regulatory impacts. Because an objective assessment can be very disruptive in terms of regulatory processes, a distinct separation may be required between the examiner and the gatekeeper to the Cabinet.

Canada has in many ways responded to these challenges through its long experience of regulatory institutional building. The focus of the oversight function had, since 1994, tended to move away from a strong challenge – considered to be 'control and command' – towards performance management based on the Regulatory Management Process Standards.[45] This situation was subsequently assessed by the DMCT who found that RPMS could be better complemented with a stronger central challenge function tied to the Special Committee of Council. This prompted a move of the challenge function in 1998 to the centre of government (PCO). This shift of locus definitively strengthened the challenge function providing power and objectivity to its technical assessments. The resulting new Secretariat (RAOICS) provides advice to the Cabinet committee (SCC) and has the mandate to ensure the standards of RIAs. The impacts of these institutional changes are still being realised and a programme of action has been identified through studies commissioned by the RAOICS.

Regulatory quality is not merely an issue of maintaining levels of performance, but of achieving continuous improvement over time. The OECD has generally argued that RIA must be seen as a developing process, in which required standards continue to be raised over time as experience and

expertise accumulate and greater resources become available. The regular assessment and publication of performance data in relation to RIA compliance would not only increase confidence in the achievement of standards and, therefore, RIA's contribution to regulatory quality, it would also tend to encourage improved performance over time. A vigorous challenge function is also considered an effective means of promoting improved RIA quality since departmental standards will be constantly challenged by experts in the RIA challenge function.

It should be noted that the regulatory challenge function focusing on RIAs of proposed regulations should be complemented by a challenge function which would advocate reforms of existing regulations. Often this role is carried out by non-governmental bodies, such as the existing think tanks in Canada working on regulatory issues. In many countries the competition authority with a very target focus on competition and micro-economic efficiencies, has been involved too. For its success, the task needs enough competencies, standing and prestige to compete with ministers and regulators. In Canada, this role was played by the Economic Council of Canada until its disappearance in the 1990s.

2.3. Co-ordination between levels of government

The Canadian constitution confers on the federal Parliament general authority to legislate for the "peace, order and good government" of Canada, other than on matters exclusively assigned to the provincial legislatures. For example, the federal Parliament has legislative authority over direct and indirect taxation, public debt, defence, trade and commerce, external affairs, navigation and shipping, bankruptcy and patent law, criminal law and procedure, citizenship, federal penitentiaries, postal services, unemployment insurance, fisheries, banking, federal courts and the appointment of superior court judges. Areas of provincial jurisdiction include: direct taxation within the province and debt-financing for provincial government initiatives, provincial courts, provincial prisons, education and healthcare, property and civil rights and municipal government. There are a number of important areas of shared jurisdiction, including agriculture and certain aspects of natural resources, where federal law prevails in cases of conflict. In addition, under the constitution, all "residual" powers – that is, those not specifically granted to the provinces – accrue to the federal parliament.

Intergovernmental co-operation is particularly important in the context of a federal country. Co-operation is needed to address issues of regulatory overlap and duplication, as well as issues of internal barriers to trade. In addition, co-operation on regulatory governance policies is essential if reform efforts are to be consistent and mutually reinforcing and the possibility of reforms taken at one level of government being frustrated by the actions of other governments is to be avoided.

Canada has an extensive set of institutional arrangements for managing inter-governmental co-operation between federal and provincial governments. Central to this are the "First Ministers' Meetings", which are called by the Prime Minister as the need arises, rather than according to a set timetable. These meetings constitute a forum for promoting inter-jurisdictional co-operation and a substantial number of inter-governmental agreements have been signed at such meetings, many of which relate to regulatory harmonisation and co-operation. One example is the *Agreement on Internal Trade* (see below).

The First Ministers' Meetings are supplemented by a wide range of Ministerial Councils, whereby federal, provincial and territorial Ministers meet to further inter-governmental co-operation in particular areas. Ministerial Councils have been established in most major policy areas, including labour market, social services, consumer affairs, aquaculture, health, transport and highway safety, and agriculture. In some cases, the federal government is not member of a Ministerial council, as it is the case for education.

Attempts have also been made to harmonise regulatory reform efforts, with the federal government having taken initiatives to assist provincial level reform policies and encourage further progress. For example, in 1996, the Treasury Board Secretariat published "Managing Regulation in Canada: Regulatory Reform and Regulatory Process", which summarised the reform programmes and regulatory processes of each provincial government. The document indicated that many provinces had made little progress on regulatory reform and had, in some cases, only rudimentary reform policies in place. Since that time, several of the Provinces and Territories have made considerable efforts to reform their regulatory processes. However, consultative meetings of federal, provincial and territorial governments to discuss regulatory policy have been rare until recently. Lately informal meetings of regulatory policy authorities including RAOICS (the latest was in January 2001) have been organised. This would appear to be a potentially fruitful avenue for strengthening inter-governmental co-ordination efforts and improving progress in regulatory harmonisations.

Regulatory duplication and overlap. The reduction of duplication and overlap between federal and provincial regulation has also been a theme of regulatory reform in Canada since its early days. In 1986, the *Guiding Principles* of regulation promised that the government would co-operate more with the provinces to address the "overall regulatory burden" by eliminating "wasteful duplication." See Table 3 for a list of the regulatory powers of the different levels of government. Provincial consultation was added as one element of the RIAs and intergovernmental co-ordination was pursued via meetings of the First Ministers of Canada and the relevant Ministerial Councils. Agreements were signed in a wide range of areas, including agriculture, environment, housing, and job training.

Progress was initially slow, with a 1991 survey of businesses finding that duplication was their single greatest regulatory problem.[46] The same year, *The Economist* cited "a huge duplication of activities" between federal and provincial governments as a source of inefficiencies and costs.[47] The issue remained on the agenda, with a further commitment being made in 1993 as part of the *Prosperity Agenda* and successive editions of the Regulatory Policy continuing to stress intergovernmental co-ordination. Recent federal/provincial/territorial agreements such as in the environmental and food[48] area have made considerable progress.[49] However, recent evidence suggests that substantial problems remain. For example, a recent Parliamentary Committee report from British Columbia documents the failures of a federal/provincial agreement on control of effluent from pulp and paper mills that was first signed in 1994, expired in 1996 and had not been renegotiated successfully by the time of writing of the report in late 2000.[50] While these administrative agreements have not been successfully renegotiated, federal pulp and paper regulations are still in place. According to the report, the original harmonisation agreement actually resulted in less effective government monitoring and enforcement. More generally, a 2000 report concluded that "More work is also needed to promote co-operation and collaboration between levels of government with jurisdiction over the same industries…particularly in the area of food, health products and chemicals. The business community in particular continues to argue that overlapping government regulations competitively disadvantage it."[51]

Internal barriers to trade. Local regulations are often important barriers to the free access of products, services, investments and workers. Despite some progresses in the past decade, important inter-provincial barriers to trade still exist in Canada. These include local siting requirements, which have created more production facilities than are needed, restrictions against commerce and advertising across provincial borders and varying product standards. Apart from some exceptions, including engineers and doctors, professional accreditations were, for a long time, not recognised across provincial boundaries, restricting labour mobility. Restrictions on service and construction procurement prevent competition between companies in different provinces, and even different cities. Business groups complain that these barriers have splintered the Canadian market and kept businesses small, hindering investment and competitiveness.

Unsurprisingly, the Regulatory Policy has recognised the importance of co-ordination between levels of government since its initial adoption in 1986. Though unrelated to the Regulatory Policy, in that year, a Committee of Ministers on Internal Trade, representing both the federal and provincial governments, was created to open Canada's internal market. However, in five years, the committee made only modest gains, partially easing restrictions only in procurement and liquor sales and making some progress in consultations in other areas.

By 1991, the free trade agreement with the United States had brought a new urgency to the issue. The example of the EC Single Market Programme was available and there were proposals for a common-market clause in the Canadian constitution. In May 1992, ministers responsible for inter-provincial trade agreed to a moratorium on the creation of new trade barriers, and to eliminate all remaining barriers by 1995 to ensure "the free flow of people, goods, services and capital" across Canada – a commitment that echoes the stated objectives of the EC Single Market Programme. This commitment, not surprisingly proved unachievable, given the short timeline and the quantity and variety of barriers to be eliminated. This led, in turn, to the adoption of the *Agreement on Internal Trade*, in 1995, as a more formalised and detailed programme for action on internal barriers to trade.

The AIT is the primary mechanism governing actions to remove barriers to internal trade, investment and mobility. This Agreement provides:

- general rules which prevent governments from erecting new trade barriers and which require the reduction of existing ones in areas covered under the Agreement;

- specific obligations in 10 economic sectors — such as government purchasing, labour mobility and investment — which cover a significant amount of economic activity in Canada;

- for the streamlining and harmonisation of regulations and standards (*e.g.* transportation, consumer protection);

- a formal dispute resolution mechanism that is accessible to individuals and businesses as well as governments; and

- commitments to further liberalise trade through continuing negotiations and specified work programs.

The key areas of progress with regard to regulatory standards in the six years since the signing of the AIT are as follows:

- as of July 1, 2001, AIT labour mobility obligations had either been met of were "well on the way" to being met in 42 of the 51 regulated occupations, covering 97% of workers in the regulated occupations. For the remaining 9 occupations, regulatory bodies have major issues yet to resolve before they meet their obligations;

- consumer-related measures and standards: including the signing of a co-operative enforcement agreement to enforce consumer-related legislation and regulations;

- no province can require an investor of any province to be resident in its territory as a condition for the establishment of acquisition of an enterprise;

- residency requirements as a condition of access to employment opportunities, licensing certification or registration relating to a worker's occupation or eligibility for a worker's occupation are prohibited;

- transportation: parties have harmonised a number of requirements relating to truck safety, weight and dimensions;

- environment: parties have signed the Harmonization Accord, and work is underway to develop Canada-wide standards in six areas: particulate matter; ozone; benzene; petroleum hydrocarbons in soil; dioxins and furans; and mercury;

- as of October 1, 1997, certain technical barriers with policy implications relating to agricultural and food products (*e.g.* fluid milk standards, dairy blends, etc) were brought under the AIT; and

- the implementation of a dispute settlement mechanism (by July 2001, 122 disputes had been initiated under the AIT).[52]

The federal enforcement and compliance activities on health and safety regulations pertaining to foods have been consolidated within the Canadian Food Inspection Agency (CFIA) since 1997, and the latter is encouraging a co-operative approach with the provinces, which have significant responsibilities for these issues. A new regulatory approach is being rolled out for food testing that monitors critical points in the food production process. Multi-stakeholder groups (including government and industry representatives) discuss the best way to address problems with toxins.

Table 3. **Regulatory powers across levels of government**[1]

Economic and social sectors	Federal	Provincial
Telecommunications	✓	-
Electricity	✓	✓
Gas	-	✓
Financial services	✓	✓
Postal services	✓	-
Inter-city buses	-	✓
Inter-Provincial	✓	-
Trucking	✓	✓
Rail transport	✓	✓
Air transport	✓	-
Agriculture	✓	✓
Water use	✓	✓
Regulated professions or trades	✓	✓
Infrastructure investment	✓	✓
Pharmaceuticals	✓	✓
Health care	✓	✓
Road safety	✓	✓
Aviation safety	✓	-
Water treatment	✓	✓
Environment	✓	✓
Consumer protection and privacy	✓	✓

Economic and social sectors	Federal	Provincial
Immigration selection systems	✓	-
Gambling	✓	✓
Education	✓	✓
Training	✓	✓
Care of the Aged	✓	✓
Unemployment and Social Security	✓	-
Product Safety and Labelling	✓	✓
Occupational Health and Safety	✓	✓

1. Canadian municipalities are not constitutionally recognised. They are not viewed as governments in their own right, but are considered a provincial responsibility. As such, this level of government is not vested with specific regulatory powers. In practice, however, regulatory powers are delegated to Canadian municipalities through provincial legislation in a variety of policy areas. Regulatory powers exercised by municipalities vary from province to province. Hence, they are not included in this table.

Source: Privy Council Office, Government of Canada.

Even with these changes, under the AIT, and a further nine years previously devoted to inter-provincial trade barriers, a single market is not fully effective in Canada.[53] According to some commentators, Canada has had more success in removing the barriers to its external north-south trade with the United States than to its own internal east-west trade.[54] Examples of remaining barriers include several farm sectors in which trade remains severely circumscribed, the fact energy and procurement by government entities of a commercial or industrial nature are beyond the scope of the AIT and that no code of conduct on permissible incentives has been reached. The OECD found in 2000 that "progress in fulfilling provisions under the Agreement on Internal Trade is extremely slow (for example compared with Free Trade Agreement/NAFTA)… with little change in the last two years in most areas."[55] However, recent and substantial progresses include reductions to internal trade barriers, labour mobility, consumer-related measures and standards, transportation and the environment, (though issues remain, such as residency requirements which have not been removed). [56]

This appears to be an area to which substantial priority should be given. Areas for Canada to consider in order to progress is to use regulation impact analysis for proposals for regulatory harmonisation and other regulatory agreements in order to highlight the issues more clearly, namely to identify the costs and benefits of freeing versus inhibiting trade and who bears these costs or would reap the benefits. Canada could explore the approach used in Australia where RIA is prepared for national standards and other regulatory instruments, involving inter-jurisdictional agreement.[57] Another issue for consideration is whether the fragmented, sector specific nature of the AIT – notwithstanding its inclusion of some general rules and principles – may be inconsistent with the need to make substantial progress in reducing barriers to trade over a wide area of the economy.[58] It may be appropriate to consider the merits of the approach taken in the Mutual Recognition Agreements concluded in Australia in 1994 and implemented in legislation by all State and Territory legislatures in 1995. The Australian approach allowed the free sale across Australia of virtually all products and full mobility for virtually all occupational groups through a single piece of legislation, with issues of regulatory harmonisation being addressed through Ministerial Council structures after the adoption of the mutual recognition principle, rather than before, as appears to have occurred in Canada. Consideration of some strategies to implement the European Single Market may also be adaptable to the Canadian case.[59]

3. ADMINISTRATIVE CAPACITIES FOR MAKING NEW REGULATION OF HIGH QUALITY

3.1. Administrative transparency, consistency and predictability

Transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests. Just as important is the role of transparency in reinforcing the legitimacy and fairness of regulatory processes. Transparency is a multi-faceted concept that is not easy to change in practice. It involves a wide range of practices, including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publication, codification another ways of making rules easy to find and understand; and implementation and appeals processes that are predictable and consistent. The Canadian regulatory system is one of the most transparent among OECD Members, but some aspects of consultation merit attention.

Transparent and consistent processes for making and implementing legislation are fundamental to ensuring confidence in the legislative process and to safeguarding opportunities to participate in the formulation of laws. In the majority of OECD countries, such procedures are established in legislation.[60] These specify matters such as requirements for transparency and consultation (within and/or outside government), publication, scrutiny by legislatures, and due process for appeals. Decrees or other policy statements can also supplement such laws.

Canada has a general law, the *Statutory Instruments Act* (SIA) (originally enacted in 1971 and subsequently revised) which provides for the examination, publication and scrutiny of a wide range of regulations and other statutory instruments. However, the SIA does not include requirements with regard to either consultation processes or regulatory impact analysis. These matters are addressed through government policy documents, such as the Regulatory Policy and other Cabinet Directives.[61] There are general laws that impose similar obligations in relation to primary legislation. The *Publication of Statutes Act* provides for the Clerk of the Parliaments to keep the original copies of all statutes and to issue certified copies. It also requires publication of statutes in the *Canada Gazette* and their distribution. The *Department of Justice Act*, s. 4.1, requires all bills tabled in the House of Commons to be examined by the Deputy Minister of Justice to determine whether they are inconsistent with the *Canadian Charter of Rights and Freedoms*. The *Cabinet Directive on Law-Making* as well as the *Good Governance Guidelines* set out a range of procedural requirements in relation to the development of primary legislation, including a general obligation to consult with those who may be affected.

Moreover, the Internet has become a central tool used in the law-making process. The Government's consistent efforts to use the Internet to disseminate the Regulatory Policy and supporting materials makes Canada a leader on this respect. In 2001, the PCO developed an interactive, web-based learning and information tool under the *Law-Making and Policy Project*, which will contribute significantly to improving the provision of training and guidance on regulatory policy related topics. The Learning Tool provides officials with on-line, on-demand access to policies, guidance, and best practices in undertaking appropriate analyses to support the making of informed decisions on policy, legislative and regulatory proposals. This tool's development is on-going with a broader objective of providing similar guidance with respect to the policy-making and statute development processes. The tool will integrate these three processes into a continuum to better illustrate the dependencies between policy, statute, and subordinate legislation.

In sum there is high confidence in Canada in the degree of openness and predictability of the law-making process and in the opportunities for participation by affected groups.

3.1.2. Transparency as dialogue with affected groups: use of public consultation

Consultation is a central element of the 1995 *Recommendation of the OECD Council on Improving the Quality of Government Regulation.* A well-designed and implemented consultation programme can contribute to higher-quality regulations by providing a cost-effective source of data on which to base decision-making, assisting in the identification of effective alternatives, improving compliance and enabling faster regulatory responses to changing conditions. Just as importantly, consultation is a key governance value, improving the credibility and legitimacy of government action and increasing the acceptance of the resulting regulations by those affected. Studies of consultation practices across OECD countries have stated that best practice consultation programmes include the following characteristics:[62]

- capable of being used in very different circumstances;
- integrated into the decision-making processes in order to improve regulatory quality;
- makes information available early, timed to fit in with the regulatory process;
- makes relevant information accessible, at reasonable cost;
- broadly based and balanced, structuring a continuing dialogue with a wide range of interests;
- processes which are transparent;
- regularly evaluates current consultative approaches to improve them and raise cost-effectiveness; and
- the habit of consultation is embedded into the administrative culture of regulatory organisations.

Public consultation has been central to the government's regulatory policy since 1986 and perhaps represents its most successful reform. Prior to 1986, Canada did not have standard, government-wide requirements for public consultation. Consultation was either *ad hoc*, routine through long-standing formal structures, or did not take place at all.

The 1986 reforms therefore represented a major departure from previous practice. The newly adopted consultation requirements comprised:

- adoption of the Citizen's Code of Regulatory Fairness, which included a commitment that citizens should have the opportunity for consultation and participation in the federal regulatory process and be provided with adequate early notice of possible regulatory initiatives;
- a systematic and standardised "notice-and-comment" process – called pre-publication – requiring that draft regulations be published for at least 30 days, together with the RIA, in the Canada Gazette;
- a requirement that a RIA, which includes a section documenting the consultation conducted, accompany all proposed regulations going to SCC for approval.

Consultation on subordinate regulations is closely integrated with the RIA process, although consultation is expected to commence well before the drafting of the RIAs. A range of procedures is used in these earlier consultation phases. These include publication in the Gazette of a "Notice of Intent" to regulate that invites participation or requests data, comments or other information that would help define issues relating to the regulation. As well, regulating departments use discussion papers, written submissions, informal discussions, *ad hoc* meetings, departmental Web sites to seek input and disseminate information, workshops, conferences, seminars, using regional offices to collect and channel opinion, newsletters, consultative or on-going multi-stakeholder advisory committees.[63] While centrally provided guidance on the design of consultative mechanisms is made available, departments retain a high degree of discretion as to the mechanisms used in individual cases.

The minimum procedural steps involved are:

- Publication of the intention to regulate in the department's annual Plans and Priorities Report (previously the Federal Regulatory Plan);

- Initial consultation with stakeholders, to be documented in the RIAs in relation to the draft regulation;

- After review by SCC, the RIAs to be "pre-published" in the Canada Gazette, Part I with comments received for a minimum of thirty days;

- The RIAs and regulation is submitted to SCC for final approval, reflecting comments received and revisions made resulting from prepublication. The revised RIAs should fully reflect the background and rationale for the change. Once approved by Governor in Council, the regulations and RIAs are published in Canada Gazette, Part II.

The mechanisms of consultation on subordinate regulations in Canada ranks as outstanding against OECD criteria. It flexibly employs a wide range of consultation tools, typically commences early in the regulation-making process and contains a number of iterations during the regulatory process that serve different and complementary ends. The high degree of integration of consultation and RIA also represents best practice, helping to inform stakeholders and empower them to contribute more effectively, while also serving to improve the quality and quantity of data available for analytical purposes. Thus, the integration of these two tools helps to maximise the effectiveness of each.

Despite the very high standard in the design of the processes of consultation, a recent "roundtable" of stakeholders[64] concluded that there were substantial problems with its implementation. Specific issues identified included the question of whether there was sufficient access to consultation opportunities, the weighting of consultation comments from different parties and the perceived limited degree of impact of consultation comments on actual policy outcomes. Others, however, have reached different conclusions on at least some of these issues. For example, the recent review of the RIA system, arguing that the system had had substantial impacts, stated that "the effectiveness of consultation on decision-making was indicated by the number of times that changes were made in a regulatory proposal as it was being developed due to consultation."[65] Notably, the current consultation guidelines for managers date from 1992. The adoption of a revised document provides an opportunity to address these dissatisfactions with the use of consultation in practice. PCO's current work on new guidelines is targeted at reinforcing basic, effective consultation principles and practices, while identifying new and emerging techniques and tools, such as online consultation. The guidelines will include an annex item on evaluation, outlining an approach that will be closely aligned with the OECD evaluation framework to be released in the coming year. If approved, they will apply to institutions across the Government of Canada and offer a way to raise the quality of standards in this vital area.

It can also be noted that the combination of consultation opportunities and the information provided in RIAs was originally expected by the framers of the Regulatory Policy to result in a "public challenge" function emerging with, for example, counter-analyses to the RIAs being provided. That this has not happened may be due to the success of the wide-ranging consultation that does occur, with most parties regarding themselves as "partners" in the regulatory development process.[66] Alternatively, some research on consultation has suggested that a degree of disillusion exists due to a perception that views expressed are not sufficiently taken into account.[67] This factor, together with the rapid increase in the number of requests for inputs as part of consultation processes has, arguably, led to a degree of "consultation fatigue".

The Deputy Ministers' Challenge Team proposed some amendments to the process by which consultation is conducted, noting that increasingly it is used before draft bills go to Cabinet. Their specific suggestions indicate areas where further improvements could be made, including:

- more focussed consultations, especially at the outset of the policy-development process in order to help determine the instrument choice or the administrative vehicle for implementation;

- publicise the reports departments make of the results of consultation so that all participants have a formal record of the positions and issues; and

- take a project management approach to consultations so that stakeholders are given clear objectives, predictability, dependability and timeliness of consultations.

These proposals appear to be worthy of consideration as means of further improving an already impressive performance on consultation.

In conclusion, the challenge for Canada, as with all open societies, is on the one hand to provide avenues for all interested parties to participate in the policy design and on the other not to overburden the system with duplication and irrelevancy, or permit well organised interest groups to capture the debate and finally the outcome. Another challenge is to communicate the central objective of a public consultation, that is, while all views will be heard, the final decision must remain with elected representatives. In other words, consultation is primarily designed to identify good ideas and forewarn departments of potential adverse side-effects, rather than to take a vote for and against particular proposals. To meet the challenge, Canada might explore new ways and requirements providing greater transparency about who will bear the costs and benefits of any proposal; the departments justifying in detail the reasons for their decisions, and explaining the weights given to the consulted interests in the particular draft regulation.

3.1.3. Transparency in implementation of regulation: Communication

Canada employs a variety of tools to ensure that laws are effectively communicated to affected parties. In common with most OECD countries, there is a basic requirement for all laws to be published in the official *Canada Gazette*. In addition, substantial use has been made of the internet as a tool for providing better access to laws and law-making. The text of most legislation and subordinate regulations is available via the internet, while the parliament's Web site also provides information on the status of bills and the deliberations of parliamentary committees.

In addition, regulating departments are required to develop a comprehensive plan to communicate regulatory changes to those affected. This plan can include the use of media notices, special publications, statements or speeches by Ministers or government officials, public information lines and Internet postings.

The government also emphasises the use of plain language in legal instruments. Tools have been developed to assist departments in drafting clear language regulations. In March 1998, the Treasury Board of Canada Secretariat and the Department of Justice published a document, *Developing Regulations: The Basic Steps and Plain Language Approach*. For legislation, the Justice Department established a Plain Language Committee and later, the English Legislative Language Committee. These committees have developed conventions and guidelines to improve drafting. The Groupe jurilinguistique français has also worked over the past 20 years to improve the quality of the French version of legislation. Some departments also make available plain language versions of proposed legislative changes on line.

Finally, in order to ensure that international trading partners have the opportunity to be aware of proposed regulatory changes in Canada which may affect them, the Regulatory Policy allows for an extended pre-publication period to coincide with the provisions of various international trade agreements. The Standards Council of Canada is under contract with the Department of Foreign Affairs, International and Trade to act as Canada's official enquiry point.

3.1.4. Transparency in effectiveness of regulation: compliance and enforcement

Compliance and enforcement are fundamental determinants of the ability of regulations to achieve their underlying objectives. A low level of compliance, whether due to problems with regulatory design or due to enforcement problems can render regulatory structures largely ineffective. Despite this, few OECD countries have, to date, adopted explicit and detailed compliance strategies or policies. A comprehensive approach to compliance and enforcement must consider the issues of promoting voluntary compliance, ensuring adequate detection and appropriate sanctions.

Canada, like the Netherlands, is among the few countries to have adopted explicit compliance policies as part of its regulatory governance efforts. The 1992 publication of the guidebook *A Strategic Approach to Developing Compliance Policies*,[68] considers a wide range of program design, monitoring and enforcement issues. In addition, it has integrated its compliance efforts with the RIA and consultation processes, by requiring compliance to be one of the six broad issues addressed in every RIAs. This means that implementation and compliance strategies are required to be explicitly and publicly discussed as part of the preparation of a regulatory proposal.

The Department of Justice has also supplemented the compliance guidebook with the 1998 publication *Designing Regulatory Laws that Work.*[69] This document contains practical advice on enforcement and compliance options, as alternatives to criminal law-based options. The manual identifies enforcement alternatives to the traditional "command-and-control" approaches to regulation, and provides strategic advice on the appropriateness of alternative approaches to a range of regulatory situations and provides legislative precedents for each option.

A necessary aspect of a compliance and enforcement policy is the assessment of performance. This is an area in which Canada has recently made substantial innovations, principally via the *Improved Reporting to Parliament Project* — the first phase of which began in 1994. On a pilot basis, in 1997, Part III of the Estimates was split into two reports: *Departmental Performance Reports* tabled in the fall and *Reports on Plans and Priorities* in the spring. The intention is to demonstrate the links between policies and programs (including regulatory initiatives) and their actual outcomes. The specific processes of performance reporting are continuing to be refined, with the Treasury Board Secretariat working with departments to improve the process and the relevance of what is reported.[70]

In addition to the 83 individual departmental and agency performance reports, the President of the Treasury Board presents annually to Parliament "Canada's Performance" report. "Canada's Performance" provides a societal context for situating departmental results in relation to the broad, quality of life themes in the areas of health, the economy, the environment and Canadian communities.

Secondly, the Auditor-General's report includes a substantial element of performance reporting: reporting to Parliament on the effectiveness of government policy, namely whether or not stated objectives are being achieved – though not on the choice of such policy. For example, in December 2000 the Auditor-General reported on federal health and safety regulatory programmes, judging them against the government's overall objective in this area: "to proactively protect Canadians from risks to health and safety — to catch the problem before it happens, and if it happens, to minimise the consequences."[71] The Auditor General assessed the major federal health and safety programmes administered by the Canadian Food Inspection Agency, Health Canada, Environment Canada, Transport Canada, the Canadian Nuclear Safety Commission and the National Energy Board, covering about 85 Acts and 250 regulations.

Overall, Canada performs very well in these areas. It is one of few OECD countries with a comprehensive compliance and enforcement strategy, which is well integrated with other relevant regulatory policy tools, notably RIA and consultation. It has recently adopted significant innovations in performance reporting which are continuing to be refined and have the potential to make important contributions to regulatory management in a dynamic context in the future.

3.2. Choice of policy instruments: regulation and alternatives

A core administrative capacity for good regulation is the ability to choose the most efficient and effective policy tool, whether regulatory or non-regulatory. In the OECD area the range of policy tools and their use are expanding as experimentation occurs, learning is diffused, and understanding of the applicability of market mechanisms increases. At the same time, administrators, rule-makers and regulators often face risks in using new tools. A leading role — supportive of innovation and policy learning — must be taken by reform authorities if alternatives to traditional regulations are to make serious headway into the policy system.

Canadian regulatory policy has required an explicit assessment of alternatives to be conducted since 1986, with agencies being required to demonstrate that proposed regulations are the best of all potential regulatory and non-regulatory alternatives to reach the desired goal. The inclusion of a discussion of alternatives and the costs and benefits of each in the RIAs means that the public has the opportunity to debate the merits of the identified options as part of the consultation process. In addition, the government has supported regulators in seeking and weighing alternatives by publishing guidelines including a guide to Regulatory alternatives in 1993, which was developed by a Best Practice Committee with industry, academic and departmental representation.

Subsequently, similar requirements were applied to primary legislation, via the *Cabinet Directive on Law-Making* (March 1999), which directed policy analysts to consider alternatives to legislation as part of the development process for proposed legislation. This emphasis on finding the right policy tool was taken a step further, with the release of the *Good Governance Guidelines* in 1999. The Department of Justice in collaboration with PCO and TBS is developing a framework for challenging the choice of instruments at the stage of developing proposals for primary law. The framework will also reinforce the challenge function in the RIA in relation to subordinate law. The Deputy Minister's Challenge Team is also examining innovative approaches to government intervention through a series of case studies intended to add to the range of guides already available. This work is intended to result in a better understanding of the array of instruments that can be used to effect public policy objectives. The results of this strong promotion of the use of alternatives by the centre of government has been a substantial degree of innovation in the

design and use of alternative policy instruments, both in specific terms and via attempts to design processes to favour the use of alternatives. A substantial example of the latter was the, ultimately unsuccessful, attempt to adopt a *Regulatory Efficiency Act* (see Box 4)**.**

Substantial work has also been undertaken to promote the use **of voluntary codes.** This was initiated with a symposium held in 1996. Using the information gained there, a guide and a web-page provided by Industry Canada is devoted to providing regulators with relevant information. The page includes definitions of a voluntary code; an evaluative framework; studies from the symposium; and a list of Canadian and international Voluntary Code initiatives.

One of the most substantial Canadian uses of voluntary codes pre-dates these initiatives. This is the chemical industry's *Responsible Care* programme. This instrument was first proposed by industry: the Canadian Chemical Producers' Association established Responsible Care in 1985 to address public concerns about the manufacture, distribution and use of chemicals following the chemical spill in Bhopal, India in December 1984. Under this scheme, the CEO or most senior executive of every member of CCPA must commit to implementing the guiding principles and codes of practice of Responsible Care within three years of joining the association and to be publicly verified as having done so. As well as these requirements, there is CEO networking via leadership groups, public input through a national advisory panel, and mutual assistance through sharing successful practices.

Responsible Care, as a voluntary scheme, functions as a comprehensive approach to managing the production and use of chemicals throughout their life-cycle and, as such, arguably reaches further than would be possible through simple reliance on regulatory controls. The fact that chemical producers see the adoption of its disciplines as ultimately serving their interests as well as those of the public is indicated by Responsible Care's adoption in over 40 countries. It therefore represents a major Canadian contribution to the world-wide use of voluntary instruments.

A variant of the voluntary code concept currently being developed by the Department of Environment is that of voluntary agreements, in which companies voluntarily enter into environmental performance agreements, as part of an "environmental leaders" programme, in which the best performers are recognised publicly. The proposals include the incorporation of very specific principles for the scheme and the addressing of questions of accountability through mechanisms such as third party audits.

As in many OECD countries, the area of environmental regulation is one of the most active in Canada in terms of regulatory alternatives. Other initiatives being taken in this area include a domestic trading system, currently being implemented for ozone depleting substances, which is being developed in conjunction with the Ministry of Finance. At the provincial level, Quebec has established a levy and credit system for per-chloro-ethylene (PERC) to provide financial incentives for dry cleaners to upgrade their technology. Under the scheme, PERC was taxed in order to increase its price, while the revenue was made available as a subsidy to dry cleaners who adopted improved technology.

Box 4. **The Regulatory Efficiency Bill (C-62, 1994)**

The Regulatory Efficiency Bill was introduced to Parliament by the President of the Treasury Board in December 1994. It would have allowed the Governor-in-Council, on the advice of the President of the Treasury Board and the Minister responsible for the relevant regulations, to declare that certain regulations were subject to "compliance plans" and that a Minister or other person or body would be the regulatory authority for approving proposed "compliance plans".

These "compliance plans" would constitute alternative means of complying with the objectives of the regulations and could be approved provided the "protection of health, safety, the environment or other regulatory objectives [were] met equally well or better" than would be the case if the regulations were followed. Under the REA, regulatees would have been able to submit compliance plans outlining how they would meet the regulatory objectives using alternative methods to the ones stipulated in the regulation. Approval of compliance plans was to be subject to evaluation requirements and to the designated regulatory authority undertaking consultation with those that would be directly affected by the plan. Once approved, compliance plans would substitute for the regulation and the relevant penalties applicable under the regulations would apply in respect of breaches of the compliance plans.

Proponents of the bill argued that it would address some of the limitations of traditional command-and-control regulation by increasing the flexibility and responsiveness of the regulatory system to new developments, such as new technology, and thus lower the costs of compliance. In this regard, it can be seen as having conceptual similarities to the use of performance based regulation, allowing regulated groups to adopt a "proactive" approach by proposing their own means of meeting agreed regulatory goals, thus potentially adding significantly to policy innovation.

The Bill was ultimately allowed to lapse after substantial concerns had been expressed by a range of stakeholders. In the first instance, the Parliamentary Standing Joint Committee for the Scrutiny of Regulations raised a number of issues of constitutional and legal principle. It argued that its effect would be to grant the Executive the power to grant dispensations from the application of subordinate regulations, in contravention of the principle that it was the role of Parliament to determine people's obligations under the law. The Committee also argued that the Bill offended against the principle of equality before the law, as it put forward a system in which there could eventually be "as many different rules as there were persons initially subject to a particular regulation". As well, concerns were raised about the effect on government accountability, since it was arguable that there would be no Minister accountable for the operation of alternative compliance mechanisms. Some commentators have also suggested that there were concerns that the proposal would increase uncertainty as to whether regulatory goals were being met.[72]

Two Australian States (Victoria and New South Wales) subsequently undertook considerable work in developing similar proposals. A Victorian Parliamentary Committee studied the history of the Canadian Bill in the context of reporting to the Victorian Parliament on a similar proposal. It noted that the Canadian Parliamentary Committee had failed to suggest amendments to the Bill to address any concerns, instead condemning the concept outright. It concluded that "the main reason for [the defeat of the Bill] was that it was seen to be bad politics, in that it would be seen as the Liberal Party pandering to its business allies". Finally, despite a positive 1997 report to the Victorian Parliament from the Committee, highlighting in particular means by which the objections to the Canadian Bill could be met, and a similarly positive response from government, no Regulatory Efficiency Bill has, to date, been introduced in that jurisdiction.

Source: Law Reform Committee, Parliament of Victoria. *Regulatory Efficiency Legislation: Report*, October 1997

In sum, Canadian regulatory policy actively encourages regulators to consider a wide range of regulatory alternatives, while there is evidence of a range of alternatives being adopted in practice, including the industry derived Responsible Care scheme that has become an international "best practice" standard. As in all OECD countries, challenges remain in terms of encouraging greater take-up of alternative policy tools, and particularly market-based instruments. The Deputy Ministers' Challenge Team's *Report on Law-Making and Governance* drafted in 1998 highlighted a number of these challenges and indicated that this will be an area of further policy attention. In response, the government has recently adopted a framework for action based on three tracks of work: process, capacity and research. The process track is looking at developing a challenge function in departments and central agencies to ensure better

consideration of the range of appropriate instruments and their selection. The capacity building track includes training and dissemination of information on instrument choice to ensure capacity in the legal, policy and operational groups to make informed choices. Research includes creating an inventory of Canadian and international good practices, developing a better understanding of incentives for selecting particular instruments as well as the costs and benefits relating to these instruments.

3.3. Understanding regulatory effects: the use of Regulatory Impact Analysis (RIA)

The 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* emphasised the role of RIA in systematically ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments "integrate regulatory impact analysis into the development review and reform of regulations". A list of RIA best practices has been suggested in *Regulatory Impact Analysis: Best Practices in OECD Countries*.[73] This report provides a framework for the following description and assessment of RIA practice in Canada.

RIA is part process and part analytical tool. Its impact on regulatory quality derives from both of these elements: the process of systematically considering policy choice in a comparative context and seeking to identify all of the important impacts of each policy option is itself a powerful means of influencing outcomes. At the same time, the quality of the assessment methodology can be a crucial determinant of the ability of RIA to lead analysts toward the welfare-maximising policy option. The Canadian system includes substantial requirements in respect of both procedural and analytical aspects of RIA.

The current RIA requirements in Canada are the product of almost twenty five years experience, with the original requirements for a "Socio-Economic Impact Analysis" having been implemented in 1978, making Canada a RIA pioneer. Apart from a brief period in the 1980s, in which attempts were made to apply RIA disciplines to draft primary legislation, the Canadian requirements have applied exclusively to subordinate regulations. That said, process requirements contained in the *Cabinet Directive on Law-making* and the *Good Governance Guidelines* incorporate a number of elements that form part of a sound RIA system, while being less than completely equivalent.

Within the context of subordinate regulations, the Canadian system has wide coverage, effectively applying to all instruments of a legislative character, as defined in the *Statutory Instruments Act* 1995. The broad elements of the current RIA requirement have been in place since 1986 and were reinforced by the creation of *Regulatory Process Management Standards* in 1995. Procedurally, important elements of the RIAs requirement are the fact that it is closely integrated with the consultation process and that the RIAs is an evolving document, commencing at the time of "pre-publication" of a regulatory proposal, being published again in amended form prior to the adoption of the final regulation and also being sent to Cabinet as a supporting document to inform its decision to adopt the regulation. Analytically, the key requirements of the RIAs are that it contains a justification of the need for government action, makes the case that the regulation is the best alternative, shows that the regulation maximises net social benefits, demonstrates that adequate consultation has been undertaken and shows that an appropriate compliance and enforcement mechanism is in place.[74]

The following discussion measures Canada's RIA practices against the set of RIA best practices identified by the OECD.[75]

Maximise political commitment to RIA. Political commitment to RIA should come from the highest level of government if its ability to affect policy outcomes is to be maximised. Canada rates highly on this criterion. The RIA requirements are reflected in the Regulatory Policy, for which the SCC has specific responsibility. Moreover, final RIAs are, in effect, Cabinet documents and therefore form an integral part of the final process of approval of regulations at the political level. The requirement that Ministers sign RIAs also contributes to political accountability and commitment to the RIA process.

Allocate responsibilities for RIA programme elements carefully. Experiences in OECD countries show no exception to the rule that RIA will fail if left entirely to regulators, but will also fail if it is too centralised. To ensure ownership by the regulator and at the same time establishing quality control and consistency, responsibilities should be shared between regulators and a central control unit. It is worth noting that in the early 1990s TBS experienced an overflow in the process and an important backlog of proposals due to an over-centralised approach, and this was one of the reasons why they changed the implementation policy towards performance-based regulations of regulators.[76] Today, the proponent department is responsible for preparing the RIA, including either conducting the quantitative analysis in-house or contracting it out, and organising the consultation involved in developing a regulation.

The element of central quality control is provided by RAOICS in a number of ways. At the broadest level, it provides advice and assistance to aid departments in developing RIAs, including the publication of an impressive array of guidance documents, as well as a state-of-the-art system of advice available on the internet. RAOICS is also in charge of the 'regulatory challenge' function discussed in Section 2.2. For most individual regulatory submissions, RAOICS assesses individual RIAs to determine whether departments have met the requirements of the Regulatory Policy and whether it is supported by the appropriate standard of analysis.[77] This is critical to ensuring effective Cabinet decision making – SCC needs a completed RIA and a written and confidential comments on the RIAs provided by RAOICS before considering and deciding on the proposals that Ministers submit to the Governor in Council for approval. Under the regulatory management system, the current scheme gives RAOICS the authority to challenge departments on the analysis they undertake and the information they provide. RAOICS provides feedback on the RIAs to regulatory departments and, where appropriate, requests that they be revised. The process of assessing and commenting on RIAs is based on an informal and continuous co-ordination between the proponent department and RAOICS, up until the point where departments formally submit proposals, and where they can be returned for improvement. Given this *modus operandi*, and the fact that the Minister signs the RIA to attest to the adequacy of the analysis before its lodgement, it is perhaps unsurprising that the Secretariat's power to refuse to allow a proposal to go to Cabinet on the basis of inadequate analysis is only used occasionally. On the other hand, Canada measures the success of its system not only by how many RIA are rejected but also by improved quality, the degree to which RIA is an integrated part of the policy process and the capacity of regulators to meet RIA requirements. They stress the need for improved training, guidance and sharing of best practices. Contrary to other more centralised systems, Canada has not developed a reporting monitoring system on the quality of RIAs themselves.

From a general perspective, the process has resulted in better regulations and a change of culture of regulators. Available indications suggest that the quality of RIAs has not declined since the adoption of the more "decentralised" approach and the location of the oversight body at the centre of government. Few countries have had sufficient experience with regulatory quality management to provide a base of evidence as to what works best over time. Moreover, the impacts of the last move of the regulatory policy's responsibilities to RAOICS at the centre of the government, which was a shift to a more centralised approach in the regulatory management system, may not yet be totally visible. It may be that the balance can not remain static and that periodically it needs to shift toward and then away from centralised management in order continually influence the capacity for high quality regulations throughout the government. However, it seems that room for improvement exists. Discussions with staff of the Auditor-General's Office indicate they continue to have concerns that RIAs are not being adequately prepared and

that key information is not being disclosed.[78] The previously quoted study of the RIA system recently proposed 19 recommendations to improve the tool.[79] Additional concerns focus on the variability of the quality of individual RIAs and their compliance across departments and within each one of them, better communication of the results and targeted improvement of the quantification analysis.[80] On the latter aspect, it is nearly impossible to monitor the aggregated expected benefits and costs through time and over regulatory areas.

Train the regulators. Regulators must have the skills to produce high quality RIAs. The Canadian system rates highly on this criterion. The *Regulatory Process Management Standards* require that regulatory authorities ensure that their personnel are competent to carry out the regulatory process. To assist them in meeting this requirement a wide range of courses, manuals, and learning tools are provided. Many of these are available electronically, via the Web site of the Privy Council Office. Subject matter covered in guidance documents includes: assessing regulatory alternatives; undertaking cost-benefit analysis; composing RIAs; developing compliance policies; managing regulatory programmes; international regulatory collaboration; the federal regulatory process; and enlightened practices in regulatory programmes. Regulatory authorities are encouraged to take advantage of training courses on regulation-making offered by Consulting and Audit Canada (CAC). Recently there have been courses on: Benefit Cost Analysis; Assessing Regulatory Alternatives; Consultation;[81] and on the Legislative Tool Box.[82] Departments themselves also offer extensive in-house training to their staff, tailored to the specific regulatory programmes they manage.

In August 2001, The PCO released an interactive, web-based learning and information tool under the *Law-Making and Policy Project*. It provides officials with on-line, on-demand access to policies, guidance, and best practices in undertaking appropriate analyses to support the making of informed decisions on policy, legislative and regulatory proposals. This tool's development is on-going with a broader objective of providing similar guidance with respect to the policy-making and statute development processes. The tool will integrate these three processes into a continuum to better illustrate the dependencies between policy, statute, and subordinate legislation.

Use a consistent but flexible analytical method. The OECD recommends as a key principle that regulations should "produce benefits that justify costs, considering the distribution of effects across society." A cost-benefit test is the preferred method for considering regulatory impacts because it aims to produce public policy that meets the criterion of being "socially optimal" (*i.e.* maximising welfare).[83] The Canadian RIA system rates highly on this criterion. The Canadian RIA requirement has been based on benefit/cost analysis since 1986, and explicitly adopts the welfare maximisation goals as decision criterion by requiring that each regulatory proposal "maximises the net benefit to Canadians". This requires that the policy chosen is the best one available. The RIA guide stresses the importance of flexibility in analytical method and proportionality in the resources spent on analysis. That is, the level of analysis should be proportional to the significance of the proposal. However, it does not provide explicit criteria to focus evaluation efforts and selectively target the application of RIA.

Develop and implement data collection strategies. In most OECD countries lack of information is a key reason for quality problems in RIA. Innovative and more cost-effective data collection strategies can play an important role in improving analytical quality. The PCO provides a guidance document on how to measure the costs and benefits of proposals and their alternatives. The Auditor-General stressed the importance of safeguarding the credibility of science in government, in particular in its use to identify risks, and identified areas where regulators should be better informed about the risk-rating of activities

Target RIA efforts. RIA resources should be targeted to regulations where impacts are largest, and where prospects are best for altering outcomes. The amount of time and effort spent on regulatory analysis should be commensurate with the improvement in the regulation that the analysis is expected to

provide.[84] In Canada, there are no filtering criteria to determine whether or not a RIA should be prepared, as the requirement applies to all "regulations" as defined in the *Statutory Instruments Act.*[85] However, the proportionality rule applies, as stated above, requiring that regulations with larger impacts should be subjected to more detailed analysis. Notwithstanding the absence of a "threshold" for the application of RIA, the proportionality rule does ensure a substantial degree of targeting of effort. Hence, the Canadian system rates highly on this criterion. Notwithstanding this conclusion, there may be merit in considering the adoption of an explicit threshold for RIA, or the alternative of a "tiering" of RIA requirements.

Integrate RIA with the policy making process. For RIA to be effective in improving regulatory outcomes, it must be integrated with the policy process, rather than being applied as an "add on" element after policy decisions have been made. Achieving this integration is a long-term task, and presents substantial difficulties in all OECD countries. Within this context, the Canadian system scores highly on this criterion. The recent review of the Canadian RIA process concluded that it had changed the decision-making process, with more attention being paid to alternatives, costs and benefits than when the requirements were implemented.[86] The two-stage nature of the RIA requirements, together with the integration of RIA and consultation and the use of the RIAs as a Cabinet document are likely to be factors contributing to this outcome. All of these factors will tend to provide disciplines on the quality of the RIA performed, thus tending to encourage regulators to adopt RIA perspectives earlier in the policy process.

Involve the public extensively. Public involvement in RIA serves to improve quality by providing an additional source of important data and by subjecting the resulting analysis to critical assessment, helping to identify poor assumptions, faulty reasoning and unanticipated effects. The Canadian system is exemplary in regard to this criterion. In general terms, consultation has become central to Canadian regulatory policy: As noted above, since 1999, public consultation has been the first requirement discussed in the Policy. In relation to RIA specifically, the fact that all RIAs are published not once but twice – *i.e.* at draft and final regulation stages – provides a level of public involvement rarely seen in OECD countries.

Apply RIA to existing as well as new regulation. RIA disciplines are equally applicable to existing regulation as to new regulation. Indeed, data requirements for sound analysis are more easily met when analysing existing regulation, making RIA a potentially powerful tool in regulatory review programmes. Canada has some experience in this respect. For instance, for the 1992 regulatory review, departments were required to apply the requirements of the Regulatory Policy (*e.g.* public consultation, cost-benefit test, co-operation with subnational governments) to assess their existing regulations. But this and some other wide-ranging reviews, were based on self-assessment, and few detailed or quantitative criteria were developed as a framework for the reviews. In sum, Canada is relatively weak on this criterion. This is an area in which consideration can be given to improving current practices, and is discussed further in Section 4.

Assessment In general, Canadian RIA scores extremely highly against the OECD best practices discussed above. Indeed, Canada is among the leading countries in the OECD in the implementation of RIA, reflecting the extensive experience that has been gained over many years and the willingness demonstrated to refine, update and supplement policy and programme elements over time. A few areas for potential improvement can, however, be identified. Review of the quality criteria applied to primary legislation could be undertaken with a view to ensuring that they are as closely aligned with RIA best practices as possible. In particular, adoption of clear analytical requirements, plus procedural steps that would ensure a high level of integration of impact analysis and consultation would have potential to ensure the benefits obtained from Canada's application of RIA to subordinate regulations are also obtained in respect of primary laws.

In addition, consideration should be given to a reversion toward a more active "challenge" function, supplemented by public reporting on RIA outcomes as means of encouraging higher and more consistent standards of analysis. These steps could be further supplemented by the adoption of more technical methodological guidance, as recommended by the recent review conducted by the Regulatory Consulting Group Inc and the Delphi Group.

3.4. Independent regulators[87]

During the last two decades, many OECD countries have substantially restructured key network based economic sectors, separating network and competitive elements of the sectors in order to promote competition and efficiency. These changes have imposed substantial new regulatory demands on government, leading to the adoption of new approaches, including the rise of "independent" regulators, exercising decision-making functions within the constraints imposed by their governing laws. In general, these new, market-based institutional structures have been based around the concept of separating ownership, policy development and day-to-day regulatory overview, in order to provide appropriate incentives for all players and maximise certainty and transparency. These initiatives are thereby intended to improve the economic environment in which the sector operates as well as accountability for the major players. Canada's current structure of independent regulators in some ways predates this wider trend. After a period of largely autonomous regulators, Canada started some 20 years ago reduce the degree of independence enjoyed by these bodies, frequently via the removal of their policy-making powers.

Canada shares with the United States a history of creating specialised sectoral regulators during the first part of the 20th century. Progressively, though, the Canadian model diverged from that of the United States. Between the 1930s and the late 1960s, the government progressively increased their powers until it had established veritable 'governments in miniature' where regulators were given a broad range of powers and instruments to regulate the energy, transportation and communication sectors. These bodies had both comprehensive regulatory decision-making powers and an independent capacity as primary policy makers in those sectors. They possessed a mix of functions that included regulation making, licensing, adjudicative, quasi-judicial, subsidy or spending roles, policy, and policy making and monitoring roles. Though supervised by the courts and the Cabinet, the combination of their wide-ranging functions and their considerable autonomy within the federal government meant they truly merited the designation of independent regulators.[88]

During the last two decades the Canadian Government has largely reclaimed the policy-making powers formerly exercised by the independent regulators, moving the model toward one more typical of the Ministerial accountability usually found in a Westminster Parliamentary system. The shift coincided with, and was encouraged by, several other factors and events. These included federal-provincial disputes, private industry-public sector disagreements and, most notably, a general move towards market-based policies and deregulation replacing direct intervention and protection of national champions by the regulators. As a result there was a general reduction of the degree of independence enjoyed by these bodies.[89] Today, only the Canadian Radio-television and Telecommunications Commission (CRTC) retains its traditional status and power.[90] Its counterparts, the National Energy Board (NEB) and the Canadian Transport Agency (CTA) have had their range of powers and functions contracted and their membership and staff greatly reduced.[91] Similarly, the terms of appointment of the regulators have changed. The primary focus of the regulators is on policing the framework of consultation and their compliance by all players, particularly through the exercise of licensing powers and arbitration between parties. However, in some cases, like in the energy sector, the regulator has been given new obligations, such as the responsibilities for promoting environmental quality now exercised by the energy regulator.

The reduction of institutional autonomy has necessarily been accompanied by a rise in the accountability of ministers. Ministerial accountability to Parliament has been enhanced by requiring, amongst other things, that the minister, and not the regulator, tables its annual report in Parliament. Accountability to the public has also been enhanced by the adoption of extensive consultation with interested parties regarding proposed changes to regulations and through the widespread use of public hearings.[92] With the main exception of the CRTC, sectoral regulators are also subject to the accountability regime of the regulatory policy (see Section 2.1). All their regulations (as secondary legislation) follow the same process and are subject to the Regulatory Policy. As such, the NEB and CTA need to prepare RIAs, consult with stakeholders and pre-publish their regulations in the Canada Gazette (which makes them open for public comment/scrutiny).

Table 3. **Main sectoral regulators and the competition authority in Canada**

Bodies	**Current framework legislation**	**Staff**	**Homepage**
Canadian Radio-television and Telecommunications Commission (CRTC)[93]	*The Canadian Radio-Television and Telecommunications Commission Act of 1976*, as amended by the *Broadcasting Act* of 1991 and the 1993 *Telecommunications Act*	400	www.crtc.gc.ca
Canadian Transportation Agency (CTA)[94]	The 1996 Canada Transportation Act and the 1996 Railway Act	270	www.cta-otc.gc.ca
National Energy Board (NEB)[95]	The National Energy Board Act 1985	280	www.neb-one.gc.ca
Competition Bureau and Commissioner Competition Tribunal	1986 Competition Act[96]	383	http://strategis.ic.gc.ca/SSG/ct01250e.html www.ct-tc.gc.ca/

A reinvigorated competition authority comprising a Commissioner, a Bureau and a Tribunal, has also strengthened the new framework (see Chapter 3).[97] In the case of transport, electricity and natural gas the Bureau has played an important role in bringing about pro-competitive regulatory reform reducing the scope of sector specific regulation in favour of broader general policies. For example, in the context of a policy review in transportation, the Bureau in 2000-2001 made three submissions to the Canada Transportation Act Review Panel on the Canada Transportation Act and related transportation acts. The Bureau's advocacy occurs (on its own initiative or on request from the regulator) through interventions before the industry-specific regulator as well as by providing policy advice to Parliament and to the government departments overseeing the industry in question. Also, the Bureau can file submissions in support of greater competition and possibly participate in regulatory hearings and consultations conducted by the regulators.

The Competition Bureau has also articulated a number of principles related to assigning and co-ordinating its roles and responsibilities with those of various regulators. An interesting initiative is the 1999 Interface Agreement between the Bureau and the CRTC. The purpose of this agreement was to provide industry stakeholders, including the general public, with greater clarity and certainty as to the overall regulatory and legal framework governing the telecommunications and broadcasting sectors. The agreement describes the authority of the CRTC under the *Telecommunications Act* and the *Broadcasting Act* and that of the Bureau regarding the telecommunications and broadcasting sectors. As well, the Canada Transportation Act provides for the possibility of suspension of the Competition Act for a period of 90 days, in favour or the Cabinet. This process was invoked to facilitate negotiation of the 1999 merger, subject to conditions, of Canada's two leading air carriers.

In sum, Canada has made substantial changes to its earlier structure of independent regulators which have moved them in the direction of current views on achieving best regulatory performance by an appropriate separation of powers and functions, while also ensuring appropriate delineation of the respective roles of overarching competition bodies and sectoral regulators.

4. DYNAMIC CHANGE: KEEPING REGULATIONS UP-TO-DATE

Regulations that are efficient today may become inefficient tomorrow, due to social, economic, or technological change. Most OECD countries have large stocks of laws, regulations and administrative formalities that have accumulated over years or decades without adequate review and revision. The OECD *Report on Regulatory Reform* recommends that governments "review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively."

4.1. Revisions of existing regulations

Canada's approach to the review of existing regulations has, essentially been based on the "systematic review" model. That is, it has periodically conducted broad scale reviews of the existing regulatory structure against an identified set of criteria, with a view to modernising the whole in a co-ordinated fashion. Two major reviews of this type have been undertaken, the first in 1984 and the second in 1992.

The 1984 *Task Force on Program Review* (best known as the Nielsen Task Force) examined the federal regulatory structure and programs, focussing on providing better service to the public and better management of government programs. The review was highly critical of the regulatory system, judging it to be "unstructured, uncontrolled, highly variable, and thoroughly confusing".[98] This review had a substantial outcome insofar as the recommendations of the task force laid the foundations for the first Regulatory Policy announced in 1986 (see Section 1.1).

The 1992 review was designed as a comprehensive review of all existing regulations "to ensure that the use of the government's regulatory powers results in the greatest prosperity for Canadians." It was an integral part of a bigger agenda: the *Prosperity Agenda* aimed at ensuring Canada's competitiveness in the global marketplace. The regulatory review was driven by the twin concerns that regulation was imposing unnecessary costs on business and consumers and thus impeding competitiveness and that a large and complex regulatory system was a drain on pubic finances.[99] There were two components to the review: (1) departments were required to self-assess whether existing regulations met the over-riding objective that "the use of the government's regulatory powers results in the greatest prosperity for Canadians" and (2) a review by the House of Commons Standing Committee on Finance was to determine how existing regulations affected competitiveness and to identify ways to improve regulatory programs, processes and inter-governmental collaboration in general terms. The basis for review decisions was the federal Government's Regulatory Policy.[100]

- Government intervention is justified and regulation is the best alternative
- Canadians have been consulted
- The benefits outweigh the costs to Canadian governments, businesses and individuals
- The regulatory activity impedes as little as possible Canada's competitiveness
- Regulatory burden has been minimised through co-operation with other governments.
- Systems are in place and resources sufficient to manage regulatory programs effectively.

The Departmental reviews culminated in each case in a report to the responsible Minister which identified regulatory programs in respect of which the costs exceeded the benefits, with proposed dates for their elimination or modification; regulations in respect of which efficiency and effectiveness could be improved; and means by which the department could ensure its regulatory programs remain responsive to Canada's changing circumstances. The processes employed included public consultation with input from a wide range of stakeholders. Several departments used advisory panels with broadly based representation. At the end of the review (complete by June 1993), 835 out of a total of about 2 800 regulations then listed in the *Consolidated Index of Statutory Instruments* were identified for revocation, revision or further review.[101] Each department designed a five-year schedule of reform, so that by 1998, departments were expected to have significantly smaller, simpler, more co-operative and responsive regulatory programs. While the Treasury Board Secretariat monitored performance, no public statement on outcomes was made at the end of the programme.

As previously noted, the across the board revision of tasks, responsibilities and human resources of departments, undertaken in the mid-1990s, to modernise the federal public administration permitted a substantive reduction of superfluous or overly-ambitious/burdensome regulations based on departmental self-assessment and prioritisation. An additional requirement that arguably performs a regular review function is that annual performance reports that each department must present to Parliament. However, the fact that these reports are annual suggests that their overall focus is likely to be short term and specific, rather than being a mechanism of strategic overview with a longer-term time horizon.

Subsequent to these broad-scale reviews, Canada has taken a more targeted approach. A small number of Canadian Acts have incorporated specific review requirements. However, where this process has been used – for example in the case of the *Canadian Environment Protection Act, 1999* which has a mandated review five years after its entry into force, it appears to be intended as an *ex post* review of the legislation's original assumptions and approach, rather than as a means of ensuring quality in the dynamic context. The latter objective can only be achieved through regular review requirements, rather than a one off arrangement. There are exceptions to this, for example, the *Canada Transportation Act 1996,* required a comprehensive review within four years of both the operation of the legislation and the policy objective on which it is based.

This trend to incorporate specific provisions for a comprehensive review of the provisions and operation of the Act within a set time period appears to be increasing; being more common in Acts passed in the last ten years. It is notable that the mechanisms employed are *ad hoc* in nature, rather than being systematic and regular. There is no forward programme for reviews and no use of sunsetting as an automatic review requirement. Notably, the 1986 Regulatory Policy proposed a programme of systematic review and evaluation of regulatory programmes over a recurrent seven year cycle. However, this was never fully implemented.[102] However, several departments have found that current consultation mechanisms are identifying those regulations most in need of reform and consequently review of existing

regulations is focused in these areas. The review and reform of six sectors under the Jobs and Growth Agenda: Building an More Innovative Economy was meant to be the first group of a number of reviews to improve the efficiency of regulation. No official assessment of these reviews were made and no subsequent reviews have taken place.

Though several comprehensive and ad hoc reviews have taken place in the past, Canadian policy could be further enhanced with a clear commitment to review existing regulations systematically after a set period of time. Sustaining the momentum in regulatory policy is important. The government's recent Innovation Strategy paper is an excellent initiative to keep up the pace of reform, raise awareness of what needs to be done now and over the medium term and complement the reviews built into various statutes. It positions regulatory issues in the context of a broader government agenda on innovation and a knowledge-based economy that is built on a skilled workforce and an attractive investment environment. As part of this agenda, Canada is looking at ways to improve business and regulatory policies to support innovation and has set a target to complete systematic expert reviews of Canada's most important stewardship regimes by 2010. The inclusion of a wide range of stakeholders in this exercise will help to ensure success. Canada may also wish to consider the model offered by Australia's current National Competition Policy review process as a possible approach in this regard. This model, which is also in operation within the context of a Westminster system of government, includes both national and sub-national levels of government, functions according to a set, multi-year timetable, assesses regulation in terms of specific, published criteria and balances departmental responsibility for review conduct with transparency, public involvement and central quality assurance mechanisms.[103]

4.2. E-government and reducing red tape

At both the federal and provincial levels Canada has shown a strong commitment to reducing administrative burden of regulations on business. Canada focuses on the impacts on SMEs as administrative requirements tend to impose a heavier burden on SMEs than on larger firms. The Joint Forum on Paper Burden Reduction was launched in 1994 as a partnership between government and small business. Between 1994 and 1997, the Forum and its supporting Interdepartmental Working Group examined irritants identified by business, including those related to payroll and taxes, customs procedures and paper work, government surveys, forms and instructions. This resulted in a number of initiatives to simplify and decrease government reporting requirements. Reducing the paper and regulatory burden was also a major component of the government's *Building a More Innovative Economy* strategy in 1994.

Examples of improvements made include:

- implementation of a single Business Number that eliminated the need for multiple registration account numbers in 1995;

- introduction of a one-stop shop called the Business Window that decreased the time business had to spend dealing with the Canada Customs and Revenue Agency (CCRA) in 1995;

- since the early 1990's, the Canada Customs and Revenue Agency has streamlined cross-border movement of goods, partly through the increased use of technology, so that most commercial goods are processed on minimum information through electronic data interchange within 45 minutes, and the Agency continues to implement further reforms based on the principles of risk management and supported by leading edge technology; and,

- in 1997, Human Resources Development Canada simplified the Record of Employment system used to determine eligibility for unemployment insurance benefits, including cutting the instruction sheet from 35 pages to less than four.

More systematically, in order to ensure government information requirements would continue to be subject to review, the *Regulatory Policy* in 1995, stipulated that no unnecessary information burden should be imposed by regulations and that the special circumstances of small business should be addressed.

In recent years, the federal government has used the Internet to offer an impressive array of business simplification initiatives aimed at further reducing administrative burdens, especially for SMEs. Already, Canada's record of online information and service delivery is amongst the best in the world, a performance that stands to benefit foreign as well as domestic firms.

Electronic service delivery is poised to fundamentally change the way business is done in and with Canada. When fully implemented, online service delivery will streamline the business environment by simplifying and accelerating certain business procedures; and by supporting businesses in obtaining the information they need quickly and efficiently (electronic service delivery is supported by additional methods of access such as telephone, in-person, e-mail through the country-wide network of Canada Business Service Centres).

Users and observers praise the initiative highly — a recent independent study of 22 countries ranked Canada first in implementing e-government.[104] This is demonstrated by the extent of use it receives: the Canada Site has some seven million hits each month with 20% originating outside the country.[105] Examples of particular initiatives include:

- BusinessGateway.ca, launched in January 2001, provides businesses with relevant, frequently used government services and information on subjects such as Taxation, Regulations, Importing/Exporting and Human Resources Management;

- the network of Canada Business Service Centres (CBSC) was established through federal and provincial/territorial collaboration and focuses on integrating information from both orders of government into a client-centred business information and referral service for start-up entrepreneurs, established small and medium-sized businesses and new exporters — the CBSCs maintain a business information data base which contains a comprehensive inventory of programme and services descriptions as well as information related to federal Regulations most often needed by SMEs;

- the Business Number (BN) federally has been integrated with a number of provincial programmes —Ontario, Nova Scotia, (with BC, Manitoba and others to join) have adopted the BN as a common business identifier. Business Registry Online (BRO) allows businesses to register for Canada Customs and Revenue Agency and relevant provincial programs in a single transaction. Using this integrated on-line service, businesses can now receive a BN for their corporate income tax account, as well as GST/HST, payroll deduction, import/export, and corporate income tax accounts, at the same time as federal incorporation is approved by Industry Canada. This replaces the multiple, sequenced transactions that characterised business interaction with government in the past, resulting in greater client satisfaction, increased compliance, a drop from a formerly six-week to 30-minute process; and

- a one-stop service was recently launched on the Internet.

5. CONCLUSIONS AND RECOMMENDATIONS FOR ACTION

5.1. General assessment of current strengths and weaknesses

Canada has a mature and well-functioning system of regulatory governance. It was a pioneer in many areas of regulatory reform and has been a consistent and vigorous innovator across a wide range of topics. More than thirty years of review and more than twenty years of innovation and reform have made Canada one of the most experienced of OECD countries in attempts to improve government capacities to assure high quality regulation. The institutions, procedures, and other regulatory tools in Canada form an efficient, transparent and accountable whole. The principles and processes or regulatory quality management have permeated the policy-making process to an extent matched by few if any OECD countries and they are embedded in the administrative culture of policy-makers.

At the policy level, Canada has generally adopted the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* and, in many areas, has implemented additional requirements that go beyond those of the recommendation to provide more robust quality assurance (See Section 2.1.). The Government has central institutions to drive regulatory policies and an array of practices in departments and agencies devoted to improving regulatory outcomes. Regulatory management in Canada can be characterised as both process and results oriented, with a high degree of integrity and professionalism. Canadian tools and guidance can also inspire other OECD countries. RAOICS and its predecessors have developed an impressive array of documents covering most issues such as cost-benefit analysis, the identification of alternative instruments, how to design and implement regulatory programmes to achieve outcomes; and the use of consultation. The use of the Regulatory Process Management Standards as a self-assessment guide for departments is a noticeable innovation in the context of moving towards performance oriented regulatory management rather than pure command and control approaches. In addition, the Canadian system is exemplary in terms of the degree of transparency and consultation evident in policy development and law-making processes.

Despite these extensive achievements, some areas in which improvements are possible and would yield potentially significant gains have been identified in this review. There are indications that enforcing the challenge functions – in both dimensions: regulatory processes and reforms of regulatory regimes – could be strengthened in order to improve performance in a number of areas and foster further progress in some respects. In addition, there are concrete steps that could be taken to improve further the quality of the RIA system, many of which have been identified in the review recently commissioned by the government.

5.2. Potential benefits and costs of further regulatory reform

The reform efforts undertaken during the 1980s and 1990s have had clear and demonstrable benefits for the Canadian economy and society. As outlined in [forthcoming] Chapter 1, Canadian economic performance was considerably stronger, particularly in the late 1990s, than had been the case previously.

Looking to the future, further improvements to the regulatory environment should continue to help to strengthen Canada's long-term economic performance. Canadians continue to be concerned about the "productivity gap" with the United States and, notwithstanding concerns as to its real nature and magnitude, there is substantial potential for further regulatory reform to improve the economic performance of the country through a reduction of regulatory costs. Further pro-competitive reforms, as discussed in Chapter 3, together with actions to reduce inter-provincial barriers to trade, have the potential to yield important productivity gains and make important contributions toward Canada achieving its goal of creating a "world-leading economy driven by innovation, ideas and talent".[106]

There is little evidence of substantial public concerns as to the reform programme followed to date, perhaps because the programme has at all times emphasised the need for maximum transparency and public participation in policy-making and reform efforts. This is a substantial asset for Canadian regulatory reform and should be drawn upon by ensuring that reform momentum is maintained and even increased. The systematic reviews proposed in the Innovation Strategy will be a focal point for comprehensive regulatory reform.

5.3. Policy options for consideration

This section identifies actions that, based on international consensus on good regulatory practices and on concrete experiences in OECD countries, are likely to be particularly beneficial to improving regulation in Canada. They are based on the recommendations and policy framework in the OECD Report on Regulatory Reform and also on the extensive analysis and reports that Canada has itself conducted into its regulatory machinery. The recommendations below relate to three broad areas: strengthening the regulatory management system, improving elements of the regulatory impact assessment process, and strengthening inter-governmental reform efforts within Canada.

1. Rationalise and harmonise the criteria of the regulatory policy

Canada's regulatory governance structure is substantial and wide-ranging and imposes many requirements on regulators to implement various aspects of quality assurance. As indicated in Section 2.1, Canada employs a wide range of regulatory quality criteria, while their precise nature and form varies somewhat between the controls applied to regulatory policy, to primary laws and to subordinate regulations. While, there is a high degree of consistency in requirements, specific standards and criteria vary. This leads to some concern as to the potential for inconsistent treatment of different regulatory instruments by different elements of the policy structure and makes it harder to make comparisons across instruments as to their impacts. It also raises the danger that regulators' knowledge and understanding of the requirements may be inadequate. Ensuring consistency in the criteria employed, regardless of the policy instrument under consideration, would be likely to improve understanding and acceptance of their importance, allow them to be disseminated more effectively in practice and, consequently, improve the degree of compliance.[107] Equivalent quality controls, applied to all instruments, would help to ensure uniformly high quality outcomes.

Attention should also be given to the possibility of rationalising the number of quality criteria employed. Similar criteria could be combined or, in some cases, removed. Action of this type can be expected to address the incipient risk of "criteria inflation" – as with regulatory inflation generally, an uncontrolled increase in the number of regulatory quality requirements runs the risk of reducing voluntary compliance and reducing the degree of focus in compliance efforts toward fundamental elements of the quality assurance system.

2. Develop a stronger advocacy role for regulatory reform

While Canada has sound institutional arrangements for the management of its regulatory governance systems and processes, it lacks a strong advocate for the benefits of further reform, that can focus strategically on developing and arguing for new initiatives and approaches. Greater use of an influential external body could bring new perspectives and additional sources of expertise to the reform task. An external advocate would also have the potential to enhance the credibility of the reform programme by undermining any perception of it being dominated by regulatory "insiders". The body is likely to have greater freedom to advise if it is located at arms length from the key process-related machinery at the centre of government or even independent of government, complementing in many ways the internal work done by the Deputy Ministers Challenge Team.

A model for a regulatory reform "champion" of this sort could be the United Kingdom's Better Regulation Task Force. This standing body, with wide representation encompassing business, the voluntary sector and other stakeholder groups and a Secretariat can provide a leverage for difficult regulatory decisions. Its credibility and accessibility to the media and to the highest level of the government are further enhanced by the high profile of its members. Such a body may also be a particularly fruitful means of designing and implementing a strategically targeted approach to keeping the stock of existing regulations under regular review.

The systematic reviews proposed in the Innovation Strategy will be a focal point for comprehensive regulatory reform. It sets out an approach to drive economic growth and social development over the next decade, through a long-term national commitment and partnership including the provincial and territorial governments, business, labour, and academia.

3. Strengthen capacities to prepare and review RIAs

To augment the central challenge function at the centre of the government, the resources and skills available for RIA quality assurance in the Regulation Affairs Division within RAOICS needs more than its current allocation of 10 to 11 professional officers. Furthermore, to keep a credible capacity to challenge departments and agencies, in addition to regularly appointing public servants from other parts of the administration who both provide and gain experience, RAOICS should create a stable base of administrators, including administrators specialised in the assessment of cost-benefit and other quantitative analysis.

In parallel with the creation of stronger capacities at the centre of government, Canada should consider improving the access to departmental decision-makers of the staff preparing RIA within regulating departments, to ensure the quality of drafts and their capacity to respond effectively and in a timely way to central critiques of such drafts. While this is largely an organisational and resource decision to be made by departments, if the centre enforces the quality requirement more strongly and consistently across agencies, and provides feedback on comparative performance, the incentives to make these improvements should flow naturally.

4. Establish a systematic, but targeted, ex post evaluation of the compliance to the Regulatory Policy requirements and standards.

A central challenge for most OECD countries is to further enhance the ex post evaluation of compliance by departments and other regulation-making bodies with their regulatory policies. The Auditor-General could be tasked with monitoring and publishing assessments of compliance with the RIA requirements. This monitoring would provide a report card to regulators, Parliament and citizens on the efforts of the administration to improve the quality of regulation. It could usefully be released at the same time as departments table their Performance Reports. It may also be advisable to phase this policy in, starting in the first year with giving departments confidential reports on compliance.

Canada should consider implementing the model used in Australia where the central regulation review body records its assessment of each RIA as adequate or inadequate against each of the six elements contained in the Canadian RIA, as well as other agreed performance criteria, such as demonstrating that the regulation does not unnecessarily restrict competition, that the instrument chosen maximises net benefits and that preparation of the RIA began early in the development of policy. Departments can then be given summary information on how well they are complying with the requirements of the policy, while annual publication of the overall results, as in the Australian case, would mean that this information could also be used to compare the performance of departments. Systematic weaknesses and non-compliance could then be identified and addressed.

5. Act to address the remaining shortcomings of the Regulatory Impact Analysis system

In 2000 a detailed review, commissioned by RAOICS, on the current RIA system proposed a number of substantial recommendations. Many of the issues identified in that report have also been canvassed in this review. Given the overall strength of the RIA system in Canada, addressing the remaining shortcomings could yield substantial gains and ensure that the full potential of RIA to improve regulatory quality is reached. Key improvements in this regard would be as follows:

- *Target the RIA process toward the more substantial regulatory proposals*

The existing "proportionality" requirement should be supplemented or replaced by clearer guidance on the extent of the analysis required for regulations of different degrees of importance. In particular, consideration should be given to adopting a "threshold" level of impact, below which no RIA would be required. One method would be to require a short qualitative RIA for every regulatory proposal, addressing each of the RIA questions without quantitative assessment, and only those proposals which are expected to impose an impact over some threshold level would be required to prepare quantitative assessments of costs and benefits. This would help to ensure scarce RIA expertise is devoted to the areas of highest potential benefit. In order to reduce the risk that departments strategically understate impacts in the qualitative RIA, a feedback mechanism could be implemented whereby departments, which were found over time to give biased impressions, would be required to prepare quantitative RIA for all proposals for a set period or until PCO was assured of the willingness and capacity to prepare accurate qualitative RIA.

- *Broaden the scope of RIA to assure the quality of quasi regulatory instruments*

Also at the federal level, increased oversight should be applied to instruments which are not currently covered by RIA analysis, including grey and quasi regulations, and standards referenced in regulations and those ministerial regulations currently not covered but having impacts which would otherwise justify the preparation of RIA. A general registry of such 'regulations' would also increase transparency and reduce duplication and inconsistency. (RegWatch, a database recently created by the Standards Council of Canada, to track all references in federal legislation to Canadian, foreign and international standards, looks to be a promising start).

- *Improve the provision of training and written methodological guidance*

Canada currently produces extensive guidance on a range of regulatory policy related topics. However, the usability of these guidance documents is likely to be improved if they were to be combined into a smaller number of documents, with unnecessary detail and duplication removed and greater attention paid to regular updating of the documents in line with changes to government's Regulatory Policy and other initiatives. The recently introduced web-based Learning Tool has the potential to become this platform.

6. Review the requirements to assess regulatory alternatives

The Canadian government has invested substantial time and effort in advising departments on how to fully explore alternative ways to meet policy objectives. However, further efforts are needed, as the government and the DMCT have recognised. A review of departmental practices in this area and assessment of their compliance with the policy could be an appropriate task for the independent advocacy and review body recommended above. Periodically published "scoreboards" may enhance incentives for good performance, as well as serving to disseminate and cross-fertilise practices among different policy areas.

7. Address concerns over representation, consistency, reporting and fatigue in consultation

While consultation, as one of the central pillars of Canadian regulatory processes, is being regularly upgraded some new challenges are emerging: (1) interest groups, including business, criticise the weighting of consultation comments from different parties and lack of clarity over how the government is responding to comments; (2) variation across departments in the extent and timing of consultation; (3) a sense that the regulatory process is being inundated with consultation, sometimes involving unnecessary duplication; and (4) partly because of the great success of consultation, signs of "consultation fatigue", so that regulatory initiatives risk failing to engage all affected groups in dialogue, thereby reducing the potential contribution of consultation. The government is aware of these problems, and is addressing them through the release of updated consultation guidelines in the very near future. Amongst new features, the new guidelines to be released in 2002 (and replacing the 1992 ones) will focus on identifying new and emerging techniques and tools, such as online consultation and will provide elements for evaluating the consultation process. This could help to take consultation practice into new territory and advancing best practice.

Consistent with the advice provided by the Deputy Ministers' Challenge Team, Canada could explore further more focussed consultations, facilitate public access to current departmental reports on consultation, strengthen project management of consultations, and involve the public more effectively. (See Section 3.1.1.) Other avenues to explore include: extended use of internet-based consultation and removing duplication of consultation, identifying the stage of policy development when public contributions would be most useful. To address concerns expressed by business and other groups about the reasoning behind decisions, Canada could comprehensively enforce the requirement for departments to report in the RIA: who was consulted, what they said and particularly indicate those areas where the points made were not followed and the reasons for this. Thus, the RIA would clearly and publicly state unresolved areas of contention and the reasons why the government has chosen its approach.

8. Accelerate implementation of the Agreement on Internal Trade

Despite fifteen years of efforts to create a single market within Canada, including six years of the AIT, substantial challenges remain. Canada should consider the adoption of key elements of other successful efforts undertaken to create single markets in recent years, including Australia's Mutual Recognition Acts and the European Union's Single Market Programme. Moves to create a single market within Canada should receive high priority, particularly given the relatively small size of the overall Canadian market. The Federal Government should also initiate a dialogue with the provinces in explore using RIA for provincial regulation on a consistent basis. Policy debates concerning regulatory barriers to inter-provincial trade would be assisted if RIA is prepared for Ministerial Councils and other decision-making bodies when standards and regulations, which will adopted by more than one province, are being developed.[108]

ANNEX

Major developments in improving capacities to assure high quality regulation

1972:	Parliament passed the Statutory Instruments Act and created the Standing Joint Committee of the House of Commons and Senate on Regulations and Other Statutory Instruments.
1974:	The Consumer Research Council (successor to the Canadian Consumer Council) published a report on regulatory agencies, dealing with both substantive and process issues.
1976:	*The Way Ahead* document was issued by the federal government. The paper proposed that cost benefit analysis be applied to government regulation.
1977:	Periodic evaluation of the efficiency and effectiveness of regulatory programmes ordered by the Treasury Board Secretariat
1978:	Introduction of Socio-Economic Impact Analysis, applied to major new regulations in the areas of "health, safety and fairness."
	Office for the Reduction of Paperburden established in the Treasury Board
	The Economic Council of Canada commenced a number of studies of specific areas of regulation which appeared to be having a particularly large impact on the Canadian economy, in order to assess the effects of regulatory action by all levels of government.
1979	Office of the Co-ordinator, Regulatory Reform (OCRR) established in the Treasury Board Secretariat
	The interim report of the ECC's reference, *Responsible Regulation*, was published. It proposed extensive changes to the regulatory process, including a regulatory calendar and Regulatory Impact Analysis Statement.
1980	House of Commons' Special Committee on Regulatory Reform made 29 recommendations for improving regulation management, such as the appointment of a federal minister responsible for regulatory affairs and several major deregulatory initiatives.
1982:	The federal *Access to Information Act* was enacted.
1983:	Commencement of the semi-annual publication of the *Regulatory Agenda*.
1985:	The Nielsen Ministerial Task Force on Program Review documented the pervasiveness of regulations and highlighted concerns for the economic impact on society. It concluded that the regulatory system was "unstructured, uncontrolled, highly variable and thoroughly confusing."
1986:	*Regulatory Reform Strategy* adopted by Cabinet, with the emphasis on "regulating smarter", including adopting a regulatory process based on dialogue with affected parties and the public, and embodying: (1) Ten *Guiding Principles of Federal Regulatory Policy*; (2) *Citizens' Code of Regulatory Fairness*; (3) Regulatory Impact Analysis Statements required for all new regulations; (4) public notice-and-comment mechanism established for regulatory proposals; and (5) appointment of a Minister for Regulatory Affairs, with an office of regulatory affairs (ORR) created to support the post.

	OCRR replaced by the Regulatory Affairs Branch of the Office of Privatisation and Regulatory Affairs (OPRA), under a Minister of Privatisation and Regulatory Affairs, to act as a gatekeeper to the Cabinet level Special Committee of Council (SCC), empowered to send back regulations that do not meet the terms of the government's Regulatory Policy. Annual publication of the *Federal Regulatory Plan* initiated.
1991:	OPRA was dissolved and responsibility for regulatory affairs was moved to the Treasury Board Secretariat, with the creation of the Regulatory Affairs Directorate. Training in regulatory policy related skills was introduced. The President of the Treasury Board, who oversees the budgeting process, was named Minister responsible for Regulatory Affairs.
1992	A new Regulatory Policy incorporated the 1986 principles and added a new focus on managing regulatory programmes. Under the Prosperity Agenda, the Government began a comprehensive review of all existing regulations "to ensure that the use of the government's regulatory powers results in the greatest prosperity for Canadians". Departments examined their regulatory programmes using public consultations, assessed their effect on Canadian competitiveness and identified ways to improve the regulatory process, the programmes and intergovernmental collaboration. This resulted in recommendations for 835 of a stock of 2800 regulations to be revoked or revised over five years.[109] It is also resulted in a renewed movement toward federal-provincial harmonisation and toward improved collaboration between government and industry. Parliamentary Report by the House of Commons' Standing Committee on Finance, Regulations and Competitiveness reviewed the effect of regulation on Canadian competitiveness. It recommended changes to improve analysis, increase stakeholder involvement, improve co-ordination among federal departments and increase involvement of parliamentarians in the regulatory process.
1993:	Publication of *Responsive Regulation in Canada*, the government response to the Sub-Committee on Regulations and Competitiveness
1994:	The government published *Building a More Innovative Economy*, a strategy to promote job creation and economic growth. It featured a package of regulatory reform initiatives emphasising the need for partnerships with other governments and the private sector. It also undertook to complete earlier promised actions (1992-93 regulatory review outcomes), and to review regulation in six key sectors of the economy.
1995:	Revisions to the Federal Regulatory Policy by the Treasury Board, including adoption of the Regulatory Process Management Standards (RPMS) to ensure departments had the management systems in place to adhere to the policy.
1996:	Establishment of the Deputy Ministers' Challenge Team on Law-Making and Governance.
1997:	Abolition of the centralised Federal Regulatory Plan, replaced by each department having two annual departmental Reports: (1) Plans and Priorities and (2) Performance Reports, both tabled in Parliament.
1998	Creation of Regulatory Affairs and Orders in Council Secretariat (RAOICS), which consolidated within PCO responsibility for regulatory affairs and support to SCC.
1999:	Revised Federal Regulatory Policy issued, reflecting transfer of the Policy from the Treasury Board to the Special Committee of Council.
2000:	As required. seven departments submitted reviews to the Privy Council Office and the Treasury Board Secretariat on their compliance with the RPMS, consolidated into one assessment report. *Results for Canadians* on four "management commitments" for government: citizen focus, values driven management, results orientation and responsible public spending.
Source:	Government of Canada and OECD/PUMA.

NOTES

1. The United Nations' Human Development Report has ranked Canada as the country with the best quality of life for the past seven years, though this year it dropped below Norway, to be on equal footing with Australia, Sweden, and Belgium. In the 2001 Global Competitiveness Report prepared by the World Economic Forum, Canada has moved in different directions on the two competitiveness indices. On the Growth Competitiveness Index, based on macroeconomic policies, it moved up to number three in a major international ranking of competitiveness that examines strengths and weaknesses that will contribute to future economic growth among the 75 countries. However, Canada moved down to 11th in the Current Competitiveness Index which is based on microeconomic policies such as "the set of institutions, market structures and economic policies supportive of high current levels of prosperity". The latter index includes a series of framework indicators assessing regulatory environment.

2. Provinces have jurisdiction over the creation of municipalities so there are various definitions and organisational models. Statistics Canada uses the term "census subdivisions", which includes cities, municipalities, indian reserves and settlements as well as unorganised territories. They have categorised 46 different types of municipalities. Using Statistic Canada's classification, there are 5 593 census subdivisions in Canada.

3. "The Constitution Act, 1867, distributes the legislative powers of Canada between the Parliament of Canada and the legislatures of the provinces (Part VI, Sections 91 to 95). The legislatures of the territories exercise legislative authority through delegation from the Parliament of Canada.

4. Prince, Michael J. (1997), Aristotle's Benchmarks: Institutions and Accountabilities of the Canadian Regulatory State, in "Changing the Rules: Canadian Regulatory Regimes and Institutions" *eds*. G.B. Doern, M. Hill, M. J. Prince and R. J. Schultz, University of Toronto Press, pp. 239-240.

5. Prince, Michael J. (1997), Aristotle's Benchmarks: Institutions and Accountabilities of the Canadian Regulatory State, in "Changing the Rules: Canadian Regulatory Regimes and Institutions" eds. G.B. Doern, M. Hill, M. J. Prince and R. J. Schultz, University of Toronto Press, pp. 239-240.

6. Management of Government: Regulatory Programs (1985), A Study Team Report to the Task Force on Program Review, Government of Canada, May, p. 20, as reported in Scott's 1992 study.

7. The concept of bijural is larger than the concept of bi-judicial. The latter suggests that the system relates only to court process, whereas "bijural" embraces all aspects of legislation, not juste its application in court.

8. Cabinet directive on law-making, (March 1999), p. 5.

9. While this list can be seen as a "hierarchy" of laws, strictly, it is difficult to indicate which ones will prevail in cases of conflict. Still, there are a few basic rules about resolving conflict:

   - Constitutional laws prevail over inconsistent non-constitutional laws (see the Constitution Act, 1982, s. 52); inconsistent laws are of no force or effect;
   - Quasi-constitutional statutes prevail over other conflicting statutes.

- Federal laws (statutes and delegated legislation) are paramount over conflicting provincial laws in areas of overlapping federal-provincial jurisdiction; however, if there is no conflict (in the sense that compliance with one law entails breach of another), then both laws continue to apply; (The provinces and the federal Parliament have concurrent powers to make laws in relation to agriculture, immigration, and interprovincial trade in non-renewable resources – Prince *ibid* p. 239.)
- Federal statutes generally prevail over conflicting federal delegated legislation; however, statutes can provide for delegated legislation to prevail over statutes, including delegated legislation that amends statutes; instances of this are quite rare and, from a policy perspective, it tends to be controversial. Also, delegated legislation authorised by a statute that prevails over other statutes (for example, a quasi-constitutional statute) prevails over conflicting statutes.
- As between different types of delegated legislation, it is difficult to say what prevails. There has been at least one case where the court held that a regulation of a provincial cabinet prevailed over a by-law of a professional nursing association. It reasoned that because the regulation was made by a body more closely associated with the Legislature, it should prevail. This rationale is rather simplistic and has not been tested in any other cases. If delegated legislation made by the same body conflicts, the conflict is resolved using two rules of legislative interpretation. The first one says that special legislation prevails over legislation of more general application. If it is impossible to tell which is more general, the second rule may be applied: legislation enacted later prevails over legislation enacted earlier.

10. The SIA provides for some significant exemptions to the process, for example, the Queen's Regulations and Orders for the Canadian Forces and Indian Band by-laws are exempted from examination and publication requirements.

11. According to the SI Act, there are four types of instruments that are regulations:

- instruments described as "regulations" in an Act;
- rules, orders and regulations governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act;
- statutory instruments made in the exercise of a legislative power conferred by or under an Act; and
- statutory instruments for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act.

The descriptions of the first two types are self-explanatory. However, in determining whether an instrument is of the third or fourth type, the first step is to determine whether it qualifies as a statutory instrument, as defined in the SI Act.

12. The four bodies are: the Canadian General Standards Board (part of Public Works and Government Services Canada); the Canadian Standards Association; the Underwriters Laboratories of Canada; and the Bureau de normalisation du Quebec.

13. That is only three years after the United States established its Inflation Impact Assessments for major regulations.

14. Stanbury, W.T. (1992), Reforming the Federal Regulatory Process in Canada, 1971-1992, prepared for the Federal House of Commons and included as Appendix SREC-2 of "Regulations and Competitiveness" Issue n°. 23, House of Commons., (November) p. 23A:35.

15. Hill, Margaret, M., (1998), "A Historical Perspective on Regulatory Reform: Institutions and Ideas after the Regulation Reference", (prepared for the Deputy Prime Ministers Challenge Team) pp. 4-5.

16. Campbell, Anthony, *Taming the Regulatory Tiger*, p. 5.

17. Hill (1998), *op cit.*, p. 7.

18 The Canadian requirements for RIA are mostly met by putting the analytical requirements in a publicly available document, referred to as the Regulatory Impact Analysis Statement (RIAS). As OECD countries do not generally use this terminology, it is not used in this report. Either, the context of the sentence will indicate whether the reference is to the analysis or the document; or if this is not clear, it is stated which is being referenced.

19. A strategic approach to Developing Compliance Policies. www.pco-bcp.gc.ca/raoics-srdc/publications/PolGuides/compstra_e.

20. *Regulations and Competitiveness.* Sub-Committee on Regulations and Competitiveness, House of Commons Standing Committee on Finance Review.

21. Doern, B; Hill, M.; Prince, M.; Schultz, R., "Candadian Regulatory Institutions: converging and Colliding Regimes" in Doern, B; Hill, M.; Prince, M.; Schultz, R., (1999), "Changing the Rules. Canadian Regulatory Regimes and Institutions", University of Toronto Press., p. 7.

22. *Assessing the Contribution of Regulatory Impact Analysis on Decision Making and the Development of Regulations.* The Regulatory Consulting Group Inc./The Delphi Group, August 2000, pp. 5-6.

23. Hill (1998), *op cit*, p. 16.

24 Fraser Insitute (2001), *Canada's Regulatory Burden: How Many Regulations? At What Cost?* Vancouver, August.

25. Fraser Institute

26. OECD (1997), *OECD Report on Regulatory Reform*, Paris.

27. For example, in terms of the broader measure of multifactor productivity, it is important to note that Canada has narrowed the gap with the US, dramatically increasing its productivity growth rate in the post-1995 period (an average annual rate of 1.0% for Canada and 1.3% for the US as compared to -0.3% and 0.5% respectively, for 1988-1995 period). See Philip Armstrong, Tarek Harchaoui, Chris Jackson, Faouzi Tarkhani (Micro-Economic Analysis Division, Statistics Canada): *A Comparison of Canada-U.S. Economic Growth in the Information Age, 1981-2000: The Importance of Investment in Information and Communications Technologies.* (This document is available at www.statscan.ca).

28. OECD (2000), *Structural Issues and Policies*, Economic Survey: Canada, p. 68.

29. Mohnen, Pierre and Rosa, Julio (1999), *Barriers to Innovation in Service Industries in Canada*, Science and Technology Redesign Project Research Paper No. 7, Statistics Canada. Baldwin, John and Lin, Zhengxi (2001), *Impediments to Advanced Technology Adoption for Canadian Manufacturers*, Research Paper Series No. 173, Statistics Canada, www.statscan.ca.

30. OECD (2001), *Economic Surveys — Canada*, September.

31. See Lexicon on Results-based Management and accountability" that was published by TBS in July 2001. It is found at: www.tbs-sct.gc.ca/eval/pubs/RMAF-CGRR/rmaf-cgrr-06-e.asp <www.tbs-sct.gc.ca/eval/pubs/RMAF-CGRR/rmaf-cgrr-06-e.asp>.

32. Early efforts were directed at bringing together the internal federal policy research community to develop a comprehensive picture of medium term policy pressures. Using this work as a base, the PRI then extended this circle of engagement to include the external research community, academia, research institutes, think tanks, and international institutions by establishing venues or the exchange of knowledge. Increasingly, these networks of government and external researchers are becoming inter-linked.

33. Thus, for example, the Commissioner appeared before the Standing Committee on Transport in 1999 to discuss competition issues raised by the potential restructuring of the airline industry.

34. Government of Canada, Privy Council (1999), *Government of Canada Regulatory Policy*, (November) Appendix A.

35. OECD (1997), "The OECD Report on Regulatory Reform". Paris.

36. Thought not part of the 1995 OECD Recommendation, this important element of the policy concerning the systematic and periodic review of existing regulations was included in the 1997 *OECD Report on Regulatory Reform*

37. The conclusions of this report are discussed in Section 3.3.

38. *Assessing the Contribution of Regulatory Impact Analysis on Decision Making and the Development of Regulations.* The Regulatory Consulting Group Inc./The Delphi Group

39 Report of the Auditor General of Canada (2000), Chapter 24: *_Federal Health and Safety Regulatory Programs,* (December).

40. The Governor in Council is the Governor General of Canada acting on the advice of the Queen's Privy Council for Canada (*i.e.*, the Cabinet). When legislative authority is conferred to the GiC, it is exercised by the government collectively through the Special Committee of Council (SCC), with few exceptions.

41. *Results for Canadians*, pp. 11, 14 and 22.

42. While this change incorporates a move toward more comprehensive reporting and the establishment of a useful link between ex ante planning and ex post performance reporting, the move away from an omnibus plan has reduced the ease with which comparisons between departments can be made. There are also questions as to the objectivity and reliability of performance reporting that is internal to the body under review.

43. This is quite rare. Since 1991 the Parliament has repealed less than half a dozen of the regulations.

44. The Office also acts as the Commissioner of the Environment and Sustainable Development

45 The trend towards decentralisation reflects also a broader management approach as indicated in the 2000 *Results for Canadians* (see above), which emphasised the delegation of decision-making responsibility subject to clear goal setting, performance standards and accountability mechanisms.

46. Zafiriou, p. 18.

47. Porter, Michael. E. (1991), *Canada at the Crossroads,* Business Council on National Issues, Toronto.

48 Health and safety tasks have been consolidated within the Canadian Food Inspection Agency (CFIA), and the latter is encouraging a co-operative approach with the provinces, which have significant responsibilities for these issues. A new regulatory approach is being rolled out for food testing that monitors critical points in the food production process. Multi-stakeholder groups (including government and industry representatives) discuss the best way to address problems with toxins.

49. For example, the Canada-Wide Environmental Standards Agreement is a framework for federal, provincial, and territorial environment ministers to work together to address important issues that require common environmental standards across the country. In addition, there are now agreements on inspections and enforcement, monitoring and reporting, and Environmental Impact Assessment.

50. Select Standing Committee on Public Accounts; *Pulp and Paper Mill Effluent Permit Monitoring*; the Legislative Assembly of British Columbia, Fourth Session, Thirty-sixth Parliament, Eleventh Report

51. Averill Nancy and Amanda Coe (2000), "Managing Regulation: Policy, Practice and Prognosis", prepared by the *Public Policy Forum*., p. 35. The executive summary can be found at: *www.ppforum.com/english/publications/publications/exsummary.html*

52. Note from the Canadian Government, (September 2001) on *Federal-Provincial-Territorial Co-operation.*

53 OECD (2001), *Economic Survey*, p. 122 (September).

54. OECD (2001), *Economic Surveys — Canada*, (September); and OECD (2000), *Structural Issues and Policies,* " Economic Survey: Canada", p. 92. and OECD mission to Ottawa, June 2001.

55. OECD (2000), *op cit*, p. 92.

56 OECD (2001), *Economic Survey*, September, p. 122.

57. See Council of Australian Governments (1997), *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*.

58. The AIT also suffers from inefficient enforcement of its obligations: private parties have to find a government champion in most cases, and, like the WTO, the process involves elaborate negotiation looking far down into the future to the unlikely-to-be-used possibility of retaliation. The exception is for procurement, where a more efficient process has, for that reason, been used.

59 Even though the European model is not suited to Canada's system of governance, as set out under the Constitution

60. According to the OECD Regulatory Indicators Database (1998), 17 OECD countries (of 27 respondents) establish procedures for making legislation in a specific law, while 16 countries do so in the case of lower-level rules.

61. In effect, each of the Regulatory Policies adopted since 1986 has been a Cabinet Directive.

62. OECD (1997), 218 ff.

63. The Regulatory Consulting Group Inc. the Delphi Group (2000), *Assessing the Contribution of Regulatory Impact Analysis on Decision Making and the Development of Regulations,* August 31, p. 19.

64. Averill, N and Coe, A. (2000), *op. cit*, see especially, pp. 27-30.

65. The Regulatory Consulting Group Inc. the Delphi Group (2000), *op. cit*, p. 23

66. The Regulatory Consulting Group Inc. the Delphi Group (2000), *ibid*.

67. Averill, N and Coe, A. (2000), *op cit*, p. 29.

68. *A Strategic Approach to Developing Compliance Policies*, is a sophisticated outline of the issues involved in planning and implementing an effective compliance programme. It explains that there is a variety of factors that influence the ability and the willingness of people to comply with the law, including:

- understanding and acceptance of the objectives and rules of the regulatory program;
- enforceability of the rules;
- capability of the regulated group to comply;

- social and psychological factors;
- economic considerations; and
- capability of the regulatory program to monitor, promote and enforce compliance.

69. Department of Justice (1998), Designing Regulatory Laws that Work: A Manual of Precedents for Regulatory Reform, second edition.

70. Privy Council Office (2000), *Report on Law-Making and Governance: A Summary of Discussions Held by the Deputy Ministers' Challenge Team on law-Making and Governance*, (April), pp. 13-14.

71. Report of the Auditor General of Canada (2000), (December), Chapter 24, p. 24-5.

72. Hill, Margaret, M., (1998), "A Historical Perspective on Regulatory Reform: Institutions and Ideas after the Regulation Reference", Strategic Directions and Policy Co-ordination, Environment Canada, May 6, p. 16.

73. OECD (1997*b*).

74. *RIAs Writers' Guide.* www.pco-bcp.gc.ca p 7.

75. OECD (1997).

76. In Canada in 1986, when the Regulatory Policy was first introduced, strong central control was seen to be necessary to introduce and solidify the practice of RIA and the production of RIAs. In the mid-90s the Canadian system shifted somewhat toward allocating responsibility to the regulator and away from emphasis on central quality control. To a large degree, departments had internalised the requirements of the Regulatory Policy so Regulatory Affairs at TBS looked at all regulatory proposals but in a much more focussed and selective way. TBS emphasis was on training, guidance and capacity building. In late 1998 the Government shifted the focus back to a more centralised approach, after reviewing the roles and responsibilities of central agencies and Cabinet Committees in the regulation making process. It determined that a realignment would strengthen oversight, co-ordination, policy linkages and challenge in the regulation-making process, which was the key reason for consolidating capacity at the Privy Council Office.

77. This is the case only for GICs.

78. OECD mission to Ottawa, meeting with academics June 2001.

79. The Regulatory Consulting Group Inc. the Delphi Group (2000), *op cit*, pp. 11-12.

80. The Regulatory Consulting Group Inc. the Delphi Group (2000), *op cit*, pp. 11-12.

81. The Public Service Commission also offers a number of public sector management courses, including Managing Public Consultations a course designed to enhance consultations as part of policy and decision making throughout government. The course covers the stages of planning, facilitating, and closing public consultation.

82. The Legislative Toolbox provides a step-by-step process to help with the choice of policy instruments, ranging from communications to statutes and regulations; as well training on how to prepare drafting instructions for a Memorandum to Cabinet.

83. OECD (1997), p. 221.

84. Morrall, John and Broder, Ivy (1997), "Collecting and Using Data for Regulatory Decision-making," published in OECD (1997*b*).

85. In fact, a form of "de minimise" exemption applies where regulations affect only a small number of people and reasonable steps have been taken to inform them. Some other exemptions exist, including where RIAs publication would be injurious to the conduct of federal/provincial or international affairs. Exemptions can also be created via the enabling legislation of a particular set of regulations.

86. The Regulatory Consulting Group Inc. the Delphi Group (2000), *op cit*, pp. 11-12.

87. This section will be reviewed under the light of the findings of other chapters' findings.

88. See Schultz, R. J. and Doern, G. B. (1998), "No Longer Governments in Miniature", Canadian Sectoral Regulatory Institutions in a North American Context. In G. B. Doern and S. Wilks (Eds.) *Changing Regulatory Institutions in Britain and North America*, Toronto: University of Toronto Press.

89. See R. J. Schultz and G. B. Doern (1998), op. cit.

90. The 1995 Act though mentioning competition, emphasises the non-economic objectives and the 'orderly development' of the industry, see R. J. Schultz and G. B. Doern (1998), op. cit.

91. In the case of the NEB, the Board was moved from Ottawa to Calgary in 1991.

92. The National Energy Board, for example, publishes the *Regulatory Agenda*, which is a monthly status report of the Board's regulatory activities. It lists recent and pending decisions, current and future public hearings, applications filed with the Board, legislative changes and other general activities.

93. In 1968 the CRTC replaced the Board of Broadcast Governors which had been founded in 1958.

94. In 1996, the CTA replaced the Canadian Transportation Commission which in 1967 succeeded the National Transportation Agency.

95. The specialised independent regulator was established in 1959.

96. The first Act on competition issues was passed in 1889, one year before the United States Sherman Act.

97. Thus, for example, the Commissioner appeared before the Standing Committee on Transport in 1999 to discuss competition issues raised by the potential restructuring of the airline industry.

98. Task Force on Program Review (1985), *A Study Team Report: Review of the Regulatory System*, Ottawa; Government of Canada.

99. Averill, N. and Coe, A. (2000), *Managing Regulation: Policy, Practice and Prognosis*, Public Policy Forum, p. 12.

100 Government of Canada, Regulatory Review Report 1992- 1994, December 1994

101. Privy Council Office (2000), *Report on Law-Making and Governance: A Summary of Discussions Held by the Deputy Ministers' Challenge Team on law-Making and Governance*, (April) p. 3.

102. Averill, N. and Coe, A. (2000), *Managing Regulation: Policy, Practice and Prognosis*, Public Policy Forum, p. 9.

103. See Deighton-Smith, R. (2001), *Australia's National Competition Policy: Policy Lessons from Its Implementation.* Australian Journal of Public Administration, Vol. 60, (September), and Holmes, S. and Argy, S. (1997) *Reviewing Existing Regulations: Australia's National Legislative Review*, Regulatory Impact Analysis: Best Practices in OECD Countries, PUMA/OECD, Paris.

104. See the 2001 Report "eGovernment Leadership: Rhetoric vs. Reality – Closing the Gap" by Accenture, a global management and technology consulting organisation. Accenture attributed Canada's "number one position in eGovernment leadership for 2001" to the federal government's "commitment to break open the traditional departmental approach to online service delivery and instead place the needs of citizens and businesses at the core."

105. Statistic provided by the Government of Canada. No further breakdown on the nature of foreign enquiries is available at this time.

106. Speech from the Throne, January 30, 2001, p. 3.

107. While extensive analysis and information is already provided both to Cabinet and Parliament, to explain the impact of draft statutes, the Government should consider reapplying RIA analysis to primary legislation, to ensure Cabinet receives a document attached to other explanatory material which address the six questions contained in the RIA statement, including cost benefit analysis and an outline of alternative ways that the objectives of the bill could be met.

108. It may be appropriate to follow the Australian model in achieving this. See Council of Australian Governments (1997) *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*.

109. While an interim assessment of the review was made in 1994 and there was ongoing monitoring conducted by the Treasury Board Secretariat, no final assessment was published at the end of the programme.