Comments on the Parliamentary Task Force on regulatory reform : discussion paper / Consumer and Corporate Affairs Canada

Consumer and Corporate Affairs | Consommation et Corporations

Deputy Minister | Sous-ministre

September 19, 1980

Mr. James S. Peterson, M.P.
Chairman
Special Committee on Regulatory Reform
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Peterson;

In response to your invitation, I attach a submission setting out the comments and views of this department concerning the Discussion Paper on Regulatory Reform which you circulated. I hope that this submission and your committee's forthcoming discussion with our Deputy Minister and other officials will assist your committee in its pursuit of regulatory reform.

Yours sincerely,

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Kathleen Francoeur Hendriks

A/Deputy Minister

CONSUMER AND CORPORATE AFFAIRS CANADA

COMMENTS ON THE PARLIAMENTARY TASK FORCE ON REGULATORY REFORM - DISCUSSION PAPER

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I INTRODUCTION

The Department of Consumer and Corporate Affairs Canada (CCAC) is responsible for the administration and enforcement of a large number and wide range of regulations. These regulations relate to mandatory labelling of net contents, grade standards, safety precautions, prohibition of retail sale of certain products and many others. The purpose of these regulations is generally to ensure equity in the marketplace both for industry and consumers. They flow from sixty-five separate acts. Of these, thirty-three are under the jurisdiction of CCAC and the remaining thirty-two reside with other departments such as Health and Welfare Canada and Agriculture Canada. It is estimated that in excess of two-thirds of the Department's $79,000,000 million budget goes to support these regulatory activities. Thus, the process of regulatory review and reform is a matter that is of vital interest to the Department. Indeed we have already begun a comprehensive internal regulatory review program.

Since a significant portion of our activities involve regulating the market at the point of sale, we are frequently reminded of the quite different perspectives by which the regulatory process is viewed by the participants. An example is the requirement to declare textile fibre content under the Textile Labelling and Advertising regulations. Some companies may well view this as a burden and a restraint on their operating flexibility, while consumers see it as a benefit through providing more precise and consistent information. Within an industry affected by a particular regulation, divergent views may exist despite the fact that a great many regulations are developed in response to direct industry requests. Regulators have a different perspective, that being to achieve an appropriate balance between conflicting interests and to come to grips with and resolve problems in the marketplace. In other words, to focus on the burden placed on only one of the participants can seriously distort one's evaluation of any particular regulation.

A theme current throughout the Discussion Paper is the desire for increased consultation, review and analysis. Some suggestions, taken by themselves, have merit and may be seen to contribute to a regulatory process that is open and subject to informed scrutiny. There is a parallel here with the regulatory process itself. If one looks at each regulation in isolation, there would be few who could find fault with its objective or its mode of operation. However, when the regulatory package is viewed as a whole, the potential for inconsistencies, anomalies, and burden becomes evident. There is a danger that the processes of consultation and analysis could, in their totality, reduce

the system to introspective immobility and generate a demand for massive resources which, in a period of restraint, could only weaken other activities. This issue will be treated in more detail below, and some suggestions made as to how effective oversight may be achieved without bringing the system to a standstill.

The process through which regulations now in place has been developed may be perceived as lacking coordination or integration. In the federal sphere of responsibility, the regulatory authority has been delegated by regulatory act to individual departments or agencies. Reasonable and valid regulations relating to each act have been developed and put in place. The rationale for each individual regulation may be entirely reasonable. However, the cumulative effect that the sum of regulations imposes on those who must comply with them may be onerous, expensive and sometimes confusing and contradictory. The problem of regulatory burden is compounded by the increasing rate of introduction of regulations by other levels of government. Regulations may be perceived to overlap, duplicate or contradict each other. Consequently, over time, the accumulation of many individual regulations can produce serious, unintended, holistic results. It is the cumulative result which can be burdensome to those who must comply with the growing number of regulations.

Regulators are aware of these problems and have successfully addressed many of them. An example can be found in the administrative arrangements among several departments to achieve consistency in the wording and application of regulations.

The review of the currency and validity of all individual regulations is a necessary, ongoing endeavour. However, if a meaningful impact on the cumulative effect of regulations is to be made, a "systems" approach to the introduction of new regulations and to regulatory review and reform is essential. Since new regulations often produce unanticipated side effects, such as overlapping existing regulations, or not taking advantage of information already being generated, it is most important to be sensitive to the cumulative effects of proposed regulations. Thus, the undesirable side effects of proposed regulations can be anticipated and minimized. In this process, careful consultation with those in the private sector who must comply with proposed regulations is invaluable.

The main body of this submission is organized on a functional basis reflecting the concerns of CCAC as a major regulatory department. First, it deals with the general issue of consultation and information as a component of the whole regulatory process. Second, the initiation and operation of regulations are examined. Finally, procedures for review and evaluation are discussed. The suggestions contained in the Discussion Paper are treated as they bear on each of these functional areas.

II CONSULTATION AND INFORMATION

Section II of the Discussion Paper contains four suggestions relating to participation in the development of new regulations by interested groups and individuals affected by proposed regulations. These interests can be divided into two major groups: those who would be required to comply with or be affected by the proposed regulations, and the intended beneficiaries. In a subsequent section of the Discussion Paper, suggestions are raised concerning the ex ante participation of Parliament in the formulation of regulations.

In discussing consultation processes, it may also be useful to divide regulations into two major categories: statutory regulations, developed by regulatory departments, deriving from regulatory legislation passed by Parliament, and adjudicative regulations set by regulatory tribunal decision, such as telephone rates established by the CRTC. Because the two processes of regulation formulation are widely different, so too are the possible ways of providing involvement by interested parties in their development.

A. Current Procedures in CCAC

1. Statutory Regulations

It is the practice of the Department to seek out views from interested groups during the development of new or revised regulations. The Department regularly consults extensively with those interested, principally industry associations, from the first perception of a problem through planning, the drafting of regulations if these are shown to be necessary, to implementation. Consumer groups, such as the Consumers' Association of Canada may, when deemed appropriate, be asked to participate as a member of an industry/government technical committee for the study of a particular problem. But, in matters of concern to them, they would always be informed and free to comment. CCAC is conscious of its special responsibilities in supporting the broad interests of consumers, who are entitled to fairness in the marketplace.

Once this consultation has occurred, a communiqué is issued to the trade, and in some instances the proposed regulation is published in the Canada Gazette with a further opportunity to comment. For example, Section 19 of the Consumer Packaging and Labelling Act states that:

> "A copy of each regulation or amendment to a regulation that the Governor in Council proposes to make under Section 11 or 18 shall be published in the Canada Gazette and a reasonable opportunity shall be afforded to consumers, dealers and other interested persons to make representations with respect thereto".

Generally, and except for very minor "clarification" amendments, 60 days are allowed for comment on relatively straightforward regulations or amendments, and 90 days are allowed for more complex regulations or amendments likely to require detailed study or research by respondents.

Chapter 490 of the Administrative Policy Manual of the Treasury Board is applicable to other legislation administered by the Department. Paragraph 490.1.4(2) states that:

> "Departments and agencies administering statutes which convey the power to make regulations in the HSF (health, safety, fairness) area are responsible for ... publishing in advance, at least 60 days before promulgation, the terms of, the legal authority for and the purpose of a new major HSF regulation along with a summary of the results of the SEIA (conforming to the prescribed content requirements) in Part 1 of the Canada Gazette...."

These practices appear to be reasonable and to work effectively. It should be stressed that these notification procedures are employed in addition to the more proactive seeking out of reaction from industry and other interested groups. Consideration might be given by the Task Force to extending this requirement for formal consultation as a general practice in the development of new regulations and amendments involving significant impact. It is important, however, to retain the flexibility for regulators to move swiftly in cases of emergency.

We would hope that any interdepartmental rules governing "consultation" would not be of excessive formality, but would permit flexibility in consulting those best able to provide needed information and present a spectrum of viewpoints. A less structured approach has the advantage of providing access to a larger community of interested groups, who may not have the means to participate meaningfully in a more structured process.

2. Judicial Regulation

In the case of deliberations of federal regulatory tribunals, the Director of Investigation may intervene directly in some instances. The Consumer Bureau provides support funding on an annual basis to consumer advocacy groups which intervene on behalf of consumers in federal, regulatory hearings.

The annual budget for this funding is very small, $239,000 in 1980/81 and is distributed among three consumer interest organizations which are directly involved in regulatory interventions. This limited funding is generally provided to cover a one-year period and is intended to underwrite mainly research and overhead activities of intervenors. Since the CRTC is presently the only federal regulatory agency which provides some funding for the out-of-pocket cost of intervention activities including expert witnesses, our funds are often also stretched to cover the costs of specific interventions.

The results of intervention by the Regulated Industries Program (RIP) of the Consumers' Association of Canada, the Public Interest Advocacy Centre (PIAC)and Transport 2000, funded by the Department, have had an effective impact on the regulatory process. For example, following the RIP intervention before the Canadian Transport Commission hearing in April 1979, air fair increases of $16,900,000 were suspended. The same group intervened in a telegram rate increase hearing in which the increase sought was reduced by $732,000. Both RIP and PIAC have made numerous successful interventions in CRTC hearings opposing telephone rate increases. Endorsement of the value of these interventions has been expressed by both CRTC and CTC.

It is recommended that support funding of advocacy groups by interested departments or agencies and cost recovery funding by federal, regulatory tribunals should be widely expanded. This represents an effective means through which regulatory departments and agencies can assure direct participation by representatives of consumers or other groups of citizens who are affected by regulatory decisions.

B. Consultation Implications

Consultation results in improved regulation, where regulation is needed, and generates its wider acceptance. However, it cannot always resolve the conflicts resulting from disparate or conflicting interests.

Clearly, when a regulator receives divergent recommendations, all proposals cannot be accommodated. Even a compromise position is not always possible. No one process may be appropriate for all situations, but some method should be employed to preclude misunderstanding.

C. Consultation Process

The process or processes for providing an opportunity for interested groups or individuals to participate in the regulation formulation or overhaul process should include:

- encouraging the receipt of written briefs from interested parties, recognizing that this may not always be possible

- flexibility to accommodate to the requirements for information input of each particular situation

- openness to ensure that generally all input information is available to all participants in the process, subject to restrictions applying to proprietary information. This would also alert those interested in the process of the existence of countervailing input, thus reducing the expectation of having their position accepted, unchallenged, by regulators.

Flexibility should be retained by the regulator to seek out the information needed and to stop before reaching the point of "paralysis by analysis". This is not to say that an interest group which feels strongly that it has an important contribution to make should be denied an opportunity to do so. But, the regulatory body should have the option of not seeking out additional counsel when it feels it has adequate input, thus allowing it to strike a reasonable balance in the consultation process, and not be hidebound by "regulations" or procedures.

A full and open consultation process entails a cost and may be time-consuming. However, it is clearly worthwhile in order to ensure the appropriateness and viability of regulations.

III INITIATION OF REGULATION

It is unlikely that a single process would be appropriate for the development of all types of regulations. However, some comments are put forward here relating to the suggestions in the Discussion Paper. These are systemic in nature and may have application over a broad range of regulations and over more than one process for developing regulations.

Some benefits may accrue from applying a more standardized process for the development of regulations throughout the federal system. The process should be as simple and open as possible. It should clearly set out the basis for using a regulatory instrument, and the implications expected from its implementation.

1. Project Planning

As a first stage toward possible development of a regulation, there must be definition of the problem. There must also be consideration of optional strategies, e.g., regulation by another department, agency or level of government, self-regulation by industry according to a voluntary national or international standard, tax or other incentives or penalties, or no regulation at all. This preliminary planning should be open to discussion with those interested, but it would be understood at this stage to be exploratory in nature.

2. Impact of Proposed Regulations

The economic, social, and other relevant implications of proposed regulations must, in all cases, be examined. The intensity of the examination and the detail incorporated should reflect a substantial measure of judgement on the part of the regulator. We endorse the existing SEIA process for major HSF regulations. A similar, but less stringent process should generally apply to regulations of less impact.

Consultation should be carried out throughout the regulatory development process. Thus, interested parties would have access to the information used by regulators, and to their development rationale, throughout the whole preparation process including the examination of expected impact.

Provision must, however, be made for regulators to react swiftly, circumventing normal procedures where emergency demands immediate action. This eventuality is a very real one, particularly in dealing with food, drugs, or hazardous products.

It is likely that most regulators presently employ a process in the development of regulations which, to varying degrees, incorporates the proposed two stages of assessment. An appropriate balance between formalization and flexibility would ensure consistently high standards of openness, participation and efficiency.

IV REVIEW AND EVALUATION

A. Continuous Monitoring of Regulations

An obligation exists for major regulatory departments and agencies to undertake an ongoing program of review and reform of all of the regulatory instruments for which they are responsible. For those departments such as CCAC which administer a large number and variety of regulations with relatively few people, the task of regulatory review and reform is a formidable one if it is to be meaningful. A much more

intensive review process than simply identifying a few obsolete regulations is required. A comprehensive, step-by-step process is recommended, based on identified priorities for regulatory reform.

The program now in place in CCAC may be useful for other major regulatory departments. The Department has developed and implemented a three-phase, comprehensive program of regulatory review and reform. Phase I includes an in-house review of regulations by those responsible for their development and administration.

In Phase II, the findings and proposed changes emanating from Phase I will be referred to interested groups of those who must comply with our regulations and to representatives of the intended beneficiaries. Their reactions to proposed regulatory reforms will be sought and included in the final consideration of proposed changes.

Phase III represents the reform segment of the program in which a systematic plan of changes to the process of regulation and to specific regulations will be undertaken on a basis of established priorities.

B. Sunset Provisions

A persistent complaint voiced about our regulatory system is that, once a regulation is instituted, it takes on a life of its own and a major effort is required to bring about the modification or termination of a regulation. The existence of the ECC project, the Parliamentary Task Force, and the Departmental reviews reflect a perception that regulatory review and reform has long been neglected. CCAC fully supports the proposition that the regulatory system must be responsive to changes in the regulatory environment. The Discussion Paper presents two suggestions (7, 11) that bear directly on the problem by introducing Sunset Clauses:

1. Principal Categories

The Discussion Paper states that the "garden-variety Sunset Clause" terminates a government's legal authority to carry out a regulatory activity after a specified period of time. In fact, the existing Canadian and U.S.A. experience indicates that there is a wide variety of Sunset-type clauses which the Parliamentary Committee may wish to consider. Sunset Clauses can be divided into the following categories:

a. A Termination Clause in a statute causes the statute or part of it (and regulations made under it) to cease to exist after a specified date, unless Parliament decides otherwise before that date. See, for example, the Bank Act.

b. A Lapsing Clause is to the same effect, causing the statute to become inoperative. See, for example, the Small Business Loans Act and the Fisheries Improvement Loans Act.

c. A Termination Enabling Clause in a statute provides that a termination motion can be put before Parliament by a specified number of members of Parliament, and requires the government to take action corresponding to Parliament's decision on the motion. See, for example, Section 125.1 of the Income Tax Act.

d. A Sunset Review Clause in a statute requires a Minister to table a report in Parliament in the future, describing activities pursuant to the statute, and perhaps also justifying retention of the activity and examining consequences of terminating or modifying the activity, as well as advantages and disadvantages of alternate means of achieving its objectives.

2. Cautionary Note

At first glance, the various forms of Sunset Clause appear to offer a method for ensuring that regulatory programs receive automatic re-evaluation. There are, however, a number of pitfalls or weaknesses inherent in "Sunsetting". For example:

a. Parliament can do whatever Parliament can find the time to do. Sunset Clauses impose rigid priorities on future Parliaments and on government departments with no foreknowledge of the conflicting demands and emerging priorities which may exist in the future. Therefore, their widespread use is undesirable and could even paralyze Parliament.

b. With Parliamentary time at a premium, insofar as Termination and Lapsing Clauses are concerned, there is a danger of cursory ("rubber stamp") reviews of regulatory programs, of reviews being postponed (as has occurred with the Bank Act) or even of a regulatory activity being scrapped without opportunity for full review.

c. Sunset Clauses, improperly applied, could lead to a climate of uncertainty in industry. Industry wishes to be consulted during development of regulations. It is equally concerned that consultation occur well in advance of any proposed major amendment or cancellation of existing regulatory provisions.

d. The suggestion that Termination Clauses be used does not distinguish among the different types of problems that regulations attempt to solve. Some problems are transitory in nature. For example, the Energuide program is intended to accelerate changes that the marketplace may bring about in any event, and so lends itself to automatic review or termination. A second type of problem can be seen as mutable in that conditions addressed by the regulatory program are likely to change over time. An example is Weights and Measures Regulations where the technology of measurement is subject to change. Finally, there are problems that are permanent in nature, for example the safety of food. Termination clauses would appear inappropriate for regulatory programs intended to address mutable and permanent problems.

C. Parliamentary Review

Suggestions 9, 10, 12, 13 and 14 of the Discussion Paper relate to Parliamentary review and overview of regulation. The most significant is suggestion 14.

The Main Estimates Committees of the House of Commons should use all available sources of information to ensure that examination of Main Estimates, and of the operational plans on which they are based, is informed, thorough and probing. Control of expenditure is the stirrup by which Parliament historically raised itself to supremacy over the Crown.

Both the written evaluations of the government's existing regulatory programs and annual reports of the departments could be a valuable source of information. Where such evaluations, annual reports, and the estimates themselves are in a format or of a quality which leaves important questions unanswered, committee members should say so - they are entitled to the best of support in a critically important function. Without requiring excessive rigidity in presentation, they should insist that annual reports, which are too often a recital of "what we do", should state broad objectives, specific goals, strategies, and progress towards achievement of these objectives and goals in the year under review.

V. SUMMARY

How then do we go about improving the regulatory system so that it is more responsive to social and economic changes while at the same time ensuring that it does not hamstring future Parliaments nor burden departments with massive resource demands? First, a selective use of

Sunset Clauses may be employed, fully recognizing the nature of the problem under regulation. A regular reporting system within the regulatory departments (Section IV A) can alert the Deputy Minister and Minister to a situation where a review is warranted. Regular consultations with affected parties as practised by CCAC can also alert the Minister to the need for review. It should be noted that consultation on existing regulations, both ongoing and during a review, can be highly effective as the parties are dealing with a known phenomenon rather than with a proposal of as yet unknown impact.

Periodic review and evaluation are essential to maintain a regulatory environment that is salutory for all of the participants. To be fully effective, however, reasonable flexibility should remain with the responsible Minister. Only in this way will we be able to respond to needs of the time rather than be captive to a review schedule laid down in the past.

Consumer and Corporate Affairs
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