



RED TAPE HOLDING YOU BACK?

SMARTER REGULATIONS
FOR A COMPETITIVE ECONOMY

OCTOBER 2010

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EXECUTIVE SUMMARY

The complexity of the contemporary global economy requires a great deal of contextual, tacit, and specialized knowledge in order to capitalize on the new information and communications, technologies, production systems and processes that are the drivers of innovation. The level of detailed and contextualized knowledge required to effectively harness innovative technology and production platforms towards the pursuit of social and environmental objectives is one that entrenched government rule-making structures and processes are no longer adequately equipped to provide. As a result, governments at all levels from all regions of the world are searching for ways to accomplish their social and environmental objectives that are more attuned to the decision-making calculus of private economic actors.

Businesses are rising to the challenge by devising innovative self-governance frameworks in collaboration with members of civil society. Third-party certification initiatives allow conscientious companies to strengthen their positions in global value chains by demonstrating their commitment to corporate social responsibility and ensuring the quality and integrity of their products and services.

These innovative self-governance initiatives represent valuable allies to governments in their quest to bring established political institutions into line with the economic realities of the 21st century. The provincial regulatory regime in Ontario is currently limited by a compartmentalized approach to policy-making in which most legislation and regulations are developed through a one-way relationship between government and business. Business is too often viewed primarily as the object of regulation, rather than an equal partner in the creation of innovative, productivity-enhancing systems and procedures for achieving improved social and environmental outcomes.

Productivity is also stifled due to a lack of horizontal and vertical communication between the different departments, agencies, and delegated authorities that make up the various levels of government and the various provinces and territories.

The Ontario government has begun to respond to the need for a more flexible regulatory regime through the Open for Business program and its associated initiatives. This program contains some ambitious goals which mark a concerted effort by the top levels of government to bring a new way of thinking imbued with a greater emphasis on flexibility and competitiveness to the provincial regulatory context. Foremost among them are the move to regulatory tiering in environmental assessment; the proposed Risk and Competitiveness Impact Assessment; the commitment to consider more alternatives to regulation; and the creation of a new relationship with business characterized by greater openness and responsiveness.

However, there are some real limitations in the Open for Business strategy that must be addressed if it is to amount to more than a short-lived review exercise. The report's critique of existing government practice centres on three principles of economically sustainable regulation:

- participatory decision-making processes supported by appropriate institutional structures
- horizontal and vertical co-ordination and harmonization through appropriate institutional mechanisms
- instruments for enhancing quality, accountability and transparency, including an integrated risk and impact assessment, an automatic review process, outcomes-based regulations, regulatory tiering, and an equivalence of performance test

First and foremost, the government needs to articulate clearly how it envisions moving beyond the current informal, sporadic approach to stakeholder consultation towards a more productive and reciprocal relationship with business that will allow it to reconcile the act of regulation with the principle of economic sustainability. The report contends that co-regulation based on a partnership model with accredited, industry-backed certification organizations is the most viable model for reconciling social and environmental outcomes with economic sustainability.

Secondly, the government must indicate how it will follow through on its commitment to harmonize standards between regulatory agencies within and across the three levels of government in order to ensure that businesses and taxpayers are no longer saddled with the costs of inadequate (or excessive) government planning. The report puts forward the concept of a Regulatory Agenda setting process, which allows government priorities to be established through a process analogous to the tax and spending processes, as the most credible alternative to current practice. The corollary to this process is a complementary institutional structure for resolving cross-jurisdictional issues.

Finally, the government must build on concepts such as impact assessment and regulatory tiering in order to arrive at substantive principles for quality, transparency and accountability capable of enhancing performance along the three pillars of social, environmental, and economic sustainability.

The report discusses five tools that are integral to this conception of performance:

- an integrated risk and impact assessment;
- a five-year automatic review process;
- an outcomes-based approach to co-regulation;
- regulatory tiering; and
- an Equivalence of Performance Test.

The report makes eight recommendations for achieving an economically sustainable regulatory regime. Specifically, the Ontario Chamber of Commerce (OCC) recommends that the government of Ontario:

1. Establish comprehensive regulatory reform as a strategic government priority, with targets and annual benchmarks, accompanied by specific and defined measures, which clearly demonstrate an “economic sustainability culture” of supporting rather than inhibiting business.
2. Draw on existing models from the federal government and elsewhere to establish formal institutional mechanisms for co-regulation.
3. Establish institutional mechanisms for inter-departmental and inter-jurisdictional co-ordination in the form of an Annual Regulatory Agenda-Setting Process and a complementary body for resolving cross-jurisdictional issues.
4. Require that all significant regulatory measures, including rule-making by delegated authorities, undergo a mandatory integrated impact assessment before they are implemented. This process should take place with oversight from an independent, expert body.
5. Legislate a five-year automatic review process with clear evaluation techniques and criteria to systematically review new and existing laws and regulations.
6. Adopt an outcomes-based approach to co-regulation through the development of general standards for accreditation of third-party certification programs.
7. Make regulatory tiering a mandatory feature of its assessment criteria by developing alternative thresholds for standards and compliance obligations for SMEs and lower-risk, standardized, and/or less complex activities.
8. Adopt an Equivalence of Performance Test for non-certified organizations to enable companies that meet general performance criteria to assume greater internal responsibility for compliance with regulatory outcomes in accordance with a standardized enforcement reduction plan.

SUMMARY OF RECOMMENDATIONS

The OCC recommends that the government of Ontario:

1.

Establish comprehensive regulatory reform as a strategic government priority, with targets and annual benchmarks, accompanied by specific and defined measures, which clearly demonstrate an “economic sustainability culture” of supporting rather than inhibiting business.

2.

Draw on existing models from the federal government and elsewhere to establish formal institutional mechanisms for co-regulation.

3.

Establish institutional mechanisms for inter-departmental and inter-jurisdictional co-ordination in the form of an Annual Regulatory Agenda-Setting Process and a complementary body for resolving cross-jurisdictional issues.

4.

Require that all significant regulatory measures, including rule-making by delegated authorities, undergo a mandatory integrated impact assessment before they are implemented. This process should take place with oversight from an independent, expert body.

5.

Legislate a five-year automatic review process with clear evaluation techniques and criteria to systematically review new and existing laws and regulations.

6.

Adopt an outcomes-based approach to co-regulation through the development of general standards for accreditation of third-party certification programs.

7.

Make regulatory tiering a mandatory feature of its assessment criteria by developing alternative thresholds for standards and compliance obligations for SMEs and lower-risk, standardized, and/or less complex activities.

8.

Adopt an Equivalence of Performance Test for non-certified organizations to enable companies that meet general performance criteria to assume greater internal responsibility for compliance with regulatory outcomes in accordance with a standardized enforcement reduction plan.

INTRODUCTION

Regulatory reform is not a new issue. It has been a subject of debate in Ontario for many years. As the economy has grown in complexity, and the rules governing it have multiplied, the debate has grown in intensity. A steady increase in the size of bureaucracy at all levels of government has caused the job of policy making to become so compartmentalized that different departments and agencies often take a unilateral approach to holistic policy issues. This often results in overlapping, contradictory, and inefficient regulations and requirements that are directly at odds with the transition to a knowledge- and innovation-based economy in which investments flow and markets change direction at the speed of light. In the current context, flexibility and adaptation are the hallmarks of competitiveness.

In response to the growing disconnect between economic and regulatory activities, national and sub-national governments from around the world have started to devote significant resources to reforming rule-making processes to make them more relevant to the 21st century global economy. In Canada, focused reform efforts have occurred at the federal level since the mid-1980s. The provinces have responded, to different degrees, to the push for leaner regulation, with British Columbia leading the way. Ontario is following close behind. The current Ontario government is making the most sustained push for regulatory reform to date through its Open for Business program. While this program has the makings of a comprehensive strategy for regulatory reform, the reform process in Ontario is still in its infancy, and there is still much room for improvement. With the stakes at an all-time high and the issue of reform currently on the government's agenda, this report aims to provide the government with strategic advice from Ontario's business community on how to successfully steer this process through to conclusion.

This report represents a continuation of the OCC's efforts to provide government and stakeholders with timely, relevant information about the regulatory burden that can be translated into practical and immediate solutions that will benefit not only the economy but the broader public interest. Regulatory reform has been at the forefront of the OCC's advocacy efforts for the past decade, and has consistently been identified by OCC members as a top issue affecting their competitiveness and a top priority for reform. Some of the government's most recent initiatives and proposals to align the regulatory framework with the priorities of the business community reflect previous recommendations put forward by the OCC and its business network. This includes proposals in the current Open for Business program such as harmonization between regulatory agencies within and between the various levels of government and a risk and competitiveness impact assessment for the development of new regulations.

In continuing the tradition of providing trusted advice that represents the interests of all sectors and regions of the province, the OCC has convened a task force comprised of a broad cross-section of members aimed at providing an objective assessment of the government's progress towards regulatory reform and develop a coherent framework for moving forward. The overarching themes which emerged from the task force consultations addressed the key components required to attain economically feasible regulations that promote sustainable economic growth. Once the task force had decided on the most important themes, all of the OCC's members were given a chance to weigh in through an online discussion forum. The outcome was a set of guiding principles that will allow the government to achieve its regulatory objectives with consensus and active support from the Ontario business community.

This report will not cover every issue related to regulation. Rather, it will focus on those that have been identified as top priorities by the OCC's membership at this critical juncture in the political and economic development of the province. These priorities relate to the formative principles necessary to move beyond a conflictual, costly, and reactive approach to regulation towards a more democratic, efficient, and proactive approach that will allow regulations to achieve its social and environmental policy objectives while at the same time promoting economic sustainability.

This report discusses three essential elements of a sustainable regulatory regime:

1. participatory decision-making processes supported by appropriate institutional structures
2. horizontal and vertical co-ordination and harmonization through appropriate institutional mechanisms
3. instruments for enhancing quality, accountability and transparency, including an integrated risk and impact assessment, an automatic review process, outcomes-based regulations, regulatory tiering, and an equivalence of performance test

ECONOMIC CONTEXT

The need for a change in how government regulates business is apparent. The existing rule making system evolved at a time when the Canadian economy was far less complex than it is today. The economic landscape has been reconfigured to such an extent that the current approach is no longer sufficient to meet the demands of the economy.

In the 21st century economy, science and technology along with knowledge and information are constantly being reformulated and repackaged. Supply chains are becoming more specialized at the same time as competition is intensifying. Greater openness to foreign markets is spelling enhanced competition between jurisdictions, as emerging markets aspire to lead positions in global value chains. Advances in information and communications technology are driving more complex configurations of product quality, causing companies to venture into new frontiers of product differentiation. As competition intensifies, production becomes more knowledge-intensive, placing a greater premium on the skills and education of the workforce.

The features of the contemporary global economy were precipitated by policies of privatization and liberalization pursued by international political institutions and individual countries. In Canada, these policies were accompanied by a push for decentralization, with the federal and provincial governments devolving an unprecedented share of responsibility for important functions such as economic redistribution and social service provision to a wider range of actors. In Ontario, the city-region and clusters have become the focal point for economic development, with responsibility for programs and services such as social housing, healthcare, childcare, and welfare assistance being transferred to informal alliances of municipal, business and community leaders. Through public-private partnerships, firms are directly involved in administering and delivering public services, as well as financing and maintaining public assets.

As a result of this institutional re-alignment, many of the traditional lines between the state and market have been blurred. However, in Ontario the downloading to business of key government responsibilities has primarily been limited to program administration and financial management, and has not been accompanied by a corresponding degree of regulatory authority. Rather, the goals of policy, the problems to be tackled, and the instruments to be deployed are almost exclusively determined by the bureaucracy and Cabinet, with comparatively few openings for stakeholders such as business associations, labour unions, and non-governmental organizations to consistently influence the process.

The Ontario government's business-as-usual approach to policy making has become increasingly hard-pressed to deal with the complex issues of the day. As the world becomes more interconnected, and as the emerging countries strive for the same standard of living enjoyed by the West, the need to find more sustainable ways of doing business and trade becomes evident. Problems such as climate change and rising food and energy prices are illustrative of the interrelationship between economic growth and environmental and social factors. Greater awareness of the externalities of uncontained economic growth has led to a consensus that the bottom line is not simply about profit, especially in the narrow sense of price competition. Rather, long-term success in global value chains is also critically dependent on whether companies invest in the technical and productive capacity of their suppliers and labour force, and on whether they harness the earth's resources in a way that does not diminish the stock of air, land, and water on which economic activity depends. The economic bottom line rests on the three pillars of Profit, Planet, and People.

There is intense political disagreement about how to solve the social and environmental issues facing the global community. While governments have remained deadlocked in protracted negotiations, businesses and NGOs have been at the forefront of designing innovative solutions to address the defining issues of our time. The World Trade Organization's drive to eliminate non-tariff barriers to trade by harmonizing standards across countries has given rise to formal protocols for the accreditation of certification agencies that implement, audit, and enforce standards related to social and environmental practices. This framework has led to the proliferation of grassroots governance frameworks comprised of alliances of businesses, labour, and NGOs that set and enforce standards through third-party certification initiatives. Certification by an accredited NGO is an attractive option for conscientious companies because it is a way to demonstrate a commitment to corporate social responsibility while at the same time a means to avoid more prescriptive government regulations.

The apparel and forestry industries are two of the forerunners when it comes to integrating the principles of social and environmental sustainability into supply chain management. In the case of forest certification, the Forest Stewardship Council (FSC), a non-profit organization comprised of environmental organizations and forest industry representatives, among others, sets guidelines for sustainable forest management, accredits and audits third-party certification agencies. Likewise, in the apparel industry, there are a number of major standard-setting organizations with more or less comprehensive codes of conduct and verification procedures competing for a share of the marketplace. Perhaps the most advanced of these is the European Ethical Trading Initiative, a government-sponsored initiative which has adopted all of the core International Labour Organization conventions.

There are numerous other examples of business and civil society organizations collaborating to create their own regulatory solutions to pressing social and environmental problems. These networks can be local, regional, national, or global in scope. What they all share in common is a collaborative institutional structure and an inclusive decision-making process for setting and upholding standards that contribute to improved social and environmental outcomes.

REGULATORY CONTEXT

Businesses can help government identify opportunities to make regulations more efficient.

A good example of this is the recycling regulations contained in the Waste Diversion Act. Under the Act, brand owners or “Stewards” of products such as tires, electronics, and hazardous waste, must pay a fee to a stewardship body (e.g. Ontario Tire Stewardship) in order to cover the costs of collecting and processing waste products. The cost of the program is partially offset by consumers, in the form of an “eco-charge” by the Steward, who may or may not be located in Ontario.

The rules allow a company who is not a Steward to enter into a Remitter’s Agreement with an obligated Steward to file monthly reports and submit payments on the Steward’s behalf. Theoretically this rule enables one company, the end-retailer, to consolidate reporting and payment requirements for multiple products into one procedure, clearly a much more efficient alternative.

However, as it stands, Ontario businesses wanting to assume responsibility for stewardship requirements must follow separate criteria for each product. The Remitter’s process for electronics is straightforward - it simply requires the business to fill out a line on a form and notify all involved parties. The process for hazardous waste is much more complicated, requiring a business to fill out complex legal documents which have to be signed by all parties and verified by all legal departments. There are no guidelines whatsoever for tires, which are currently ineligible for the Remitter’s process.

By creating different requirements for each product, the Act rules out, for no apparent reason, an obvious opportunity to make the recycling regulations more efficient.

These examples of flexible and dynamic third-party regulation can be contrasted with the rigid, paternalistic approach to regulation taken by successive provincial governments. The government of Ontario explicitly recognizes that adaptation and innovation are key to meeting the economic and social challenges of the 21st century. The purpose of the government’s decentralization and clustering policies is to harness the contextual intelligence of local decision-makers in order to design policies that will address state and market failures that limit innovation. However, the virtual monopoly of central government institutions on the policy making process means that all too often, government intervention is incompatible with the complex contexts faced by the diverse stakeholders the government purports to represent.

Nowhere is the inadequacy of Ontario’s current institutional paradigm more apparent than in the sphere of regulation. Almost all provincial regulatory and enforcement agencies are managed and staffed by bureaucrats. In most cases, there is no formal advisory role for business or service bureau for client outreach. In the absence of a formal policy directive stipulating that consultation must and should occur, consultation tends to happen inconsistently and sporadically. As a result, regulations are usually based on policy derived from line ministry or executive direction, with almost no input from business. While the government has recently taken steps to create more regularized channels for stakeholder input through mandatory twice-annual effective dates and a 45-day consultation period for new regulations, these measures only come into effect after policy direction has already been established, too late for meaningful input.

The sentiment from OCC members is that consultation and communication are virtually non-existent. In most cases, businesses are mandated into regulations with no prior awareness of their existence, let alone an opportunity to contribute to the final outcome. As a result, many regulations are based on a perception of risk, rather than an objective assessment of

hazard(s), and do not fully weigh the costs and benefits of the preferred course of action against those of inaction or against other policy alternatives. In many cases, all industries and firms are subject to the same criteria, down to the step-by-step processes to be followed, irrespective of any unique circumstances.

In reality, all industries and firms are characterized by different technological, process, and cost constraints, causing the degree of risk and the potential for risk mitigation to vary between firms. In addition, economic innovation and technological advances can lead to the development of new systems and processes that are at variance with existing regulations. These factors speak to the necessity of a flexible approach to regulation that allows for innovation and adaptability in managing risk(s).

The government's blanket approach to regulation assumes that the interests of economic stakeholders are at odds with the public interest. In reality, many economic stakeholders have a shared interest in promoting more progressive social and environmental values. Although there are undoubtedly some firms that will only adhere to higher standards if there are explicit criteria backed by a credible threat of sanctions, experience suggests that the vast majority of firms react positively to commonly accepted standards. In fact, firms often implement even higher standards than are legally prescribed in order to enhance the corporate bottom line. Given that profitability goes hand in hand with social and environmental responsibility, it does not make sense to treat regulations as a zero-sum game.

By subjecting all organizations to one common, predetermined framework, government regulations interfere with economic productivity in the pursuit of social and environmental objectives that could be achieved to an even greater extent by harnessing the tacit knowledge, technical expertise, and technological advancements that are deployed by firms in order to strengthen their competitive edge in the innovation economy.

OCC members feel that greater institutional flexibility is not only called for in how government interacts with business, but also in how the various layers and branches of government interact with each other. At the provincial level, responsibility for designing, implementing, and enforcing regulations is spread across several departments and agencies. The rule-making system is further divided between local, provincial, federal, and international regulatory bodies. In practice businesses must comply with a large body of regulations consisting of multiple regulators, rules, and processes. Because many Ontario companies are national in scope, they are forced to comply with a variety of different provincial standards on top of the usual list of requirements. As policy issues become increasingly complex, the lines of authority become even more blurred, making the regulatory system even harder to navigate.

In the current institutional milieu, several regulatory bodies are involved in regulating the same issues. This includes different delegated authorities such as government agencies, crown corporations, and human rights tribunals.

Due to the independent mandates and operating structures of these bodies, they do not take into account the practical implications of their regulations on policy objectives from other sources in government. A recent example is a restaurant caught in the middle of two provincial commissions – Ontario Human Rights and Ontario Alcohol and Gaming. Ontario Human Rights has determined that a patron has the right to smoke 'medical marijuana' at the doors of the restaurant while Ontario Alcohol and Gaming will revoke a restaurant's license if alcohol is served to an individual known to have used a 'controlled substance'.

In this particular case, the restaurant owner incurred thousands of dollars in legal fees trying to determine which avenues were available to meet the conflicting requirements of the commissions. In addition to the financial burden, there was a significant disruption to the operation of the business.

This outcome could have been avoided had there been oversight of the two commissions in order to determine which public policy objective was of greater priority. Instead, responsibility for resolving the dilemma fell to the business owner, causing a significant diversion of resources that could have been reinvested in the company.

Although the provincial policy context has become much more complicated and convoluted, there is no formal enterprise-wide planning process at the provincial level to ensure an integrated approach to regulation. The government has taken preliminary steps to strengthen communication between ministries, but has not revealed any proposal for permanently enhancing co-operation. Likewise, there is very little co-ordination between the provincial, municipal, and federal levels of government to give structure to the policy development process. Rather, public sector regulatory management is characterized by a routine lack of communication and collaboration between regulatory bodies from all levels. The result is often duplication and/or conflict between competing regulations, which impacts efficiency, consistency, and reliability at all stages of the regulatory life cycle, from project approval, to reporting, to enforcement.

In many cases, businesses must spend valuable time and money deciphering regulations and completing the required procedures and documentation, often with the help of outside professionals. When businesses are forced to divert their resources, away from production towards compliance, this results in an uncalculated opportunity cost to the economy. Government negligence in the planning of regulations limits companies' ability to expand and upgrade, which affects jobs, taxation revenue, and overall economic competitiveness.

OPEN FOR BUSINESS INITIATIVE

The Ontario government's Open for Business (OFB) program is the latest strategy for regulatory reform that aims to have a measureable impact on economic competitiveness. The ultimate goal of the government's Open for Business strategy is to advance innovation, job creation, and economic prosperity through the adoption of more flexible and responsive regulations.

OFB contains a number of measures designed to make the regulatory framework more conducive to economic growth. One of the main goals of the Open for Business initiative is a 25% reduction in the total regulatory burden. This measure will be complemented by a regulatory cap-and-trade system that will require two existing regulations to be revoked for every new regulation or amendment introduced.

The planned burden reduction will in large part be achieved through the Open for Business Act, an omnibus Bill which contains over 100 amendments designed to harmonize and streamline regulations from 10 different ministries. The legislation contains a variety of tools for achieving these objectives such as aligning provincial and federal standards, minimizing duplication, combining multiple approval processes, expediting procedures, easing compliance obligations and clarifying requirements.

The most ambitious of all the measures is the adoption of a risk-based system for environmental approvals. This tool would provide a flexible alternative to the existing approval process by creating a tiered regulation that would allow certain projects to meet less stringent criteria depending on the nature of the activity and the attendant risk.

The Open for Business initiative contains a number of additional measures to strengthen the existing regulatory system. Of particular significance is the creation of a Risk and Competitiveness Impact Assessment for the development of new policies and regulations. An integrated risk and impact assessment that considers the economic, social, and environmental impacts of proposed regulations is an integral feature of a sustainable regulatory regime. It allows policy-makers to compare the risks/costs of not taking action with the benefits and economic side-effects of planned policy interventions, and provides a justification for the creation of new regulations. It also allows government planners to determine whether a proposed regulation will have a disproportionate impact on small and medium businesses, and will allow them to take steps to reduce the burden on those businesses that are disproportionately affected. Furthermore, it requires that dialogue with business stakeholders begin early-on in the policy-planning process, before the specific content of the regulation has been established. An integrated risk and impact assessment is an essential tool for making regulations transparent, efficient and effective, and signals a serious commitment on the part of the government to modernize the culture of regulatory management in the province.

Another feature of Open for Business that highlights a more positive direction by government is a proposed best practices guide on alternatives to regulation. This initiative would provide an important opportunity to work with businesses to replace the existing fleet of heavily prescriptive regulations with more flexible, outcomes-based alternatives which, rather than stifling innovative behaviour, would draw on the ingenuity of economic actors to achieve cutting edge sustainability practices and lead to a larger pool of best practices to draw on.

One of the most significant but least formalized aspects of the Open for Business program is the government's commitment to developing a new relationship with business. The government views greater openness and responsiveness as foundations for this relationship. The goal is to achieve a clearer understanding of business needs, perspectives and priorities in order to make regulations more conducive to economic competitiveness.

The government has made a number of significant pledges in connection with this goal, including:

- to implement government-wide business consultation standards and best practice guidelines on engaging with business
- to create ministry channels for business feedback and suggestions
- to solicit regular input from business on satisfaction with how government regulates, provides services, and works with business
- to leverage opportunities to partner with business to advance Ontario's prosperity and innovation agenda

The government has shown evidence of implementing these goals through stipulating a 45-day consultation period and twice-annual effective dates for all new regulations. It has conducted extensive roundtables with industry associations and business representatives to determine businesses' views on preferred methods of consultation, the timing and frequency of consultations, and the process for notification about consultations. The team leading the Open for Business Initiative is in the process of reviewing and analyzing the consultation results, and will be using the findings to drive the development of go-forward recommendations.

The shape of these recommendations will play a critical role in determining whether the initial round of Open for Business reforms will take the province in the direction of a more flexible and sustainable regulatory regime that recognizes and exploits the synergy between social and environmental responsibility and business competitiveness.

REPORT CARD

Experience shows that successful regulatory reform requires the allocation of specific responsibilities and powers to central government agencies to monitor, oversee and promote progress across the entire public administration. The government of Ontario has done a relatively good job of integrating this concept into its planning. Although the responsibility for delivering the OFB agenda is diffused across all ministries, all ministries must report to the Deputy Minister for Economic Development and Trade.

The Open for Business team, which provides corporate leadership for the OFB Initiative, is housed in MEDT. It works with a Deputy Minister Steering Committee and a Business Advisory Panel to provide strategic advice and diffuse best practices across the ministries. This team is responsible for identifying opportunities for the public sector to collaborate as an enterprise, resolve issues, streamline and simplify processes. It is also entrusted with monitoring and reporting on ministries' progress on OFB initiatives on a quarterly basis. OFB priorities are executed through an Executive Leads Committee, which is comprised of a lead Assistant Deputy Minister from each ministry.

The Ministry of Economic Development and Trade and Cabinet Office work together to ensure enterprise-wide adoption of OFB initiatives. OFB positioning and branding is included in ministries' announcements. An internal Open for Business eBulletin is produced monthly to keep the Ontario Public Service up-to-date on new developments, progress and results of OFB. By designating a senior Minister responsible for regulatory reform and reinforcing OFB's mandate with consistent messaging from the highest level of government, the government has created an institutional structure which is on par with international best practice in the sphere of regulatory reform. However, a number of ministries are reportedly lagging on their OFB commitments, which could affect the government's ability to reach its targets. There may therefore be a need to review the effectiveness of the existing institutional arrangement to ensure an adequate structure for bringing about the wide-scale reform required to produce tangible results for business.

A supporting institutional structure is a necessary but insufficient condition for achieving a more effective approach to regulation. It is also necessary to provide channels for business and citizen engagement in the guidance, management and evaluation of reform. The OFB initiative arguably meets this threshold. Since the beginning of the three-year Open for Business program, OFB management and staff have been holding regular

consultations with stakeholders from a wide range of sectors, including industry associations, committees, and agencies, culminating in the government's new Business Sector Strategy. Through the Business Sector Strategy, the government will continue interfacing with industry leaders from several sectors in order to devise solutions for addressing the top priorities identified by business. While the government is sending the right signal by working closely with business to address obstacles, the government must prove that it is serious about engaging stakeholders more effectively, by taking concrete actions that directly address the priorities identified by business.

Finally, successful regulatory reform is contingent on having a system of measurement in place to track progress towards the goals of reform. Accurate performance indicators are required to determine what must be measured in order to keep track of success and to enable sound performance management. The government fares relatively less well on this measure. The government has announced that it will work with the Cabinet Office Strategy and Results Branch to position OFB as a key government priority, subject to tracking and reporting on key government commitments. All ministries are required to demonstrate results on the OFB agenda in their internal communications. However, the government has not disclosed what indicators are being used to arrive at this target.

The government pledged to make a 25% reduction in the overall regulatory burden as a cornerstone of its reform agenda. It subsequently announced that between September 2008 and March 2010, 157 Lieutenant Governor in Council regulations were revoked, resulting in 101 fewer regulations overall. However, the government has not indicated what methodology is being used to arrive at the overall reduction target. In practice, the methodologies to measure administrative burdens vary in their degree of technical complexity, from simply counting the number of regulations, to sophisticated techniques that measure the scale of the burden through the price, time, and quantity of businesses affected by information obligations, data requirements, and administrative activities. In the latter model, costs are primarily determined through detailed consultations with business, which specify the time and money companies spend fulfilling their regulatory obligations.

If the government's approach is simply to reduce the number of "musts" and "shalls" that businesses are required to comply with, without measuring the impact on productivity, there is no guarantee that at the end of the day it will have a measureable effect on private sector performance. The government has acknowledged the importance of evaluating new regulations on the basis of a Risk and Competitive Impact Assessment. The government must extend the principles of measurement and accountability to the review of the existing regulatory framework in order to ensure that there are clear criteria in place for streamlining existing regulations that will have a more positive impact for business.

This leads to one of the most serious limitations of the government's regulatory reform strategy. As currently articulated, most of the planned interventions under OFB are retroactive in nature. The planned 25% reduction deals exclusively with the existing stock of regulations. Likewise, the Open for Business Act applies only to the existing body of legislation.

While the government plans to introduce a cap-and-trade system for new regulations, without a tested methodology to compare new regulations to those they are replacing, there is no guarantee that this measure will have a tangible impact on business productivity. It is even more unclear how the government will ensure sufficient collaboration and compromise between competing departments and agencies on a go-forward basis to ensure that new regulations do not create more problems than they solve. By failing to articulate specific principles for enhancing regulatory coordination, streamlining, and outcomes on a go-forward basis, the government is passing up an unprecedented opportunity to advance a more sustainable approach to regulatory management for the future. As it stands, the government has indicated that in order to meet the 25% reduction target, a number of ministries have planned their most significant reductions for the end of 2010/2011. This poses a risk to successfully delivering on this commitment.

Given that the government's existing reform agenda does not fully elaborate on some of the key elements associated with improved regulatory performance, there is a need to go beyond the existing Open for Business context through more extensive and comprehensive measures that will bring about a full scale change in government practice going forward. The government must build on Open for Business through a long-term strategic plan that incorporates the tools necessary for success.

Recommendation: Establish comprehensive regulatory reform as a strategic government priority, with targets and annual benchmarks, accompanied by specific and defined measures, that clearly demonstrate an “economic sustainability culture” of supporting rather than inhibiting business.

LOOKING AHEAD

The government is currently at a transition point in the development of a more modern regulatory framework. To distinguish the current initiative from the traditional one-off review exercises - typical of how governments have handled this issue in the past - the government must build on the foundation it has established through a renewed agenda that will bring greater efficiency and effectiveness to the provincial regulatory regime. OCC members have identified three major components of a sustainable regulatory regime:

1. participatory decision-making processes supported by appropriate institutional structures
2. horizontal and vertical co-ordination and harmonization through appropriate institutional mechanisms
3. instruments for enhancing quality, accountability and transparency, including an integrated risk and impact assessment; an automatic review process; outcomes-based regulations; regulatory tiering; and an equivalence of performance test

PARTICIPATORY DECISION-MAKING PROCESSES SUPPORTED BY APPROPRIATE INSTITUTIONAL STRUCTURES

OCC members agree that public servants do not inherently understand the impact regulations have on economic competitiveness. Existing policy processes and networks exclude many sectors and businesses, particularly SMEs, from participating in the planning and design of new regulations. This results in inflexible, prescriptive regulations that discourage economic productivity and innovation.

The issue lies not only primarily in a lack of business leadership on the sustainability front, but rather in the disenfranchisement of business and other stakeholders, with respect to shaping the rules of the game. In order to achieve a more sustainable regulatory framework, therefore, the government must move away from its top-down, unilateral approach to regulation and towards a more democratic model of regulation, based on a greater transference of power to its stakeholder partners. The government must move towards a regime of co-regulation based on the creation of permanent institutional mechanisms for business and citizen groups to develop, manage, and evaluate new laws and regulations. What is needed is a wholesale transformation of the existing institutional paradigm in order to better reconcile the principles of social and environmental sustainability with the demands of efficiency.

The Open for Business Program contains elements of a co-regulation model. The stated goals of the program include the creation of ministry channels for regular business feedback and suggestions, and the leveraging of partnerships with business to advance Ontario’s prosperity and innovation agenda. The government has shown a commitment to implementing these principles through holding preliminary consultations with business regarding the timing and frequency of consultations and consultation methods.

While this is a positive first step, the participation of business and citizen groups should not be limited to a provisory role in the development of new regulations. Rather, the government should complement its policy of decentralization, with respect to social service provision and economic redistribution, with the creation of flexible institutional arrangements to delegate responsibility for developing, implementing, and monitoring regulations to grassroots networks of businesses and NGOs. Many such networks have demonstrated a strong capacity to provide leadership on issues related to social, environmental, and economic sustainability. Industry-backed informal governance arrangements have developed innovative models for addressing pressing issues that are the subject of intense debate by governments. These initiatives are an invaluable source of the contextual intelligence that is required to achieve the productivity enhancements essential to innovation. Adopting a decentralized approach to regulatory management would be a natural extension of the government’s policy

objective, re-articulated through the Open for Business initiative, of leveraging opportunities for partnerships with the private sector to advance the innovation and prosperity agenda.

Not only would greater institutional flexibility allow the government to achieve better-performing regulations, it would free up vital private sector resources for new investment and employment. It would also shield taxpayers from cost overruns by shifting more risk onto the private sector. The savings generated from lower compliance and enforcement obligations would allow the government to divert more resources to front-line public services, which are currently struggling to keep up with the pressure of an aging population.

Recommendation: The government should draw on existing models from the federal government and elsewhere to establish formal institutional mechanisms for co-regulation

HORIZONTAL AND VERTICAL CO-ORDINATION AND HARMONIZATION THROUGH APPROPRIATE INSTITUTIONAL MECHANISMS

In addition to formal channels for business participation, OCC members have identified greater collaboration between provincial government departments and agencies as a necessary priority for reform. Because most rule-making involves multiple departments and arms-length agencies within the provincial government - and among municipal, federal, and foreign governments – a process is needed to improve coordination, eliminate duplication/incompatibility, and maximize the benefits of regulation. The government must move from the current one-regulation-at-a-time approach to a systems-thinking approach that allows for complementarity and harmonization between separately regulated issues.

The government has hinted at the need for greater systems-thinking through its Open for Business strategy. It has vowed to create a more modern government by harmonizing with and eliminating duplication between provincial and federal government regulations and municipal by-laws. However, the only visible sign of this commitment to date has been the Open for Business Act. While this legislation goes a long way towards streamlining and improving existing procedures and services, it does nothing to ensure that future legislation and regulations will be based on coordinated decision-making between regulatory authorities. Therefore, it does not offer a long-term solution to the problem of departmental and jurisdictional compartmentalization.

While businesses agree on the need for an enterprise-wide approach to regulation, they are also adamant that this goal must not be achieved by adding another layer of complexity to the bureaucracy, such as, for example, a regulatory convener. A more strategic approach to achieving inter-institutional collaboration and harmonization would be an annual regulatory agenda-setting process that debates, sets, and announces provincial regulatory priorities in the same way as the tax and spending processes. The essential features of an annual regulatory agenda-setting process are:

- a process whereby all proposed new regulations from across provincial departments and agencies are aggregated and prioritized annually at the Cabinet level
- an appreciation of the many possible criteria that might legitimately be used to distinguish high-priority from low-priority new regulations
- a determination of what proposals should be included as new regulations
- an annual ministerial regulatory agenda statement and debate in the legislature
- an annual regulatory budget which measures the aggregate administrative cost of putting new regulations in place
- a provision and processes for handling contingencies and emergencies requiring new regulations

An annual regulatory agenda-setting process would be administered at the Cabinet level, by central government agencies, and would incorporate a mechanism to provide the Premier, Finance Minister, and their staff with strategic advice and technical expertise on proposed regulations. This role could be fulfilled by a designated Cabinet Committee.

The rationale and criteria for determining government priorities would include risk and impact assessments, international obligations, constitutionality, and existing regulation/policy at other levels of government. Proposals for new regulations would come from the various ministers, departments and agencies, driven by consultation with various stakeholder groups and constituencies. The same Cabinet Committee entrusted

The federal government's Organics Product Regulations offer an informative case-study as to how co-regulation between government and industry can be achieved in practice. Unlike the prevailing provincial model of paternalistic, top-down regulation, the federal organic regulatory regime is an example of bottom-up regulation in which the decision to regulate was in large part motivated by industry and consumer pressure. Historically, Canadian Organic Standards were voluntary. Oversight of the organics industry was conducted solely by third-party certification initiatives. However, organic stakeholders wanted to ensure that the burgeoning market for organic products would not give rise to substandard "greenwashed" products that would compete with legitimate producers for market share. The creation of government approved, minimum organic standards was also viewed as necessary to allow Canadian producers to meet the requirements of Canada's international trading partners. (In 2008, there were 47 countries with fully implemented organic regulations.)

The process for designing the standards involved the creation of an innovative and democratic institutional structure that allowed stakeholders in agriculture and trade who had first developed organic standards to be involved in the development of certification criteria. The Canadian General Standards Board (CGSB), which has the mandate to create client-centered standards and conformity assessment services, led the process through the Organic Technical Committee, which includes representation by organic producers and processors knowledgeable about industry best practices. The Canadian Food Inspection Agency (CFIA) was designated as the lead authority responsible for oversight of the system on the government's behalf. CFIA has a Canadian Organic Office that works with the Organic Federation of Canada, a board of provincial representatives from the organic community, through a Standards Interpretation Committee, to resolve technical issues and variations between provinces. The Standards Interpretation Committee advises the CGSB's Organic Technical Committee in the development and maintenance of standards. In order to ensure the coherence of the system, there is cross-representation between the CFIA's Standards Interpretation Committee and the CGSB's Organic Technical Committee.

The Canada Organic Regime is based on a third-party service delivery model. Rather than monitoring all organic producers and facilities for compliance, CFIA's Conformity Verification Bodies (CVBs) assess existing industry certification bodies to determine if they meet the established criteria. Certification

with providing strategic advice could also focus on capacity issues affecting departmental performance. This approach would eliminate excessive government interference in business operations by providing certainty and predictability in regard to both the letter of regulations and enforcement and compliance procedures. It would ensure that any conflicts or discrepancies between regulations are resolved prior to implementation, freeing businesses and taxpayers from the direct and indirect costs associated with determining the legal obligations that flow from conflicting requirements.

Our overview of the provincial context has also revealed the need for greater symmetry in regulatory activities between competing jurisdictions. The Canadian federal system is characterized by a high degree of provincial autonomy and distinct regional cleavages. These factors have led to differentiated provincial regulatory regimes that often create barriers to inter-provincial trade. Similarly, as Ontario export markets become increasingly diversified, the government must ensure that provincial standards are in alignment with those of the province's major trading partners. Disagreement between the federal and provincial governments over who is responsible for certain inter-jurisdictional issues can also lead to overlap between these two levels of government.

OCC members have been loud and clear about the need for greater synergy between the federal and provincial governments in the sphere of regulation. The area in which businesses have experienced the most significant frustration is the Environmental Assessment process. This process requires prospective projects to undergo public consultations that can be time-consuming and costly, resulting in lost trade and investment opportunities. Often, the disruption to economic activity occurs for purely "not-in-my-backyard" reasons. The duplication of this process at the federal level only increases the opportunity cost for business. The result is slower economic growth with no added benefit to the environment.

The need for greater inter-jurisdictional coordination necessitates the creation of an institutional mechanism that can deal with issues that cut across government boundaries. There are several different forms this mechanism can take. British Columbia has created the Federal-Provincial-Territorial Committee on Regulatory Governance and Reform, which brings together a network of regulatory experts from across provincial boundaries to develop best practices on regulatory policy and build support for common approaches to regulatory development and overall management in Canada. Another option is a Regulatory Review Commission.

bodies which fulfill the general criteria are recommended for CFIA accreditation. CVBs monitor accredited certification bodies for ongoing compliance. On-farm and facility organic production system verification are conducted by third-party verification officers employed by accredited certification bodies. Organic operators are required to place the name of their certification body on organic product packaging, in addition to the newly minted Canada Organic Logo.

This institutional structure has allowed the government to develop and maintain a dynamic standard that accommodates provincial variation and is equivalent to Canada's trading partners. As of June 2009, Canada had signed an equivalency deal with its largest trading partner, the United States. Canadian farmers and processors certified to the Canadian Organic Regime will no longer have to certify to the US National Organic Program. Through working with existing organic practitioners to build on the market-driven self-governance initiatives already in place in the industry, the government was able to bring greater consistency to the organic market while at the same time maintaining competition and differentiation in the marketplace, through incorporating a number of distinct models that all have in common a minimum set of internationally recognized standards. The provincial government can learn from this model in devising its own made-in-Ontario solutions to support power-sharing and co-regulation with industry and other stakeholders from target policy communities.

The provincial government must work with the other provinces and territories and the federal government to devise an appropriate institutional structure for reaching consensus on inter-jurisdictional issues that cause lost time and money to business. This body would be able to provide the Cabinet-level advisory committee with an overview of the issues and challenges associated with complex regulatory regime management and advice on how to handle cross-jurisdictional issues.

Recommendation: The government should establish institutional mechanisms for inter-departmental and inter-jurisdictional co-ordination in the form of an Annual Regulatory Agenda-Setting Process and a complementary body for resolving cross-jurisdictional issues.

INSTRUMENTS FOR ENHANCING QUALITY, ACCOUNTABILITY AND TRANSPARENCY

INTEGRATED IMPACT ASSESSMENT

The effectiveness of regulations is determined by their net benefit to the three main pillars of development: society, environment, and economy. The government has implicitly recognized this through the announcement of a risk and competitiveness impact assessment for new regulations. However, it has not specified what the basic parameters of this instrument will be, or how it will be administered in practice.

In order to ensure a robust analysis of proposed regulations, an impact assessment must take an integrated approach that weighs the social and environmental risks/benefits against the economic impacts and devises the least-cost means of achieving the desired result(s). It must also take a client-centred approach that incorporates quantitative and qualitative analysis from stakeholders from each of the affected communities.

Including a representative sample of stakeholders allows the government to identify whether a regulation will have a disproportionate impact on a specific industry or group of companies. For example, an impact assessment can include an 'SME Test' which measures the specific costs and benefits for small and medium enterprises. By designing a mandatory impact assessment that includes each of these criteria, the government can ensure new regulations are designed in a way that allows the desired impacts to be achieved in accordance with efficiency and political legitimacy.

A central pillar of a successful regulatory regime is an independent body to assess the substantive quality of new regulations and ensure ministries comply with the quality principles embodied in consultations and impact assessments. Such a body would include representation from all of the established policy communities, including academia, industry, and civil society. Its function would be to provide ministries with objective guidance and strategic advice for designing and implementing effective regulations and to provide oversight of the government's regulatory agenda.

Recommendation: The government should require all significant regulatory measures, including rule-making by delegated authorities, to undergo a mandatory integrated impact assessment before they are implemented. This process should take place with oversight from an independent, expert body.

AUTOMATIC REVIEW PROCESS

Impact analysis should not be limited to the design of new regulations. Once a regulation is approved, its effectiveness should be measured on a regular timetable using standardized evaluation techniques and criteria. Having mandatory reviews at fixed intervals provides an opportunity to correct and revise regulations in response to economic and technological changes that can render aspects of existing regulations redundant. Regulations that are up for review should only be extended if their continued relevance can be demonstrated through a standard assessment process. This ensures that the greatest degree of flexibility possible is built into the regulatory process. In order to ensure that quality management in the form of both impact analysis and regulatory review becomes a standard feature of the policy-development process, the government should formalize these instruments in legislation. This will increase the likelihood that these practices will be adhered to by future governments with different policy agendas.

Recommendation: The government should legislate a five-year automatic review process with clear evaluation techniques and criteria to systematically review new and existing laws and regulations.

OUTCOMES-BASED REGULATIONS

Outcomes-based regulation recognizes that firms are able to develop much more flexible, efficient and innovative approaches to regulation, which are just as or more effective than those initiated by bureaucrats operating in policy silos. In addition, non-legislative alternatives can be amended more easily and implemented quicker than prescriptive regulations.

Outcomes-based regulation must not be confused with deregulation, whereby effective regulations are substituted with lax guidelines that enable companies to renege on their social and environmental commitments. To the contrary, cutting corners is more likely to be a symptom of over-regulation, which requires businesses to make costly sacrifices of time and money. Through encouraging companies to engage in evasive behaviour, over-regulation contributes to the underground economy, and, contrary to the intent of regulations, undermines public health and safety. The purpose of outcomes-based regulation, on the other hand, is to give employers and employees a greater stake in the outcome of regulations by demonstrating a clear impact on the business bottom line and allowing businesses to determine the most cost-effective way of achieving higher standards.

The built-in flexibility of outcomes-based regulation is crucial to enhancing productivity in markets characterized by rapid growth, innovation, and/or technological change. Given the advantages of outcomes-based regulation, the government of Ontario should make it a priority to integrate alternatives to prescriptive regulation into the various stages of the policy-making cycle.

Once the need for regulation is justified, government can work with industry associations to determine what standards already exist at the grassroots level in order to establish guidelines appropriate to business. Where third-party certification programs or industry codes of conduct have already been developed, the government should determine whether the standards entailed represent effective alternatives to the proposed regulation, and, if so, recognize certification by an accredited body to be equivalent to a government stamp of

approval. In some industries, there may be numerous certification programs in existence, in which case multiple organizations could qualify for government recognition.

Recommendation: The government should adopt an outcomes-based approach to co-regulation through the development of general standards for accreditation of third-party certification programs.

REGULATORY TIERING

Different self-governance initiatives tend to vary in the quality of their standards. Some provide an easier fix, and represent a more incremental approach to change, than others. Therefore, there may be some options among already existing alternatives, that are more reasonable solutions for small businesses which do not have the available overhead or capacity to commit to more comprehensive programs.

The government's proposed risk-based system of environmental approvals provides a precedent for extending the principle of regulatory tiering to other ministries and activities.

The new environmental approvals system will allow for more flexible regulations by focusing resources on activities that pose the highest risk. All projects not categorized as high risk will no longer be required to obtain an environmental assessment approval consisting of time-consuming and costly application and public consultation processes. Rather, the approvals will simply be required to register the project on the Environmental Activity and Sector Registry, and operate in accordance with registry regulations.

This approach will allow more businesses to capitalize on investment and trade opportunities, not only by providing a simplified alternative to the existing process for lower-risk activities, but by freeing up resources for ministry staff to ensure more efficient completion of approvals which will remain subject to full review. Concentrating efforts on those activities posing the highest risk to the environment will also allow ministry staff to assess those projects in much greater depth, which will, in turn, lead to improved environmental outcomes.

Once fully implemented, it is estimated that the risk-based system will save businesses as much as 25 percent of the project application cost. In this case, tiered regulation represents a win-win solution to the challenge posed by balancing environmental protection with economic performance.

In order to create a level economic playing field, the government's reform strategy must include measures to offset the disproportionate impact of regulations on small and medium businesses. When significantly different degrees of risk and impacts can be identified, there exists a case for regulatory tiering. This option allows businesses characterized by lower-risk, standardized, or less complex activities to take advantage of exemptions in the form of less onerous standards, reduced fees, and/or simplified reporting requirements.

The variation that exists among current industry certification programs could provide the starting point for a tiered approach to regulation which takes into account the size and risk profile of a business in determining the degree to which it must be regulated.

Recommendation: The government should make regulatory tiering a mandatory feature of its assessment criteria by developing alternative thresholds for standards and compliance obligations for SMEs and lower-risk, standardized, and/or less complex activities

EQUIVALENCE OF PERFORMANCE TEST

Some organizations that consider social and economic sustainability an important part of their value proposition may have their own internal systems in place for implementing and monitoring standards. While there is substantial room for variation in the quality of corporate governance systems, there

is nonetheless an inherent conflict of interest in having the same organization both implement and audit standards. In such cases, the government should continue to have an interventionist role in order to ensure that the desired outcomes of regulations are reached.

There should also be a means to recognize companies that have taken viable steps to achieving best practices in sustainability, accountability, and transparency. The government should create an equivalency mechanism that confers legitimacy on existing sustainability principles and verification procedures that meet general quality criteria. A formal Equivalence of Performance Test would allow businesses to apply lower-cost compliance methods as long as they are equally effective as an existing regulation. Once a certain level of performance is reached, the government can acknowledge a company's track record by reducing the reporting and inspection requirements that it is expected to fulfill.

This method combines the logic of performance-based regulation with an economic incentive to improve business innovative capacity to achieve more efficient processes and procedures that take into account industry best practices with respect to social and environmental responsibility.

Recommendation: The government should adopt an Equivalence of Performance Test for non-certified organizations that enables companies meeting general performance criteria to assume greater internal responsibility for compliance with regulatory outcomes in accordance with a standardized enforcement reduction plan.

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