Democratizing the Regulation Making Process in Manitoba: Drawing on National and International Best Practices

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2012 CanLIIDocs 277

I. INTRODUCTION

Regulations are the omnipresent medium through which citizens most frequently engage with the law. Statutes may be more glamorous and usually attract more public scrutiny and debate, but regulations are far more likely to have a direct impact on our daily lives. If looking solely at sheer volume, regulations also constitute a much larger body of law than statute.[1] The process by which regulations are made should therefore be a topic of great concern for a healthy, functioning democracy.

Canada's regulatory policy is widely regarded as among the best in the world.[2] Federal policy prescribes formal roles to various government

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1 For example, the English version of the Manitoba *Pension Benefits Act* weighs in at 18865 words. The English version of the ancillary regulations spans 57426 words. This is not an unusual ratio of statute to regulations.

2 Organization for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Government Capacity to Ensure High Quality Regulation* (Paris: OECD, 2002) at 6.

agencies, and carefully ensures accountability and transparency at all stages of the process. At the provincial level, the situation is less consistent. Although some Canadian provinces have strong regulatory policies, others lag behind. We will argue that Manitoba's regulatory policy is among the latter and one of the anchors weighing down the province's economic growth. Drawing heavily from the federal example (supplemented with lessons derived from other Canadian provinces, Australia and the United States), we will make a number of recommendations towards reforming Manitoba's regulation-making process.

2012 CanLIIDocs 277

II. WHAT ARE REGULATIONS?

There is a perception that regulations are more technical and specific than statute. The *MacGuigan Report* (which will be discussed in greater detail below) uses the analogy of a "skeleton" to describe the way Parliaments enact statutes, "leaving the 'details' to be filled in by regulations."[3] Another textbook takes this image a little further, describing legislation "as a skeleton of principle onto which a mass of formal regulations have to be added to give life to a complex statutory scheme."[4] Although this is the usual practice in Canada, there is in fact no absolute distinction between the subject matter of regulations and statutes.[5] The only categorical difference between regulations and statute is the process through which they are made. Statutes are passed by elected representatives, and go through the formal legislative process, whereas regulations are made pursuant to delegated power. This delegation is effectively the outsourcing of governance, empowered by an enabling clause within a statute that grants a regulation-making power to a party

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[3] Canada, Special Committee on Statutory Instruments, *Third Report of the Special Committee on Statutory Instruments*, (Ottawa: Queen's Printer for Canada, 1969) at 5 (Chair: Mark MacGuigan) [*MacGuigan Report*].

[4] David J. Mullan, et al, *Administrative Law: Cases, Text, and Materials*, 5th ed (Toronto: Edmond Montgomery Publications Ltd.) at 676.

[5] For example, the new Manitoba *Condominium Act* prescribes a rescission period of seven days on a contract for the sale of a condominium unit. *Condominium Act,* SM. 2011, c 30, s 47(1). Nova Scotia has a similar provision, although it is contained in the Regulations. *Condominium Regulations,* NS Reg 230/2011, s 75(1)(c). See also OECD, *The OECD Report on Regulatory Synthesis* (Paris: OECD, 1997) at 6.

outside the Legislature. The recipients of this delegated power can be the Executive, a specific minister, or a Crown corporation among others. Although some regulations are undoubtedly essential for modern government, the process must be carefully controlled. To put it succinctly, the regulatory process must be regulated.

It is important to note from the outset that regulations are entirely necessary and desirable in many cases. While we are primarily concerned with the political and economic ills associated with over-regulation, we recognize that under-regulation can be equally damaging in situations of genuine market failure, especially where the public's safety is involved. If deployed appropriately, regulation can do a great deal to promote economic growth. For example, the creation of common standards for an industry—a task best achieved by government intervention in the form of regulation—can increase competition by cutting down on the ambiguity facing customers in purchase decisions. It is only when regulatory power is not carefully controlled that potentially negative consequences ensue.

2012 CanLIIDocs 277

III. Common Problems Associated with Regulations

A. Excessive Executive Discretion

One example of the ills associated with uncontrolled regulatory power is when an excessive amount of discretion is placed in the hands of the executive branch. This level of discretionary power is inconsistent with the basic tenets of responsible government and if we strive to be a democratic society, we stray from the principles of responsible government at our own risk. Consider the enabling clause in British Columbia's *Island Trust Act*, which states "despite this or any other Act, the Lieutenant Governor in Council may, by regulation, do one or more of the following [...]".[6] Seemingly the words "despite this or any other Act" confer upon the Lieutenant Governor in Council the power to enact regulations that are inconsistent with any statute, admittedly in a fairly limited context. Essentially, this level of discretion allows the Executive to break the law.

6 *Island Trusts Act*, RSBC 1996, c 239, s 54(2).

B. Lazy Lawmaking

Regulatory power can also be a vehicle for bad, vague, or plain lazy lawmaking. Another example from British Columbia on this point is the *Wood First Act*.[7] This *Act* proposes to "facilitate a culture of wood by requiring the use of wood as the primary building material in all new provincially funded buildings."[8] The problem is the Act leaves all details on how to facilitate a "culture of wood" to regulations. Decisions of what is meant by "primary building material" or "provincially funded", which could have incredibly far-reaching implications, will be made in a far less transparent way than they ought to be. In this case, the legislature has offloaded the work that they ought to be doing themselves to the bureaucracy in order to make a clumsy gesture to a preferred industrial sector.

An example of this practice happening in Manitoba can be taken from the political scuffle over penned hunting in 1999. Penned hunting (the hunting of game within a confined space so as to ensure a "guaranteed kill" experience) attracts millions of dollars for neighbouring jurisdictions,[9] but has been heavily opposed by animal rights groups in Manitoba. Uncertain of how to handle the matter, the Province introduced Bill 5 to "enable the regulation or the prohibition of the activity of penned hunting."[10] Rather than deciding on whether or not to ban the practice, lawmakers instead decided to leave the matter ambiguous by empowering the Minister to regulate as he or she saw fit. By delegating control of the subject to regulators, the legislative branch was able to dodge a politically charged issue and maintain the illusion of having taken action without a substantive decision ever being made.

C. Economic Stagnation

A final risk carried by unrestrained regulatory power is the economic stagnation associated with over-regulation. Regulations carry inherent

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7 Bill 9, *Wood First Act* 1st Sess, 39th Leg., British Columbia, 2009. Regulations have not been enacted as of July 2012.

8 *Ibid* at s 2.

9 Chantelle J Bryson, "*The Wildlife Amendment Act*" (2001) 28:2 Underneath the Golden Boy 228.

10 *Ibid* at 229.

2012 CanLIIDocs 277

compliance costs which can hamper economic growth. Compliance costs come in numerous forms: the human resource costs in both the supervising department and within the private sector to ensure adherence; the movement of capital away from production; and the loss of production in the province as companies leave for a more favourable regulatory climate. To minimize these effects, it is imperative that regulatory power be deployed only when necessary. Regulators must resist the temptation to wield regulatory power, for what may indeed be a good cause, when a non-regulatory measure would be more suitable. Thus while ensuring that every childcare centre maintain all the primary colours in a minimum number of boxes is a noble goal, it is inappropriate for governments to deploy coercive power to achieve it.[11]

In many cases, the use of regulatory power can be likened to a one-way ratchet, steadily ticking up but never scaling back. New regulations are added to the existing number, but rarely are any removed. The situation can be likened to the accumulation of clutter within a house. By merely going about our business, we continuously collect new goods, but instances where we set out to de-clutter are rare, and usually sparked only when a space becomes intolerably overcrowded. Since regulatory reform is a rather unsexy topic, conscious effort and political motivation are required. The result, in Manitoba and many other jurisdictions, is over-regulation.

Manitoba has regulations that require taxi drivers to wait until their passengers are fully seated before they inquire about destinations,[12] regulations that govern the colour scheme on a no-smoking sign,[13] and regulations that set minimum and maximum prices for vegetables grown in the province.[14] One unnecessary regulation is amusing, two are a concern, and any more are a drain on economic efficiency. If Manitoba hopes to escape from "have not" status, it will have to take a hard look at reforming its regulation-making process.

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11 This was an actual regulatory proposal in Colorado. See "Over-regulated America" *The Economist* (18 February 2012) online: economist.com <http://www.economist.com/node/21547789>.

12 *Taxicab Regulation*, Man Reg 209/91, s 27(2)(b).

13 *Non-Smokers' Health Protection Regulation*, Man Reg 174/2004, s 8-9.

14 *Manitoba Vegetable Producers Marketing Plan Regulation*, Man Reg 117/2009, s 19(a).

2012 CanLIIDocs 277

D. Regulatory Capture

A different type of problem that can arise with respect to regulatory power is a situation known as regulatory capture. This issue arises when regulators and the regulated develop a relationship that is too cozy. Regulators become beholden or "captured" by the industry they are supposed to be regulating. One paper on the subject identifies three distinct levels of regulatory capture:

i. Identification with the regulated parties;
ii. Sympathy with the challenges that the industry faces in meeting its regulatory burdens;
iii. An absence of toughness.[15]

In the wake of the 2008 financial crisis in the United States, a veritable cottage industry of literature emerged documenting the feebleness of the Securities Exchange Commission in its mandate to protect the public interest. Furthermore, decisions over the discretionary allocation of bailout money by the Department of the Treasury in 2008 were found by one study to have been "consistent with regulatory capture theory."[16] Regulatory capture turns the whole endeavour of regulating upside-down. Most perversely, businesses are motivated to focus their attention on influencing regulators rather than maximizing efficiency and improving their competitiveness.

The problems that arise are two-fold. First, the closed system created by such a close relationship between regulators and their industry means that enforcement of existing regulations often takes place behind closed doors. With no chance for public scrutiny, enforcement can become selective, as the regulatory body and the industry will naturally find ways to meet an equilibrium which may not reflect the public interest.[17] Secondly, the close relationship may foster a situation where the industry has too much say in the creation of new regulations. They may use their proximity

2012 CanLIIDocs 277

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[15] Toni Makkai & John Braithwaite, "In and Out of the Revolving Door: Making Sense of Regulatory Capture" Journal of Public Policy 12, 1 (1992) 61-78 (at 61).

[16] Roger D Congleton, "On the Political Economy of the Financial Crisis and Bailout of 2008-2009" Public Choice Vol 140 (2009) at 310 (287-317).

[17] David Martimort, "The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs", online: (1999) The Review of Economic Studies <www.jstor.org/stable/pdfplus/2566926.pdf?acceptTC=true>.

to cajole and suggest favourable conditions for their own goals.[18] Industry representatives may "consult" during the formation of new rules that will govern their own business transactions, and if this influence is not entirely transparent, the result can run afoul of the public interest. The keys to avoiding regulatory capture are transparency and accountability. By ensuring that the enforcement of regulations is carried out in a consistent, formalized structure, which is open to public scrutiny, the opportunities for selective enforcement dry up. Similarly, a transparent process coupled with consultations that are as extensive as feasibly possible will ensure that new regulations are appropriately balanced.

In Manitoba there are several regulatory bodies that are arguably operating under regulatory capture. One well-studied example is the Taxicab Board. The taxi market is undoubtedly an area in which some regulation is required. For one thing, the clientele is disproportionately drawn from visitors to the region, and the function that reputation plays in maintaining standards in other industries is less effective. Furthermore, for practical reasons, most consumers are compelled to hire the first taxi that they can find, making the market akin to an endless series of micro-monopolies. For these reasons, some minimum standards in health, safety and business practices ought to be guaranteed by regulation. However, in most North American cities the consumer fare structure and the number of licenses that can be issued have become standard parts of the regulatory regime. What occurs in most markets is a type of protectionism that benefits the holders of taxicab licenses through an artificially imposed scarcity. Thus in Winnipeg in 2010 there were 410 licenses, although if the market had been allowed to grow along with the economy over the past 20 years there would be 496.[19] Meanwhile, the re-sale value of a taxicab license has increased to $350,000 (from $100,000 in 2000).[20]

Faced with a similar situation, New Zealand removed all license controls from their taxicab industry in 1989 and over the following decade saw a dramatic decrease in consumer fares coupled with a gain of over a

2012 CanLIIDocs 277

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18 *Ibid* at 2.

19 David Seymour, "Something Rotten in the State of Winnipeg Taxi Market", online: (2009) Notes from the Frontier Centre for Public Policy <www.fcpp.org/publication.php/2610/>.

20 *Ibid*.

thousand jobs as new carriers entered the marketplace.[21] In 2000, Ireland undertook a similar campaign of decoupling regulators and the taxicab industry. Again, they were met with a decrease in fare and wait-times for consumers, but what was most surprising in the Irish experience, was how much the market grew beyond projections. Whereas government estimates predicted that the number of cabs on Irish streets would less than double over ten years, the number of carriers actually tripled in size over two years to meet the market's natural demands.[22] These examples illustrate the type of growth that is being stifled by regulatory capture, and demonstrate that while the current system may work for the few license holders, it can be a nightmare for consumers or those looking to create new jobs.

2012 CanLIIDocs 277

IV. REGULATORY HISTORY: FROM THE GLORIOUS REVOLUTION TO TODAY

To properly contextualize our conclusions on the steps that Manitoba ought to take to reform its regulatory system, we would first like to offer an account of regulatory history. We do not seek to provide a comprehensive survey of all regulatory history, but rather an overview of those developments over the past centuries that are useful for our purposes.

A useful date to begin is 1610 and the judgement of Sir Edward Coke in the *Case of Proclamations*. The English monarchy and Parliament were at odds as each explored the extent of their law-making powers. At that time, "the great question was whether the sovereign had rightful authority to displace the traditional liberties and privileges of the People."[23] At issue in the case was James I's assertion of the power to proclaim new offences. Coke needed to find an authority that trumped that of the King. He based his judgement upon what he called the traditional common law of the English people, which he claimed "constituted the 'ancient constitution' of the realm."[24] He continued that "the King cannot change any part of

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21 *Ibid.*

22 *Ibid.*

23 Michael W McConnell, "Tradition and Constitutionalism before the Constitution" (1998) U Ill L Rev 173 at 177.

24 *Ibid.*

the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[25] According to Coke's argument, the customs and laws of England were above the King's authority, and could not be altered without the approval of the People's representatives. Herein we see the genesis of the separation of legislative and executive power that fully crystallized in 1688's Glorious Revolution, wherein the monarchy's eminence within the constitutional structure of England was displaced by legislative supremacy.

2012 CanLIIDocs 277

In the years that followed, the legislative branch was ascendant and with this more expansive power came the ability to delegate. For roughly two centuries, the relative insignificance of delegated power prompted little attention from Parliament, but by the late 19th century the business of governing had drastically changed. In 1888 FW Maitland observed:

> The new wants of a new age have been met in a new manner—by giving statutory powers over all things to the King-in-Council, sometimes to the Treasury, sometimes to the Secretary of State, sometimes to this Board, sometimes to the other… Year by year the subordinated government of England is becoming more and more important… We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.[26]

The complexities of modern government had resulted in a sprawling subordinate arm that possessed considerable powers. Some voices cried out against the shadowy excesses of the bureaucracy that undermined the supremacy of Parliament. One of the most forceful, Lord Hewart, wrote in 1929:

> It is one thing to confer power, subject to proper restrictions, to make regulations. It is another thing to give those regulations the force of statute. It is one thing to make regulations which are to have no effect unless and until they are approved by Parliament. It is another thing to make regulations, behind the back of Parliament, which come into force without the assent or even the knowledge of Parliament. Again, it is a strong thing to place the decision of a Minister, in a matter affecting the rights of individuals, beyond the possibility of review by the Courts of Law. And it is a strong thing to empower a Minister to

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[25] (1611) 12 Co Rep 74.

[26] FW Maitland, *The Constitutional History of* England (Cambridge: University Press, 1963) at 417.

> modify, by his personal or departmental order, the provisions of a statute which has been enacted.[27]

Lord Hewart's polemic sparked a heated national discussion, and Parliament responded by commissioning a *Report of the Committee on Minister's Powers (Donoughmore Report).* This report is generally seen as a starting place for modern regulatory jurisprudence.[28]

The *Donoughmore Report* affirmed the necessity of delegated legislation and cited six justifications:

i. Parliament does not have time to properly address technical and arcane minutia.
ii. Modern times require complex and technical laws that are beyond the competence and expertise of Parliament.
iii. Implementation of administrative regime is a complex process, and Parliament cannot realistically foresee all contingencies.
iv. The ability of the law to be flexible and adjust is a legitimate virtue. Sometimes delegation is the best way to achieve this.
v. Delegation can afford an opportunity to experiment which is occasionally desirable
vi. In emergencies delegation may be the only realistic way to deal with a crisis.[29]

Although necessary, the committee did see a great danger "that the [civil] servant may be transformed into the master."[30] It recommended more formal controls and oversight by Parliament. These concerns were eventually addressed by the *Statutory Instruments Act (UK), 1946.*[31]

In Canada, the extensive use of regulations began in earnest during World War II.[32] As JR Mallory writes, "at the beginning of 1940 the whole

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27 The Right Hon Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Ltd, 1929) at 19.

28 Caroline Morris & Ryan Malone, "Regulations Review in the New Zealand Parliament" (2004) 4 Macquarie LJ at 9 (Hein Online).

29 U.K., H.C., *Committee on Ministers' Power Reports* Cmnd 4060 in *Sessional Papers,* (Her Majesties Stationary Office, 1932) at 51-52 (Chair: Lord Donoughmore).

30 *Ibid* at 53.

31 (UK), 9 & 10 Geo 6, c 36.

32 Prior to the 20th Century, the use of delegated legislation had been relatively minor. Early examples include instances where the Parliament of Upper Canada delegated legislative power to an official to combat fire damage (*An Act to Prevent Accidents by Fire in this Province, 1792)* and manage the province's ferry traffic (*An Act for the Regulation of Ferries, 1792*). See Denys C Holland & John P McGowan, *Delegated Legislation in*

2012 CanLIIDocs 277

character of executive government in Canada changed."[33] Prior to this time "it could not be said that…the scope of the activities of the federal government was such that Parliament lacked adequate time to act as a "watch-dog."[34] With the rapid increase in the usage of Orders in Council, the government undertook to table in Parliament all those regulations that related to the war. The rationale of this was to keep the legislative branch well-apprised of the actions of the subordinate government. Although certain standards of publication and oversight were being observed, they were not entrenched until 1947 with the *Statutory Orders and Regulations Order* (ironically it was only another Order in Council that set out filing and publication procedures). Although as Holland and MacGowan observe: "Judging by the number of statutory instruments actually published, it was by and large ignored."[35] It was only the *Regulations Act in 1950* that gave a statutory mandate for a more comprehensive regulatory policy.

The *Regulations Act* was significant for setting out unequivocal publication requirements for regulations.[36] It is fundamental to the values of Canadian constitutional democracy that the law be knowable, and as Holland and McGowan observe: "there is no logical, practical, or moral reason why this principle should apply solely to primary legislation and not to regulations or other forms of delegated legislation."[37] By setting out a requirement that every regulation be published in the *Canada Gazette* and subsequently tabled in Parliament, Canada took an important step towards democratizing its regulatory system.[38] But of course there was still much more to do.

Canada (Toronto, Carswell Co Ltd, 1989).

[33] JR Mallory, "Delegated Legislation in Canada: Recent Changes in Machinery" (1953) 19:4 Economics and Politics Science: The Journal of the Canadian Political Science Association 462.

[34] *Ibid.*

[35] *Supra* note 32 at 38.

[36] Although the requirement to publish was unequivocal for regulations that were encompassed within the definition of "regulation" in the statute, the *MacGuigan Report* pointed out many instances of subordinate law-making that were able to circumvent the publication requirement.

[37] *Supra* note 32 at 35.

[38] *Supra* note 2 at 7.

2012 CanLIIDocs 277

Throughout the next decades the usage of regulations continued to grow. With this increased volume, voices clamoured—in Canada and abroad—for better regulatory policy. In the United States, the drastic growth in regulatory powers that accompanied the New Deal prompted Theodore Lowi to publish *The End of Liberalism* in 1969.[39] Lowi championed sunset clauses as a check on the power of regulatory agencies, which he saw as effectively comprising a fourth and largely unaccountable branch of government. Lowi went so far as to declare that a second American Republic had arisen, organized around an ideology of "interest group liberalism." Lowi argued that those societal interests of sufficiently shrewd organizing skill now had regulatory agencies to advance their interests. The end result was citizens' disengagement and disenchantment with governments that seemed to have abdicated governing to bureaucrats.

In Lowi's view, the winners and losers of interest group liberalism were not determined by wealth alone, but rather by the ability to channel manpower and money into effective organization and lobbying.[40] He believed that in many sectors, these conditions within the system of regulation tended to favour the status quo, and resulted in the creation and preservation of oligopolies. This effect can be seen in the aviation industry of the late 60's and early 70's, where it was:

> illegal to engage in any commercial air service without a 'certificate of convenience and necessity' from the Civil Aeronautics Board, and no such certificate for the entry of new company or the expanded service of an existing company will be granted without due consideration of the profit margins of all members.[41]

The above conditions provide a classic example of regulatory capture. The symbiotic relationship between the industry and the regulatory agency squeezes out competition, and leaves the market trapped in stasis.

The solution proposed by Lowi was a tenure-of-statutes act:

> The only direct antidote to immortality would appear to be an attack upon the Frankenstein legislation creating each monster, and in that spirit the final reform

2012 CanLIIDocs 277

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[39] Theodore J Lowi, *The End of Liberalism* (New York: W.W. Norton & Company Inc.: New York, 1969).

[40] *Ibid* at 278-279.

[41] *Ibid* at 280.

> proposal is for a general statute setting a Jeffersonian limit of from five to ten years on the life of every enabling act.[42]

Of course it did not mean that no agency could endure longer, only that agencies must regularly prove the ongoing necessity of their regulatory function. Lowi imagined a sunset audit to be "a creative time during which the politics of the agency is likely to come unstuck and the opportunity for substantive reconsideration is most propitious."[43] In the decade following the publication of *The End of Liberalism*, 35 American states passed sunset laws, although Lowi himself grew disillusioned with the results.[44] In Colorado, the first state to enact a tenure-of-statutes act, the auditing agency spent $212,000 and uncovered savings of only $6,810.[45] The greatest challenge for sunset reviews (perhaps unsurprisingly) was that the onus often lay with the auditors to show that regulation was not required, rather than the opposite, which was the original intention of conducting the review. Notwithstanding that they are something less than a cure-all, sunset clauses can be a useful tool to maintain legislative oversight, and were endorsed by the Canadian Federal regulatory policy along with mandatory reviews.[46]

Coming back to Canada, concerns that the use of delegated legislation was insufficiently accountable to Parliament persisted even with the improvements made by the *Regulations Act*. To address these concerns, Parliament convened a special committee on statutory instruments who published their findings in 1969. The *MacGuigan Report's* preface began by setting out the importance of fostering accountability and transparency in the regulatory process:

> This report is based on the assumption that public knowledge of government activities is the basis of all control of delegated legislation. For parliamentary democracy is a system of government which requires that the executive be

2012 CanLIIDocs 277

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42 *Ibid* at 309.

43 *Ibid* at 310.

44 Chris Mooney, "A Short History of Sunsets", at para 34 online: (2004) Legal Affairs <http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp>.

45 *Ibid* at para 14.

46 Treasury Board of Canada Secretariat, "Cabinet Directive on Streamlining Regulations", online: (2007) Treasury Board of Canada Secretariat < http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp>.

> responsible to the legislature and both be accountable to the people, and there can be neither responsibility nor accountability where there is no knowledge of what has been done. In political matters knowledge is the beginning of power, and its lack, impotence.[47]

The committee's ultimate conclusion that "there should be…public knowledge of the processes of delegated legislation before, during, and after the making of regulations" was robustly defended:

> Your Committee adopts this position for five reasons. First, the people cannot control their government without knowledge of its actions, nor can Parliament fulfill its role of responsibility with respect to legislation without being fully informed on the operation of those legislative powers which it has delegated to others. Second, the existence of secrecy is likely to lead to popular suspicion of wrongdoing by government whether or not there is any genuine reason for suspicion. Third, we are living today in a period in which the validity of authority can no longer be taken for granted but must be constantly demonstrated. Governmental systems which do not take this new attitude seriously are apt to find public confidence in them diminishing rapidly. Obviously a continuing demonstration of the justice of the system necessitates an opening of the processes and products of delegated legislation to the light of publicity.[48]

This thesis has provided the bedrock for much of the Federal regulatory policy ever since.

The *MacGuigan Report* recommended consultations as the crucial mechanism to affect these changes.[49] At the time, two Canadian statutes—*The Broadcasting Act* and *The Grain Futures Act*—legally required consultations with stakeholders. In other cases, consultations were undoubtedly occurring but only at the regulator's discretion.[50] The committee stopped short of calling for a systematic minimum requirement on what would constitute an adequate consultation process, and instead made the more modest recommendation that "when enabling provisions and statutes are being drawn, consideration should be given to providing for some type of formalized hearing or consultation procedure."[51]

Other recommendations in the *MacGuigan Report* aimed to facilitate an effective consultation process. These included drafting standards,

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47 *Supra* note 3 at vii.

48 *Ibid* at vii and viii.

49 *Ibid* at 47.

50 *Ibid* at 43.

51 *Ibid* at 48.

2012 CanLIIDocs 277

stricter publication requirements,[52] and the establishment of a Standing Committee of Parliament to scrutinize regulations.[53] Interestingly, the Committee cited Manitoba as a leader in this last recommendation, having set up an analogous committee in 1960.[54] In 1971, the federal government accepted many of the *MacGuigan Report's* recommendations and enacted the *Statutory Instruments Act.*[55] The *Statutory Instruments Act* also assigned formal review roles to various government agencies. This is still the instrument that sets out the basis for the federal government's regulatory policy and will be examined closer in a following section.

Although the crux of the current policy was put in place in 1971, it has been significantly supplemented several times in the years that have followed. Particularly important were the reforms implemented by the newly elected Mulroney Government in 1986, which included the requirement of a Regulatory Impact Assessment Statement (RIAS) that would accompany the regulation through all stages of publication and review. The RIAS will be examined in greater detail below. The 1986 reforms also included the aspirational and non-binding *Citizen's Code for Regulatory Fairness.* This document attempted to encapsulate the philosophy underlying the government's regulatory policy:

> [in] a democratic country… the citizen should have a full opportunity to be informed about and participate in regulatory decisions and to have a basis for 'regulating the regulators' and judging the regulatory performance of the Government.[56]

It is in this spirit that the Federal Government—or any other government for that matter—ought to be evaluated when examining the current policy.

Another historical development worth noting is the school of thought that emerged in the 1970s and 80s that correlated excessive regulation with poor economic performance. On the one hand, regulations impose

2012 CanLIIDocs 277

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52 Ultimately the definition of a "regulation" set forth by s 2 of the *Regulations Act* failed to capture a significant amount of delegated legislation.

53 *Supra* note 3 at 74.

54 *Ibid* at 70.

55 *Statutory Instruments Act*, RSC 1970-71-72, c 38.

56 Paul Salembier, *Regulatory Law and Practice in Canada*, (Markham: LexisNexis Canada Inc, 2004) at 371.

compliance costs, and "red tape" can discourage and deter entrepreneurship.[57] Each of these costs represents an unnecessary drag on economic output. Thus, the number of regulations should be kept to a minimum. On the other hand, it was observed that transparency in the regulatory process had the practical effect of keeping businesses in the loop about any potential changes in their sector. This translated into confidence in government, and an all-around friendlier climate to do business.[58]

In the 1990s, The Organization for Economic Cooperation and Development (OECD), seeing the importance of regulatory reform on economic performance, published a series of reports that critically examined member countries' regulatory systems. The report on Canada was published in 2002, and the Canadian policy was praised for high levels of accountability and transparency. Another country that scored very highly was Australia, which over the past decades pioneered several innovations. These include a comprehensive policy of mandatory reviews, sunset clauses, and a Small Business Deregulation Taskforce, which reviews impactful regulations.[59] The Australian reform experience will be looked at further when we turn to making recommendations for Manitoba.

V. VARIOUS APPROACHES TO REGULATORY REFORM

A. The Rise of Cost-Benefit Analysis

Cost-benefit analysis (CBA) as a means of assessing regulatory activity has been steadily growing in prevalence and sophistication since the 1970s. At its root, CBA suggests "things are worth doing if the benefits that result from doing them outweigh the costs."[60] In theory, a universal requirement for such an accounting during the regulation-making process

[57] Organization for Economic Co-operation and Development, *The OECD Report on Regulatory Reform: Synthesis*, (Paris: OECD, 1997) at 6.

[58] *Supra* note 2 at 33.

[59] Organization for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Australia – Towards a Seamless National Economy*, (Paris: OECD, 2010) at 101.

[60] Amartya Sen, "The Discipline of Cost-Benefit Analysis" (2000) 29 J Legal Stud at 5.

2012 CanLIIDocs 277

would result in the culling of unnecessary regulations, leaving only those with a net benefit. Though it may seem uncontroversial, this definition of CBA is deceptively complex. The consequences of regulating (or not regulating) will often ripple out beyond the immediate focus, making them difficult to track and evaluate, and these considerations become exponentially more troublesome once the issue of opportunity cost is addressed. Adding to the difficulty, CBA will often require a valuation of intangible consequences, such as the preservation of human life, or the violation of rights. How does one attach a monetary value to such concepts? The question of how best to approach these complications has sparked widely divergent literature.

In general, regulators tend to provide poor estimates of their proposal's potential impact. This criticism may seem unduly harsh (and, granted, only possible with the benefit of hindsight) but documentation of American regulators over the last decade affirms it. Some literature suggests that regulators have a tendency to underestimate their proposals, perhaps because they fail to foresee how their projects will balloon as they move through the regulation-making process.[61] A once slim idea becomes more costly as more elements are added to it to satisfy political stakeholders. Other commentators suggest that, in the majority of cases, regulators actually overestimate the costs of their proposals by failing to take into consideration how industry innovation will lower compliance costs.[62] Whether over or underestimating, the consensus is that departmental projections are often inaccurate.

Cass Sunstein, an American legal scholar and a leading proponent of CBA, applies the lessons developed by Daniel Kahneman and others in the field of behavioural economics to the regulation-making process in an attempt to resolve these issues. In Sunstein's view, CBA is:

> [A] means of overcoming predictable problems in individual and social cognition. Most of these problems might be collected under the general heading of selective attention. [CBA] should be understood as a method for putting 'on

2012 CanLIIDocs 277

61 Winston Harrington, Richard D Morgenstern & Peter Nelson, "On the Accuracy of Regulatory Cost Estimates" (1999) Discussion Paper 99, Resources for the Future at 6 <http://www.rff.org/rff/Documents/RFF-DP-99-18.pdf>.

62 *Ibid* at 20.

screen' important social facts that might otherwise escape private and public attention.[63]

Regulators are often led to make inefficient regulations, or to regulate when it is unnecessary, by relying on heuristics rather than empirical evidence. Though it may not be possible to consider every possible alternative when weighing the opportunity cost of a regulation, it is necessary to consider the matter as thoroughly as possible, and consider the decision as part of the larger governmental context. Though difficult, Sunstein argues that non-monetary consequences are capable of being evaluated. A human life, for example, has been estimated to be worth "between $700,000 and $16.3 million [USD] with the most commonly used figure of $6.1 million, as determined by the [EPA]."[64]

Critics of Sunstein's methodology suggest that such in-depth analysis is impractical, as it requires bureaucrats to spend massive amounts of time and resources in the assessment of proposals, slowing the process to a halt.[65] David Driesen also argues that, in its current form, CBA has a tendency to favour less stringent and less costly regulations, but almost never advocate for more expansive coverage.[66] Driesen argues that costs are easier to project and are thus afforded a disproportionately strong position within the accounting. This flaw results in the creation of regulation that is cost-effective, but fails to go far enough to fully address the problem set before it.

B. Capping Regulatory Output

Increasingly, regulatory reform efforts have focused on the concept of a regulatory output limitation. Proponents of this method suggest that although new regulations must be implemented as necessity demands, a concerted effort should be made to fix the number of total regulations by culling those that already exist. Essentially, this method is aimed at

2012 CanLIIDocs 277

[63] Cass R Sunstein, "Cognition and Cost-Benefit Analysis" (2000) 29 The Journal of Legal Studies at 3.

[64] Bryan Schwartz & Patrick Robinson, "A Better Frame of Mind for Fiscal Decision Making: The Lesson of Behavioural Economics" (2004) 4 Underneath the Golden Boy 71.

[65] David M. Driesen, "Is Cost-Benefit Analysis Neutral?" (2006) Syracuse College of Law Faculty Scholarship at 22 <http://surface.syr.edu/lawpub/17/>.

[66] *Ibid.*

enforcing a constant de-cluttering process. In its more aggressive forms, this limitation means a commitment to a zero net increase in new regulations. For each new regulation created, an existing one must be removed in a one for one trade-off.

This zero-increase concept plays a central role in British Columbia's "Straightforward BC" regulatory reform program. Originally announced in 2001, the program represents a joint effort between the provincial Minister of Finance and Minister of Jobs, Tourism and Innovation aimed at "cutting red tape and reducing needless requirements."[67] In 2004, the program added a commitment to a zero net increase based on a baseline number of existing regulations. According to their recently published annual report, the province has not only been able to meet their self-imposed requirement, but has successfully managed to generate a further 9.9% reduction from the 2004 baseline.[68]

In *Believe in America: Mitt Romney's Plan for Jobs and Economic Growth*, the American presidential hopeful dedicated a significant portion of his platform to regulatory reform. A zero net increase of compliance costs is central among his policies. The plan requires that an agency proposing the creation of a new regulation "go through a budget-like process and identify off-setting cost reductions from the existing regulatory burden."[69] Romney's offering differs from that of British Columbia's in that it focuses on a frozen level of compliance costs (for every dollar in costs added an existing dollar must be removed), as opposed to the number of regulations. How this requirement would have been used in practice remains unclear. By necessity, a "budget-like process" would rely heavily on impact assessments for new regulations and cost estimations for those that already exist. While these numbers can be difficult to state with complete accuracy, the real problems arise in the one-for-one trade-off. For example, if we imagine a new regulation regarding food safety that carries with it an

2012 CanLIIDocs 277

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[67] Government of British Columbia, *Straightforward BC: Regulation, Clear and Simple*, online: Government of British Columbia <www.straightforwardbc.gov.bc.ca/About_Us.html>.

[68] Government of British Columbia, *Achieving a Modern Regulatory Environment: BC's Regulatory Reform Initiative First Annual Report 2011/2012*, (Victoria: Government of British Columbia, 2011) at 6.

[69] Romney for President, Media Release, "Believe in America: Mitt Romney's Plan for Jobs and Economic Growth" (6 September 2011).

estimated compliance cost of $X. The proposal could only be implemented if a similar costing regulation could be eliminated or if a number of smaller regulations whose costs sum to X could be culled together. If after surveying the body of existing food safety regulations the agency cannot find any that could safely be removed, or merely none that represent $X, a beneficial regulation may be forgone.

A flaw in these programs comes from their assumption of a saturated regulatory environment. A zero net increase can hamper the development of necessary and potentially beneficial regulations, particularly those aimed at emerging industries where the marketplace is constantly shifting. While it is true that many areas of society are over-regulated, that does not necessarily mean that there are not a number of important sectors that are actually under-regulated. A zero net increase assumes a uniform level of regulation across all industries. To combat this flaw, BC provides a number of exceptions that place certain types of regulations outside the inflexible accounting structure.[70] These include regulations that are meant to be transitory in nature, or where the minister can identify special circumstances that demand flexibility. Though a regulatory cap may be an ideal to strive for, best practice suggests that we should not tether ourselves to it at the risk of regulatory stagnation.

2012 CanLIIDocs 277

VI. THE FEDERAL GOVERNMENT OF CANADA'S REGULATORY POLICY

A. The Current Policy

Regulatory policy at the federal level is outlined by two key documents: *The Cabinet Directive on Streamlining Regulation*,[71] which describes regulatory objectives and policy aspirations, and *The Statutory Instruments Act*,[72] which details the procedure required to create a new regulation. Although additional legal constraints may be prescribed in the

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70 British Columbia, Government of British Columbia, *Government of British Columbia Regulatory Policy*, (Victoria, Government of British Columbia, 2008) at 2.

71 Canada, Treasury Board of Canada Secretariat, *Cabinet Directive on Streamlining Regulation*, (Ottawa, Treasury Board of Canada Secretariat, 2007).

72 *Statutory Instruments Act*, RSC 1985, c S-22.

enabling Act of a specific regulatory subject, this pair provides the general framework of the process.

Two departments perform the lion's share of the oversight of the federal policy. Before moving on to describe the policy in greater detail, it may be helpful to introduce them. The Department of Justice (DOJ) provides legal advice and drafting services to sponsoring departments. As a regulation proposal is being formed, it is the DOJ's responsibility to ensure that the regulation does not exceed the authority delegated to the department by the enabling statute and does not trench on the rights guaranteed in the *Canadian Charter of Rights and Freedoms.*[73] The Treasury Board Secretariat, Regulatory Affairs Sector (TBS-RAS) is a committee of Cabinet Ministers charged with:

> Ensuring that the analysis that departments and agencies provide on policy and regulatory proposals is consistent with the commitments and directions set out in the *Cabinet Directive on Streamlining Regulation* and that the analysis effectively supports ministerial decision making.[74]

The TBS-RAS scrutinizes the sponsoring department's RIAS, demands changes where they the principles of the *Directive* would be better served another way.

The stated overarching goal of the Federal policy is to protect and advance "the public interest by working with Canadians and other governments to ensure that its regulatory activities result in the greatest overall benefit to current and future generations of Canadians."[75] When exercising delegated authority, regulators are required by the *Directive* to:

i. protect and advance the public interest economic well-being of Canadians;
ii. promote a fair and competitive market economy that encourages entrepreneurship, investment, and innovation;
iii. make decisions based on evidence and the best available knowledge;
iv. create accessible, understandable, and responsive regulation through inclusiveness, transparency, accountability, and public scrutiny;
v. advance the efficiency and effectiveness of regulation by ascertaining that the benefits of regulation justify the costs;

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[73] *Ibid* at s 3.2.

[74] Treasury Board Secretariat of Canada, "A Guide to the Regulatory Process", online: Treasury Board Secretariat of Canada <http://www.tbs-sct.gc.ca/ri-qr/processguide processus-eng.asp>.

[75] *Supra* note 71 [emphasis added].

2012 CanLIIDocs 277

vi. require timeliness, policy coherence, and minimal duplication.[76]

The principles of the *Directive* govern every stage of the regulation-making process. Each stage is meant to ensure that quality control checks are in place so that only necessary regulations come into force. Only those regulations that adhere to the limited power delegated to the sponsoring department by the Legislature may come into force. The steps are described in detail in the *Guide to the Federal Regulatory Development Process*,[77] and for our purposes, are briefly summarized below.

2012 CanLIIDocs 277

1. Planning

The process opens with a proposal from a sponsoring department.[78] Officials from that department are charged with reviewing the regulatory proposal and the available alternatives to make certain that regulation is the best suited course to address the issue. The level of impact the regulation will have on Canadians is assessed through the formal Triage Framework as outlined under the *Directive*.[79]

2. Analysis

The department is required to reach out to issue-specific stakeholders and conduct consultation. A full accounting of all potential costs and benefits of the proposal must be prepared and submitted as part of the RIAS. The RIAS is submitted to the TBS-RAS, who then reviews the proposed regulation's financial implications.

3. Drafting

The sponsoring department must then formally draft the proposed regulation with input from the DOJ's Legislative Counsel.

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76 *Ibid.*

77 Treasury Board Secretariat of Canada, "Guide to the Federal Regulatory Development Process", online: Treasury Board Secretariat of Canada <http://www.tbs-sct.gc.ca/ri-qr/documents/gfrpg-gperf/gfrpg-gperf02-eng.asp>.

78 It is also possible that an administrative body or similar agency with regulation-making authority may put forward the proposal, but for the purposes of this paper only governmental departments will be considered.

79 *Supra* note 71.

4. Review by Justice

DOJ then reviews the draft product in conjunction with the completed RIAS and approves or denies the proposal.

5. Sign-off by Sponsoring Minister

The Minister of the sponsoring department will then formally sign-off on the regulation, recommending its approval by the TBS-RAS.

6. First Review by TBS-RAS

The entire proposal, including the RIAS and all supporting documents, are sent to the TBS-RAS, who review the package and ensure that it conforms to the principles outlined in the *Directive*. If it passes their review, it will be approved for pre-publication.

7. Pre-publication

Canada Gazette, Part I will publish the proposal in its current incarnation.

8. Updating the Regulatory Proposal

Pre-publication will often draw comments from public and governmental stakeholders, and it will be the sponsoring department's responsibility to address these comments, include any of the suggestions within their proposal that better service the *Directive* principles, and adjust the proposal accordingly.

9. Second Review by DOJ

The newly changed proposal must receive a second round of approval so that DOJ can review the variations and ensure they comply with their criteria.

10. Final Sign-off by Sponsoring Minister

The responsible minister signs final proposal and submits it for completion.

11. Making the Proposal a Full Regulation

The TBS-RAS, serving as advisors to the Governor General, makes the final decision on the proposal, and if approved, it comes into force as a regulation.

2012 CanLIIDocs 277

12. Registration

The regulation is formally registered as being in effect, and is published in *Canada Gazette, Part II*.

13. Review by the Standing Joint Committee for the Scrutiny of Regulations

The committee, comprised of Senators and MPs, reviews regulations after they come into force to ensure a final measure of Legislative oversight. They have the power to recommend cancellation or changes if they feel the regulation oversteps the limited authority granted to the sponsoring department by the enabling legislation.

2012 CanLIIDocs 277

B. Table 1: Steps in the Federal Regulatory Process

Seeking Pre-Publication of a Proposed Regulation			
Step	**Description**	**Who Is Involved?**	**Approvals**
1	Determine the level of impact (triage) and whether an exemption from pre-publication will be sought. See the Exemption from Pre-Publication section for more information.	Regulatory Organization (RO) and TBS-RAS.	RO director or above signs finalized triage.
2	Conduct analysis and develop the Regulatory Impact Analysis Statement (RIAS), and obtain concurrence on the RIAS from TBS-RAS analyst.	RO and TBS-RAS.	
3	Draft the regulation.	RO and JUS.	RO director general.
4	Examine draft regulation and review the RIAS (the extent of the RIAS review varies according to the mandate of the Regulations Section involved) and issue stamped copies of the draft regulation.	JUS.	
5	Send signed regulatory submission to PCO-OIC.	RO and PCO-OIC.	Responsible minister signs proposal.
6	Treasury Board considers the submission and decides whether to	Treasury Board, TBS-RAS, and PCO-OIC.	Treasury Board approves pre-

	approve it for pre-publication.		publication.
7	Pre-publish the proposed regulation in the *Canada Gazette*, Part I.	PCO-OIC and PWGSC.	

Final Approval, Publication, and Registration of a Proposed Regulation

Step	Description	Who Is Involved	Approvals
8	Receive and review comments on the draft regulation, revise the regulation, update the RIAS, as needed and obtain concurrence on it from TBS-RAS analyst.	RO and TBS-RAS.	
9	Examine the proposed regulation and RIAS and issue stamped copies.	JUS.	
10	Send signed final regulatory submission to PCO-OIC.	RO and PCO-OIC.	Responsible minister signs proposal.
11	The GIC (Treasury Board ministers advising the Governor General) considers the submission and decides whether to make the regulation.	Treasury Board, Governor General, TBS-RAS, and PCO-OIC.	GIC makes regulation.
12	Register and publish regulations in the Canada Gazette, Part II.	PCO-OIC and PWGSC.	
13	Review by the Standing Joint Committee for the Scrutiny of Regulations.		

Source: Treasury Board of Canada, Secretariat

In the following sections we will look at some of the core components and essential tools of the Federal system in greater detail.

2012 CanLIIDocs 277

C. Regulatory Impact Assessment Statements

Even more than the draft itself, the RIAS contains the most valuable information about the regulation. Each RIAS will contain information on the potential costs and benefits of the proposal, similar accounting for the alternatives, documentation of all consultations that have occurred and the comments received, and a compliance checklist that ensures the proposal conforms to the *Directive*.[80] The RIAS is a guide to the Executive's rationale and offers an invaluable tool for scrutinizing their decision.[81] A first draft of the RIAS must be made available to the public through publication in the *Canada Gazette, Part I* in advance of the consultation phase. This allows the public to understand the sponsoring department's assessment of the situation and potentially empowers any stakeholders to disabuse the sponsoring department of any flaws in that assessment. The completed RIAS must document these exchanges and incorporate the feedback as part of the *Directive*'s commitment to transparency and meaningful consultation.

2012 CanLIIDocs 277

D. Consultations

The importance of consultations in the regulatory process was identified early on as essential for Canadian regulatory policy. The *MacGuigan Report* concluded that:

> before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant… It is essential that all relevant facts and viewpoints should be taken into account before regulations are finally made.[82]

Meaningful consultations are made possible by the RIAS and government agencies' adherence to pre-publication requirements. The advantages of a transparent consultation process are obvious. Stakeholders are made to feel confident that government is responsible, and are able to

80 Department of Justice, "Regulatory Impact Analysis Statement", online: Department of Justice <http://www.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/part4/rias-reir.html>.

81 *Supra* note 71.

82 *Supra* note 3 at 47.

adequately adjust their activities to be in line with any regulatory initiatives.

E. Drafting Standards

Clear and well-established drafting standards are an essential component of the Federal regulatory system. These standards are maintained by a review performed by the Regulations Section of the DOJ. Given Canada's bilingual legal system (and the equally binding force of the French and English text of laws) a team of two lawyers, one Anglophone and one Francophone, carefully review the text of the regulations.[83] The *Statutory Instruments Act* sets out the core legal component of this review. The regulation must be "authorized by the statute pursuant to which it is to be made."[84] This is not as simple a requirement as it may sound. Salembrier articulated just how much is covered by such a requirement:

> It requires, first, that the content of the proposed regulation be checked against the scope of the enabling provision in the statute that authorizes the making of the regulation. This is sometimes an uncomplicated affair, where the language of the enabling provision is clear and precise. Under accepted principles of statutory interpretation, however, even seemingly clear statutory text can be interpreted only by reading it in the context of the rest of the statute in which it is found, and determining the scope of an enabling provision therefore requires at least a basic exercise in statutory interpretation in every case.[85]

The review by the DOJ must also ensure that the regulation is in conformity with the common law, and the jurisprudence governing delegated powers. Among these requirements are the common law's prohibitions against sub-delegation and retroactivity.

A failure to maintain clear drafting standards would impose costs upon society. If regulations are not easily comprehensible to stakeholders, it is easy to infer that compliance costs will be higher. Those parties required to follow the regulation will be either compelled to seek out legal advice to understand their regulatory obligations or risk punitive fines for non-compliance. Thus the federal government's drafting standards,

2012 CanLIIDocs 277

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[83] J Paul Salembier, *Regulatory Law and Practice in Canada*, (Markham: LexisNexis Butterworths, 2004) at 59-60.

[84] *Supra* note 72 at s 3.2(a).

[85] *Supra* note 83 at 61.

although easy to overlook, are an important asset to the overall regulatory process.

F. Publication

It is desirable at all stages of the regulatory process for the public to have access to information concerning the sponsoring department's proposal. To be effective, the process requires publication and wide availability so that the public understands that there are opportunities to participate in the consultation process. The *Canada Gazette*, as the official publication of the Government of Canada, serves as the vehicle for this availability by offering pre-publication of a regulation in its proposal form, and final publication once it comes into force. Pre-publication informs the public of what the executive is planning and allows for public comment on a proposed regulation for a period of 30 days.[86] The final publication in the *Gazette* represents the form of the regulation as it was registered and given force.

G. Legislative Oversight

Strong oversight by the legislative branch maintains public confidence and ensures the appropriate use of delegated authority. At the Federal level this oversight is provided by the Standing Joint Committee for the Scrutiny of Regulations (SJCSR), an apolitical amalgam of both Houses of Parliament.[87] The Committee's Legal Counsel reviews each line of a proposal to ensure that the sponsoring department has not overstepped the authority delegated to them by the relevant statute's enabling clause. The SJCSR "has the ability to initiate a process for revoking a regulation"[88] after it has come into force and the House has stated that it will consider itself bound by any such disallowance recommendations that come from the Committee.[89] In practice, this drastic action is "used only

86 Peter Bernhardt & Paul Salembier, "Understanding the Regulation Making Process", online: (2002) 25.1 Canadian Parliamentary Review at para 34 <http://www.revparl.ca/english/issue.asp?param=82&art=245>.

87 *Supra* note 83 at 117.

88 Linda Reid, MLA, "Oversight of Regulations by Parliamentarians" (2010) 33 Canadian Parliamentary Review 7 at 8.

89 Parliament of Canada, "House of Commons Procedures and Practice: Delegated Legislation", online: Parliament of Canada <http://www.parl.gc.ca/marleaumo

2012 CanLIIDocs 277

when strictly necessary" and the SJCSR has a strong preference to suggest wording changes or deletions over wholesale disallowance.[90] While Normand Grimard, a former Joint Chair of the Committee, acknowledges that "[membership] on the Committee may be the least desirable position on Parliament Hill" due to a lack of grandstanding opportunities, the SJCSR remains "an essential watchdog in controlling bureaucracy and protecting democracy."[91]

2012 CanLIIDocs 277

H. The Use Of Sunset Clauses and Mandatory Reviews

The arrival of the *Cabinet Directive on Streamlining Regulation* in 2007 represents a strong endorsement of regular review within the regulatory process. Section 4.6 requires all departments to ensure "that regulation continually meets its initial policy objectives and for renewing regulatory frameworks on an ongoing basis."[92] Though intervals for review are not specified within the *Directive*, departments are required to develop "time-based performance indicators"[93] for new regulations and ensure effective monitoring. The *Directive*'s language appears purposefully vague, but highlights the Federal government's adoption of the life-cycle approach to regulation-making. The notion that regulations must be revisited after coming into force helps to ensure continuing relevancy and efficiency.

The growing importance placed on regular review has yet to result in a comprehensive requirement of sunset clauses or a mandatory review of all regulations. Instead, their use has been limited to select areas of the law, predominantly in statutes. Sections 21 and 670 of the *Bank Act* state that, unless renewed, the Act's coverage will expire (and all banks cease to carry on business) five years after the Act comes into effect.[94] This five-year expiry threat focuses attention on the changing needs of the banking industry at regular intervals, and ensures that the Act is consistently

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ntpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch17&Seq=4&Language=E#fn>.

90 Normand Grimard, "The Standing Joint Committee for the Scrutiny of Regulations", online: (1998) 21:3 Canadian Parliamentary Review 2 at para 7 <http://www.revparl.ca/english/issue.asp?param=68&art=106>.

91 *Ibid* at para 1.

92 *Supra* note 71 at s 7.2.

93 *Ibid* at s 4.6.

94 *Bank Act*, RSC 1991, c 46.

updated. This practice has been cited as one of the key factors which allowed the Canadian banking industry to weather the worst of the 2008 financial crisis relatively unscathed.[95] An almost identical provision appears in the *Insurance Companies Act*.[96]

VII. REGULATION MAKING IN MANITOBA

A. The Current Process

In Manitoba, the creation of regulations is outlined by *Procedures for Making Regulations,* drafted by the Legislative Counsel Office and last updated in March 2011.[97] The document provides information on the steps a sponsoring department must initiate, internal procedures that must be followed to bring a proposed regulation into effect, and mechanisms that ensure approved regulations have legal force.

1. Policy Development

The process opens with the sponsoring department's desire to create a regulation that addresses a particular policy objective. In order to ensure that the proposed regulation has a legal basis, the Legislative Counsel Office can provide advice on whether or not the proposal would be authorized by the power vested in the department by the governing statute. The governing statute will determine whether a minister can make a regulation alone (for our purposes, a Ministerial regulation), or if it will require the authority of the Lieutenant Governor in Council (a Cabinet regulation). This distinction carries with it differing steps which will be detailed below. If there are revenue implications that may flow from the proposal, the PMR states that, "the Department might need Treasury Board approval."[98]

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[95] Charles Freedman, "The Canadian Banking System" (Paper delivered at the Conference on Developments in the Financial System: National and International Perspectives, The Jerome Levy Economics Institute of Bard College, 10-11 April 1997). online: <www.bankofcanada.ca/wp-content/uploads/2010/01/tr81.pdf/>.

[96] *Insurance Companies Act*, RSC 1991, c 47 s 707.

[97] Manitoba, Legislative Counsel Office, *Procedures for Regulation Making* (Legislative Counsel Office, 2011) [*PMR 2011*].

[98] *Ibid* at 1.

2012 CanLIIDocs 277

2012 CanLIIDocs 277

2. Drafting

The sponsoring department then works with the Legislative Counsel Office to draft the proposal. The drafter will be responsible for ensuring that the language complies with "the existing legislative and regulatory framework" and is "consistent with the drafting standards of the Legislative Counsel Office."[99] The Legislative Counsel Office also provides translation services and will ensure that the proposed draft is available in both of Manitoba's official languages. Once the drafting and translation are complete, a package containing a number of copies and approval instructions are returned to the sponsoring department.

3. Creation of the Regulation

A Cabinet regulation can only be made with an Order in Council, drafted alongside the proposal by the Legislative Council Office. The sponsoring department must also prepare a Regulatory Impact Statement which outlines the reasoning behind the proposal (including an accounting of costs and benefits), a discussion of the rejected alternatives, and a description of any consultation with the public that has occurred and its results. The sponsoring department's minister will then present the package to Cabinet to be approved and signed.

For the other type of regulation (ministerial), a Regulatory Impact Statement is not required nor is a submission to the Cabinet for approval. Instead the sponsoring minister is required to perform some form of "internal review" and send a copy to the Registrar for final registration.[100]

4. Registration

The regulation does not officially come into effect until it is registered by Manitoba's Registrar. The *Regulations Act* empowers the Registrar to make an assessment of the proposal and to ensure that it conforms to the definition of a regulation provided by the Act.[101] Upon registration, all regulations are "permanently referred to the Standing Committee on Statutory Regulations and Orders of the Legislative Assembly."[102] The

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[99] *Ibid* at 2.

[100] *Ibid* at 3.

[101] *The Regulations Act*, CCSM 1988, c R60.

[102] *Ibid*, s 11.

purpose and effectiveness of this committee will be discussed in more detail below.

5. Publication

The new regulation is then published in the *Manitoba Gazette*, which is required by law "unless it is dispensed with under *The Regulations Act*."[103] Regulations are also posted online as a service to the public. The Act allows the Lieutenant Governor in Council to do away with publication in the *Manitoba Gazette* if the regulation is so long that publication "would be impractical or unduly expensive" and if it is made available to the parties likely to be affected by its authority.[104] The *Regulations Regulation* under *The Regulations Act* also stipulates that any regulations made under *The Highway Traffic Act, The Health Services Insurance Act*, or *The Pharmaceutical Act* do not require printed publication.[105]

B. Problems with the Current System

1. 1994 Handbook vs. 2011 Handbook: We're Going the Wrong Way

Manitoba was once a leader. In 1968 the province was praised for its legislative oversight of the regulatory process by the *McGuigan Report* and in the late 1970s, Sterling Lyon influentially raised the issue at a first ministers' conference. Long-time civil servant Jim Eldridge writes "Lyon led discussions on regulatory reform…later introducing a formal process of before-the-fact regulatory review and consultation which became the model for other jurisdictions."[106] This model was used by the Filmon government in the 1990s, although the process was never formalized or open to public-scrutiny, and was limited to a closed door cabinet review.

But when comparing the most recent incarnation of *Procedures for Making Regulations (PMR 2011)* to the version produced by the Legislative Counsel Office in 1994,[107] one finds that while the process remains mostly

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[103] *Supra* note 97 at 7.

[104] *Supra* note 101 at s 5(1).

[105] Man Reg 270/90, s 7.1.

[106] Jim Eldridge, "A Practitioner's Reflections on the Practice of Federalism" in Paul G Thomas and Curtis Brown, eds, *Manitoba Politics and Government*, (Winnipeg: University of Manitoba Press, 2010) at 260.

[107] Manitoba, Legislative Counsel Office, *Procedures for Regulation Making*, (Legislative

2012 CanLIIDocs 277

the same, the amount of detail provided in the handbook has been drastically reduced. *PMR 2011* is a mere seven pages long, whereas seventeen years earlier, it had been twenty-five pages, including a number of copies of the cabinet submission and Regulatory Impact Statement forms that are mentioned throughout both documents. This is not a situation where less is more. We would argue that such a short document outlining an essential governmental function is insufficient.

The changes are subtle, but they leave a number of important gaps. For example, in *PMR 1994* there was a page-long section outlining the contents of a "Cabinet Submission"—the required background information, financial implications and communication strategy—whereas in *PMR 2011* this information has been removed. The newer document still mentions that the "Cabinet Submission" must be filed at the same stage of the process, but the public's understanding of what this means is greatly limited. Similar treatment has been applied to a page-long section that outlined the drafting style of the Legislative Counsel Office.

Further problems arise when brevity gives rise to ambiguous language. The 'Policy Development' section of *PMR 2011* explains that if a "proposed regulation has funding or revenue implications for the government, the Department might need Treasury Board approval."[108] What might this mean? No further information is provided as to when Treasury Board approval is required. This flexibility with language is undesirable when outlining a formalized regulatory process and it is disheartening that Manitoba is moving away from clarity.

2. A Lack of Legislative Oversight

It is highly ironic that in 1967 the *MacGuigan Report* cited Manitoba as a model for legislative oversight of a regulatory system.[109] Manitoba was the first jurisdiction in Canada to establish a legislative committee with this function, the Standing Committee on Statutory Regulations and Orders (SCSRO).[110] The Committee's mandate was to apply the following principles in assessing regulations:

Counsel Office, 1994) [*PMR 1994*].

108 *Ibid* [emphasis added].

109 *Supra* note 3 at 70.

110 *Supra* note 88 at 9.

2012 CanLIIDocs 277

i. The Regulations should not contain legislation which should be enacted by the Legislature, but should be confined to administrative matters.
ii. The Regulations should be in strict accord with the statute conferring the power and unless so authorized by the statute, should not have any retroactive effect.
iii. The Regulations should not exclude the jurisdiction of the Courts.
iv. The Regulations should not impose a fine, imprisonment or other penalty or shift the onus of proof of innocence on to the person accused of an offense.
v. A Regulation in respect of personal liberties should be strictly confined to things authorized by the statute.[111]

This mandate would be a very good one, but there is no binding requirement that this Committee have regular meetings. Even though the *Regulations Act* permanently refers all regulations upon registration to the SCSRO,[112] the Committee has not met for many years.[113] The last recorded meeting of the SCSRO to fulfill its role of regulatory scrutiny was on Novermber 26, 1979.[114] The Committee continued to meet throughout the 1980s to consider bills (as any other standing committee would) until 19 December 1988.[115] It has not convened since, leaving a troubling vacuum in Manitoba's regulatory process. At the federal level, the SJCSR meets nearly bi-weekly,[116] and reviews hundreds of regulations each year.[117]

[111] *Supra* note 3 at 70.

[112] *Supra* note 101 at s 11.

[113] *Supra* note 88 at 9.

[114] Legislative Assembly of Manitoba - Standing Committee Reports - Part III 1979-80 - Standing Committee on Statutory Regulations and Orders, November 26, 1979 - Hearing of the Standing Committee of Statutory Regulations and Orders, pp 1-7.

[115] Legislative Assembly of Manitoba - Standing Committee Reports - Part II 1988-89 - First Session - Thirty-Fourth Legislature - Standing Committee on Statutory Regulations and Orders, vol XXXVII No 4, December 19, 1988, pp. 35-49.

[116] Parliament of Canada, *Senate and House of Commons Joint Committees*, online: Parliament of Canada: <http://www.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Cmte=REGS&Language=E&Mode=1&Parl=40&Ses=3&CmteInst=joint/>.

[117] *Supra* note 90.

2012 CanLIIDocs 277

3. A Lack of Transparency and Accountability

Ultimately the regulatory system in Manitoba lacks meaningful safeguards that promote accountability and transparency, particularly mandatory consultations, pre-publication, central agency review and a universal RIS requirement. These elements work best in concert and as part of a comprehensive regulatory policy. For example, consultations are most effective when a formalized interpretive aide is available to the public. At the Federal level, this is accomplished by the RIAS, which is made available to the public at the pre-publication stage long before the regulation comes into effect. Although a RIS is required by *PMR 2011* for some regulations, they are not published in advance as at Federal level, nor are they easily available to the public upon request.

In Manitoba, consultations are rarely required, but are voluntarily undertaken on occasion.[118] The Province has demonstrated recognition of the value of public consultation in important recent legislation. Section 14(3) of *The Franchises Act* states that:

> [e]xcept in circumstances that the minister appointed by the Lieutenant Governor in Council to administer this Act considers to be of an urgent nature, in the formation or substantive review of regulations made under this section, the minister must provide an opportunity for public consultation regarding the proposed regulation or amendment.[119]

Despite this recognition at the statutory level, consultations do not play a consistent role in the formation of regulations.

Another safeguard sorely lacking in Manitoba is central agency review. The Federal system recognizes that there is an inherent bias in sponsoring departments to favour their own proposals. J Fraiberg and M Trebilock describe a certain inherent bias that exists at the level of individual regulators:

> The more of it they do [regulate] the more likely they are to receive prestige, power, and recognition, at least within their own bureaucratic circles. Thus, there is an incentive for regulators to regulate more aggressively than is perhaps optimal.[120]

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[118] For example, Provincial Land-Use regulatory decisions involve a built-in consultation process. Government of Manitoba, *Provincial Planning Regulation Portal*, online: Government of Manitoba <http://www.gov.mb.ca/ia/plups/rrrcp.html/>.

[119] RSM 2010, c 13, s 14(3).

[120] Jeremy D Fraiberg & Michael J Trebilock, "Risk Regulation: Technocratic and

2012 CanLIIDocs 277

To balance this bias, the Federal system implemented external reviews ensuring that regulators do not overstep delegated authority, that regulatory intervention is warranted in the situation, and that the proposal represents an optimized use of public resources. In Manitoba, these safeguards are lacking. There is a half-hearted measure to refer proposals with financial implications to the Treasury Board, but like much of the Province's policy, details are scant. Throughout the vast majority of the Province's regulatory process, the sponsoring department is in the driver's seat of their own proposal. The only semblance of an external review takes place at registration. Although the Registrar is empowered to examine proposed regulations, this power is limited to matters of form rather than substance. At no stage in the process does any external reviewer ask: is this even necessary?

2012 CanLIIDocs 277

C. Manitoba's Governance of Crown Corporations

Manitoba's current preference for opaque decision-making negatively affects other areas of executive power, most conspicuously in the Province's influence over Crown Corporations. The controversy over Manitoba Hydro's proposed new transmission line, Bipole III, through the province's western corridor provides a recent example. The original preference of the Hydro Board was to build the line on the east side of Lake Winnipeg, through a corridor of the province that had not previously been used to transmit power. The Province stepped in to override that decision, electing instead for the longer, and more expensive alternative.[121] The debate over which alternative is preferable is well-documented,[122] but that is not of major concern to this paper. Instead, we take issue with the way that the decision was made.

Many of the reforms we suggest for the regulatory process should also apply to the way Manitoba governs Crown Corporations. Any substitutions or overrides the Province makes over Board decisions should

Democratic Tools for Regulatory Reform", (1998) Vol 43 No 4 McGill LJ 835 at 843

121 Bryan Schwartz & Elijah Harper, "East side the right side", *Winnipeg Free Press* (14 May 2007) online: Winnipeg Free Press <http://winnipegfreepress.com/historic/32228799.html/>.

122 Bryan Schwartz & Perry Chung, "East vs. West: Evaluating Manitoba Hydro's Options for a Power Transmission Line from an International Law Perspective" (2007) 7 Asper Review of International Business and Trade Law.

come in the form of an executive directive as opposed to a private instruction. A directive, like a regulation, is a form of delegated power which passes from the Legislative branch to the Executive by an enabling Act. Although *R v Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud* held that directives are not necessary binding on non-governmental actors,[123] they are seen as explicit expressions of policy and should formalize the relations between Crown Corporations and a Provincial government. These directives should be subject to the same scrutiny as regulations. There is no reason why government should be able to bypass transparency by operating under the shadowy cover of informal channels. The Bipole III example is a textbook case where a lack of formal structure allowed for an undemocratic exercise of power in a matter of great importance to Manitobans. As the regulatory process is being reformed, so too should the Province's governance of Crown Corporations.

2012 CanLIIDocs 277

D. Bill 203: A Proposal for Reform

In the face of the current system's shortcomings, a reform bill, *The Regulatory Accountability and Transparency Act*, was tabled by Mavis Taillieu in the Manitoba legislature in the 5th session of the 39th legislature,[124] as well as in the 1st session of the 40th legislature.[125] Although neither incarnation of the bill has made it to 2nd reading, the bill's sponsor has indicated that she plans to continue tabling it in future sessions.[126] As an opposition private member's bill, the legislation has very little chance of being enacted in the current political climate, but as a serious proposal for regulatory reform it is owed critical examination.

Bill 203 begins with an aspirational preamble that identifies the burdens associated with over-regulation, and the importance of strengthening the regulatory process:

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[123] *R. v Institutional Head of Beaver Creek Correctional Camp ex parte McCaud*, [1969] 2 DLR (3d) 545, 1 CCC 371.

[124] Bill 203, *The Regulatory Accountability and Transparency Act*, 5th Sess, 39th Leg, Manitoba, 2010 (did not proceed past first reading) [Bill 203].

[125] The two bills are identical—all citations which refer to the previous bill effectively refer to this one as well. Bill 203, *The Regulatory Accountability and Transparency Act*, 1st Sess 40th Leg, Manitoba, 2012 (did not proceed past first reading).

[126] Email from Mavis Taillieu, MLA to Daniel Hildebrand (3 July 2012).

> WHEREAS unnecessary red tape and regulations create additional costs for businesses, non-profit organizations and private citizens in their dealings with government;
> AND WHEREAS the reduction of non-essential or redundant regulations and forms prescribed by regulation will streamline existing processes and enhance the government's effectiveness;
> AND WHEREAS publicizing the regulatory process will promote government accountability and transparency;[127]

After the definition section, the Bill contains three sections that propose reforms to the regulatory system. Section 2 calls on the Minister of Justice to establish a baseline measurement against which regulatory reform progress can be measured.[128] The presumption is that after all is said and done there should be fewer regulations, though the Bill does not explicitly state a zero net increase goal. Section 2b also calls on the Minister to develop a policy that would require all new regulatory proposals to include the following:

i. an assessment of the need for the proposed regulation, with a view to avoiding duplication,
ii. an analysis of alternatives,
iii. a study of the economic impact of the proposed regulation, including an analysis of its effect on provincial competitiveness and how compliance costs can be minimized,
iv. confirmation that public consultation has occurred,
v. an estimate of the time and cost for implementation,
vi. ongoing review for relevancy of the proposed regulation through the inclusion of a sunset clause;[129]

Section 2 concludes by requiring that the policy and any progress be publicized.[130] Section 3 of the Bill requires that every department undertake a comprehensive review of all its regulations, with an eye to eliminating any unnecessary red tape and to tabling subsequent progress reports. Section 4 prescribes the process of publicizing, which can be done by tabling a report in the legislature or if the legislature is not in session by making the document available to the public "in a reasonable manner."[131]

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127 *Supra* note 125 at Preamble.

128 *Ibid* at 2(a).

129 *Ibid* at s 2(b)(i-vi).

130 *Ibid* at s 2(c).

131 *Ibid* at s 4.

2012 CanLIIDocs 277

Section 2 contains some of the core components of the Federal policy. It appears to require—albeit in an inchoate form—a RIAS. Although details are lacking, it is laudable to entrench in statute a requirement for an impact assessment on all potential regulations, rather than continue with only sporadic and informal reviews. Section 2 also requires that new regulatory proposals include "confirmation that public consultation has occurred". Consultations are an essential component of a strong regulatory system, and to be mentioned in the statute is a positive step, but more detail is needed. Meaningful consultations require a rigorous and interconnected regime of several elements including a RIAS, pre-publication and drafting standards. In our opinion, Bill 203 could be improved by including a more comprehensive consultation scheme that includes pre-publication, a prerequisite for meaningful stakeholder consultations.

The boldest initiative in Bill 203 is the sunset provision. Section 2(b)(vi) would make all new regulations subject to a sunset provision whereby a date for the repeal of a regulation would be scheduled from the moment that regulation came into force. Bill 203 is silent on what kind of sunset timeline would be appropriate, but Ms. Taillieu has suggested that there is no "one size fits all", and different types of regulations may have different repeal timelines.[132] This is a promising initiative, but care will have to be taken to ensure that decisions to renew regulations at the repeal date are not done automatically, and that the sunset clause is fully vested with the creative period of reinvention originally described by Theodore Lowi.

The other major initiative of Bill 203, a requirement that each department undertake a major review of all its regulations, is unassailable and something that ought to be done at regular intervals. The major benefit of sunset clauses is that it imposes a mechanism which ensures that these reviews occur. If the provisions of section 2(b)(vi) came into force, the type of review prescribed by section 3 would become superfluous. In sum, Bill 203 is a welcome first-step, but more details are needed.

2012 CanLIIDocs 277

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[132] *Supra* note 126.

VIII. RECOMMENDATIONS FOR REFORM IN MANITOBA

In its current form, Manitoba's regulatory policy is insufficient. There is a troubling lack of transparency and accountability. We feel that the majority of Manitoba's regulatory problems can be solved with the adoption of the following ten recommendations. These recommendations are drawn primarily from the example set by the Federal regulatory policy with supplements from other established best practices. To be most effective, it will be necessary to formalize the Province's endorsement of these reform measures in a new policy document, replacing *PMR 2011*.

2012 CanLIIDocs 277

A. Comprehensive Approach to Reform

We recommend that the forthcoming suggestions be instituted as a comprehensive package. This does not mean that every recommendation must be instituted at the same moment (this may be impossible), but rather they should be treated as part of a single project, announced together and with a defined schedule of implementation dates. The OECD notes that there are a number of reasons to prefer a comprehensive approach:

> benefits appears faster (which means that pro-reform interests are created sooner); affected parties have more warning of the need to adapt; vested interested have less opportunity to block change; and reform enjoys a higher political profile.[133]

In contrast, a piecemeal approach to reform will often result in the easiest reforms being undertaken right away. As the implementation of the more difficult reforms is delayed, vested interests are given the opportunity to fight to avoid change.[134] Delays to announced changes only add to the ambiguity of the regulatory climate and pose a risk to private investors who may be considering entering the province. The best approach would be to provide detailed descriptions of all forthcoming reforms, set firm dates for all reforms at once, and ensure that they roll out on schedule and as promised. Manitoba should look to British Columbia's "Straightforward" program as an example of how to deliver their reform platform to the public. This would include a commitment to produce a

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[133] *Supra* note 2 at 27.

[134] *Ibid.*

report within five years that will summarize the Province's efforts to that point, and be produced annually thereafter.[135]

B. An Aspirational Document

To begin, it will be helpful for Manitoba to encapsulate its new spirit of regulatory reform and articulate the principles that will guide that process. This document would be aspirational and non-binding, but serve as a general statement of the Province's goals. The proposed Bill 203's preamble provides some example of what an aspirational document may say, though it is our recommendation that it be expanded upon. Manitoba should make a commitment to align its regulatory policy with established best practice, a number of which are illustrated at the Federal level. The *Cabinet Directive on the Streamlining of Regulation* provides a strong, high-level overview of the Federal government's guiding principles and should serve as a model for a Manitoban aspirational document.

C. Reconvene the Standing Committee

Section 11 of Manitoba's *Regulations Act* reads: "Upon registration, a regulation stands permanently referred to the Standing Committee on Statutory Regulations and Orders of the Legislative Assembly."[136] At the time of the MacGuigan Report, Manitoba was seen as an innovator by being the first province to form a body of legislative representatives to oversee the Province's regulatory activity. This early adoption makes it all the more puzzling that Manitoba seems to have abandoned its own good idea. The Committee may still technically exist, but it has not convened to discuss a regulation in decades.

We recommend that the Committee be immediately reconvened and that the language of the *Regulations Act* be amended to reflect a new responsibility to meet for a minimum number of days each year to provide a check on the power delegated to the Executive branch. The Committee's powers should also be defined to mirror those of the Federal Standing Joint Committee on the Scrutiny of Regulations. A disallowance power should be established to give the Committee recourse should they find a

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[135] Government of British Columbia, *Straightforward BC: Regulation, Clear and Simple*, online: Straightforward BC <http://straightforwardbc.gob.bc.ca/>.

[136] *Supra* note 101.

2012 CanLIIDocs 277

department has overstepped the authority granted to it by an enabling Act. A legislative watchdog charged with the task of reviewing new regulations would inject much needed accountability into the process.

D. Mandatory Regulatory Impact Statements

We recommend that the practice of requiring a RIS be expanded to all new proposals, regardless of whether they are Ministerial or Cabinet regulations. The benefits derived from an impact assessment are universal, and there is nothing distinguishing these two types of regulations that could warrant omitting this step for Ministerial regulations. In order to promote transparency in the decision-making process, all RISs should be published alongside the rest of the proposal and sent through to the Standing Committee for scrutiny.

2012 CanLIIDocs 277

E. Regulatory Output Cap

We recommend that Manitoba set a goal of a net zero increase for regulatory output, based on a baseline figure for 2012. We make this suggestion with the understanding that the zero increase should be an ideal only, and not a strict limitation. The Province's efforts towards this goal could be flexible and draw from the example provided by British Columbia's regulatory reform efforts. Exceptions should be put in place that would allow a Minister to forgo the necessity of choosing an existing regulation to be removed for each new proposal. The goal of this program should be to force a consideration of whether or not another area of the Minister's jurisdiction could be trimmed to keep the costs of compliance as low as possible. This program should provide an impetus for the Province to review existing regulations and break the one-way ratchet trend in the regulation-making process.

F. Cost-Benefit Analysis

We recognize that there is a significant and inevitable gap between foresight and hindsight when assessing a regulation. An RIS, no matter how scrupulously considered, may miss hidden consequences that only reveal themselves when put into effect. While it may not be feasible for all regulations, it would be beneficial for Manitoba to incorporate some of the comprehensive CBA practices developed at the Federal level in the United States to provide a more complete picture of a regulation's effect on the province. We suggest that a threshold be established which triggers

a CBA of proposed regulations when there is the potential that the regulations would significantly impact Manitobans. If the original RIS suggests that the regulation could result in a cost of $X, that regulation should be scheduled for full CBA review. While we foresee departments doing their best to squeeze large regulations under that threshold, the Standing Committee and members of the public will have a fuller opportunity to scrutinize the department's accounting with the publication of the RIS mentioned above.

In order to reap the benefits of hindsight, we also recommend that a number of test-cases, high-impact regulations created during the last ten years, be subjected to a full CBA analysis as part of a pilot project to review existing regulations. Reviewers would be able to evaluate the effect of each regulation with empirically collected evidence, as opposed to projection, and provide a complete assessment of whether or not the original goals of the regulation have been met. If the project yields benefits, either by exposing unnecessary regulations ready for removal, or merely by finding ways that they can be tailored to mitigate previously undetected consequences, the project should be expanded to reach further back into Manitoba's regulatory body.

2012 CanLIIDocs 277

G. Mandatory Consultations

In order to ensure that Manitobans (be they representatives of a particular industry, or private citizens) have a meaningful voice in the regulatory decisions that affect them, we recommend that public consultation be formally embedded in the Province's regulatory policy. The *PMR 2011* makes no reference to public consultations, and though the practice may be used sporadically for the drafting of certain regulations, the benefits that consultations provide warrant a central place in Manitoba's regulatory policy. Manitoba is the only province in Canada that affords time for citizens to consult on legislation at the Standing Committee stage, so it is very puzzling that do we not extend the same good practice to laws created through delegated power.

At the Federal level, Section 4(1) of *The Cabinet Directive on Streamlining Regulation* states that all sponsoring departments "are responsible for identifying interested and affected parties, and for providing them with opportunities to take part in open, meaningful, and

balanced consultations at all stages of the regulatory process."[137] While there may be some ambiguity in the language (How does a department determine who will be interested or affected?) this section illustrates the importance of public consultation to the overall goals of the Federal policy.

In British Columbia, the province has made public consultation one of the cornerstones of their "Straightforward" reform program. Their annual report details a number of projects wherein broad-based public consultations were conducted and integrated into the Province's regulatory goals, ranging from changes to the provincial *Water Act* and the possible expansion of the Lower Mainland's transit infrastructure.[138] Though they have not gone so far as to create a universal requirement for consultations, they have shown a dedication to increasing their use within the regulation-making process. Manitoba should look to the examples set by the federal and BC governments and ensure that public consultations are given a prominent place in a new policy statement.

2012 CanLIIDocs 277

H. Advisory Bodies

Departments have a natural inclination to favour their own proposals. In order to foster balanced assessment of a proposal, we recommend that review by central agencies like the Treasury Board be expanded. The *PMR 2011* states that Treasury Board approval might be required for regulations with financial implications. We suggest that Treasury Board approval should be mandatory for any regulation that will require government resources, and that this new requirement be formalized in the new policy statement. External review will ensure that the figures presented to the public and Standing Committee in the RIS have been reviewed by an impartial body, and balance the department's bias.

We also recommend that Manitoba follow the example set by Australia and create a formalized consulting body composed of members of the province's small business community. The group should be charged with reporting to the Minister with recommendations on how to reduce

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137 *Supra* note 71.

138 British Columbia, BC's Regulatory Reform Initiative, *Achieving a Modern Regulatory Environment: First Annual Report*, (Victoria, 2011/2012) at 11 online: <http://www.straightforwardbc.gov.bc.ca/docs/Reg_Reform_Report_2012.pdf>.

the level of paperwork required of business-owners. In Australia, a formal goal of halving the paperwork requirement was set,[139] and in order to provide structure for the group, it may be helpful to provide similar targets to be met over the next five years. By allowing citizens a place within the oversight process, the Province will benefit from first-hand feedback detailing the most costly and frustrating barriers to production.

I. Registration and Coming-into-Force

We recommend that all regulations should be delayed from coming into force until published. The rule of law dictates that only those laws which are knowable should be enforceable. *PMR 2011* states that while many regulations will come into effect before being published in the *Manitoba Gazette*, there is a convention against enforcement until publication. It would be beneficial to formalize this convention, perhaps drawing upon Section 17 of Quebec's *Regulations Act* which provides a fifteen day grace period between publication and legal effect of a regulation.[140] With the *Gazette's* current 275 copy weekly print-run (to say nothing of distribution), we recognize that print-media may not be the ideal vehicle for quickly informing the public as to the existence of new regulations. It is our recommendation that the *Gazette* immediately offer an online version, posted on a weekly basis and featured prominently on the Manitoba Laws website. In Newfoundland and Labrador, Section 11(1.1) of the *Statutes and Subordinate Legislation Act* considers "publication" complete once the information is available on an official government website.[141] Manitoba should adopt a similar definition, and delay the coming into force of a regulation to a set period of days after the information is freely available online.

J. Ensuring Relevance: Mandatory Reviews

Positive changes to regulatory policy will yield better regulations in the future, but Manitoba's economic landscape and legal needs will inevitably change over time. Even a well-crafted and thoughtful regulation can become out-dated. To ensure continued relevancy, the Federal

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[139] *Supra* note 59 at 101.

[140] RSQ c R18.1.

[141] RSNL 1990, c-S27.

2012 CanLIIDocs 277

government has adopted sunset clauses or mandatory reviews for some particularly fast-moving industries, and we recommend that Manitoba implement similar provisions. Bill 203 suggests that all new regulations must include an "ongoing review for relevancy of the proposed regulation through the inclusion of a sunset clause."[142] Will a sunset clause in every new regulation protect relevancy, or will the sheer volume of sunset clauses turn the practice away from Theodore Lowi's ideal creative period and towards a rote exercise of merely stamping the regulations back into life for another finite number of years?

We recommend that a sliding scale be introduced, which considers the varying needs of each area of regulation, and tailors a mandatory review period for each new regulation. Rather than being set to expire completely as with a sunset clause, each regulation should carry a requirement of review by a legislative committee every x years. It is natural that some regulatory areas will change quicker than others, and as such, will require review more often to ensure that all governing regulations are still relevant. For an area like the issuance of small business permits, we would suggest that the reviews happen often, perhaps every five years, to ensure that Manitoba's economy is not weighed down by out-of-date rules. For more static subjects, the reviews can be conducted further apart, every decade or twenty years depending on the particular area. These considerations could be extended to the Province's statutory output to ensure their continued relevancy as well. During the review period, it should be the duty of the departmental Ministers to report to a legislative committee on the regulation's costs and benefits. The committee would then be responsible for recommending any changes that would align the regulation with the Province's reform goals, be it a scaling back, expansion or elimination of the regulation altogether.

IX. CONCLUSION

Though they may rarely make headlines, regulations affect our lives on a daily basis. They govern the ways in which we conduct business and organize our society. It is therefore unsettling that Manitoba employs a haphazard and opaque approach to regulation-making. A healthy

[142] *Supra* note 126.

2012 CanLIIDocs 277

democracy requires the responsible use of delegated authority, but without a transparent and accountable process regulators are free to act with impunity. Manitoba's regulatory policy has not evolved with changing best practices, in fact, over the last twenty years the Province seems to have moved in the opposite direction. It is time for Manitoba to reform its approach to regulations.

Drawing upon the example set by the Federal regulatory policy, the lessons taken from regulatory history, and the best practices exemplified by other jurisdictions, this paper offers possible answers on how best to accomplish that goal. By introducing the comprehensive package of reform suggested above, and by making a genuine commitment to the development of accountability and transparency throughout governmental decision-making, Manitoba has an opportunity to take a positive step towards realizing its full economic potential.

2012 CanLIIDocs 277