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Creating a World Class Regulatory System in Ontario

by

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From mid-1992 until end-1996, Jim chaired the OECD Working Group on Regulatory Reform and Management. During this time the OECD Ministerial Council issued its *Guiding Principles for Regulatory Quality and Performance*; adherence is a condition of membership in the organization.

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Executive Summary

Governments really do only three things: spend, tax and regulate. Of these three functions of governments, regulation receives the least attention. However, regulations in Ontario are costing each man, woman and child on average over \$4,500 a year, considerably more than the almost \$3,500 per resident forecast by Ontario for health sector expenditures in 2010-11. Each and every Ontarian, therefore, has a significant stake in the cost-effectiveness of regulation.

Achieving quality regulation is not about wholesale deregulation. It is not just about red tape reduction. And it is definitely not about reducing hard-won health, social, environmental, and security protections for citizens. It is as far from a "race to the bottom" as is possible. Quality regulation is about sound government.

The OECD has shown the importance of a central regulatory policy to achieving quality regulation. While not widely publicized, on April 1, 2010, the Government of Ontario promulgated a new *Regulatory Policy* to govern provincial regulation-making.

This report assesses this *Policy* against generally accepted best practices and concludes:

- Ontario has also made a good start at laying out appropriate quality regulation principles in its *Regulatory Policy*
- Similarly, changes to the regulation-making process are likely to be positive, although there have been no changes actually made in the seven months following the promulgation of the *policy*
- However, Ontario has not yet created an institutional framework that would ensure effective implementation; as a result the policy may not be successful

Seven recommendations –a based on lessons learned in other jurisdictions – are put forward in this report. They are meant to encourage the development of a sound institutional framework that will ensure quality regulation in Ontario.

Legislators, officials, interested stakeholders and the public all have a vital stake in the institutional framework developed for implementing the *Regulatory Policy*. It will affect all Ontarians in significant ways for years to come.

List of Recommendations

It is recommended:

Recommendation 1: That the Government of Ontario establish a centralized oversight mechanism to implement the *Regulatory Policy*.

That this oversight mechanism have clear authority for the following functions:

- Government-wide coordination and supervision of the regulatory process
- Advice to Cabinet and the Legislation and Regulations Committee on compliance of regulations with the *Regulatory Policy*
- Review and challenge of Regulatory Impact Assessments
- Advice and support to regulators
- Advocacy within and outside of government on the *Regulatory Policy* and process

That the oversight mechanism have as a key responsibility advising Cabinet and the Legislation and Regulations Committee on the adequacy of the impact assessment underlying proposals and the resulting justification for both legislation and regulations.

Recommendation 2: That the Government of Ontario issue clear standards which Regulatory Impact Assessments must meet.

Recommendation 3: That the Government of Ontario require, through regulation under the Legislation Act, Regulatory Impact Assessments of acceptable quality.

Recommendation 4: That the Government of Ontario develop a multi-year strategy:

- To educate regulators on the new *Regulatory Policy*, why it is necessary, and what it means for them
- To develop a broad range of guidance and tools to assist regulators meet their obligations under the new policy
- To train officials in each regulatory department and agency so that sufficient capacity exists to perform proper Regulatory Impact Assessments

Recommendation 5: That the Government of Ontario communicate its implementation plan for the *Regulatory Policy*, not only to regulators but to the public, providing a clear articulation of roles and responsibilities.

Recommendation 6: That, because introduction of the *Regulatory Policy* will not be costless for any ministry or agency involved, the Government's implementation plan address resourcing explicitly.

Recommendation 7: That the Government of Ontario build into its implementation plans an explicit monitoring and evaluation of compliance with the *Regulatory Policy* with findings published annually

Creating a World Class Regulatory System in Ontario

1. Introduction

1.1 Regulatory Goals for Ontario

Governments really do only three things: spend, tax and regulate.

In an ideal world, governments' spending choices are focused on those key services that citizens want and which will help them achieve a better life. Ideally taxes are fair to all residents and do not create such a burden that they drive innovative businesses and individuals elsewhere. And, in an ideal world, regulation is designed and administered to provide real, focused protections for citizens, and does not drive up costs for ordinary individuals and businesses unnecessarily; it does not cripple the spirit of innovation, entrepreneurship and social responsibility that characterizes good citizenship.

Over the past thirty years, leading governments world-wide have come to realize the importance of ensuring cost-effective regulation, promulgated according to democratic principles. At its worst, regulation can impose undemocratic, ill-considered, ineffective and costly rules on the public and business¹ – economic competitiveness suffers, environmental degradation is not tackled, and citizens' health and financial well-being is put at risk.

We suspect that to most people the machinery of regulation-making in government is an esoteric, remote and incredibly dull subject. Despite the lack of public focus, governments world-wide now recognize that how one makes and administers regulation is as important as government budgeting. Many have developed new policies and procedures to improve their regulatory systems. Their success or failure touches each and every citizen.

While it has not been widely publicized, on April 1, 2010, the Government of Ontario joined the ranks of jurisdictions trying to ensure rational and open regulatory decision-making by promulgating a new *regulatory policy* with government-wide effect.

This policy is considered by the Government of Ontario to be part of its *Open for Business* (OFB) program. The stated goal of that program is to "create a **more competitive business climate**, while protecting the environment and public interest" [emphasis added] (The Ontario Ministry of Economic Development and Trade, MEDT 2010a).

¹ In many third-world jurisdictions, regulation is the leading facilitator of corruption and a major cause of poverty.

Open for Business has made several improvements to Ontario's regulatory system in recent years. In our judgement, however, the new *Regulatory Policy*, including related changes in the regulation-making process, is likely to have the greatest impact of the various OFB initiatives on business climate, good governance and all Ontarians... providing it is effectively implemented.

1.2 What is a Regulatory Policy

A regulatory policy has three inter-related components:

- Principles: First, a policy must enunciate a set of principles that shapes operations across all regulatory departments and agencies in the jurisdiction. The principles typically address preferred design characteristics of regulations, key aspects of their administration, and the regulation-making process. A regulatory policy, therefore, governs the most significant aspects of regulation qua governance instrument.²
- Regulatory Processes: Second, regulatory policies address how regulations are made. Generally this includes systematic use of evidence in an open and transparent rule-making process. This is a particularly important element of regulatory policy because, in most jurisdictions, regulations are typically rules³ that are put in place without the benefit of debated in a legislature. As well, regulatory policy in some jurisdictions now addresses how regulatory programs are administered, and this can be viewed as a best practice.
- Institutional Framework: Third, *regulatory policies* are treated by the Organisation for Economic Cooperation and Development (OECD) as including the governance and other institutional framework elements that allow the quality regulation principles to become effective internal regulation of bureaucratic and ministerial behaviour.

The OECD is arguably the world institutional leader⁴ in recognizing and in promoting good regulatory practices. In 1995, the OECD Council promulgated principles for creating quality regulatory systems.⁵ Over the years the OECD has invested significant

² It does not address the substance of particular regulations.

³ Regulations are "rules" governing behaviour. They are law. And they are usually "subordinate legislation," which means they are implemented using the authority of a primary statute that was passed in a legislature. Usually they are promulgated by a government agency, a department, a Minister, or (most often in Canada) by Cabinet or a Cabinet Committee.

⁴ There are, of course, many others. The World Bank and Asia-Pacific Economic Cooperation have also paid considerable attention to this area and undertaken considerable research, much based on case studies. OECD (2007a) describes the joint checklist for good regulation developed by APEC and the OECD to assist member governments.

⁵ OECD (2005) discusses the 1995-2005 evolution and the new 2005 articulation of principles.

resources to research what makes a regulation high quality and what characteristics of institutional frameworks are most important for achieving quality regulation objectives.⁶

The OECD (2009a, page 21) and Jacobs (2006b) both describe the fundamental motivation of OECD and other countries in pursuing quality regulation as indeed being economic competitiveness. Jurisdictions want to achieve legitimate regulatory objectives in the most efficient and effective way possible. In somewhat different language, that is the *Open for Business* goal.

Quality regulatory principles are not about wholesale deregulation. They are not just about red tape reduction. And they definitely are not about reducing hard-won health, social, environmental, and security protections for citizens. They are as far from a "race to the bottom"⁷ as is possible. Quality regulatory principles are about sound government.

1.3 The Importance of Regulatory Policy

Hahn (2000, page 11) reports a range of estimates of aggregate costs of regulation in various countries from a low of 7% of GDP to a high of 19%. In all industrialized countries it is recognized as a significant factor in determining citizens' well-being.⁸

The stakes are significant for Ontarians. With provincial GDP now approaching \$600 billion, and if regulations cost 10% of GDP⁹ (near the low end of the range), then regulations in Ontario would be costing each man, woman and child on average over \$4,500 a year, considerably more than the \$3,492 per resident forecast by Ontario for the Health Sector in 2010-11.¹⁰ All Ontarians, therefore, have a significant stake in making sure that all their governments – federal, provincial and municipal – have cost-effective regulatory systems. The OECD has shown the importance of a central regulatory policy to achieving quality regulation.

If successfully implemented, Ontario's *Regulatory Policy* should lead to:

- Measurably more cost-effective regulation
- Regulations demonstrably justified through presentation of evidence and analysis
- Citizens, public interest groups, and businesses having confidence in the integrity and fairness of the regulation-making process and in regulation administration

⁶ In this paper the authors draw heavily on this substantial body of comparative research. MEDT officials have indicated (private communication) that they are aware of and have used OECD work.

⁷ In a survey of trends in regulation important to developing countries, Guasch and Hahn (1999) note there have been two that are overwhelming. First has been a massive increase in social regulation; the second is increased deregulation of economic regulation in order to eliminate the generally significant transfers to a small group of industry beneficiaries at the expense of consumers. Consumers and ordinary citizens should expect to benefit from both.

⁸ The OECD has estimated that in more heavily regulated economies, ambitious economic regulation reform would increase GDP "on the order of 3 to 6 percent." OECD (1997b), page 3.

⁹ This would include federal, provincial and provincially sanctioned (including municipal) regulation.

¹⁰ See Ontario Budget Table 24. Ontario's Medium-Term Expense Outlook available at http://www.fin.gov.on.ca/en/budget/ontariobudgets/2010/ch2e.html#c2_secE_table24 . There are approximately 13.2 million Ontarians per Ontario Ministry of Finance – see <http://www.fin.gov.on.ca/en/economy/ecupdates/factsheet.html>

Improved clarity, rationality, transparency and predictability take unnecessary risk out of the equation for business decisions. This better investment climate will, over the medium to longer term, result in more business investment, innovation, and job-creation. All Ontarians will benefit.

1.4 Purpose of this Report

Ontario has launched its new *Regulatory Policy*. This report assesses that policy against generally accepted best practices. Essentially the story that will be told is that:

- Ontario has already undertaken several initiatives that will positively affect the business and investment climate
- Ontario has also made a good start at laying out appropriate quality regulation principles in its *Regulatory Policy* – repeated in full in Appendix A
- That policy identifies some important changes to the regulation-making process, but they have not yet been implemented
- Importantly, the government has been silent, so far, on the institutional framework needed to ensure effective implementation.

Ontario deserves much credit for promulgating a policy where none existed before. Getting the policy and institutional framework completely right should not be expected on a first iteration.... experience shows that years of effort will be required.

The purpose of this report is to help speed that evolution along.

2. Ontario's Recent Regulatory Initiatives

2.1 Introduction

Ontario has launched several regulatory initiatives which can affect business and indeed all Ontarians positively. For example, the *Open for Business* proposal to move to a single business number like other jurisdictions have done is quite useful.¹¹ Similarly, the proposed *Open for Business Act*, which will modify the *Environmental Protection Act* and the *Ontario Water Resources Act* to adopt a risk-based approach to approvals, is promising to ensure that government is focused on the most important issues.

This section describes three recent initiatives intended to modernize the way regulations are made in Ontario: (1) the Regulatory Registry, (2) Coming-into Force Dates, and (3) the Ontario-Quebec Trade and Cooperation Agreement.

2.2 (1) Regulatory Registry

Ontario's Small Business Agency launched the Regulatory Registry in 2005. It has an easily accessible website that provides information on current regulatory proposals for consultation, proposals past the consultation stage (but not yet law), and approved regulations. The template employed by the Registry identifies key information for the proposal including: the proposing organization, legislative authority, brief summary of the proposal, proposal identifier, and web links to further information deemed important by the proposer. The Registry has an "alert" function to inform stakeholders about proposals of interest to them.

To illustrate, on October 14, 2010 the Registry contained 37 proposals for which feedback was actively being sought. One of these was a Ministry of Consumer Services proposal -- posted on October 5 with a due date of October 14 for comments -- to amend regulations to, inter alia, scale mandated risk and safety management plans for propane facilities according to facility size. That posting included links to: a detailed description of the proposal, background information on the legislative authority, key technical standards, and the original Report of the Propane Safety Committee which had led to the current regulatory obligations.

In principle, this proposed regulatory change appears to make sense as a way to focus scarce public and private sector resources on the areas of greatest risk. However, we note that there was no analysis in the information presented as to the potential impacts on safety of either workers or the public, business costs (increase or decrease), or on government costs (increase or decrease).¹² Nor was there information on alternative ways to achieve those goals. So is this proposal too conservative; and are risks to the public

¹¹ For example, the federal government started in the mid-1990s and British Columbia began in 2004.

¹² The Ontario *Regulatory Policy* states: "Proposed Ontario regulations **must be accompanied** by a regulatory impact assessment that addresses, at a minimum, the impact on the access of persons, goods, services and investments from other jurisdictions, including jurisdictions within Canada" [emphasis added].

increased or decreased as a result? It is difficult for the public to know what trade-offs if any were being made.

The self-described goals of the Registry¹³ are to:

- Encourage more businesses to participate in developing better regulations in Ontario
- Help businesses to develop a better understanding of regulations in Ontario and how to comply with them
- Assist the Ontario government in understanding how new regulations may affect the competitiveness of the business sector in this province

The Registry was clearly an important step forward and provides a good platform for future initiatives.

It should be noted that many jurisdictions require such notification for all regulations, not only regulations which affect business. Moreover, many require regulators to publish summary or complete regulatory impact analysis statements; for example in the *Canada Gazette* or the United States' *Federal Register*.¹⁴ The United Kingdom, in contrast, relies on individual ministries to provide online information about regulatory proposals, including an impact analysis.¹⁵

2.3 (2) Two Coming-into-force Dates for Regulations each Year

Effective January 2010, regulations that affect businesses will come into force either on January 1st or on July 1st each year. The intent of this initiative was to enable business to better track and plan for regulatory requirements.

Ontario is the first jurisdiction in Canada to implement such an initiative. Use of two fixed dates has certainly received business support.¹⁶

This initiative should prove helpful to both business and government in planning to address new regulatory obligations.

2.4 (3) Ontario-Quebec Trade and Cooperation Agreement

In September 2009, Ontario and Quebec signed the *Trade and Cooperation Agreement*. It identifies specific initiatives in several economic sectors that should promote economic

¹³ See the Service Ontario website at <http://www.ontariocanada.com/registry/> .

¹⁴ See the three respective website at <http://www.gazette.gc.ca/index-eng.html> , <http://www.regulations.gov/search/Regs/home.html#home> , and

¹⁵ For example, see the Department of Health consultations regarding "full and rewarding lives" requirements for organizations providing services for autistic adults in the community. Note the impact analysis summary provided at http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_118058 . Other Ministries provide similar websites. Where the regulations have greater impact, the practice is to post the full RIA as well.

¹⁶ See Ontario Chamber of Commerce's website at <http://occ.on.ca/about-us/> .

growth. For example, there is agreement to harmonize transportation regulations and standards. Importantly, the Agreement also committed both parties to establish *regulatory policies* by April 1, 2010, and Article 3.6 establishes a Joint Committee on Regulatory Cooperation.

The Agreement is clearly intended to reduce barriers to trade, investment and labour mobility, in many cases through better regulatory practices.

The Agreement is a very positive step forward, given the importance of Ontario-Quebec movement of trade, investment and labour. It is not, however, trend-setting. Previous agreements¹⁷ in Canada include:

- The 1995 *Agreement on Internal Trade* (AIT), signed by all Canadian governments
- The 2006 British Columbia and Alberta *Trade, Investment and Labour Mobility Agreement* (TILMA) – in April 2010 this was extended to Saskatchewan through the *North West Partnership Trade Agreement* (NWPTA)
- The February 2009 New Brunswick and Nova Scotia *Partnership Agreement on Regulation and the Economy* (PARE)

2.5 Conclusion: Need for a *Regulatory Policy*

Simply put, the Government of Ontario has undertaken many positive initiatives designed to modernize regulatory practices. They have received support from business and other groups in doing so. Nevertheless, the previous specific initiatives do not go far enough to create the sort of positive business climate that the government has sought.

For instance, business seeks assurance that they will not be "surprised" by regulatory initiatives and their administration. The Regulatory Registry goes some distance in that regard in that it provides both notification and useful documentation. Nevertheless, many business groups believe that Ontario regulators rely excessively on one-day workshops involving all stakeholders for face-to-face consultation. In their view, these workshops cannot get beyond rhetoric and displace serious consultation. The latter necessarily requires time and effort on everyone's part. While more onerous for all parties, if properly structured, serious consultation more often leads to consensus among stakeholders on proposals.¹⁸ Truly open processes not only achieve better designed regulations, they

¹⁷ For the text of the agreements see AIT -- http://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/h_il00034.html ; TILMA / NWPT -- <http://www.tted.gov.bc.ca/DomIntlTrade/DomesticTrade/Documents/NewWestPartnershipTradeAgreement.pdf> , PARE -- <http://www.gnb.ca/cnb/promos/red-tape/nb-ns/NB-NSAgreement-e.pdf> , and OQTCPA -- http://www.ontariocanada.com/ontcan/Imedt/downloads/Ontario-QuebecTradeCooperationAgreement_sept09_en.pdf .

¹⁸ CAIG members cite the work undertaken by the federal and provincial governments in developing the Clean Air Management System. Business, Environmental NGOs and government officials arrived at a consensus of the way to go. CAIG members believe that this example should be the norm rather than the exception of consultation on important regulatory initiatives. Alberta offers a good example of

achieve greater buy-in and reduce later compliance difficulties for both business and government.

Like all Ontarians, business desires proposed regulations that are not capricious but fully justified. And, like all interest groups, they seek to have meaningful input into the regulation-making process.

This is the same assurance that all Ontarians can be presumed to desire. The government's new *Regulatory Policy* and associated changes in regulation-making process are intended to address this issue directly.

how to do this on a broad range of issues in its CASA (Clean Air Strategic Alliance) that has worked well over a number of years.

3. Framework for Benchmarking

3.1 The OECD Standard

Since 1995, as mentioned in Section 1.2, the OECD's Regulatory Reform Program of research has focused on what regulatory quality means, and on how governments can achieve that quality.

This research shows that quality of regulation is correlated with economic performance. Good governance, therefore, requires governments to pay attention to regulatory processes, tools, and institutions. The OECD advocates getting the "inputs" to good regulatory governance right, thus ensuring the quality of regulatory "outputs" and the beneficial real world social and economic outcomes that follow.

OECD Quality Regulation Principles:

In 1995 the OECD released *Recommendations for Improving the Quality of Government Regulation*, which established that good regulation should:

1. Serve clearly identified policy goals, and be effective in achieving those goals
2. Have a sound legal and empirical basis
3. Produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account;
4. Minimize costs and market distortions
5. Promote innovation through market incentives and goal-based approaches;
6. Be clear, simple, and practical for users
7. Be consistent with other regulations and policies
8. Be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels

The *1995 Recommendations* were the first-ever international statement of regulatory principles common to OECD member countries. Building on these recommendations, in 1997 the OECD produced a Report to Ministers on Regulatory Reform with seven guiding principles, which have become the basis for the design of national regulatory reform policies worldwide. The OECD updated the 1997 Recommendations, releasing the *Guiding Principles for Regulatory Quality and Performance* in April 2005.

3.2 Evaluation Framework

Appendix B provides the list of questions used by the OECD to assess the policies and practices in its 31 member jurisdictions.

However, the OECD assesses over 80 specific elements. In this document we have pared these down to a more manageable number by focusing on the most critical elements.

Based on OECD research, there are a number of key features of good regulatory policy that can be identified and which can serve as an effective framework for assessing Ontario's policy; to identify its strengths and possible improvements.

Quality Regulation Principles:

Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively.

- Review regulations against the principles of good regulation; update regulations through automatic review procedures such as sun-setting
- Use performance-based regulatory tools
- Consider alternatives to regulation when appropriate
- Integrate regulatory impact analysis into the development, review and revision of significant regulations
- Eliminate unnecessary regulatory barriers to trade and investment through continued liberalization and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness
- Minimize the aggregate regulatory burden; measure the aggregate regulatory burden

Regulatory Processes:

Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.

- Consult with all significantly affected and potentially interested parties, whether domestic or foreign, where appropriate at the earliest possible stage while developing or reviewing regulation
- Create and update on a continuous basis public registries of regulations and business formalities or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them
- Ensure that administrative procedures for applying regulations are transparent, non discriminatory, contain an appeal processes

Institutional Framework:

Adopt at the political level broad programs of regulatory reform that establish clear objectives and frameworks for implementation

- Establish principles of “good regulation“ to guide reform
- Create effective and credible co-ordination mechanisms inside the government, foster coherence across major policy objectives

- Ensure that institutional frameworks and resources are adequate and that systems are in place to manage regulatory resources effectively
- Strengthen quality regulation by staffing regulatory units adequately, conducting regular training
- Encourage better regulation at all levels of government
- Make effective use of ex-post evaluation

4. Ontario's Quality Regulation Principles

4.1 Summary Assessment

Table 1 below summarizes our assessment of the Ontario *Regulatory Policy's* statement of quality regulation principles.

Table 1: Assessment of Ontario's Quality Regulation Principles

Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively.	
<ul style="list-style-type: none"> Review regulations against the principles of good regulation; update regulations through automatic review procedures such as sun-setting. 	✓
<ul style="list-style-type: none"> Use performance-based regulatory tools 	✓
<ul style="list-style-type: none"> Consider alternatives to regulation when appropriate. 	✓
<ul style="list-style-type: none"> Integrate regulatory impact analysis into the development, review and revision of significant regulations 	✓
<ul style="list-style-type: none"> Eliminate unnecessary regulatory barriers to trade and investment through continued liberalization and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness. 	✓
<ul style="list-style-type: none"> Minimize the aggregate regulatory burden; measure the aggregate regulatory burden 	unknown

4.2 Commentary

Other than not addressing the issue of aggregate burden, the Ontario *Regulatory Policy* is very consistent with the OECD-based criteria we have used. For instance, the policy states that "the problem to be solved must be clearly articulated and alternatives to making a regulation must be carefully considered..." It also tells regulators to use results-based instruments "where appropriate and practicable."

More Detail: As Ontario gains more experience, it should be expected that the high level guidance provided in the *policy* will be expanded upon.

For instance, the *policy's* section on RIA specifies that the assessment "assess the impact on a range of economic factors, including trade, investment and labour mobility ..."

MEDT has been developing a compliance cost tool for regulators.¹⁹ Ideally, Ontario would address several other aspects of RIA standards right away (e.g. data collection, treatment of uncertainty, risk assessment standards, and the like).

But substantially more detailed guidance should not be expected at this time. Ontario is still in the very earliest stages of implementation and should not be faulted for still having further work to do in this area.

One can turn to the many evaluation criteria in Appendix B for a sense of what further guidance will be needed in depth. Generally, other jurisdictions have handled additional guidance through formal guides and "how to" manuals rather than making a change in *policy* itself.

4.3 Conclusion

Ontario's *Regulatory Policy* is quite acceptable in its articulation of the principles to govern regulation-making. Ontario, however, should expect to have to prepare additional guidance in the future and will need to plan accordingly.

¹⁹ Improved RIA preparation will be a key issue in implementing Ontario's *Regulatory Policy*. One member of CAIG provided an example from a company that regulatory compliance costs in Ontario had increased by \$1.5 million in the last 18 months for that company. These increased compliance costs represent over 9% of this international chemical products company's total profits on Canadian sales in 2010.

5. Ontario's Regulatory Processes

5.1 Summary Assessment

Table 2 below summarizes our assessment of the Ontario *Regulatory Policy* as it relates to stated characteristics of the regulation-making process – at least as it applies to regulations affecting business.

Table 2: Assessment of Ontario's Regulatory Process

Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.	
<ul style="list-style-type: none"> Consult with all significantly affected and potentially interested parties, whether domestic or foreign, where appropriate at the <u>earliest possible stage</u> while developing or reviewing regulation. 	✓
<ul style="list-style-type: none"> Create and update on a continuous basis public registries of regulations and business formalities or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them. 	✓
<ul style="list-style-type: none"> Ensure that administrative procedures for applying regulations are transparent, non discriminatory, contain an appeal processes. 	unknown

5.2 Regulation-making in Ontario

The new *Regulatory Policy* will modify the way regulations are made.

The Ontario Executive Council Office (2008) describes the current regulation-making process for regulations requiring approval of the Lieutenant Governor. That description will need to be updated to account for the new *Regulatory Policy*.

For our purposes, the formal regulation-making process described in that document can be simplified somewhat into five main processes. However, to be a complete description of the process, it also needs to be expanded to account for earlier steps in the Ministry, and the more recent requirement to publish notices in the Regulation Registry:

Table 3: Current Regulation-making Process in Ontario²⁰

1. Ministry becomes aware to a problem / issue / risk that may need to be addressed	
2. Ministry assembles evidence and decides whether action should be taken	
3. Ministry analyzes alternatives, possibly consulting stakeholders, and deciding a regulation may be necessary	
4. A draft regulation is prepared for the	5. Notification of the Proposed Regulation is

²⁰ Note: shaded cells indicate they are covered by Executive Council Office (2008).

Sponsoring Ministry by the Office of the Legislative Counsel	published on the Regulation Registry along with supporting documents ²¹
6. Changes are made if necessary to the regulation (Sponsoring Ministry requests updated draft from the Office of the Legislative Counsel)	
7. Draft regulation is reviewed by the Legislation and Regulations Committee (LRC) ²²	
8. The LRC's recommendations are reviewed by Cabinet, which decides whether to approve, deny or modify the proposed regulation	
9. Once approved, and signed by the Chair of Cabinet, the regulation is transmitted to the Lieutenant Governor for his/her signature	
10. Once signed, the regulation is transmitted to the Registrar of Regulations and published in the Ontario Gazette ²³	
11. The new regulation is referred to the Legislative Standing Committee on Regulations and Private Members Bills ²⁴	

Ontario's *Regulatory Policy* will change this process in several ways. The most significant is the introduction of Regulatory Impact Assessments (RIAs) to be posted on the Registry at "step 5."

5.3 Commentary

Documentation: The current Executive Council description does not include newer aspects of the Ontario regulatory process such as the Registry. The *Regulatory Policy* introduces further changes as noted above. New documentation will be required.

As will be argued in the next Section, governance of the process should be strengthened. Changed governance is likely to entail more detailed direction to regulators regarding the formal process to be followed.

For instance, if responsibility to challenge RIAs is assigned to an office (e.g. MEDT or to the Executive Council Office) then copies of RIAs and proposed regulatory changes will likely have to be sent there for scrutiny before publication.²⁵

²¹ Note that the draft text of the regulatory measure does not need to be published under the *Regulatory Policy*. However, a Regulatory Impact Analysis document will be expected to be published at the time of notification. One can expect this box to be modified in any new description of the regulation-making process.

²² Note: the "Legs and Regs" Committee does not have a representative (Minister or Parliamentary Assistant) of the Ministry of Economic Development and Trade. Committee membership list is available through the Premier's website at <http://www.premier.gov.on.ca/team/committee.asp?Team=3&Lang=EN>.

²³ Available weekly online at http://www.ontario.ca/en/ontgazette/STEL01_033657.

²⁴ Descriptions of regulation-making often do not mention this important last step. The Committee reviews all regulations to ensure, inter alia, that they are properly authorized by statute, are properly drafted, and are precise, not ambiguous. The Committee's mandate can found at http://www.ontla.on.ca/web/committee-proceedings/committees_detail_mandate.do?locale=en&detailPage=mandate&ID=138.

Detailed process descriptions, forms and the like will need to be prepared. To date, a revised process description has not been made public.

Early and Effective Consultation: The *Regulatory Policy* attempts to create an open and transparent process. As noted in Section 2.5, Ontario has not had great success in the past from the perspective of business. However, it is our understanding that MEDT is developing a set of consultation principles (based on the OECD principles for good regulatory consultations) which they plan to issue as part of the roll-out on the Open for Business Initiative. Any difficulties are less likely to be the policy itself but rather its implementation – the subject of the next Section.

The *Regulatory Policy* could be strengthened further by emphasizing early consultations before formal proposals are even on the table. Some jurisdictions, such as the Government of Canada, encourage this (OECD 2009a). Undoubtedly some Ontario regulators do this now, but others may well benefit from adopting this best practice. This point could be addressed through a more comprehensive description of the regulation-making process.

Administrative Processes: The *Regulatory Policy* is silent on administrative principles for managing regulatory programs and processes.

Few jurisdictions focus on this aspect. It is, however, important for creating a positive business and investment climate. The United Kingdom is the prime example of a jurisdiction which has devoted effort to improving the government-wide delivery of regulatory programs. Indeed, they legislated a *Regulator's Compliance Code* in order to ensure fair and effective compliance and enforcement practices.²⁶

Recognizing that the *Open for Business Act* does address many administrative issues (e.g. focusing on risk-based approval process under select Acts), the government may wish to strengthen the *Regulatory Policy* further by providing general guidance to regulators regarding management processes.

5.4 Conclusion

In our view, the changes to the regulation-making process as a result of the new *Regulatory Policy* will improve openness and transparency. Ontario will hopefully issue new documentation shortly to describe how the regulation-making process has incorporated the new policy elements.

²⁵ Challenge after publication is better than no challenge, but can lead to considerable embarrassment if low quality analysis is exposed to the public.

²⁶ See, for example, <http://www.berr.gov.uk/policies/better-regulation/improving-regulatory-delivery> . This is the gateway to the Department for Business Innovation and Skills material on improving the delivery of regulatory programs. In particular see the compliance code for regulators, which is mandated by statute -- see UK (2007). See also the OECD's somewhat earlier review of the UK's regulatory reform work – OECD 2002.

While regulatory processes could be strengthened in some regards, the *policy* is quite acceptable in our view. Priority needs to be placed on the larger issues addressed in the next section, namely governance and institutional capacity.

6. Implementing Ontario's Regulatory Policy – An Assessment

This section provides an assessment of implementation of Ontario's *Regulatory Policy*, and offers recommendations for improvement.

6.1 Summary Assessment

Table 4 below summarizes our assessment of the Ontario *Regulatory Policy* as it relates to known characteristics of the institutional framework to implementation.

Table 4: Assessment of Ontario Regulatory Policy

Adopt at the political level broad programs of regulatory reform that establish clear objectives and frameworks for implementation	
• Establish principles of “good regulation” to guide reform.	✓
• Create effective and credible co-ordination mechanisms inside the government, foster coherence across major policy objectives.	unknown
• Ensure that institutional frameworks and resources are adequate and that systems are in place to manage regulatory resources effectively.	unknown
• Strengthen quality regulation by staffing regulatory units adequately, conducting regular training	unknown
• Encourage better regulation at all levels of government.	unknown
• Make effective use of ex-post evaluation. ²⁷	✓

While some improvements can be made to other aspects of the Ontario *Regulatory Policy*, ensuring a cost-effective institutional framework is by far the most significant priority.

Research by the OECD and others clearly shows that sound regulatory governance must be embedded in an institutional framework. As we understand, MEDT has recognized this need. However, it is as yet unclear in any published materials what institutional framework will be in place to ensure Ontario achieves its policy goals.

²⁷ We have given Ontario a checkmark here because it is addressed in the policy. It must be noted, however, that jurisdictions often have difficulty in following-through on such requirements because these are seldom tied to a transaction which would trigger an evaluation. This has driven some jurisdictions to consider blanket sun-setting of regulations. Others have had legislated reviews in specific cases. Once again, while the policy statement is fine, the issue is how to ensure adherence.

6.2 Background

Sustainable reforms must be embedded in an effective institutional framework

World Bank (2009, page 38)

... to reach a sustainable level of regulatory impact analysis quality, governments need a clear strategy aimed at the institutionalization of capacities and incentives within the machinery of government

Jacobs (2006b, page 3)

The above quotes identify the most critical challenges to improving regulatory management. Section 4 showed that Ontario's *Regulatory Policy* is consistent with what other governments have done elsewhere in Canada and around the world in regard to principles. And Section 5 noted that the regulatory process is quite good as stated. The problem is that good principles and good process design are insufficient by themselves; good policy outcomes are not achieved by good statements alone.

World-wide experience provides important lessons regarding sustainable and effective implementation. These include:

- Governments need to adopt multi-faceted strategies²⁸ with the following essentials:
 - Use of evidence, usually in the form of documented regulatory impact assessment (RIA)
 - Sufficient capacity of regulators to conduct RIAs (tools, training, and resources)
 - An oversight mechanism or mechanisms with a permanent government-wide mandate. There needs to be an oversight body with clear authority for government-wide coordination and supervision to make sure that regulators meet quality standards, comply with a general economic strategy and that RIA is undertaken appropriately.(OECD, 2007c, page 4). This would include a gatekeeper function.²⁹

- The oversight mechanism needs to have clear authorities within the government for three additional related functions:³⁰
 - Challenge of RIAs, i.e. questioning regulation and its reform by assessing quality of RIAs
 - Advocacy within and outside of government to help keep government ministries and agencies on the long term path to achieve quality regulation

²⁸ Besides Jacobs (2006b) referenced above, see also Jacobs (2006a and 2006c), and OECD (2008 and 2009b).

²⁹ OECD 2007c would include this power as part of the challenge function. In our view it is best thought of as part of the "supervision."

³⁰ For a good discussion of examples of oversight bodies see OECD 2007c.

- Advice and support to regulators to enhance their capacity to achieve and commitment to achieving quality regulation.³¹ This includes training of regulators
- It takes time for regulatory policy to take hold. Ontario must be prepared to devote time and energy to policy oversight for a considerable time.

Jurisdictions have implemented regulatory policies in many ways, reflecting different contexts. But no OECD jurisdiction has developed an effective institutional framework without some challenges arising.

The Government of Ontario has not yet declared how the policy will be implemented on the ground. In this Section, lessons learned from around the world will be used to suggest ways that Ontario can address its key implementation risks.

6.3 Lessons Learned

The points enumerated in Section 6.2 have implications for the way Ontario moves forward. In our view, the Government of Ontario needs to tackle the following four priority areas:

1. An oversight function, including a challenge to regulatory impact analyses undertaken by Ministries
2. Formal assignment of authority at Ministerial and bureaucratic levels
3. A medium-term plan for training of and guidance to regulators to ensure progress is sustainable. Elements would likely address:
 - Introduction to the new *Regulatory Policy*, including consultation expectations
 - How to conduct RIA
 - How to conduct risk assessments
 A longer term plan to provide additional guidance will also likely be needed.
4. A longer-term plan to monitor progress and to introduce new elements in both policy and process to meet emerging challenges

6.4 Regulatory Impact Analyses: Need for a Challenge Function (Recommendations 1,2 and 3)

Common sense would seem to dictate that a RIA should be easy for a regulator to prepare well. After all, do not all regulators know what their proposed regulations will achieve in the way of additional protections for Ontarians? ...how businesses and others will comply? ... what compliance will cost Ontario's citizens and businesses? And because we live in a democracy, regulators are of course not only willing but eager to explain what impacts there would be for citizens. If these could all be answered consistently in the affirmative then there would be no need for a *Regulatory Policy*. The Government of

³¹ OECD 2007c, page 6, describes this as ensuring "culture" change within the government.

Ontario apparently has found that it, like virtually every other industrialized jurisdiction,³² requires some improvements in the way it regulates.

Ontario has indicated that a RIA must be prepared (and made public), at least for important regulations affecting business. A good policy, but experience has shown such a policy is not enough to address either the capacity, or incentives necessary, to deliver good RIA in practice.

Regarding incentives, "most RIA-related reforms in recent years [internationally] have focused on increasing oversight and quality control of RIA..." (Jacobs 2006a, page 43). The OECD concludes that governments need to "[co-ordinate and carefully manage] across the central ministries of government and other law-making institutions..." (OECD 2008, page 39).

To illustrate, consider three jurisdictions. Each of these has had decades of experience with a regulatory policy, with regulatory impact assessment, and with attempts to "institutionalize capacity and incentives."

Canada: The federal government first promulgated a government-wide policy requiring regulatory impact assessment for important regulations in 1978. Since 1986, policy has required a RIA for a majority of regulatory proposals. Still, some 26 years after RIA requirements were first introduced, the External Advisory Committee on Smart Regulation (EACSR) in its report to the government said:

...The need for cultural change. The recommendations in this report, and the expectations of stakeholders, cannot be addressed by tinkering with the process. **A major change in approach is needed, supported by training for government regulators and the commitment and drive of senior bureaucrats and parliamentarians** [emphasis added].

Canada (2004, page 11)

The **quality of information and analysis** available to decision makers and stakeholders is **variable**. The current system does not provide the discipline needed to clearly express regulatory objectives and anticipated outcomes that can be measured and evaluated [emphasis added].

Canada (2004, page 49)

United States: In March 1978, President Carter issued Executive Order 12044 on "Improving Government Regulations." As described in a more recent report of the Office of Management and Budget (1997, Chapter 1), that Order established general principles for agencies to follow when regulating. It required that a regulatory analysis be done for rules with "major economic consequences for the general economy, for individual

³² As of 2009, 29 of 31 OECD jurisdictions had introduced a formal regulatory policy adopted the OECD principles of quality regulation.

industries, geographical regions or levels of government." Nevertheless, in 1999, more than twenty years later, eminent academics could state:³³

... RIA numbers cannot be taken at face value. **Both theory and empirical evidence** suggest that government agencies are **likely to overstate substantially the aggregate net benefits** of their programs (for instance, protecting the environment or improving safety in the workplace) **to show that they are meeting the demands of interest groups** [emphasis added].

Guasch and Hahn (1999, page 145)

United Kingdom: The evolution of better regulatory management in the UK is very complex, reflecting its unique constitutional and legal history. As described in OECD (2002, page 51), the UK in the 1980s focused mostly on important deregulation of key sectors. But this "evolved alongside the development of broader principles of good regulation and supporting institutions." The first formal step towards a regulatory policy was a White Paper in 1985.

Lifting the Burden addressed the negative effect of over-regulation on business. It led to the creation of the Enterprise and Deregulation Unit, the predecessor of the more recent Regulatory Impact Unit (RIU).

OECD (2002) noted there were, at the time, six government-wide mechanisms³⁴ in the UK promoting quality regulation including:

- The *Panel for Regulatory Accountability*: this Ministerial Panel reviewed practices and plans in ministries
- The *Regulatory Impact Unit* was located in the Cabinet Office (since moved) with a staff of 60. Its mandate was to monitor, and report on regulatory reform progress across the government. It also provided guidance on and reviewed RIAs. The RIU acted as the government's communicator on regulatory reform
- *Regulatory Reform Ministers* were appointed to each department. Their mandate of these junior ministers³⁵ was to remove outdated or burdensome regulations, while ensuring proposed regulations were necessary and likely to impose the minimum possible costs
- The *Small Business Service*, within the government, had to be consulted on any regulation affecting small enterprises

³³ J. Luis Guasch is lead economist for the Latin America and the Caribbean Regional Office and for the Development Economics Group at the World Bank and professor of economics at the University of California, San Diego. Robert W. Hahn is director of the American Enterprise Institute (AEI)-Brookings Joint Center for Regulatory Studies, a resident scholar at AEI, and a research associate at the Kennedy School of Government, Harvard University.

³⁴ Excluding the Cabinet which usually must approve regulatory proposals.

³⁵ In Ontario, the closest equivalent would be Parliamentary Assistants.

- *The Better Regulation Task Force* was an independent advisory group of 16 unpaid members. Their mandate was to advise the government on ways to improve the effectiveness of regulation

The UK has over twenty years of experience with a regulatory policy. Nevertheless, the National Audit Office (2009) concluded that more was required. The report stated

The prospect of external scrutiny is the most effective motivator for departments to produce high quality [regulatory impact analyses]. To improve the design of new regulations, the [Better Regulation Executive] and departments should bring external challenge to the development of regulations. [emphasis added]

National Audit Office (2009, page 7)

In other words, the National Audit Office concluded that despite its level of effort, the UK government needed to strengthen this aspect of its institutional framework if it wanted to achieve its long-standing goals.

An analogy regarding challenge functions is useful. No modern industrialized jurisdiction today simply accepts expenditure proposals from departments and agencies and incorporates them into a budget. They insist on having a central agency review and challenge of proposals. Regulations may not cost governments much but they do cost citizens and business a great deal. There is no reason to believe that unconstrained regulators would behave differently from those responsible for expenditure proposals.³⁶

The conclusion of this comparison is that Ontario is unlikely to achieve its stated objectives for its *Regulatory Policy* unless it establishes an oversight mechanism or mechanisms to review the quality of RIAs. Ontario has several options for this. For instance:

1. The Executive Council Office, as gatekeeper to Cabinet, could have responsibility to ensure RIAs were of sufficient quality prior to presentation to the government's "Legislation and Regulations Committee"³⁷ or at least prior to presentation to Cabinet
2. MEDT could be given the responsibility to review all RIAs, provide comments to the sponsoring department, and to provide comments to the Executive Council Office for transmittal to Cabinet. The Minister of Economic Development and Trade could be given an explicit mandate to raise any issues regarding the quality of colleagues' proposals at Cabinet
3. A new organization could be created to review and assess the quality of RIAs. The UK did it when they created the RIU. The USA created the Office of Information and Regulatory Affairs. Canada created the Office of the Coordinator

³⁶ Indeed, some have argued for creation of a "regulatory budget" where the cost of all regulation is capped, as happens in a normal budget. This is not the place for discussing the pros and cons of such proposals.

³⁷ It is assumed in this document that the Executive Council Office is responsible for supporting this committee.

of Regulatory Reform, which has over time become the current Regulatory Affairs Sector in the Treasury Board Secretariat. Australia created what is now called the Office of Best Practice Regulation in the Department of Finance and Deregulation.

Regarding the challenge function, in the OECD's view it is not about "policy debates" – it's about the quality of the analysis and evidence brought forward to decision-makers, stakeholders and the public. To be effective and credible, therefore, standards for what constitutes an acceptable RIA need to be promulgated. Regulators would have a difficult task of preparing quality RIAs if they do not understand what one entails. Similarly, an oversight mechanism would find it difficult to launch a challenge if there were no standards to point to.³⁸

On a different tack, institutional sustainability could be assisted by making changes in Regulations promulgated under the *Legislation Act, 2006*. Regulations could be formulated to have RIAs formally approved by the Chair of Cabinet. This would put Ontario on par with Alberta which has followed this route.

Finally, it should be noted that the quality of regulation is often determined by the statutory authority for a regulatory program. If it is unclear about what is being regulated and for what purposes, about the powers that Cabinet and Ministers can exercise, or about the penalties that can be imposed then quality regulations will be difficult to develop. An oversight body can provide advice during the legislation-making process to ensure that proposed authorities facilitate rather than hinder the development of quality regulation. Some jurisdictions go so far as to require RIAs for proposed regulatory legislation.³⁹

³⁸ "In most OECD countries, central oversight bodies for regulatory reform are in charge of drafting and distributing guidelines. If this institution is not responsible for the training on RIA, strong co-ordination mechanisms should be arranged in a timely manner. In the cases where expertise is not available locally, it has to be sourced." OECD, 2008, page 51.

³⁹ Thirty of the 31 OECD jurisdictions require some form of RIA for primary legislation (OECD, 2009a, page 65). Note, however, that this does not necessarily entail a documented professional Cost-Benefit Analysis.

Recommendation 1: That the Government of Ontario establish a centralized oversight mechanism for implementation of the Regulatory Policy.

That this oversight mechanism have clear authority for the following functions:

- *Government-wide coordination and supervision of the regulatory process*
- *Advice to Cabinet and the Legislation and Regulations Committee on compliance of regulations with the Regulatory Policy*
- *Review and challenge of Regulatory Impact Assessments*
- *Advice⁴⁰ and support to regulators*
- *Advocacy within and outside of government on the Regulatory Policy and process*

That the oversight mechanism have as a key responsibility advising Cabinet and the Legislation and Regulations Committee on the adequacy of the impact assessment underlying proposals and their resulting justification for both statutory legislation and regulations

Recommendation 2: That the Government of Ontario issue clear standards which Regulatory Impact Assessments must meet.

Recommendation 3: That the Government of Ontario require, through regulation under the Legislation Act,⁴¹ RIAs of acceptable quality.

6.5 Capacity Building: Training, Tools and Guidance (Recommendation 4)

OECD (2008)⁴² provides comprehensive advice to policy-makers developing a sustainable institutional framework for RIA, a key ingredient of regulatory policy.

RIA will be new for most regulators. While not difficult conceptually, it does require considerable thought about how to focus an analysis on the most important matters. Determining how to collect data without spending too much can be a challenge. And learning how to draw conclusions from analysis may need to be learned. Lacking experience, regulators can benefit from help.

⁴⁰ In that regard, ministries should be encouraged, perhaps even required, to consult with staff of the oversight body early in the development process. Preparing a RIA after a ministry has made all its decisions is not productive.

⁴¹ One would likely be use s.32(d) to require the Registrar of Regulations to not register any relevant regulation for which the Chair of Cabinet had not advised had an adequate RIA.. Alberta has done this to put an even stronger legal foundation for RIA in place beyond Cabinet Directives.

⁴² Chapter 6 focuses on training and guidance.

The OECD found that jurisdictions use a broad range of tools. Guidelines or "how to" manuals and best practice materials can be readily found. A sample:

- Conduct of risk assessments⁴³
- Conduct of Cost Benefit Analysis⁴⁴
- Identification of reasonable alternative instruments⁴⁵
- Consultation⁴⁶
- Analysis of business impacts (beyond straightforward compliance costs; often with a special focus on small business)⁴⁷
- Conducting environmental assessments⁴⁸

Some jurisdictions go further to provide guidance and best practice documents focused more on the design of regulations and compliance regimes in order to improve administration.⁴⁹

Jurisdictions generally provide help to regulators by providing them with templates for analysis, reporting, and consultation. They often provide analytic tools to help regulators work through the challenges of good analysis. In that regard, it is understood that MEDT has been developing a tool for helping ministries present compliance cost data in a standardized format. Because regulators often have particular difficulty in providing realistic compliance cost data, this appears to be a good priority.

Besides guides, almost all OECD jurisdictions provide formal training. For instance 28 of the 31 members provide training on how to conduct RIA (OECD, 2009a, pp 28-31). In Canada, the Canada School for Public Service was engaged by the Treasury Board Secretariat to develop courses⁵⁰ covering the Government of Canada's regulatory policy, "duty of care" in administering programs, performance measurement, cost benefit and risk analysis, and Regulatory Impact Analysis Statement writing. Similarly, the UK and

⁴³ For example, the Office of Information and Regulatory Affairs in the US provides guidance on risk analysis. See http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-24.pdf

⁴⁴ For example, the UK provides a number of documents on RIA which can be accessed through the Department for Business, Innovation & Skills website at <http://www.bis.gov.uk/policies/better-regulation/policy/scrutinising-new-regulations>. Other countries providing readily accessible guides include Australia, Canada, and the United States.

⁴⁵ For example, Canada provides a separate guide on assessment of alternative governance instruments. See <http://www.tbs-sct.gc.ca/ri-qr/documents/gl-ld/asses-eval/asses-eval00-eng.asp>.

⁴⁶ For example, the UK provides a consultation guide available at <http://www.bis.gov.uk/files/file47158.pdf>

⁴⁷ Canada is updating its Business Impact Assessment tool and guidance. Throughout the OECD, however, considerable effort has been taken to improve the assessments of competition impacts. Many have developed some form of a competition assessment guide. The OECD provides an entire toolkit, available through http://www.oecd.org/document/48/0,3343,en_2649_40381664_42454576_1_1_1_37421,00.html.

⁴⁸ Regulations, like other governance instruments, can have impacts on the environment. Sometimes an assessment of the effects needs to be undertaken. The Canadian Environmental Assessment Agency provides guidance for those affected. See <http://www.ceaa.gc.ca/default.asp?lang=En&n=DACB19EE-1>.

⁴⁹ While the Government of Canada has historically put some effort into this, the UK would have to be considered the world-leader now, as a perusal of the BIS website shows.

⁵⁰ The authors were engaged in developing three of the five courses offered by the Canada School.

Australia both provide training. For example, Australia (whose population and GDP are roughly 70% larger than Ontario) trained 400 regulatory staff a year.⁵¹

Recommendation 4: *That the Government of Ontario develop a multi-year strategy:*

- *To educate regulators on the new Regulatory Policy, why it is necessary, and what it means for them*
- *To develop a broad range of guidance and tools to assist regulators meet their obligations under the new policy*
- *To train officials in each regulatory department and agency so that sufficient capacity exists to perform proper RIAs*

Note that it will likely take several years to complete such a strategy but a start is needed. If no strategy is developed then Ontario's *Regulatory Policy* will almost certainly have less impact than intended.

6.6 Clear Roles and Authorities for Ministers and Government Officials (Recommendations 5 and 6)

In jurisdictions with long-standing regulatory policies, authorities are quite clear. The Government of Ontario has not yet announced implementation plans for the *Regulatory Policy*, but several questions emerge which should be answered when implementation plans are communicated.

The Minister of Economic Development and Trade has the lead role in policy development and communications, and MEDT staff are working on new tools. But:

- Will the Minister of EDT be expected to intervene at Cabinet when ministers bring forward proposals which violate the *Regulatory Policy* (and ministers will – it happens in all jurisdictions, sometimes with good reason but sometimes not)? Or is the Executive Council Office expected to bring policy violations (e.g. a very badly distorted RIA) to the attention of all Ministers or at least the Chair of Cabinet? What role does the Legislation and Regulations Committee have in implementing the *Regulatory Policy*?
- While a goal of the *Regulatory Policy* is to promote a more competitive Ontario, acting in the public interest can lead to cases which could slow economic growth and cost jobs. Is this consistent with the currently expressed mandate of the Ministry?⁵²
- Inevitably some RIA will be presented to the public and found later to have provided incorrect or skewed information. Given its mandate, will that be a sufficient basis for

⁵¹ OECD (2008, page 52) only had recent data for fiscal 2003-4 and 04-05 for Australia.

⁵² "Our goal at the Ministry of Economic Development and Trade is clear: to grow our economy for the benefit of all Ontarians." See http://www.ontariocanada.com/ontcan/1medt/en/about_main_en.jsp.

the Legislative Committee on Regulations and Private Bills to make an observation to the Legislative Assembly?

- Accountability of all regulatory Ministers and their staff for implementing the *Regulatory Policy* is generally viewed as a key ingredient of a sustainable and effective institutional framework (OECD 2008, s4.1, page 31). Will MEDT be responsible for ensuring ministries comply with the policy through early intervention and monitoring of proposals (and if so, how)? Will the Executive Council Office? Some other body? Or none at all?
- Will MEDT have responsibility for developing training for regulators? Will they have a budget to promote good practice across ministries, to assist ministries with RIA or other technical dimensions of the policy, or to assist ministries with training? Or are ministries on their own, but subject to any challenge of their work?
- Will MEDT or another body engage early in the policy development process of other ministries to assist them in determining good regulatory designs and in helping determine the depth of RIA needed?
- Who will have responsibility for monitoring and for conducting the ex-post evaluation of ministries' performance against the *Regulatory Policy*?
- What responsibilities do Ministers, and their staff, have when proposing regulations? What is the authority for assigning those responsibilities?

In short, a good implementation plan will clarify the responsibilities of both Ministers and officials in implementing the *Regulatory Policy*.

Recommendation 5: *That the Government of Ontario communicate its implementation plan for the Regulatory Policy, not only to regulators but to the public, articulating roles and responsibilities.*

Recommendation 6: *That, because introduction of the Regulatory Policy will not be costless for any ministry or agency involved, the Government's implementation plan address resourcing explicitly.*⁵³

6.7 Monitoring and Periodic Renewal of the Policy and its Implementation (Recommendation 7)

OECD (2009a, page 20) states: "In most countries where an explicit regulatory policy has been put in place, it has been substantially revised and developed since the first collection of indicators in 1998." In other words, the Government of Ontario's *Regulatory Policy*

⁵³ Even if it simply assigns the responsibility for finding adequate resources to ministries and agencies. Lack of resources should not be an excuse for not respecting the policy.

and implementation practices are likely to change substantially over the coming few years.

While some stability is always desirable, there should be no illusion that either are perfect as currently planned, or that their focus won't need to change in response to shifts in the policy environment. Lack of perfection is not a problem. Ontario will learn better policy articulation and practices through doing.⁵⁴ However, institutional mechanisms need to be in place to ensure progress in implementation of the *regulatory policy* is measured and reported on. As well, there needs to be a periodic review of both the facts of progress and a changing environment.

The best practice would be to have an annual report on the functioning of the *Regulatory Policy*. Progress should be able to be seen over time, and if it is not then corrective action could be taken. Half of the OECD country members have a Minister who is responsible to their legislature and so report on progress to those bodies (OECD 2009a, page 25). Perhaps the best example is Australia, where the Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation (formerly part of the independent Productivity Commission) publishes an annual report on the rates of compliance of regulatory initiatives to the standards set for RIA.⁵⁵ The OBPR uses standards set by the Council of Australian Governments.⁵⁶

Recommendation 7: That the Government of Ontario build into its implementation plans an explicit monitoring and evaluation of compliance with the regulatory policy with findings published annually.

⁵⁴ Arguably, if it does not, that may be an indicator of policy failure.

⁵⁵ For instance, the report for 2008-09 indicated that 85% of Regulatory Impact Statements met all applicable standards. OBPR (2009, page 14).

⁵⁶ COAG set rules and guidelines for the conduct of economic and other policies among all Australian governments. COAG would be the equivalent in Canada to a standing federal-provincial territorial body that actually had teeth.

7. Conclusion

We understand that MEDT officials are aware of OECD studies and are in discussions with the Executive Council Office about implementation aspects. Nevertheless, we are concerned that the Government may be underestimating the difficulties it faces in building a sustainable and effective institutional structure for implementing the Regulatory Policy.

Clearly the Government of Ontario has invested heavily in *Open for Business* and undertaken many useful reforms.

As stated in Section 1.4,

- Ontario has undertaken several initiatives that will help business
- The quality regulation principles in their *Regulatory Policy* are quite appropriate
- Similarly, changes to the regulation-making process are likely to be positive, although there have been no changes actually made in the seven months following the promulgation date of the *policy*
- But most importantly, we are concerned that a sustainable institutional framework that can ensure effective implementation has not yet been created

There is no evidence that the challenges that Ontario will face in implementing its *Regulatory Policy* should be any different from those experienced in other jurisdictions around the world. So everyone involved should anticipate an evolutionary period of adjustment and improvements in the implementation of the *Regulatory Policy* that will take place over the coming months and years.

The six recommendations put forward in this report are meant to encourage Ontario to develop implementation plans based on the lessons learned in other jurisdictions, and to help speed the evolution of Ontario's *Regulatory Policy* along.

Interested stakeholders, legislators and the public will want to pay close attention to the Government of Ontario's institutional framework for implementing the *Regulatory Policy*. It will determine its long-term effectiveness, which affects all Ontarians.

Appendix A: Ontario Regulatory Policy⁵⁷

Purpose

Ontario is creating more open and responsive ways for government to work with business to deliver results, while protecting the public interest. This is an essential ingredient of Ontario's economic prosperity and recognizes the need to use 21st century tools and methods to regulate in a globalized business environment.

The purpose of this document is to set out the overall policy under which Ontario regulations will be developed and implemented. This policy sets out:

- the scope of regulation to which this policy applies;
- the principles on which Ontario regulatory development and implementation are based;
- regulatory impact assessment requirements; and
- transparency and consultation requirements for proposed regulations.

Scope

This policy applies to regulations that affect business made or approved by the Lieutenant Governor-in-Council or by a Minister that are subject to Part III of the *Legislation Act, 2006*. A regulation that affects business includes, but is not limited to, a measure that has one or more of the following effects:

- The measure changes the cost of compliance.
- The measure affects the efficiency of a business.
- The measure affects competition among the economic viability of businesses.
- The measure affects the ability of a business to maintain or create jobs.
- The measure affects the market access of goods, services, persons or investment from other Canadian jurisdictions and/or from jurisdictions outside of Canada.
- The measure affects the ability of a business to innovate.

Proposed regulatory amendments or new regulations that are considered to affect business are required to be posted for consultation purposes on the government's Regulatory Registry for a mandatory 45-day minimum time period. The Regulatory Registry is a website (www.ontariocanada.com/registry) where businesses can find out about Ontario government regulatory proposals and approved regulations that affect business. The Regulatory Registry is linked to the Twice Annual Effective Dates initiative where regulations affecting business come into effect on January 1st and July 1st of each year.

⁵⁷ MEDT (2010b)

Principles

The development and implementation of regulations by the Ontario Government are guided by general principles of good regulatory governance, including:

i) Regulations respond to a clearly identified need for regulation. Regulations must be justified by a solid business case, serve clearly stated public policy goals and be effective in achieving those goals. The problem to be solved must be clearly articulated and alternatives to making a regulation must be carefully considered before developing or amending a regulation.

ii) Regulations are developed and implemented in a transparent manner. The public and businesses affected by regulations must be afforded timely and meaningful opportunity to provide input and comments on proposed regulations.

iii) Regulations are designed to be least trade restrictive. Regulations must not be prepared or applied in a way that creates unnecessary obstacles to international or internal trade. For this purpose, regulations must be non-discriminatory and not be more trade-restrictive than necessary to fulfil a legitimate public policy objective, such as environmental protection, health and occupational health and safety, consumer protection, public safety, etc., taking into account the risks that non-fulfilment of this objective would create.

iv) Regulations are based on assessed risks, costs and benefits and minimize impacts on a fair, competitive and innovative market economy. A clear assessment of the total costs and benefits, including those to business, the public and government administration, are critical to make judgements about the reasonableness and practicality of a regulation. The assessment of costs and benefits must be based on the risks posed in the absence of regulation (that is, be based on a clearly identified need) and take into account the overall impact on the competitiveness of those subject to regulation.

v) Differences and duplication of regulation is minimized, where appropriate. Regulatory differences among jurisdictions, especially within Canada, may compromise competitiveness, increase the burden on business and lead to barriers to international and internal trade. Enhanced communications and coordination with other governments within Canada and internationally reduces unnecessary overlapping or conflicting regulations.

vi) Regulations must be results-based, where appropriate and to the extent practicable. Performance-based regulations set the standard or objective that must be met, rather than the specific means of achieving the standard or objective. Where appropriate and to the extent possible, focusing on outcomes provides greater flexibility for achieving compliance, promotes more efficiency and effectiveness of regulation and reduces the burden on those subject to regulation.

vii) Regulations are timely and reviewed on a routine basis and are not maintained if the need giving rise to their adoption no longer exists. Many regulations must be reviewed on a regular basis to determine whether the need for them continues to exist. New technologies, changes in the industrial composition of the economy, developments in supply chain management practices and the reform and development of international product, environmental or other standards all give rise to the need to reassess existing regulations to ensure that they remain appropriate and effective.

viii) Regulations are made easily accessible and written in language that can be easily understood by the public and business. Transparent regulatory procedures ensure that the public interest is not subordinate to those of regulated entities and stakeholders. Posting of regulatory proposals and final regulations to the Regulatory Registry ensures that the public as well as domestic and foreign businesses can easily identify all the requirements applicable to them.

ix) Regulations are introduced in a predictable manner. Regulations impacting business generally come into effect twice a year: either on January 1st or July 1st. Having regulations come into force on two fixed dates per year gives business greater predictability, encourages greater compliance and helps them to plan.

Regulatory Impact Assessment

Regulatory impact assessments are widely used in many places to measure the benefits and costs of new or amended regulations. These tests allow decision-makers to correlate the need for a regulation with the regulatory instrument being proposed, to set out the assessed risks, costs and benefits or regulatory proposals, to compare the effectiveness of non-regulatory alternatives, and to assess the impact on a range of economic factors, including trade, investment and labour mobility. A pragmatic and realistic approach dictates that the resources invested in regulatory impact assessment increase with the potential impact of the regulation.

Proposed Ontario regulations must be accompanied by a regulatory impact assessment that addresses, at a minimum, the impact on the access of persons, goods, services and investments from other jurisdictions, including jurisdictions within Canada.

Transparency and Consultation

Final regulations are to be promptly published or otherwise made available to the public. Proposed regulations that may have an impact on business are required to be posted on the Regulatory Registry with a minimum public comment period of 45 days. For those proposed regulations that may have a significant effect on the access of persons, goods, services or investments, the posting on the Regulatory Registry shall include a summary of the proposed regulatory measure, and where possible, the draft regulatory text. Written comments received are to be taken into account in finalizing the regulation.

Exceptions to the requirement to post proposed regulations for consultation purposes on the Regulatory Registry include those that:

Concern an emergency declared under the *Emergency Management and Civil Protection Act* or that require extraordinary measures on an urgent basis, for example, urgent public or animal health and safety issue, disaster relief, environmental spills and clean up.

- Are financially sensitive, that is, they concern program expenditures or contain financial information that could hurt or prejudice individuals, businesses or the government if made public prematurely, such as Budget or tax-related regulations (regulatory requirements relating to administrative processes and formalities attached to the collection of fiscal revenues, including fees and royalties, by government should not be considered financially sensitive).
- Involve privacy issues, that is, would disclose personal information or could create an unfair competitive advantage if released.
- Are French translations of an existing English regulation, or are removing a form or other graphic material from the regulation.
- Implement a provision of a legally binding contract.
- Correct errors in an existing regulation.
- Involve situations where, as a consequence of a legislative requirement, publication would adversely affect the administration or operation of a government program.

However, ministries are expected to post the approved regulations on the Regulatory Registry as soon as practicable.

April 1, 2010

Appendix B: OECD Review Criteria

Since the OECD initiated its work on regulatory reform in the mid 1990s, it has collected three surveys on countries' regulatory management systems, starting in 1998, with a second round in 2005 and a third round in 2008. Most recent results can be found in *Indicators of Regulatory Management Systems, 2009 Report* available on the OECD website at www.oecd.org/dataoecd/44/37/44294427.pdf.

Below are the criteria now used by the OECD in their reviews.

Central oversight

Evaluation criteria:

- Is there a dedicated body (or bodies) responsible for promoting the regulatory policy and monitoring and reporting on regulatory reform and regulatory quality in the administration from a whole of government perspective?
- Is this body consulted as part of the process of developing new regulation?
- Does this body report on progress made on reform by individual ministries?
- Is this body entrusted with the authority of reviewing and monitoring regulatory impacts conducted in individual ministries?
- Can this body conduct its own analysis of regulatory impacts?
- Is this body entrusted with an advocacy function to promote regulatory quality and reform?
- Is there an advisory body that receives references from Government to review broad areas of regulation, collecting the views of private stakeholders? (*e.g.* past bodies have included the Better Regulation Task Force in the UK, the External Advisory Council on Smart Regulation in Canada and the Regulatory Reform Council in Korea)
- Does this body have a degree of independence from government (*e.g.* through a board or commission structure)?
- Does this body report its findings publicly?
- Is a specific minister accountable for promoting government-wide progress on regulatory reform?
- Is the Minister required to report to Parliament on progress?

Training in regulatory quality skills

Evaluation criteria:

- Do formal training programs exist to better equip civil servants with the skills to develop high quality regulation?
 - Does this include training in how to conduct regulatory impact analysis?
 - Does this training include use of alternative policy instruments?
 - Does this include training on how to inform and communicate with the public?
- Is general guidance on the regulatory policy and its underlying objectives published and distributed to regulatory officials?
- Is general guidance on compliance and enforcement published and distributed to regulatory officials?
- Are other strategies in place to promote changes in the regulatory culture consistent with the objectives of the regulatory policy? (*e.g.* mobility of officials across areas, exchanges with the private sector, others)

Regulatory management and policy coherence

Evaluation criteria:

- Are there formal processes for consultation within government when preparing new regulations?
- Is the body responsible for competition policy usually consulted on new regulation? Is this consultation mandatory?
- Is the body responsible for trade policy usually consulted on new regulation? Is this consultation mandatory?
- Is the body responsible for consumer policy usually consulted on new regulation? Is this consultation mandatory?
- Is there a formal requirement that regulators consider comparable international standards and rules before setting new domestic standards?
- Are regulators required to explain the rationale for diverting from international standards when country specific rules are proposed?

Transparency in communication and access to regulations

Evaluation criteria:

- Publication of a consolidated register of all subordinate regulations currently in force?
- Is there a provision that only subordinate regulations in the registry are enforceable?
- Public access via the Internet to the text of all or most subordinate regulation?
- A general policy requiring “plain language” drafting of regulation?

- Is guidance on plain language drafting issued?

Consultation procedures

Evaluation criteria:

- Is public consultation with parties affected by regulations a routine part of developing new draft subordinate regulations?
- When is it conducted?
 - At the inception of the legal proposal?
 - During the drafting of a regulatory impact statement (RIS)?
- Is consultation mandatory?
- Are there consultation guidelines?
- If so, are they mandatory?
- What forms of public consultation are routinely used:
 - Broad circulation of proposals for comment?
 - Public notice and calling for comment?
 - Public meeting?
 - Simply posting proposals on the Internet?
 - Advisory group?
 - Preparatory public commission/committee?
- Can any member of the public choose to participate in the consultation?
- What is the minimum period for allowing consultation comments inside government?
- What is the minimum period for allowing consultation comments by the public, including citizens, business and civil society organizations?
- Are the views of participants in the consultation process made public?
- Are regulators required to respond in writing to the authors of consultation comments?
- Are the views expressed in the consultation process included in the regulatory impact analysis?
- Is there a process to monitor the quality of the consultation process? (*e.g.* surveys or other methods, please specify in comments)
- Is guidance available on how to conduct effective consultation?

Clarity and due process in decision making procedures

Evaluation criteria:

- Does the government periodically publish a list of regulations to be prepared, modified, reformed or repealed in the next six months or more?
- Is it available to the public (*i.e.* via the Internet)?
- Are there standard procedures by which the administration develops draft subordinate regulations?
- If there are standard procedures by which draft regulations are developed: are draft regulations to be scrutinized by a specific body within Government other than the department which is responsible for the regulation?

Alternatives to regulations and provision of justification for regulatory actions

Evaluation criteria:

- Are regulators required to provide a written justification of the need for new regulation?
- Are explicit decision criteria to be used when justifying a new regulation?
- Is a risk assessment required to be included as part of the written justification for the regulation?
- Has guidance been issued on the main rationales for the use of regulation?
- Are regulators required to identify and assess potentially feasible alternative policy instruments (regulatory and non-regulatory) before adopting new regulation?
- Has guidance been issued on using alternative policy instruments?
 - Performance based regulation?
 - Process (or management) based regulation?
 - Co-regulation?
 - Economic instruments?
 - The use of Quasi-regulatory guidelines as an alternative to regulation?
 - Voluntary approaches?

Regulatory Impact Analysis

Regulatory Impact Analysis (RIA) is an integrated decision support process used by governments, in many leading industrialized countries, to help improve the quality of regulation. It contributes to the creation of an open, transparent, and empirically based regulatory system. The OECD has advocated sound RIA practices for many years. It defines RIA as “an essential core tool for ensuring the quality of new regulations through a rigorous, evidence-based process for decision making.”

The following ten key elements are based on good practices identified in OECD countries:

1. Maximize political commitment to RIA.
2. Allocate responsibilities for RIA program elements carefully.
3. Train the regulators.
4. Use a consistent but flexible analytical method.
5. Develop and implement data collection strategies.
6. Target RIA efforts.
7. Integrate RIA with the policy-making process, beginning as early as possible.
8. Communicate the results.
9. Involve the public extensively.
10. Apply RIA to existing as well as new regulation.

Source: OECD (1997), Regulatory Impact Analysis: Best Practice in OECD Countries, Paris. See also Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers 2008

Evaluation criteria:

- Is regulatory impact analysis (RIA) carried out before new regulation is adopted?
- Is a government body outside the ministry sponsoring the regulation responsible for reviewing the quality of the RIA?
- Is there a clear “threshold” for applying RIA to new regulatory proposals?
- Is RIA required by law or by a similarly strictly binding administrative instrument?
- Are regulators required to identify the costs of new regulation?
- Is the impact analysis required to include the quantification of the costs?
- Are regulators required to identify the benefits of new regulation?
- Is the impact analysis required to include the quantification of the benefits?
- Does the RIA require regulators to demonstrate that the benefits of new regulation justify the costs?
- Are RIA documents required to be publicly released for consultation with the general public?
- Are *ex post* comparisons of the actual vs. predicted impacts of regulations made?
- Is there an assessment of the effectiveness of RIA in leading to modifications of initial regulatory proposals undertaken?

- Is the RIA required to include assessments of other specific impacts: Impacts on the budget, impacts on competition, impacts on market openness, impacts on small businesses, impact on specific regional areas, impact on specific social groups, impact on other groups (not for profit sector including charities), impact on the public sector
- Is risk assessment required when preparing a RIA? For all regulation, for health and safety regulation, for environmental regulation?
- Does the risk assessment require quantitative modeling?
- Does the RIA require regulators to explicitly consider compliance and enforcement issues when preparing new regulation?
- Are reports prepared on the level of compliance with the above RIA requirements?
- Are these reports published?

Administrative burden

Evaluation criteria:

- Has your country completed a measurement of administrative burdens imposed by government on enterprises and/or citizens?
- Is there an embedded program to update and repeat burden measurement?
- Which groups are targeted in your measurement of administrative burdens?
 - Impacts on citizens
 - Impacts on businesses
 - Impacts on the public sector
- *Ex ante* (prior to the introduction of the regulation)?
- *Ex post* (after the regulation has been implemented)?
- Does your methodology allow you to differentiate between various ministries or policy areas?

***Ex post* regulatory review and evaluation**

Evaluation criteria:

- Is periodic *ex post* evaluation of existing regulation mandatory?
- Are there standardized evaluation techniques or criteria to be used when regulation is reviewed?
- Are reviews required to consider explicitly the consistency of regulations in different areas and take steps to address areas of overlap/duplication/inconsistency?

- Are there mechanisms by which the public can make recommendations to modify specific regulations?
- Is sun-setting used for regulations?
- Does regulation include automatic review requirements?

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