Regulatory Frameworks

A report submitted to the

**Royal Commission on
Worker's Compensation
in British Columbia**

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FINAL REPORT

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Executive Summary

The purpose of this research is to compare and contrast the regulatory framework and process in place among various regulators in Canada, with a view to evaluating the framework used by the Worker's Compensation Board of British Columbia (WCB). The concept of regulatory framework means different things to different people. As a first step in this project, a definition of regulatory framework is proposed: it is a series of steps taken by a regulator to develop responsive regulations. More importantly, a regulatory framework is an accountability mechanism: a method by which the regulator accounts for the responsibilities conferred upon it.

This paper proposes a regulatory framework made up of three elements: policy development; regulatory program development and implementation; and regulatory effectiveness and program evaluation. Each of the above elements has several related sub-elements. Under policy development the sub-elements include: monitoring of the regulatory environment; problem and issue identification; risk management; selection of an appropriate policy instrument; assessments of regulatory impact and burden; and conduct of public consultations. In the regulatory program development and implementation, we find four sub-elements: education and training; stakeholder communications; enforcement and compliance; and penalties and appeals. Finally, the evaluation element has two sub-elements: regulatory program evaluation and the evaluation of regulatory effectiveness. The framework identifies questions at each step that, when answered, will contribute to creating effective and responsive regulations.

In the course of this research paper, many federal and provincial regulators were examined. There is ample evidence of an explicit regulatory framework in place at the federal level. That is not the case at the provincial level. Although regulators in B.C. do follow a regulatory framework, it is implicit and therefore not consistent. The key to transforming this regulatory framework into an accountability mechanism is making it visible and therefore explicit. By doing this, stakeholders become conversant with the "rules of the game". They know what questions the regulator must ask in order to determine whether regulations or any other means of government intervention is appropriate and justified. Knowing the rules of the game is likely to provide for a more informed debate and better citizen participation in public institutions.

A key finding highlighted in this report is that the WCB's regulatory framework is incomplete. As with other provinces' regulatory frameworks, it is implicit. We note however that several components of the framework are in evolution.

Section 1:

Introduction to the project

1.1   Project purpose and deliverables

The following report was undertaken by Intersol Consulting Associates Limited on behalf of the Royal Commission on Worker's Compensation in British Columbia. The purpose of this research is to compare and contrast the regulatory framework and process in place among various regulators.

The project deliverables included:

- The review of the current literature regarding regulatory frameworks with particular emphasis on what has been published by the Treasury Board of Canada, the Auditor General of the Province of British Columbia, the Conference Board of Canada, the Organization for Economic Cooperation and Development (OECD), the US Department of Labor's Occupational Safety and Health Administration and other sources as deemed appropriate.

- A review of the significant regulatory frameworks that are in place in the Province of British Columbia and elsewhere in Canada. This review is based on a series of criteria / elements identified in the literature review.

- Identification and definition of the regulatory framework utilized by the WCB of British Columbia.

- A comparative analysis of WCB regulatory framework against frameworks identified in the literature review and practices in place throughout BC and other parts of Canada.

This is the research project's final report.

1.2   Research methodology

In the early stages of the research project, it was discovered that there is precious little written about regulatory frameworks: this was unexpected. The Conference Board of Canada was one of the only sources of writings in this field. The project status was reassessed and it was decided to use the Conference Board framework as the basis for our analysis. Upon further research, it became obvious that the Conference Board framework, although sound, lacked the level of detail useful for the examination of the WCB's framework. During the course of the study of regulator practices on regulatory review, it became possible to establish a "generic" model that was consistent with the one proposed by the Conference Board. Using these two models as a template, the research identified and examined the frameworks utilized by various regulators.

This research project utilized three principal methods of investigation. As mentioned above, the first method included a literature review. The relevant contents of this review are presented in the bibliography contained in Appendix 1. A second method was through the review of existing documents accessible through access to information. Many documents, such as policy development guidelines from various government departments, were helpful in assessing regulatory practices and developing a generic regulatory framework. The third method utilized was personal interviews with selected officials from some B.C. government departments. To guide the interview process a basic questionnaire was used; it is included in Appendix 4. The results of these interviews are presented in a "aggregate" fashion; that is, the exact words of the interviewee were summarized in order to be integrated into the generic regulatory framework.

In closing, Intersol wishes to thank those who generously contributed to this research effort.

Part 1: Framework and Relevant Elements

Section 2:

Trends in Regulatory Environments

The globalization of the world's economies is applying growing pressure on governments to liberalize trade practices. Businesses and individuals express displeasure at restrictive trade practices, often embodied in regulations that prohibit or at the very least inhibit commerce. Furthermore, governments are recognizing that regulations impose a fiscal burden upon citizens. Enforcement and compliance activities require significant investments in personnel and equipment. In an era of fiscal restraint, regulations are often viewed as an expensive solution to social and market imbalances.

These mounting pressures have forced governments from all over the world to look at their existing and proposed regulations under a new light. Two new trends have emerged as a result : "deregulation", where regulations are in effect removed, and harmonization of regulations with other nations.

Deregulation is a significant trend and a driving force behind much regulatory change, which has had profound impacts in many fields across the world. An excellent example in Canada has been in the air and overland transportation sector. Deregulation has enabled access to shippers and carriers from the United States and has contributed to driving the prices downward. This is particularly the case in land transport. In the air transportation sector, deregulation has meant greater access to Canadian destinations by American carriers. Greater access in this instance has lead to increases in competition which have in turn applied pressure on pricing. However, according to critics of deregulation and industry observers, deregulation has acted as a form of disincentive for businesses in maintaining safe and secure operations. Whether this translates into increased deaths and injuries (and by that fact greater costs to society) remains unproven.

A second significant trend is harmonization of regulatory regimes across governments. In other words, nations are adjusting regulations to meet the demands of external markets, usually their chief trading partners. This has been the case in several sectors between Canada and the US. In the agri-food sector, there are serious attempts at adjusting regulations to permit easier, smoother flow of goods across the border with our largest trading partner. The principal vehicle to harmonization has been the development of Mutual Recognition Agreements (MRA). MRA's are attempts to harmonize one regulatory framework with another. This has been the case in certain sub-sector of the agri-food industry. Currently, there are negotiations underway for the U.S. to recognize the food inspection standards of our Canadian inspectors. Thus, shipments of produce which have been inspected and certified in Canada would be recognized as "ready-for-market" by US officials. MRA's are based on the notion of reciprocity: each sovereign nation recognizes the other's standards.

These two trends illustrate the mounting pressures facing governments. Citizens, businesses and trading partners demand regulations that are more responsive, less costly and less burdensome. The onus is then upon governments to develop regulations in a balanced, effective and efficient manner that considers these challenges and internalizes concerns, while intervening to protect public values such as safety.

Section 3:

Regulatory Frameworks

3.1   Regulatory framework — a working definition

In the course of conducting the research for this paper it became clear that the term "regulatory framework" was somewhat problematic. The term in some cases brought about blank stares from some respondents , while others asked directly what the expression meant. Some clarification on the terms used in this report are therefore in order.

The term framework, in this particular context is confusing. What is meant by framework? For the purposes of this paper, a framework is defined as the basic, underlying structure to a set of regulations. A framework is composed of a several complementary elements or concepts in support of something larger.

Regulations, the second concept contained in the term, is most often defined as principles, rules, or laws designed to control or govern behaviour. According to the Department of Justice of the Government of Canada:

> "Regulations are a form of law, often referred to as delegated or subordinate legislation. They have the same binding effect as Acts and usually state rules that apply generally, rather than to specific persons or things. However, regulations are not made by parliament. Rather, they are made by persons or bodies to whom Parliament has delegated the authority to make them, such as the Governor in Council, a minister or an administrative agency. Authority to make regulations must be expressly delegated by Act."[1]

From a broad perspective, regulations are the instruments used to express government policy as a way to rectify market, economic or social imbalances.

Therefore, in this context, a regulatory framework can be defined as the macro-level steps that a regulator must complete in order to bring forward regulations. Explained in another way, a regulatory framework can be defined as the high-level questions that a conscientious regulator would ask of themselves throughout the process of regulations development. Questions such as, "why do I need to regulate this behaviour"? "Who is harmed by the behaviour?" "Is this harm serious enough to warrant government intervention?", and so on. The intent of this report is to analyse what kinds of steps are taken by regulators throughout the regulations development and review efforts.

Throughout this report, the reader will be confronted at times with the term "regulations", as defined above. At other times, the term "policy instrument" will be used. Typically, "policy instrument" is a more global and all encompassing term, comprising both regulations (often referred to as secondary legislation) and other instruments available to governments to articulate policy. Examples of policy instruments include taxation and voluntary standards. Further definition and examples of policy instruments are presented in a later section of this report.

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[1] A guide to the Making of Federal Acts and Regulations. Government of Canada. Department of Justice. November 1995. Page 15.

One key finding of this research is that many governments do not have an explicit regulatory framework in place. That is not to say that these governments do not make use of a framework, but that one has to examine the process that is followed to develop regulations in order to find evidence of a framework. Indeed, it is somewhat difficult to dissociate the framework from the regulatory process. The reader should keep this in mind as he or she goes through this report.

3.2   Conference Board of Canada — a Model for Regulatory Review

The Conference Board of Canada's paper entitled "A Framework and Guiding Principles for Regulatory Review" details critical framework elements and presents two approaches to reviewing economic regulations. The paper also outlines the fundamental principles that should guide any regulatory review effort. Although the framework presented in this paper is for economic regulations, it is relevant to the present research for two reasons. First, the proposed framework is expressed at a conceptual level which is valid regardless of its field of application. Indeed, our research indicates clearly that the framework applies readily to the development of all types of regulations or policy instruments. Secondly, worker health and safety has far reaching economic dimensions.

The Conference Board of Canada framework for the review of economic regulations consists of four principal elements. They are:

➢ Policy goals

➢ Policy instruments

➢ Policy implementation

➢ Evaluation.

Framework element 1: Policy Goals

As stated, regulations are instruments used to create desirable behaviours in those whose activities have been judged to be undesirable or harmful. As a precursor to regulation, it is necessary for governments to articulate policy goals, or in other words, to define the behaviours that are unwanted. The Conference Board defines three types of policy goals: those with an economic focus, those with a social focus, and those with cultural objectives.

Policy goals focussing on economic matters generally strive to promote industry competitiveness and ensure that citizens pay a fair price for products and services. Social policy goals consider broader social issues such as equity between socio-economic classes, regional development, public safety, environmental protection and the sustainability of economic growth. Cultural policy goals refer to the protection of a nation's identity and culture.

Framework element 2: Policy Instruments

Policy instruments are the means by which policy goals are achieved. Governments have a wide variety of these instruments at their disposal; the effective articulation of policy requires the judicious selection of the most appropriate instrument. The Conference Board paper clearly identifies the challenges involved in the selection of policy instruments:

➢ Government officials must base their decisions on imperfect information about the effect of implementing a given instrument - often they can only guess at the overall impact.

➢ Pressure and lobby groups often skew the debate. Their voices are heard above many others'. Many regulators feel that such groups have too much influence in the process.

➢ The implementation of a policy instrument invariably means that some segments of society are favoured by the instrument (they become the winners) while others are not (they become the losers).

Framework element #3: Policy Implementation

Policy implementation is accomplished through enforcement and compliance programs usually administered by the regulator or by an agency with delegated authority. The enforcement aspect is one where the regulator monitors behaviours and punish deviants.

Framework element #4: Evaluation

The Conference Board suggests that the effect of the policy instruments be measured to estimate whether the outcomes match the intentions stated in the policy goals. Another level of assessment is also required: the impact on industry, consumers and on the environment. On another level, an assessment of the policy instrument must be made to determine the impact, if any, on industry, consumers and on the environment. Finally, the government in power mus assess the political consequences of its policy.

3.3   Processes for regulatory review

The way a regulator applies the regulatory framework to review a body of regulations is called the process for regulatory review. The Conference Board present two types of review processes. The first type is called the technical approach because it utilizes a logical, problem solving approach. The second type is more dynamic, as it considers various social, economic and political forces that influence the regulatory review process.

The technical approach, described by the attached diagram, consists of six discrete steps:

Step 1:   The first is the examination of policy goals performed by government. This is done with due consideration of both private and public interests.

Step 2:   The second step seeks to determine the appropriate policy instruments. The selection of an instrument has to be weighed and measured against public and private interests.

Step 3:   A third steps consists of assessing the proposed policy instruments for their impact on industry, consumers, the environment and the general public. This assessment phase may determine that the original policy goals are not feasible, and may call for their review.

Step 4:   When the policy instruments and impacts are deemed acceptable to the policy makers, changes may be required to the existing legislation.

Step 5: Enforcement of the policy instruments then becomes the focus. Government or the regulator must ensure that the new regulations are complied with.

Step 6:   Impact analysis of the implemented instruments is the last step in the process. The evaluation of the impact of the instruments must be undertaken on a periodic basis to ensure that the outcomes are indeed those that were expected.

Technical Approach

Examination of
policy goals

Proposal of
policy instruments

Assessment of
proposed instruments

Acceptable

No

Yes

Changes to legislation
or policy instruments

Implementation of
instruments

Impact analysis of
implemented instruments

No

Acceptable

Yes

End of
process
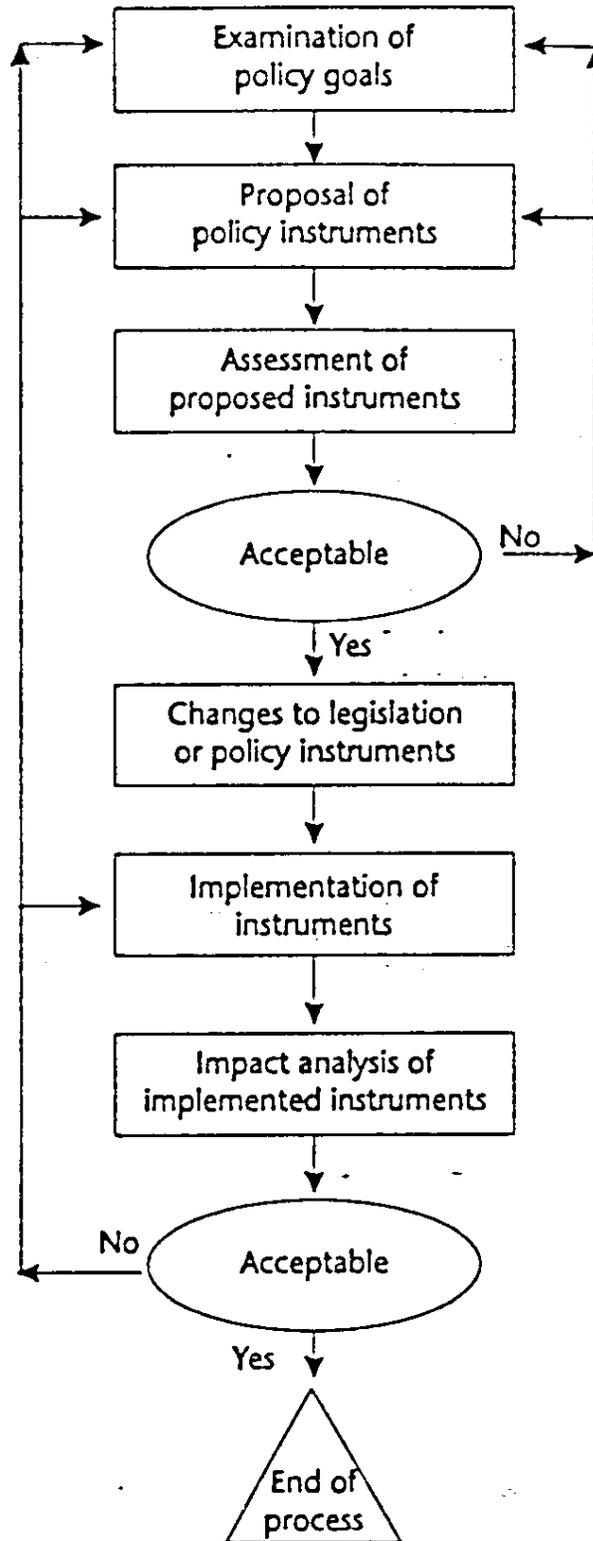
Source: The Conference Board of Canada

The dynamic approach considers the interplay of four fundamental processes:

The political process. The political process refers to the decision making process that falls in the realm of Government, Cabinet and parliament. Ultimately, the development of policy goals and the selection of policy instruments rests within the political dimension. In this political process, various stakeholders interact in an attempt to influence government to an end that meets their individual needs. In an ideal scenario, government makes a decision assuring that policy decisions are based on the public interest. In reality, it is far more complex since the pressure of lobbyists, special interests groups and to a certain extent the regulator get to be a significant factor in the final decision.

The bureaucratic process. The bureaucratic process, defined as the regulator's own administrative processes, is typically involved in the design and implementation of the selected policy instruments. This process is often referred to by many regulators as the development and management of the "regulatory program".

The analytical process. The analytical process refers to the evaluation of the proposed policy goals, policy instruments and implementation processes[2].

The judicial process. The judiciary system occasionally plays a role particularly when stakeholders contest the legitimacy of decisions taken by policy makers or on the interpretations of rules made by the regulator.

Dynamic Approach
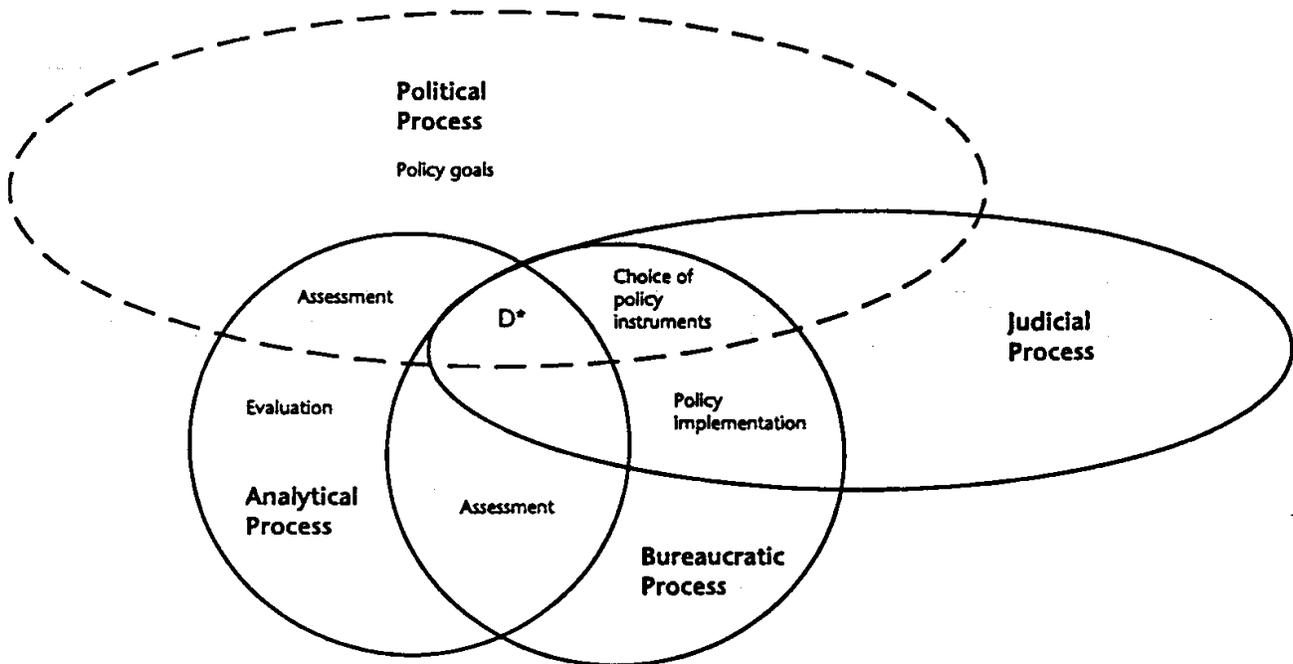
D* Decisions on policy goals, policy instruments and implementation procedures

Source: Conference Board of Canada

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[2]The Conference Board paper is sketchy on the types of analyses that are typically performed at this stage. The types of analyses will be discussed in a later section.

This dynamic process for regulatory review presents an important highlight: a high degree of coordination is required between the political and bureaucratic processes on order to maintain consistency of government policy and to support a smoothly functioning public administration system. When policy makers and regulators make decisions independently from one another, the result is confusion on the part of all those concerned. A weakness of the Conference Board model is that it does not make room for the multiple levels of approval that are typical of a policy development effort.

3.4 Guiding Principles

The Conference Board of Canada suggests that the application of certain guiding principles in the implementation of policy objectives can minimize the costs to society. In particular, the Conference Board suggests that the development and communication of policy goals be done under the principles of:

Transparency	That the policy objectives are clearly defined and are readily understood by all stakeholders;
Relevance	That selected policy goals respond to a true socio-economic need;
Consistency	That policy goals be consistent with other government policies, programs and objectives.

In the selection and implementation of policy instruments, the Conference Board recommends that these principles be followed:

Transparency	That the implementation of policy instruments be clearly established and understood by all stakeholders;
Consistency	That policy instruments be coordinated and compatible with other government commitments;
Effectiveness	That policy instrument produce the desired outcome;
Efficiency	That selected policy instruments carry the least cost to government, to the regulator and industry

3.5   Conclusion to Conference Board framework

The Conference Board framework paper is unique in many respects. It is one of only papers that speaks clearly to regulatory a framework in a Canadian Context. It also presents two process models to regulatory review, and it provide a conceptual model of a regulatory framework. In true Conference Board fashion, this paper was written in close collaboration with representatives from firms that are significant within the Canadian economy. The only other criticism that can be levelled at the paper is the lack of specific details within the regulatory framework. In an effort to bridge that gap, several regulators were studied and an enhanced, generic framework was established. It is presented in the next section.

Section 4:

A Generic Regulatory Framework

4.1   Section preamble

As indicated earlier, there is very little written about regulatory frameworks. Given this challenge, it was necessary to examine regulators' best practices with respect to regulatory frameworks in order to formulate a "generic" regulatory framework. As the reader will see this generic framework is consistent with the one presented by the Conference Board of Canada. However, the generic framework offers a greater level of detail which will be useful in our assessment of the BC Worker's Compensation Board regulatory framework and of other regulators.

4.2   Generic elements of a regulatory framework

The generic framework consists of three basic elements which each have a number of sub-elements. Examination of these sub-elements is revealing, for they are indicative of a logical thought process which answers fundamental questions. The next few sections will outline the framework elements, the related sub-elements, and the underlying questions that the framework raises.

Generic element 1: Policy development

What is meant by policy development? Indeed, what is policy? In the context of this generic framework, we propose to define policy as an approach taken to further the objectives and responsibilities of the government. In this context, the word policy could be substituted as public policy and is distinct and different from administrative policy which has an organizational aspect to it. Administrative policy refers to the methods by which a public organization will implement public policy. The manner in which public policy is establish varies greatly. At one end of the spectrum it may originate from a political party's electoral platform and transform itself into public policy once the party has been called to form a government. At the other end of the spectrum, government departments and agencies are often called to play a major role in shaping public policy. A Department often is called on to monitor the regulatory environment, identify problems and propose regulatory solutions to correct inappropriate or unwanted behaviours.   The policy development stage necessarily implies several rounds of interaction by the regulator, the minister (and perhaps Cabinet), industry and other interested parties.   This is in contrast to the Conference Board's framework that separates policy goals and instruments. Examination of regulator practices shows that the formulation of policy goals and the selection of instruments are done almost in a concurrent fashion.   Some noteworthy sub-elements are apparent in our generic framework. These sub-element provide some insight to the thought process that is applied throughout this phase of regulatory development.   The sub-elements are as follows:

- *Monitoring of the regulatory environment.* Effective regulators share a common approach of thorough monitoring of the regulatory environment. This monitoring attemps to identify and track "sentinel events" or events that will indicate the existence of a problem potentially requiring government intervention. This implies that the regulator has a systematic approach of capturing relevant information and making decisions on how and when to act upon the information. This data capturing and monitoring function clearly has the role of identifying "policy sources". By monitoring the environment, the regulator is acting in a prospective fashion: identifying the policy issues of the future. By having such a system, a sort of a "policy look-out" system, the regulator is placed in a leadership position and is capable of preparing a response before an issue becomes a crisis.

- *Problem / Issue definition.* Monitoring the regulatory environment may give some preliminary idea of the nature of the issue or problem. However, the issue or problem may be ill defined and it may take further research and consultation to define the problem or issue so that it is manageable.

- *Risk Management.* This sub-element is borne out of the previous two. A sensible regulator, when confronted with data that may represent a potential problem, is wise to ask: "So what?"; "What is the risk involved?"; "Who is at risk?"; "Is Government intervention warranted?"; and so on. This risk management approach is typically based on scientific research that grounds the regulator with relevant evidence that will hopefully guide the decision making process[3].

- *Selection of an appropriate policy instrument.* This sub-element is one where the regulator must develop and select an appropriate response to the identified problem. This at first glance, may seem simple and straightforward. It is not. Many regulators suffer from what is referred to as "regulitis": that automatic reflex to slap on another prescriptive set of regulations, which often stifles innovation and leaves industry feeling shackled[4]. It does not have to be this way. The regulator can respond in one of two ways: develop regulations or rely on non-regulatory means to change unwanted behaviour.

Policy Development
- Monitoring of the regulatory environment
- Problem / issues definition
- Risk management
- Selection of instrument
- Assessment of impact and burden
- Public consultation

Regulatory program
- Education and training
- Enforcement and compliance
- Stakeholder communication
- Penalties and Appeals

Program and regulatory evaluation
- Regulatory program evaluation
- Evaluation of regulatory effectiveness

- *Analysis of impact and burden.* Subsequent to the selection of a means of intervention, a level of analysis is required to determine the costs and benefits. This along with risk management requires a rigorous methodology and approach.

- *Public consultation.* Many regulators have seen the advantages of meaningful public consultation. Regulators are now involving stakeholders in discussions at all points in the policy development process, including in the identification of problems, in the assessment of risk, in the selection of instruments (particularly when considering non-regulatory instruments) and in the assessment of impact and burden.

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[3] A risk management framework is presented in a later section of this report.

[4] A policy instrument selection methodology is presented later in this report.

Generic element 2: Regulatory programs

In practice, regulators do not speak in terms of policy implementation, as described in the Conference Board of Canada framework. Instead, regulators develop, implement and manage multi-dimensional regulatory programs. Although regulatory program elements vary depending on the regulator's exact field, there are some "standard" elements to a regulatory program. We refer to these standard items as the sub-elements. They are:

- *Education and training*. This refers to the activities that a regulator may undertake to build awareness on the part of those affected by the regulations. Often the subject of the training is the standards that must be met as well as other compliance requirements.

- *Stakeholder communications*. Stakeholders must be kept abreast of changes to regulations, implication of judicial decisions, and other developments. The regulator must maintain ongoing communications with its audience.

- *Enforcement and compliance.* This is often the essential component of the regulatory program. If one is to regulate behaviour, then it is logical to assume that the behaviour will be monitored to ensure that it meets desirable standards. Activities of enforcement and compliance usually involve inspection, assessment, imposition of fines and sometimes the recognition of excellence (the opposite of fines).

- *Penalties and appeals mechanisms*. When the regulator is empowered to impose penalties on deviants, there must also be an appeals mechanism.

Generic element 3: Evaluation of regulatory programs and regulatory effectiveness

A logical next step in the framework is to review the regulator's actions and assess whether any results have been achieved. In practice, regulators dedicate the least amount of resources to this element of the framework. Two sub-elements are noted:

- *Evaluation of the regulatory program*. The evaluation of regulatory programs is most often accomplished through program evaluation methodology. The theory of program evaluation is well known and its methodology widely accepted. However, the practice among regulators is not commonplace. Most program evaluations take place in the context of sporadic periodic review and are not systematic by nature. On the other hand, some regulators feel that the annual evaluation of their regulatory programs in the context of institutionalized planning rituals is adequate.

- *Evaluation of the effectiveness of regulations.* Evaluating regulatory effectiveness is practiced by regulators even less than program evaluation. Many regulators will posit that regulatory effectiveness is assessed on a continual basis through ongoing monitoring of the regulatory environment (see generic framework element 1). That should not be dismissed; however, one should not confuse monitoring the environment with the review of regulatory effectiveness.

Regulators consider the sub-elements of the framework for good reason. The sub-elements raise specific questions, that an accountable and conscientious regulator will strive to answer. The following sections identify these underlying questions.

4.3   Underlying questions raised by the framework

Generic framework element 1: Policy Development

As previously mentioned, the policy development stage is a point where both the political and bureaucratic processes overlap. Bureaucrats take great pains to present their ministers with complete, carefully thought out policy. Of equal concern to the bureaucrat is the time honoured question: "What does the Minister wish to do?". This questions typifies the interaction between the political and the administrative processes. A bureaucrat unskilled in this delicate interaction does not live to see a large government pension. Therefore, in order to get a policy mature enough to withstand the questioning of a minister and his or her staff, the bureaucrat (most often a senior manager from a regulatory program) must have ready-made answers to some tough and probing questions. Successful regulators and their competent managers design and implement structures, approaches, and mechanisms that systematically produce the answers to these questions. In the following paragraphs these structures, approaches and mechanisms are outlined and their "raison d'être" is exposed through the questions they are meant to answer.

This Framework Element...	Seeks to get answers on... Question(s)
Monitoring and Data Capturing Mechanism to identify policy sources Description: The ability and capacity to identify sources of policy change.	➢ How do we know this is an issue, a concern? ➢ What play has this issue / concern had in the media?
Problem or issue definition Description: The ability to clearly define a problem or issue.	➢ What is the behaviour causing concern? ➢ What are the boundaries to the problems? ➢ What is the problem, what is not the problem? ➢ Do stakeholders define the problem the same way?
Risk Management Description: The capacity to evaluate the inherent risk and, from this evaluation, to formulate a recommendation of the appropriateness of government intervention.	➢ Why is this an issue / concern? ➢ What are the risks to public safety? ➢ What are the risks to public health? ➢ Is government intervention justified?
Selection of an appropriate intervention instrument (considering both regulatory and non-regulatory instruments) Description: The ability to select a policy instrument that is responsive and adaptive to the issue, to the situation.	➢ How can government best intervene, according to the criteria of effectiveness, efficiency and acceptability?
Assessing the potential impact and burden of the proposed government intervention Description: Systematic assessment of costs, benefits imposed by the proposed policy instrument.	➢ Are the proposed policy instrument reasonable? ➢ Will the proposed policy instrument cripple the industry? ➢ Will the proposed policy instrument overburden the taxpayer? ➢ Can the responsible government department ensure adequate compliance and enforcement?
Requirement to conduct Public Consultation Description: The capacity to engage the public and most affected stakeholders into the debate.	➢ Is the public informed on this issue / concern? ➢ What does the public think, generally speaking ? ➢ What is the view of the most affected stakeholders?

Generic Framework Element 2: Regulatory Program

This element of the generic framework is equivalent to the policy implementation segment of the Conference Board's model. Most regulators refer to policy implementation as an enforcement and compliance role that is generally part of a regulatory program. The scope and nature of regulatory programs vary widely among regulators but most often include several of the sub-elements listed below.

This Framework Element...	Seeks to get answers on... Question(s)
Education and Training Description: the capacity to educate and train those being regulated as a means of assisting them in changing behaviours.	How will those being regulated educate themselves on the requirements of government intervention?
Stakeholder Communications Description: The capacity to maintain ongoing communications with most affected stakeholders and the public.	What is the nature of ongoing stakeholder communications? How are stakeholders informed of changes?
Enforcement and Compliance Program Description: The ability to monitor behaviours, including identifying those that do not meet the standards and levying fines or other penalties	What standards are those being regulated expected to uphold? What are the regulator's service standards?
Penalties and Appeals Mechanisms Description: The capacity to impose and collect on penalties and offer some mechanism of redress to those being regulated.	What are the appeal and redress mechanisms? Does the regulator have the capacity to collect or impose the penalties?

Generic Framework Element 3: Evaluation of Regulatory Program and Regulatory Effectiveness

This generic framework element reflect the necessity to conduct evaluations at two very distinct levels. From a more "micro" point of view, the regulator must strive to evaluate the effectiveness and efficiency of its regulatory program. But from a much broader perspective, the regulator must question the effectiveness of the policy instruments. If the "raison d'être" for a specific policy instrument is to change undesirable behaviours, then the regulator must ask: "did the policy instrument change the undesirable behaviour?" In the words of the Conference Board of Canada, the outcome of a policy instrument must be measured against the original policy goals.

This Framework Element...	Seeks to get answers on... Question(s)
Program Evaluation Description: The capacity to assess the regulatory program activities against a series of criteria.	How well does the regulator get the "message" out on appropriate standards and compliance issues? How many infractions were given? Etc.
Regulatory Evaluation Description: The capacity to assess existing behaviours against the original policy goals.	Did the policy instrument achieve the desired change in behaviour(s)?

A detailed diagram showing the process flow of the generic framework is found at the end of Part 1.

4.4   Comparative Table on Regulatory Frameworks

The table presented below shows how the two frameworks complement each other. The Generic framework, while remaining consistent with the Conference Board model, goes a step beyond and provides further insight into additional steps in regulatory review.

Conference Board Framework	Generic Framework	Sub-elements or regulatory review process steps
Policy Goals Policy Instruments	Policy Development	‣ Monitoring and data capturing mechanisms to identify policy sources ‣ Problem / issue definition ‣ Risk management ‣ Selection of most appropriate policy instrument ‣ Assessing the impact and burden ‣ Conduct public consultation
Policy Implementation	Regulatory Program Development and Implementation	‣ Education and training ‣ Stakeholder communications ‣ Enforcement and compliance ‣ Penalties and appeals mechanisms
Evaluation	Evaluation	‣ Program evaluation ‣ Regulatory evaluation

Section 5:

Some Principles of Risk Management

The concept of risk management is often misunderstood. What is risk management? What is risk assessment? What is risk analysis? What must a conscientious manager do to minimize risk?
These are the questions that raised by the concepts of risk management. The following is adapted from <u>Risk Management : Guidelines for Decision-Makers. A National Standard of Canada</u>[5] a publication from the Canadian Standards Association. This section is presented to clarify some of the broad concepts brought forward in other sections of this report.

The CSA defines risk as "the chance of injury or loss as defined as a measure of the probability and severity of an adverse effect to health, property, the environment, or other things of value."[6]
Expressed differently, risk is the probability of occurrence of an unforeseen or undesirable event. Risk management refers to the measures that organizations take to minimize potential consequences of unwanted events.

The concept of risk management encompasses several types of activities. The first series of activities relates to risk analysis, which includes identifying hazards and estimating the probability and severity of consequences to life, health and property. The next series of activities involve risk assessment; this goes beyond the previous step to evaluate risks against the benefits. The full process of risk management is composed of six steps, as shown in the adjoining diagram.
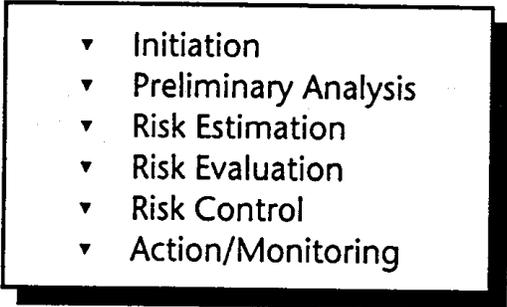
```
▾   Initiation
▾   Preliminary Analysis
▾   Risk Estimation
▾   Risk Evaluation
▾   Risk Control
▾   Action/Monitoring
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Risk Management Process

Each of these phases is composed of several steps, including the step of communicating the risk to affected stakeholders.

—The Initiation stage begins the entire risk management process. This phase includes

> ➢ Defining the problem or opportunity associated with the risk issues
>
> ➢ Assigning responsibility within the organization to manage risk
>
> ➢ Identifying stakeholders and beginning the consultation process

—The Preliminary Analysis phase begins the process of analysis to better understand the inherent risks. This phase includes:

> ➢ Defining the scope of the decisions to be made in the risk management process
>
> ➢ Identifying the specific risk scenarios
>
> ➢ Conducting stakeholder analyses to understand their needs, issues and concerns

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[5]<u>Risk Management: Guidelines for Decision-Makers. A National Standard of Canada</u>. Canadian Standards Association. Publication number CAN/CSA-Q850-97. October 1997.

[6]Idem. Page 3

—Risk Estimation is the phase in which frequency and consequences associated with the risk scenarios are estimated. This phase includes:

➤ Defining a methodology to measure risk

➤ Measuring the risk inherent to each scenario

➤ Measuring the consequences associated with each scenario

—Risk Evaluation is the phase where the risks estimated in the previous step are evaluated in terms of needs, concerns and issues from the stakeholder's perspective. This information will enable the risk manager to determine whether the risks are within acceptable limits. This phase includes:

➤ Estimating the benefits and costs related to each scenario

➤ Assessing the acceptability of risk for each concerned stakeholder

—Risk Control involves the development of actions to reduce risk. This phase includes:

➤ Identifying measures that can be put into place to control risk

➤ Assessing the stakeholder's acceptance of measures to control risk

➤ Evaluating the residual risk (risk for which no control measures can be developed)

➤ Assessing the stakeholder's acceptance of residual risk

—Action / Monitoring requires the implementation and monitoring of the actions developed in the previous phase. This phase includes:

➤ Developing an implementation plan

➤ Implementing retained control measures

➤ Evaluating the overall effectiveness of the plan

The above methodology may appear simple, and in fact, it is. Its application is a completely different challenge. The task of defining risk, estimating risk, evaluating its acceptability and developing means to control risks are part science, part art and sometimes guess-work. Successful regulators are those who have experienced and knowledgeable staff backed by a risk analysis framework patterned on the guidelines described above. Sound risk management practices are an essential component of a regulatory framework.

Section 6:

Policy Instruments — Selection and Inventory

6.1   Policy instruments and regulations

What is the distinction between policy instruments and regulations? For the purposes of this report, policy instrument refers to any method utilized to implement public policy. As section 6.7 will show there are a wide range of policy instruments available to governments, regulations being one of them.   Therefore, when the term policy instruments is used, this refers to a range of options, including regulations.

6.2   The challenge of selecting policy instruments

The selection of an instrument in support of a policy goals can appear, at first glance, to be a simple thing.   Many regulators have an automatic, pavlovian reflex to issue "command and control" regulations the minute there is a shred of evidence about a problem. As noted in earlier sections, this automatic response has serious consequences for the nature of our economy and the competitive stance of industry in general. The question of why some regulators have this reflex goes beyond the scope of this report.   However, the very culture of the organization may explain the prevalence of the "regulatory reflex".   The more interesting question is: "How can this reflex be overcome?"   The question can be answered in part through the application of a disciplined methodology that forces the regulator to systematically compare alternatives.

6.3   The objectives of policy instrument selection

The overall approach and philosophy of the regulating department or agency has a significant impact on how policy instruments will be selected. If we can draw a caricature of the extremes, we may shed some light on the existence of an organizational culture predisposed to a regulatory reflex. That is , if the prevailing organizational culture is rooted in an attitude that those subjected to regulations are fundamentally evil and must be stopped at all costs, then the resultant behaviour of the regulator will be based on a police mentality. In this extreme, the regulator has to pass laws (regulations) in order to be able to command and control behaviours. The other extreme is really a "laisser-faire" approach, where regulatory mechanisms are inadequate. Both of these extremes are likely unacceptable to Canadians. The answer lies somewhere in between.

If the stance of the regulator is that most people subjected to regulations will act in a reasonable manner, then many more options to regulation are open. In other words, such a philosophy or organizational culture may enable a regulator to accept and implement non-regulatory policy instruments more readily. This philosophy is based on the following assumptions:

➢ The objective of government intervention is to solve problems; caused by the unacceptable behaviours of some stakeholders;

➢ Interventions (and not necessarily those of government) must be geared towards modifying undesirable behaviours, or reinforcing those that are desirable;

➢ Changing behaviours can be accelerated when external forces are recognized and leveraged;

➢ Using these assumptions can have an important effect on the final selection of policy instrument.

6.4   A method of analysis for the selection of policy instruments

The selection of policy instrument takes place within the context of policy development. Typically, at this point in the process, the regulator has a good sense of the problem behaviours and an idea of the risks involved, and has determined that the problem is of a magnitude requiring intervention. However, further analysis is needed.   The following line of inquiry can deepen the level of understanding and potentially lead to better selection of policy instruments.   The line of inquiry follows these questions[7]:

➢ Define the specific behaviours that are deemed unacceptable or risky.   Identify which stakeholders exhibit this behaviour. Identify which stakeholders are in a position to assist in changing these undesirable behaviour.

➢ Identify the contributing factors driving those whose behaviours are undesirable.

➢ Define the behaviour you want from those who are the target of the intervention.   The regulator must also determine how much non-conforming behaviour is tolerable.

➢ Identify which instruments are likely to bring about the best results.   The regulator must consider that some instruments make undesirable behaviours more difficult to adopt, while other instrument act as incentives to adopting desirable behaviours.   The regulator must consider striking a "balance" between punitive and incentive instruments.

➢ For each of the potential instruments identified in the previous step, the regulator must build scenarios for the implementation of the policy instrument. In other words the regulator must ask: "How would this policy instrument work in our situation?"

➢ The regulator must then conduct a comparative analysis of the proposed instruments. The TBS publication called Assessing Regulatory Alternatives provides an exhaustive analysis of the relative advantages and disadvantages of a wide array of policy instruments.   The comparative analysis must also consider the fact that an optimal solution may involve the combined use of several policy instruments.

➢ Conduct a decision analysis to find the best possible solution. Part of the decision criteria must be the political acceptability of a policy instrument. In other words, the regulator should not waste time proposing the use of taxation as a policy instrument if the government has no stomach for this.

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[7]This line of inquiry is adapted from Assessing Regulatory Alternatives. Government of Canada. Treasury Board Secretariat. May 1994.

A factor that is not considered in the above methodology is stakeholder involvement. More and more, regulators are turning to stakeholders to jointly define problems, analyse potential solutions and jointly implement policy instruments. The key is often managing stakeholder expectations. Invariably, some stakeholders get confused about who is the ultimate decision maker. This, at the very least, must be crystal clear from the outset.

6.5   Policy Instruments — a quick inventory of regulatory instruments

Regulations can be classified into two broad categories. Prescriptive regulations are those that stipulate the product and service specifications and how to produce these. The principal disadvantage of this type of regulation is its inherent tendency to stifle innovation and creativity: the means of producing a product or service is stipulated by regulations. In recent years, prescriptive regulations have earned a reputation that signals something undesirable. These types of regulations are often viewed as overbearing, heavy handed, and coming from a desire to "command and control" the market place.

The second category of regulatory policy instrument includes performance-based regulations. This type of regulation does not stipulate the way a product or service is to be produced, but rather states only the objective or desired outcome.

A last term that is often heard is that of "technical" regulations. Technical regulations refer to regulations that are particular to a discipline or industry and are often technology-specific. Regulations governing the application of pesticides, for instance, are often viewed as technical since the application methodology will vary with the specific compound being applied.

Command and control regulations can take many forms, such as control over the price of a product and the amount of product a firm can manufacture, or prescription of the attributes and features of a product. Production processes can also be regulated, for example for environmental or occupational health and safety concerns. Alternatively, a producer can be required to disclose information about the harmful attributes of a particular product, for example, through package labelling. Another way to exercise a high degree of control is by regulating the entry and exit of a producer into a specific field, such as the field of broadcasting.

6.6   Alternatives to regulations

Many reasons are driving regulators to find alternatives to regulations. A major force is the cost to the regulator to monitor and enforce regulations. Clearly, governments have fewer resources to dedicate to this type of activity and are searching for alternate ways to modify unwanted behaviours. Several alternative approaches can be pursued.

Among the familiar approaches we can quickly identify the following:

Taxation	A cost imposed on individuals and corporations as a way to moderate behaviours and raise government revenues. Highly popular with elected officials, much less with the Canadian public.
Government expenditures	A case where a government makes an budgetary expense in a specific field. Essentially a redistribution of public funds. A popular approach among some segments of society, less so to ministers of finance.
User fees	A charge imposed on the users of a public good. Critics refer to it as a targeted tax. Airport user charges are a good example.
Government insurance schemes	A method by which risk is distributed equitably across society.
Crown Corporations	Where governments use ownership of companies in sensitive sectors to achieve various public policy goals.

6.7   *Putting the onus on the stakeholder: a growing trend*

One important trend in contemporary government policy is to encourage businesses, industry and individuals to voluntarily modify their actions. This can be achieved in one of several ways:

➢ Persuasion. The approach of persuading stakeholders to modify their behaviours requires the regulator to specify the desirable behaviours. This is based on the belief that knowledge of what is harmful can change undesirable behaviours. An example of such an approach is the advertizing campaigns against drunk driving.

➢ Industry guidelines, codes of conduct and voluntary standards. Often, the threat of government intervention through regulations is enough to mobilize an entire industry to adopt different behaviours. The development of voluntary standards has the advantage of gaining a relatively high degree of buy-in by those involved. What is lacking is the ability to deal with non-conformers.

➢ Industry self-regulation. Although listed here under non-regulatory instruments, industry self-regulation is in effect delegated authority to regulate. In most Canadian provinces, legislatures have delegated their authority to professional bodies to regulate the behaviours of their own members. Such is the case with doctors, lawyers and engineers.

6.8   *Conclusion*

As demonstrated, there are a wide range of options open to governments once the decision to intervene is taken. In absence of a policy instrument selection mechanism, is the "default" state automatically to implement regulations? In other words, is a regulator's propensity to decree regulations a direct result of the absence of a policy instrument selection mechanism? Regardless of the answer, it is likely that a mechanism that considers non-regulatory instruments would bring regulators to be more open in considering options.

Section 7:

Assessing Impact and Burden

The practice of assessing the impact and burden imposed by regulations is gaining greater acceptance in industrialized countries. This is due in part to the fact that it is recognized that regulations impose a burden, or an additional cost, on businesses. The purpose of this chapter is to highlight some general practices taken by OECD countries to incorporate an approach that considers the impact imposed by regulations.

Recent OECD publications[8] indicate that there exist a wide range of methods to systematically assess both the negative and positive impacts of proposed and existing regulations. This systematic approach, often referred to as Regulatory Impact Analysis (RIA), draws out the anticipated costs and expected benefits of proposed or existing regulations.

7.1   Objectives and outcomes of Regulatory Impact Analysis

There are four main reasons motivating the use of Regulatory Impact Analysis. First, RIA tends to improve understanding of the real impact of government actions. The analysis seeks to define and measure both the positive and negative impacts of regulatory change. A second reason is that a well constructed RIA integrates multiple policy objectives. In other words, a RIA can become not only an analytical tool but also a coordinating tool showing the effects of one government policy on another. The third reason is that RIA tends to impose greater transparency and consultation upon the regulator. Often, the regulator must enter into a substantive dialogue with stakeholders in order to define and measure the potential impacts of proposed regulations. Lastly, and most importantly, RIA improves government accountability. Decision-makers must render accounts or reasons for their decisions in light of the information established through the RIA process.

Although a few studies indicate the disadvantages of the RIA programme, one drawback is clear: the process can lengthen regulation making. Is a RIA programme worth it?   The answer is likely to be yes. In the words of one author, "[RIA]...contributes to a 'cultural shift ' whereby regulators become more aware of the costs of action, and more ready to adapt decisions to reduce costs." [9]

7.2   The Canadian approach to Regulatory Impact Analysis and Benefit-Cost Analysis

The practice of RIA in Canada focusses primarily, but not exclusively, on developing Benefit-Cost Analyses (BCA). This section will outline, in very general terms, the steps to completing a BCA. It must be underlined that the Canadian experience with regards to BCA is limited to the federal scene and the practice is not yet widespread. As demonstrated in later chapters, there is no evidence of such an approach at the provincial level.

A benefit-cost analysis can be defined as "...an approach used to assess the gains and losses resulting from a set of alternative actions to help decide whether any of the actions should be

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[8]In particular, <u>Regulatory Impact Analysis. Best Practices in OECD Countries</u>. Paris: OECD; 1997. Page 7.

[9]Idem. Page 20

undertaken."[10]   Therefore, a BCA is initiated once a regulator has identified several policy instrument options. As a result, a BCA seeks to provide decision-makers with relevant information that can be used to guide the decision-making process.

BCA's typically seek to answer four fundamental questions:

1. What changes will the alternatives impose in the marketplace?

2. What is the expected value of the benefits generated by each alternative? Who will benefit? How will they benefit?

3. What are the estimated costs of the alternatives for each stakeholder?

4. Which alternative provides the most benefits for the least cost? Which one should be retained?

The BCA provides a structured approach to answering the above questions. The process of developing a BCA is presented below:

1   Identifying and estimating the benefits
  ➢ Identify benefits anticipated by the proposed alternative - both direct benefits and indirect benefits

  ➢ Determine who will benefit from the proposed alternative

  ➢ Measure the benefits - preferably a quantitative measure - this involves selection of indicators and their evolution over time.

  ➢ Compare with existing baseline or the status quo option

2   Identify and estimating the costs
  ➢ Identify the costs associated with the proposed alternative. A cost is an anticipated consequence that would make somebody worse off.

  ➢ Determine who will pay the identified costs

  ➢ Measure the costs - preferably a quantitative measure. This involves the selection of indicators and tracking their evolution over time.
  ➢ Compare costs with a baseline or against the status quo option.

3   Providing the decision makers with relevant information
  A. The conclusion of a BCA is generally the identification of the most appropriate alternative. This often involves an analysis of the distribution of the benefits and costs. In other words, who pays most/least, who benefits most/least?

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[10]Government of Canada. Benefit-Cost Analysis Guide for Regulatory Programs. Ottawa (ON): Treasury Board Secretariat, Government of Canada; 1995. Page 4.

It must be emphasized that the BCA is a component, although significant one, of a Regulatory Impact Analysis Statement. The RIAS document acts as a major decision-making tool for elected representatives. In Canada, "...the RIA programme uses Regulatory Impact Analysis Statement (RIAS) as a means by which federal departments demonstrate that proposed regulations meet requirements of Canada's Regulatory Policy...".[11] The RIAS document consists of five parts:

1. a description of the reasons for a regulatory proposal;

2. a listing of the alternatives considered to show why the proposed regulations are preferred over other potential policy instruments;

3. an analysis of the benefits and costs to quantify the positive and negative impacts of the proposed regulations;

4. a summary of the consultations undertaken throughout the regulatory development process;

5. a description of the compliance and enforcement strategies to support the proposed regulations.

7.3 Measuring relevant impacts of regulations

The major task in completing a solid BCA is to quantify the positive impacts (benefits) as well as the negative impacts (costs) of proposed or existing regulations. BCA authors consider, but do not limit themselves to, four common types of impacts:

Impacts on Business. Regulations have a tremendous influence on businesses. Regulations can impede businesses and keep them from competing successfully in the marketplace. Regulations can inhibit businesses from adapting to a changing environment, thus rendering them obsolete. Regulations have often been accused of stifling innovation and keeping businesses from gaining a competitive edge. And finally, regulations often put an additional administrative burden on businesses and as a result erode efficiency and profitability. The impact of regulations can also be positive by protecting businesses from competition, allowing privileged access to resources, imposing barriers and tariffs and so on. On the federal scene, a Business Impact Test (BIT) was developed to help government departments identify and assess the effects of regulations.

Impacts on consumers. Consumers are often the ones that have to live with the results of regulations. Regulators must be diligent in identifying and quantifying the impact of these changes on consumers. A change in regulations can be experienced by the consumer as: paying more (or less) for a product or service; having access to a product restricted (or enhanced); or increases (or decreases) in product safety, to name just a few examples. A well developed BCA will seek to identify and measure such impacts.

Impacts on the environment and on the public good. A public good is something that is enjoyed by all members of society at no charge. Roadways, public parks, and clean air and water are examples of a public good. Regulatory change often has impacts on the environment, and the principal challenge for the BCA author is to measure these impacts. Therein lies the challenge. How does the BCA author measure the benefits of safe roadways, clean water and air, etc.? Although challenging, the task is not impossible.

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[11]OECD. Regulatory Impact Analysis. Best Practices in OECD Countries. Paris: OECD; 1997. Page 34.

Impacts on government. Another form of impact that must be measured and factored into the BCA is the cost to government. If government proposes to enact regulations, logic dictates that it will enforce the regulations[12].There are three different types of costs that must be considered: administrative costs required to run the regulatory program; enforcement costs necessary to perform inspections; and compliance costs where governments must ensure that they are capable of meeting their own regulations.

7.4 Challenges related to BCA's

The development of a sound, defensible BCA is no simple task. Several challenges can be raised, including:

- The development of BCA's require a significant level of expertise, particularly in the fields of finance and economics;

- analytical methods are not fully developed. Often quantification of costs and benefits are the source of debate and controversy;

- data is non-existent or expensive;

- stakeholders challenge the validity of RIA as a purely economic analysis exercise and fundamentally disagree with the conclusions raised by the RIA;

- proper execution of a RIA requires significant expertise in the regulatory environment, as well as in the discipline of economic analysis.

7.5 Conclusion

As we can see, the RIA, and in particular, the BCA are critical elements within a regulatory regime. These tools impose a level of analysis on regulators that force them to carefully consider the impacts of their actions. Furthermore, a RIA programme acts as a guide for decision-making and accountability and for that reason is a vital component of a regulatory framework.

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[12]This is not always the case - for example, some critics have pointed out the federal Departments of the Environment has an impressive body of regulations but no means to enforce them.

Part 1

Conclusion

The Regulatory Framework — an Accountability Mechanism

The adjoining diagram illustrates the generic framework. The diagram shows how the regulator brings to bear critical questions throughout the regulatory process. Let us quickly review the framework elements as they related to these questions.

The first generic element, policy development, starts with the monitoring of the regulatory environment and concludes at the point where Cabinet approval is given. In between, the regulator has asked critical questions such as: What is the problem? How serious is it? Should government intervene? How should government intervene? What are the costs and benefits to intervention? This phase is concluded with the approval or disapproval of intervention.

The second generic element, the establishment of a regulatory program, focusses on training & education; enforcement and compliance; and penalties and appeals. Questions raised at this stage include: are the stakeholders ready to comply with the regulations? Can the regulator enforce regulations? Is the regulator ready to collect penalties and deal with complaints and appeals? This phase has no end, unless the regulatory program is abolished. In most cases the regulatory program will be modified as a result of amendments to the legislation or the regulations.

The third and last generic element considers the evaluation of the regulatory program and of the regulations themselves (regulatory effectiveness). Questions at this point focus on: How well is the program working? Are improvements required? Are the regulations achieving the stated policy goal?

It is clear when one considers the framework in its totality that this is not only a method for government intervention, but is also in fact an accountability mechanism. Simply put, the regulatory framework is a series of tools through which a regulator can account to its stakeholders for the responsibilities that have been conferred upon them.

Generic Regulatory Framework

<u>Sources of Policy Change</u>
- Regulatory Program Feedback
- Minister's Intention
- Government Policy

- Evidence of Problems in the Regulatory Environment (as identified through sentinel events)
- Technological Changes
- Stakeholder Dissatisfaction

Policy Development

Stakeholder Consultations
Stakeholder Communications

Monitor Regulatory Environment

Is there a potential problem? — No — Yes

Problem / Issue Definition

Is the problem / issue defined? — No — Yes

Risk Management

Is this serious? How much? — No — Yes

Decision to Intervene (Minister / Cabinet)

Should government intervene? — No — Yes

Select Policy Instrument Regulatory or Non-regulatory Intervention ?

Impact Assessment

What are the costs and benefits?

Approval of Alternative (Minister / Cabinet)

Program Development

Training and Education

Are stakeholders ready to meet the standard? — No — Yes

Enforcement and Compliance Program

Is the Regulator ready to enforce the regulations? — No — Yes

Penalties and Appeals

Can the Regulator enforce and collect penalties? — No — Yes

Program Evaluation

Is our program working well? What improvements are required? — No — Yes — No

Evaluation

Regulatory Effectiveness

Are the Regulations effective? What improvements are required? — No

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Part 2: Applied Regulatory Frameworks

Section 8:

Government of Canada

8.1   Role of Central Agencies

A critical element in understanding the regulatory framework in place at the federal level is to comprehend the nature of the roles and responsibilities that are played by the federal government departments versus that of the central agencies. When it comes to establishing regulations, this responsibility falls squarely in the sphere of control of the departments who are accountable in administering the legislation and subordinate regulations. In this context, issues of regulatory coordination present formidable challenges: twenty-one different federal government departments and a host of agencies, administering countless Acts and regulations, can create chaos. The task of assuring some level of coordination and order falls into the hands of the Central agencies, and in the case of regulations to the Treasury Board Secretariat (TBS).

The question is how can an agency with no direct responsibility for regulations exercise some degree of control? The answer is relatively straightforward. Treasury Board Secretariat exercises this responsibility through the Federal Regulatory Policy of 1995.

8.2   Federal Regulatory Policy — Distribution of responsibilities

The Federal Regulatory Policy of the Government of Canada confers to the TBS the responsibility for "developing and updating the federal regulatory policy and its associated regulatory process management standards. The Secretariat develops advice, guides and training to help regulatory authorities comply with the policy and achieve the management standards. The Secretariat also monitors the performance reviews that regulatory authorities conduct to assess whether the management standards have been met, and reports to the President of the Treasury Board on these reviews."[13]

On the other hand, federal departments are responsible for the sound management of regulatory programs that fall under their authority. The policy clearly stipulates that the departments must follow the regulatory process management standards and have systems in place that ensure that these standards are met. Furthermore, departments are accountable to the President of the Treasury Board in their ability to meet these standards. The 1995 policy in effect imposes upon departments the requirement to conduct an audit of its regulation setting process and report back to the President of TBS.

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[13]Federal Regulatory Policy 1995. Pages 3

Another important player in the development and review of regulations is the Department of Justice. Justice's role is essentially one of "staff", that is to provide advice to departments in establishing regulations. Structurally, Department of Justice staff work out of satellite offices, outside of their resident ministry. This arrangements permits them to be closer to their "customer" and get thoroughly familiar with the business of the department.

The distribution of responsibilities clearly places the accountability for the way in which regulations are established on the shoulders of the TBS President. However, the responsibility also lies on the minister responsible for the department administering a particular act. Therefore, one could say that generally speaking, the way in which regulations are established is the responsibility of the TBS President, while the content of the regulations falls to the relevant minister. A noteworthy point here is that both these players are in fact cabinet ministers. Therefore the accountability links go directly to cabinet.

8.3   The Federal Regulatory Policy — its content

The policy objective is simple and straightforward: "To ensure that use of the government's regulatory powers results in the greatest net benefit to Canadian society."[14]

The policy statement clearly spells outs what could be construed as guiding principles for regulatory development and implementation. These principles include:

> ➢ Regulations must serve the public interest of safety, quality of the environment, economic and social well-being;

> ➢ The government will weigh the cost of alternatives to regulations;

> ➢ The government is committed to working collaboratively with industry, labour, professional organizations, other governments and interested individuals.

On a more specific and tangible level, the policy also defines criteria that regulatory authorities must uphold in developing new regulations or reviewing existing ones. These criteria state that:

> ➢ Prior to preparing regulations, authorities must first demonstrate that a problem exists;

> ➢ Canadians must be consulted;

> ➢ The benefits of regulations must outweigh the costs;

> ➢ No unnecessary adverse impact be imposed on the economy;

> ➢ Intergovernmental agreements be respected;

> ➢ That regulatory authorities have systems be in place to manage regulatory programs effectively.

The implications of this last criterion is important. This statement in fact imposes upon departments a specific, detailed methodology to develop new or review existing regulations, as well as the design and management of regulatory programs. The means to accomplish this is through a series of documents produced by Treasury Board Secretariat. These documents are:

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[14]Idem. Page 1.

Document name	Purpose of the document
➢ Regulatory Process Management Standards	To provide clear standards in the development of federal regulations
➢ Technical Guide to Regulatory Impact Analysis	To provide departments with guidelines and standards for the development of quantitative, economical analysis of the impact of regulations
➢ Assessing Regulatory Alternatives	To provide Bureaucrats with a full inventory of existing policy instruments
➢ Framework for Managing Regulatory Programs	To provide guidance to federal government managers in the design, implementation and evaluation of a regulatory program
➢ A Strategic Approach to Developing Compliance Policies	To provide guidance to federal Government Managers in establishing responsive and realistic compliance strategies

These documents in fact articulate the federal regulatory framework. The principal aim is to maintain a level of regulatory quality. This is not to say that the documents enable perfect regulatory quality, but the assembled instruments provide some level of guidance and consistency to federal regulations. Still, the challenges abound, so much so that a Deputy Minister's Task Force comprised of top officials from Treasury Board Secretariat, Department of Justice and most major department carrying regulatory responsibilities was assembled in the fall of 1997 to review the legislative and regulatory setting process. The next few months will undoubtedly see changes and adjustments to the federal approach.

Regardless of what is to come, the Regulatory Process Management Standards are a critical piece in defining how departments <u>are expected</u> to meet the standards described therein.

8.4   The Regulatory Process Management Standards

This document is actually entitled: <u>Federal Regulatory Process Management Standard. Compliance Guide.   A self-assessment Guide for Departmental Managers</u>.   The sub-title provides insight as to the ends the documents seeks to achieve: for departmental managers to self-evaluate, and naturally to bring forward corrections in order to uphold the standards.

The documents presents, in the opening pages, a framework for the federal regulatory system. It must be pointed out that the term "framework" is used differently than defined in this report.

What the Regulatory Process Management Standard (RPMS) refers to as a framework, can be viewed as underlying philosophy for the standards. The document states that the intent of the RPMS is to provide departments with the tools and abilities to "...create the best regulatory system in Canada."[15] The next paragraphs go on to state that best is defined as:

The Regulatory Process Management Standard

> ➢ Respecting legal and constitutional requirements;

> ➢ Give most protection at least possible cost;

> ➢ Promote openness and accountability;

> ➢ Obtain input from stakeholders

> ➢ User friendly and accessible;

> ➢ Continuously updated and improved.

The backbone of this self-assessment is a series of one hundred sixty two questions articulated around ten major theme areas. For a sample of themes and questions refer to the appendix section.

Although the above paragraphs may not demonstrate it clearly, the RPMS is useful to the regulatory program manager on two levels. First, it sets clear standards on how departments go about developing and adjusting regulations. Second, the RPMS presents questions that enable the manager to identify strengths and weakness in the systems and procedures that are in place to develop or amend regulations. This does not imply that having a system in place will automatically ensure that compliance to the standard. At the very least, it provides program staff and managers with identified benchmarks.

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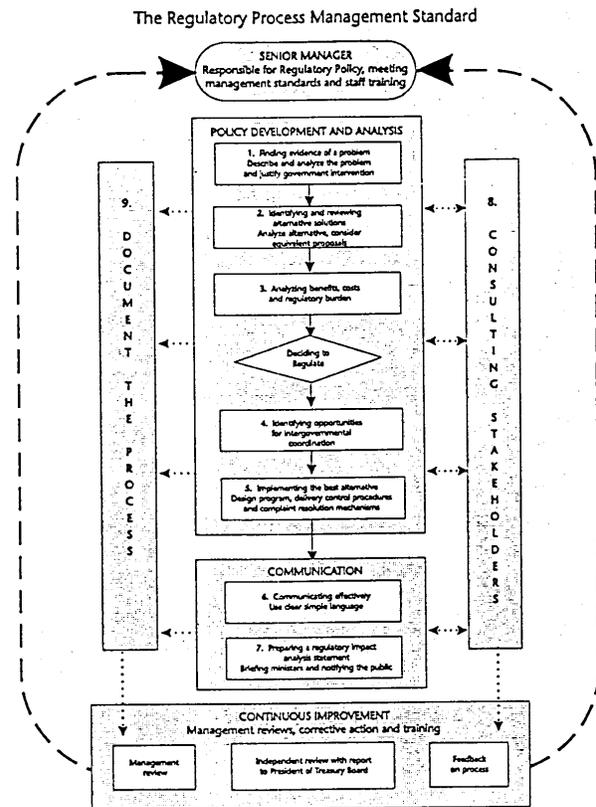
[15]Regulatory Process Management Standards. Page 3.

8.5   Government of Canada — strengths and weaknesses of the approach

This approach taken by TBS to exercise a degree of influence in the regulatory development and review process is not without its pitfalls. Several weaknesses can be identified. Among the principal ones, is the fact that this approach remains a relatively weak one from the perspective of consistency across departments. The RPMS looks for the presence of systems and procedures to maintain quality, but in the end it is the ability and skills of those who manage the regulatory development and review process which determine the quality of the regulations. In cases where quality is lacking, the results are usually direct: stakeholders oppose the regulations, or the proposed regulations do not pass the litmus test that is to get the proposal approved by the Minister and Cabinet. Although weak, this approach may be the best. It is foolish to believe that regulatory development and review could be coordinated in a central agency like the Treasury Board Secretariat.

The principal strength of this approach, paradoxically is also its principal weakness. The owners of the process, and therefore those who have to apply the regulatory development and review framework, have to be the department responsible for the administration of the regulation. The key is in striking a balance between the provision of guidance from the centre and flexibility to respond to the specific circumstances of a particular set of regulations. The important point here is that regulations development and review happens within a set of "circumstances". These circumstances can be defined as the dynamics created by the interactions between the political actors (government and parliament), the stakeholders (pressure and lobby groups) and the capacity and skills of the administration (the government department).

As a result, the approach presented in this section, although far from perfect, remains effective.

Section 9:

Applied Regulatory Frameworks — the case of selected federal government departments

9.1　Section preamble

The federal government health portfolio regroups nine regulatory programs.　Seven of these programs fall under the stewardship of Health Canada, while the two remaining programs are managed by arm's length agencies who report directly to the Minister of Health.　From the regulation of foods to the disclosure of product ingredients, the breadth, scope and nature of these programs vary greatly.　The direct consequence of these variations is the fact that each program applies the regulatory framework somewhat differently.　Some programs have developed a highly detailed and sophisticated approach to policy development and regulatory change, while others have not.　This does not mean that these programs are poorly managed, but only that their environment and the nature of their regulatory program does not call for a highly sophisticated program.

The paragraphs that follow describe which component of the framework are applied.　This is not an assessment of the effectiveness of the framework.

9.2　Health Canada — large regulatory programs

Generally speaking, the large regulatory programs have developed a relatively sophisticated approach to developing what they refer to as "regulatory policy"[16].　The development process follows a problem solving mode as outlined in the Regulatory Process Management Standards and is consistent with the regulatory frameworks presented in the previous sections.　The regulatory policy development process is published in internal documents and provides managers with detailed guidelines[17].

9.2.1　Monitoring of the regulatory environment

One of the strengths of these regulatory programs is their ability to monitor their regulatory environments.　The monitoring is generally accomplished in the following ways.

➢　Media monitoring.　An essential ingredient to a successful career in the public service is the ability to keep the minister out of trouble, particularly when the House is in session.　All government department monitor the media for issues that may raise questions in the House of Commons.

➢　Stakeholder consultations.　Although there are many issue-related consultations, many programs include structured consultative bodies to advise the programs about the evolution of regulations and regulatory programs on an ongoing basis.

➢　Field staff feedback.　Regulatory program field staff are the "closest to the action" and are in a position to identify problems and issues well in advance.

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[16]In many instances regulatory policy development and policy development are used interchangeably.

[17]Two regulatory programs in particular, the Therapeutics Product Directorate and the Environmental Health Directorate, have detailed policy development guidelines.

9.2.2 Problem / issue identification

Both regulatory programs studied for this research project have a phase within their policy development process where the problem or issue is defined for further analysis. In one case, efforts are made at defining the root cause of the problem.

9.2.3 Risk Management

Research has demonstrated that both programs consider some form of risk assessment. The policy development guidelines in one organization state that "A risk analysis may be done to assist in defining the issue. The risk analysis may be done at either a qualitative or quantitative level. In a qualitative risk analysis, risks are estimated as being minimal, moderate or severe. A quantitative risk analysis is more difficult and time consuming and may not be appropriate for policy problems of lesser significance."[18] Clearly there is an element of judgement on the part of staff involved as to whether a risk assessment is to be performed. In the Environmental Health Directorate, the risk assessment questions are even more explicit: a series of activities are suggested to determine whether the risk level associated with specific behaviours is acceptable.

9.2.4 Decision to intervene and selection of appropriate instrument

The policy guideline documents of both regulatory programs indicate that considerable effort is dedicated to analysing the context of the regulatory environment (beyond the analysis of the issues / problems) and in assessing alternatives to regulations. Both programs, in their policy development guidelines, refer staff to support documents including the Treasury Board's documents on Assessing regulatory Alternatives and Regulatory Process Management Standards [19]. One regulatory program also requests that staff go one step further in their analysis and consider the impact on industry competitiveness.

9.2.5 Assessing impact and burden of intervention and the conduct of public consultation

The policy development guidelines for both regulatory programs indicate that the last stage of analysis and policy development includes the ranking and selection of policy options and an outline of the implementation plan. This phase is usually concluded by the approval of the policy. Of course, this is not new to the Minister and his or her staff. They have been kept informed, and have given their approval throughout the process.

In cases where the policy development has lead to the creation of new regulations, department officials from Health Canada and the Department of Justice begin drafting[20] the text of the new legislation, which is ultimately published in the Canada Gazette part 1 and part 2 and then enacted as new regulations. During this time, on a parallel track, regulatory program staff prepare for the implementation of the new regulations by adjusting their program in all its aspects, including stakeholder communications, training, inspection and so on.

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[18]Policy Development in the therapeutic Products Programme. A Guideline. April 1997. Page 14.

[19]Both these documents are referred to in the attached bibliography.

[20]In reality, DOJ staff are involved much earlier in the process. They are at times involved in the front end policy development process to provide advice on what can and cannot be done.

9.2.6 Impact on regulatory programs

The remaining framework elements are related to regulatory program design and implementation, specifically the major components of: education and training; stakeholder communications; enforcement and compliance activities; and penalties and appeals mechanisms. Regulatory programs typically consider these items as they assess the relevant policy options in the policy development stage. Once a policy route is selected, regulatory program managers have the task of adjusting their programs accordingly. One criticism that is often heard from those involved in policy development is that there is this "disconnect" between those developing policy options and those who are tasked to implement them. The chief criticism is that policy authors do not give enough consideration to the resources needed to implement the policy instruments. The net result is that some regulatory program managers (not necessarily those in the field of health) are unable to enforce new regulations due in part to insufficient resources[21].

9.2.7 Evaluation

In the course of policy development, consideration is given to the evaluation of the policy instrument once it is implemented. It must be emphasized that this consideration does not necessarily mean that the evaluation will actually be performed.

9.3   Conclusion — Government accountability

As described in the previous paragraphs, regulatory programs do apply the regulatory framework, but with some variations. Several factors influence how the framework is applied, such as stakeholder pressure, the Minister's wishes and the severity of problem or issue. In addition, although the above description and assessment show that the selected regulatory programs apply the framework, this is indicated only through their documentation. This report does not deal with the effectiveness of staff in applying the framework.

In regard to accountability, there is a dimension of the regulatory process which cannot be accurately portrayed in a conceptual regulatory framework. It concerns the multiple levels of approval required to put a new regulation or policy into place. Inevitably this raises the issues of ministerial responsibility and the interaction between the political and bureaucratic processes. The fact that major policies calling for the development of regulations require approval from the Minister and Cabinet places the accountability squarely on the government in power. The case is not as clear when it comes to non-regulatory instruments, as a minister may or may not be aware that his or her department is in the process of developing or implementing new non-regulatory instruments.

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[21]That is one of the criticisms addressed to the Ministry of the Environment.

Section 10:

Applied Regulatory Framework — some Provincial examples

10.1   General observations

The following section will demonstrate a sharp contrast in the approaches to regulations and regulatory frameworks. The previous section demonstrated the presence of a framework underlined explicitly outlined at two levels. The first level is from an overall government point of view, through the Government of Canada's Regulatory Policy. A second view is from the regulatory program level. We demonstrated the way in which the selected programs entrench the framework in their respective policy development guidelines.

The following section outlines the application of a regulatory framework by various provincials regulators. From a provincial government-wide point of view, it is clear that there is no explicit regulatory framework in place in British Columbia. The same applies at the level of individual ministries. What is apparent at the ministry level is the presence of an implicit regulatory framework. In other words, we have not seen documentation, policy statements, etc., with respect to a regulatory framework or the regulatory process. But, as stated in previous sections, that is not to say that a regulatory framework is not applied. It does mean however, that departments are left to themselves to select and apply a framework. Throughout the interviews conducted with provincial public servants, we found some evidence of a framework in place, but there appear to be significant inconsistencies.

10.2   Government of British Columbia — Ministry of Forests

Discussions with officials from the Ministry of Forests have indicated the existence of standardized procedures and guides on the development of Cabinet Submissions and Orders in Council. In general, submission are organized in such a fashion as to answer the following questions: What is the nature of the issue?; What options are available to address the issue?; What are the implications of the proposed options? What actions are recommended?

These questions show, in part, the presence of an implicit regulatory framework. In answering these questions, Ministry staff must: define the problem, select a means of intervention, and assess the impact of the proposed solution. Ministry staff complete benefit-cost analysis in controversial cases or when the issue is viewed as having major ramifications. The Ministry also has means by which it stays closely in touch with the regulatory environment.   Consultations with industry and environmental groups are undertaken for specific issues.

The Forest Practice Code of British Columbia Act, which is in fact a body of regulations, has also had a profound effect on the way the forest resources are managed within British Columbia. While the Codes has been the object of much criticism, it has had the effect of making the forestry practices more transparent and open to public scrutiny. This, can be viewed as the application of the framework sub-elements related to monitoring the environment and public consultation.

Furthermore, a series of independent boards and agencies have been created and act, to some extent, act as"watch dogs". The Forest Practices Board, the Forest Appeals Commission, the Forest Land Commission and the Forest Jobs Commissioner all monitor the regulatory environment, in one

way or another. As well, these agencies perform a level of regulatory program and regulatory effectiveness evaluation. As with the previous applications of the regulatory framework, the ultimate accountability rests with the Minister of Forests.

Summary - Ministry of Forests

	Framework elements & sub-elements	Present	Evidence
Policy Development	Monitoring of environment	Yes	Issue based consultations Other boards and agencies
	Problem / issue definition	Yes	Through policy development process
	Risk management	No	None performed
	Selection of policy instrument	Yes	Yes, although there are no apparent guidelines
	Assessing impact	Yes	Not systematic, depends on situation. No standards or guidelines
	Public consultation	Yes	Yes
Regulatory Program	Education & training		Unknown
	Stakeholder Communication		Through Ministry's Communication Branch
	Enforcement & Compliance	Yes	Field operations ensure enforcement
	Penalties & Adjudication	Yes	Yes, through Field operations
Evaluation	Program evaluation	Yes	Through Forest practices Board, MOE, District Offices
	Evaluation of reg. effectiveness	Yes	Through Forest practices Board, MOE, District Offices

10.3   Government of British Columbia — Ministry of Health

The Ministry of Health of British Columbia does not have a formal, centralized body that is responsible for policy development nor does it have formal regulatory policy development guidelines to direct the development of regulations. Policy development occurs mainly at the level of the programs and is therefore mostly "issues" driven, that is by stakeholders' complaints or from field staff who are exposed to these pressures on a daily basis. The way in which policy is developed is still an issue with which Ministry officials are wrestling in an era of post-regionalisation.

There is no formal analytical framework or standard methodology used to assess policy options. Assessments are more "free-flowing" and rely on the historical perspective and knowledge of Ministry staff.

The selection of policy instruments is usually based on a few criteria. Those criteria include the significance of the issue and whether it is critical in maintaining an acceptable level of health care delivery (this was understood to mean patient care). Again we have evidence of implicit risk analysis performed by Ministry staff. The criterion of significance likely concerns the overall importance of the issue, while the criterion of patient care speaks to the risk of eroding current health care standards.

Stakeholder consultation has been a growing priority for the Ministry. Consultations take place on multiple levels. Initially, professional associations such as the College of Physicians, and Health Authorities and health employers associations, were the focus of consultations. More recently the Ministry has been devoting greater efforts to communicating with the public. This is due to the growing demand of the public for inclusion in health care debates.

Compliance and enforcement is largely within the domain of public health, although some inspection activities are carried out by Ministry staff. Interviews showed that the Ministry carries out limited evaluation activities , leaving this up to health care professionals and to some extent to field staff.

Summary - Ministry of Health

	Framework elements & sub-elements	Present	Evidence
Policy Development	Monitoring of environment	Yes	Demand - field driven
	Problem / issue definition	?	Unknown
	Risk management	Yes	No formal mechanism
	Selection of policy instrument	Yes	Implicit criteria, no formal mechanism
	Assessing impact	No	No evidence collected
	Public consultation	Yes	Professional associations
Regulatory Program	Education & training	?	Unknown
	Stakeholder Communication	Yes	
	Enforcement & Compliance	Yes	Limited to specific sectors
	Penalties & Adjudication	?	Unknown
Evaluation	Program evaluation	Yes	By professional associations, field operations
	Evaluation of reg. effectiveness	Yes	By professional associations, field operations

10.5   Conclusion

The preceding pages have shown how selected regulators utilize a framework to support the development of regulations. Outlined below are the significant findings.

On the subject of roles and responsibilities for regulatory review: On the federal scene, roles and responsibilities on the regulatory review process are relatively clear. It is the Treasury Board Secretariat (and therefore the President of the Treasury Board) who is accountable for the efficiency and effectiveness of the Government's regulation-making process. In turn, Departments are responsible for the sound management of regulatory programs, and must meet the standards specified in Regulatory Policy and Regulatory Process Management Standards. In British Columbia, the roles and responsibilities of central agencies like the Crown Corporations Secretariat are not explicit. It is therefore difficult to ensure consistency in the development of regulations.

In the matter of the Regulatory framework: Again at the federal level there is an explicit framework is in place. Treasury Board Secretariat exercises its responsibilities by providing departments with clear standards, clear expectations and support in developing regulations. This is not the case in the province of British Columbia. It is fair to say that Government departments in B.C. loosely follow a framework that is similar to the generic framework presented in the earlier parts of this report. There are some serious gaps however. As a result the applications of the framework and the rigour with which Ministries apply the framework varies greatly.

These findings raise one fundamental question: What are the consequences of unclear roles and responsibilities and of the use of an implicit regulatory framework? Two major consequences are apparent.

The findings listed above have a bearing on the principle of transparency. Transparency is one of the Conference Board's guiding principles for regulatory review and was also listed as a criterion used to assess the WCB's regulation review[22]. A condition necessary for transparency is clarity with regard to roles and responsibilities, as well as a defined process for regulatory review. Given that many elements of the regulatory framework are implicit, transparency of WCB decisions is questionable.

An implicit regulatory framework also makes the principle of accountability difficult to put into practice. If decision criteria, particularly from a risk management aspect, are implicit, then ensuring accountability is difficult and perhaps impossible.

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[22]Regulatory Review Process at the WCB of British Columbia. A report submitted by Intersol Consulting Associates to the Royal Commission. October 1997. Page 11.

Section 11

The Worker's Compensation Board of British Columbia

It is recognized that the policy development function at the Worker's Compensation Board has undergone many transformations over the last several years and is still in evolution. Its present incarnation, as the Policy and Regulation Development Bureau, gives the impression that the policy developed is strictly for regulatory purposes. However, this may be misleading, as documentation provided by the WCB refers to two distinct processes[23], one being the Policy and Regulation development process and a second being the Occupational Disease recognition process. This suggests that the application of policy development may go beyond regulations. At the very least the linkages between policy development and regulatory review are unclear.

11.1   Policy development at the WCB

When considering the WCB's approach to policy development, an important fact must be recognized. The Board develops and implements public policy that has important impacts on the social and economic fabric of the province. For example, by establishing worker health and safety regulations, the Board essentially defines how the workplace is to be organized. This can be a significant factor in an investor's decision-making process. The investor will judge whether or not the province's health and safety regulations are an incentive or a disincentive to investing in a business. The Board also sets social and health policies in its decisions about which injuries to compensate and how best to rehabilitate workers. Clearly, the WCB's policy development has far reaching impacts. From a risk management perspective, the consequences of the WCB's policy development process are important.

11.2   Monitoring of the regulatory environment

A WCB briefing paper lists a number of ways in which problems and concern can lead to the development of policy. Among the several examples listed are: the Legislature; Members of the worker, employer, health care or other communities having an interest in the worker's compensation system; WCB administration in the implementation of programs; WCB appeals division; and the panel of administrators. Precious few details are given on the actual methods utilized to collect, classify and analyse this information, nor do we get any insight on the criteria used to identify significant trends or problems.   It is clear that this approach is very reactive to the regulatory environment. There appears to be little, if any monitoring system to assist in the identification of issues and problems. In a discussion paper released in March of 1998[24], the WCB proposes the creation of a research and program evaluation capability within the Policy and Regulation Development Bureau. This initiative should be encouraged.

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[23]A WCB document provided insight on this matter. <u>The Policy Development Process. A Briefing Paper.</u> October 28, 1997. Author unknown.

[24]Worker's Compensation Board of British Columbia. Proposed Strategy for Ongoing Review of the Occupational Health & Safety Regulation (Draft). A Draft Policy Advice and Recommendation. Vancouver (BC): Worker's Compensation Board of British Columbia; March 20,1998. Page 14.

Given this situation, how does the WCB propose to review its regulations? The WCB's Strategy For Ongoing Review[25] sheds some light on this matter. The ongoing review strategy lists regulations that require further review. These projects are essentially a "mopping up" exercise of the regulatory review that was concluded with the enactment of the regulations in the fall of 1997.

What is abundantly apparent is that the WCB's ability to monitor the regulatory environment is a very reactive process: the alarm bells have to be sounded by stakeholders. This is an indication that there are deficiencies in the monitoring system. From a high level perspective, the existing data gathering mechanisms do not appear to be geared towards collecting, classifying and analysing data that would indicate problems in the regulatory environment. There is no indication that the WCB monitors its environment for sentinel events - events that are indicative of problems in the environment. An example of this would be the number, types and circumstances in which a work related fatality occurred. Coroner's reports, and Coroner's Jury recommendations could be identified as such events. In order to adequately monitor the environment, the WCB must collect data, identify trends and develop policy, and then, if appropriate, develop regulations.

11.3   Definition of the Problem / Issue

In a regulatory review process, the definition of problem or issue can be done at several levels. In the case of occupational health and safety regulations, problem definition can be done from a global basis, at the level of the entire body of regulations, or conversely on a more local level, using specific parts of the regulations.

In the last round of regulation review, the WCB defined problems and priorities through the RAC's public fora in the fall of 1992. The objective of the fora was described as follows: "To launch the regulatory review process, the WCB chose to host a series of public fora, the objective of which was to identify the concerns across a broad range of stakeholders"[26]. The outcome of this initial consultation was the identification of some priorities for the development of regulations (in effect it identified policy development needs). In this particular case, the need to create a new body of regulations to protect workers from violence in the workplace was identified as a top priority.

On a more local level, problems must also be identified at the level of a specific regulation sections. In the previous review of regulations, this task was left up to subcommittee members. Subcommittees had been established to consider the technical aspect of the regulations[27]. The examination of the WCB regulatory review process revealed that the methodology utilized by the twenty-plus subcommittees was at best inconsistent. "It would seem that a structured, disciplined project management framework and approach might have resulted in greater consistency in subcommittee output"[28]. A typical project management framework seeks first to identify and set boundaries for the project, and it is unclear how many of the subcommittees adopted this methodology.

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[25]Proposed Strategy For Ongoing Review. WCB Document. Author unknown. Undated but sent via fax to Royal Commission staff on October 23, 1997.

[26]Regulatory Review Process at the WCB of British Columbia. A report submitted by Intersol Consulting Associates to the Royal Commission. October 1997. Page 27.

[27]Ibid. Page 31.

[28]Ibid. Page 31.

Under the current Policy and Regulation Development Bureau, the process[29] identifies a second step where an outline and preliminary analysis is conducted. One would suspect that it is at this stage where a policy problem or issue is defined, however, details are sketchy.

STEPS
1 Policy Needs Identified
2 Outline & Preliminary Analysis
3 To Priorities Committee for Direction
4 Bureau Development and Analysis
5 Draft Policy Prepared / Consultation Undertaken
6 Bureau Revises Draft
7 Draft to SEC (when necessary)
8 Present to Panel
9 Panel Decision
10 Post implementation Review

WCB - Policy and Regulations Development Bureau
Policy and Regulation Development Process

11.4   Risk Management

In the 1992-97 regulatory review period, there is no explicit risk management approach. That is not to say that risk was not considered throughout the review process. It likely was, but in a implicit fashion. The only evidence rests with the fact that the WCB set priorities by staging the review of the OSH Act into three distinct segments[30]. One assumes that one or more risk criteria may have been used in determining priorities. On what basis were these priorities established?

Again, under the current Policy and Regulation Development Bureau there is no explicit risk management approach. One can only infer that there is some level of risk assessment performed when establishing regulatory policy priorities. The need for an explicit risk management framework is vital to ensure consistency of policy decisions. This is critical in light of the fact that policy priorities are determined in part by committees. These committees include the Policy Development Consultative Committee, the Occupational Disease Advisory Committee, and the Advisors on Regulation Review. Under such conditions, the absence of a risk management approach increases the probability of incoherence in regulatory policy. The absence of an explicit risk management approach is not unusual when compared to other British Columbia regulators. Nonetheless, the absence of an explicit risk management approach remains a significant flaw.

11.5   Selection of policy instruments

When it comes to occupational health and safety, regulations appear to be the exclusive means of intervention. Is this the result of the regulatory environment and the inherent opposition of labour and management? Is the culture of compliance and enforcement of occupational health and safety agencies at the root of this tendency? The answers to these questions remain outside the scope of this research. However, review of existing literature has turned up very few examples of non-regulatory policy instruments in this field. Some examples were found of performance based regulations being implemented, although these are a far cry from being a non-regulatory instrument. An American example cites: "The Department of Labor's (DOL) Occupational Safety ad Health Administration (OSHA) August 1996 revision of its standard protecting approximately 2.3 million workers on scaffolds in the construction industry provides another example of an effective use of a

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[29]This process is taken from The Policy Development Process. A Briefing Paper. Internal WCB document. October 28, 1997. Author unknown.

[30]Regulatory Review Process at the WCB of British Columbia. A report submitted by Intersol Consulting Associates to the Royal Commission. October 1997. Page 6.

performance standards. The final rule establishes performance-based criteria, where possible, to protect employees from scaffold-related hazards such a falls, falling objects, structural instability, electrocution and overloading." The impact of this performance-based approach is clear: "According to estimates, the new standards will prevent 4,500 injuries and 50 deaths annually, saving construction employers at least $90 million in annual costs resulting from lost workdays due to scaffold-related injuries"[31]. It appears that the "default" state of government intervention in the field of occupational health and safety is regulations. This is likely due to the fact that market forces have little or no incentive to dedicate resources to protect workers form hazards and work related illness.

However, one has to wonder if the absence of a policy instrument selection process tends to lead regulators automatically to the development of regulations. The WCB would likely do well to ask the principal policy instrument selection question: Is this the best possible way to change behaviours? What other means can be used to achieve the same ends?

11.6   Assessing the impact of regulations

In other jurisdictions, the assessment of the impact of regulations is a particularly important step. It represent the final step before approval on the part of the Minister, and is meant to be an analysis of the expected benefits and costs associated with the regulatory initiative. The WCB does not conduct impact assessments of proposed regulatory change. This is a weakness.

Many individuals have expressed concern over industry's ability to remain competitive under the imposed costs of regulations[32]. The adoption of impact assessment as part of the WCB's methodology could have positive effects. However regulatory impact assessment is not without its own challenges. Cost benefit analyses (CBA) often create controversy and are often difficult to defend. Furthermore, completing CBA's requires a specific skill set.

These challenges, however, are not insurmountable. Many regulators have modified their CBA's to focus less on the quantitative analysis and more on the qualitative. In other words, the focus is not on the numbers but rather a description of the anticipated benefits and expected costs.

11.7   Public Consultation

The public consultation process employed by the WCB in its regulatory review process was the subject of an extensive assessment completed in the fall of 1997. The reader is advised to refer to relevant chapters of the report to obtain details of the findings and recommendations. However, one additional observation can be made at this time. Many regulators have found it useful to conduct consultations throughout the policy development process and not just when a policy is ready in a first draft format. The current policy and regulation development process shows that consultations take place twice: at the time the draft policy is submitted to committee for direction, and once the draft policy is ready for review. This may be insufficient in some cases.

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[31]More Benefits, Fewer Burdens. Creating a Regulatory System that Works for the American People. United States Government. Office of Management and Budget. Office of Information and Regulatory Affairs. December 1996. Page 8.

[32]Author's personal notes from interviews conducted in the project on assessment of the regulatory review process. August - October 1997.

11.8   Regulatory Program

A critical part of the framework is the ability of the Regulator to implement the selected policy instrument.   As discussed previously, this is accomplished through the framework elements of education and training, enforcement and compliance, stakeholder communications, and penalties and appeals.   This research sought to identify the presence of these program elements in the Worker's Compensation Board, but they have not been the subject of further analysis and recommendation in this report.   The Royal Commission has previously studied these elements, and therefore the research does not need to be repeated here.

11.9   Evaluation of regulatory effectiveness

A regulatory framework is incomplete if it does not seek to evaluate, at regular intervals, regulatory effectiveness in relation to the initial policy goal.   The WCB's overall regulatory policy goals are stated under the Workers Compensation Act, Section 71 (1).   The Act states that the Board may: "...make regulations, whether of general or special application and which may apply to employers, worker, and all other persons working in or contributing to the production of an industry within the scope of this part, for the prevention of injuries and industrial diseases in employments and places of employment..."

The WCB, in a recent discussion paper indicated that it feels that it can review 5 to 6 different aspects of the regulations per year, thus reviewing the entire body of regulations every five to six years[33].

On the subject of evaluating regulatory effectiveness, it is clear that the WCB does not have the capacity to accomplish this task.   The WCB's Policy and Regulation Development Bureau is considering the creation of a research and program evaluation capability.   This function is an essential part of the regulatory process and must be implemented by the Board.

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[33]Worker's Compensation Board of British Columbia. Proposed Strategy for Ongoing Review of the Occupational Health & Safety Regulation (Draft). A Draft Policy Advice and Recommendation. Vancouver (BC): Worker's Compensation Board of British Columbia; March 20,1998. Page 12.

Summary — Government of British Columbia — Worker's Compensation Board

	Framework elements and sub-elements	Present	Findings
Policy Department	Monitoring of environment	Yes	Reactive and deficient
	Problem/Issue definition	Yes	Inconsistently applied throughout the review process
	Risk management	No	As an implicit criteria in the priority process. This is an area of weakness
	Selection of Policy Instrument	No	Regulations appear as the default policy instrument
	Assessing Impact	No	WCB does not assess impact in an explicit analytical fashion
	Public Consultation	Yes	Part of the regulatory review process
Regulatory Program	Education and Training	Yes	WCB Prevention Program
	Stakeholder Communication	Yes	WCB Ongoing committees
	Enforcement and Compliance	Yes	WCB Workplace Inspection Program
	Penalties and Appeals	Yes	WCB Appeals Division
Evaluation	Program evaluation	Yes	Program outputs are measured
	Evaluation of regulatory effectiveness	No	Not done

11.10 WCB's Regulatory Framework — Findings and Recommendations

Several elements within the existing framework require attention on the part of the WCB.

The ability to monitor the regulatory environment is an area that requires attention. The current approach appears to be reactive. The WCB's ability to collect, classify and analyse information is doubtful. The WCB needs to develop the capacity to monitor its environment for sentinel events.

In the matter of defining problems and issues, the WCB process is inconsistent. The regulatory review process must ensure consistency in problem definition at all levels in the regulatory review process. When the topic concerns new regulations, it is essential that the WCB define the problem clearly, in concert with stakeholders.

Risk management is currently an implicit process at the WCB. There is no evidence of a structured risk management approach. The WCB could draw several advantages and benefits from adopting a risk management framework within its policy development process.

Selection of policy instruments: the WCB's policy instrument of choice is regulatory intervention. At this time, the WCB does not utilise a policy instrument selection methodology. As the WCB attempts to move towards performance-based regulations it would be wise to implement such a methodology.

The WCB currently does not assess impact of its regulations on businesses, consumers and government. The WCB could gain some advantages at identifying the true costs and benefits of existing and proposed regulations.

The Policy and Regulation Development process consults at the point where a draft policy is ready for review. There are significant advantages to be had in consulting with stakeholders throughout the policy development process.

The WCB does not evaluate the effectiveness of its regulations. The WCB must periodically evaluate the effectiveness of regulations and use the findings as a means to identify problems in the environment. Consequently, this initiates the policy development process that can eventually lead to amendments in regulations.

As noted in an earlier section, the regulatory framework is an accountability mechanism. For the framework to be truly effective, it must become explicit, visible and transparent. It must become part of the overall methodology of regulation development and review at the Board.

Appendices

Appendix 1

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Appendix 2 - Comparative Chart

Generic Framework	Health Canada		BC Government Ministry of Forests		BC Government Ministry of Health		WCB	
	Present	Evidence	Present	Evidence	Present	Evidence	Present	Findings
Policy Development								
Monitoring of regulatory environment	Yes	Media / consultations / trend analysis	No	Issue based consultations, through other boards and agencies	Yes	Demand - field driven	Yes	Reactive and deficient
Problem / Issue definition	Yes	Part of Policy development guidelines	Yes	Through policy development process	?	Unknown	Yes	Inconsistently applied throughout the review process.
Risk management	Yes	Risk Management Methodology	No	None performed	Yes	No formal mechanism	No	As an implicit criteria in the priority process. This is an area of weakness.
Selection of policy instrument	Yes	Part of Policy development guidelines	Yes	Although there are no apparent guidelines	Yes	Implicit criteria, no formal mechanism	No	Regulations appear as the default policy Instrument
Assessing impact and burden	Yes	CBA performed for major initiatives	Yes	Not systematic, depends on situation. No standards or guidelines	No	No evidence collected	No	WCB does not assess impact in an explicit analytical fashion.
Public consultation	Yes	Throughout	Yes		Yes	Professional associations	Yes	Part of the regulatory review process
Regulatory programs								
Education and Training	Yes	Part of Regulatory Program	Yes	To a limited extent through field operations	?	Unknown	Yes	WCB Prevention Program
Stakeholder Communication	Yes	Part of consultation policy	Yes	Through Ministry's Communication Branch	Yes		Yes	WCB ongoing committees
Enforcement and Compliance	Yes	Varies according to program	Yes	Field operations ensure enforcement	Yes	Limited to specific sectors	Yes	WCB Workplace Inspection Program
Penalties and Appeals	Yes	Varies according to program	Yes	Yes, through field operations	?	Unknown	Yes	WCB Appeals Division
Evaluation								
Program evaluation	Yes	Part of annual planning process	Yes	Through Forest practices Board, MOE, District Offices	Yes	By professional associations, field operations	Yes	Program outputs are measured
Regulatory Evaluation	No	Part of methodology / few resources	Yes	Through Forest practices Board, MOE, District Offices	Yes	By professional associations, field operations	No	Not done

Appendix 3

Line of inquiry

Opening comments

The Royal Commission on Worker's Compensation in British Columbia is preparing its final report, to be delivered in the fall of 1998. The commission has hired Intersol Consulting Associates to research the regulatory frameworks and models that are currently in use by government ministries and regulatory agencies throughout Canada.

Your input in this comparative study is appreciated. The following questions are based on the regulatory framework presented in the Conference board of Canada' s paper titled: <u>A Framework and Guiding Principles for Regulatory Review</u>.

For the purposes of the interview (questionnaire), regulations are defined as instruments that have the force of law (often referred to as secondary legislation) and policy instrument refer to both regulatory and non-regulatory instruments.

Preamble

Is there, in your opinion, a central agency who is accountable for the quality of the regulations developed by your Ministry / Department / Agency ?

Is there an overall policy statement that guides the development of regulations?

Part 1: Policy Goals and Policy Development. This is the stage where a problem is identified, described and analysed and from which Government policy is established.

1.1 What mechanisms, or process are utilized to determine whether government intervention is required? Who develops the policy goals? Who approves the policy goals?

1.2 What types of analyses are performed to determine the extent of the problem ?

1.3 Is risk a factor that is assessed at this stages ? If yes, how ? Is there a systematic way by which risk is identified and quantified ? What is the outcome of these assessments ?

1.4 Are stakeholders involved in determining the extent of the problem ? If yes, what are the mechanisms and processes used to gain meaningful input from stakeholders ?

1.5 Are there clear goals for the proposed intervention established at this stage ?

Part 2: Policy Instruments Policy instruments refer to the instruments used to implement the government's policy goals.

2.1 Are regulations the exclusive means of intervention, or does your Department, Ministry, Agency intervene through the use of other instruments ? If so, which ones ?

2.2 How are the policy instruments selected? What is the decision criteria?   Who makes the final decision?

2.3 Is risk a factor that is assessed at this stages ? If yes, how ? Is there a systematic way by which risk is identified and quantified ? What is the outcome of these assessments ?

2.4 Are stakeholders involved in determining the extent of the problem ? If yes, what are the mechanisms and processes used to gain meaningful input from stakeholders ?

Policy instrument checklist

Alternatives to regulations

Taxation, Expenditures

- ➢ Loans and Loan guarantees
- ➢ User charges
- ➢ Public ownership
- ➢ Unstructured voluntary action
- ➢ Structured voluntary action (codes, gdlns)
- ➢ Voluntary standard
- ➢ Consensus standard
- ➢ Self-Regulation (ie college physicians)
- — Modification of private law rights
- ➢ Insurance schemes

Alternative forms of regulations

- ➢ Direct product control (Price;Qty; I;Specs; tech stds;perf stds)
- — Supplier entry and exit controls
- ➢ Production process control
- ➢ Information control

Other forms of regulations

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Part 3: Policy Implementation

3.1 Does your Sector have a compliance or enforcement program ? Is your Department, Ministry, Agency accountable for the compliance and enforcement program or is it separate?

3.2 What are the broad objectives of the compliance and enforcement program ? (E.g. inspection, education, training).

3.2 Are there explicit performance standards for the compliance program ? Are there mechanisms internal to the compliance and enforcement programs that feedback information?

3.3 How is the compliance / enforcement program developed, monitored and evaluated ?

3.4 How are the policy goals reflected in the compliance / enforcement program?

3.5 Are the stakeholders involved in the development, monitoring and evaluation of the compliance and enforcement program ?

Part 4: Evaluation

4.1 Are there formal program or projects in place to determine whether the policy instruments (regulations and non-regulatory instruments) achieve their goals, and or change behaviours of those targeted?

4.2 What process is followed to review the regulations and policy instruments?

4.2 Are there established indicators that assist your Department, Ministry, Agency in monitoring progress? What are they (some examples) and how are these indicators used?

4.3 What mechanisms are in place to ensure that the results of the evaluation are taken into account in regulatory (policy instrument) review?

Thank Interviewee

Ask for coordinates

Ask permission to call again to gather further information should that be necessary.

Ask if they have questions.

Appendix 4

Sample Regulatory Process Management Standard
Questionnaire and related themes

Policy Development and Analysis
> Theme area   Finding evidence of a problem
>> Sample questions:
>>> — re procedures in place for monitoring regulatory environment?
>>> —Are actual and potential problems analysed, their risks assessed and affected parties identified?

> Theme area   Identifying and reviewing alternative solutions
>> Sample questions:
>>> 2.1   Do you systematically consider alternative instruments for changing behaviours, including regulatory and non-regulatory solutions?
>>> 2.2   Do you give high priority to proposal from regulated parties for equivalent means of achieving desired result?

> Theme area   Analysing benefits, costs and regulatory burden
>> Sample questions:
>>> 3.1   Are benefit-costs analyses systematically carried out for regulatory proposals and their alternatives?
>>> 3.2   Is there a system in place for assessing the risks posed by a problem to ensure that effort is focussed on the msot important problem?

> Theme area   Identifying opportunities for intergovernmental coordination
>> Sample questions:
>>> 4.1   Do you review proposed regulations for consistency with requirements of other governments in Canada and abroad?
>>> 4.2   Are proposed technical regulations systematically reviewed to ensure fairness in the treatment of products from different jurisdictions?

> Theme area   Implementing the best alternative
>> Sample questions:
>>> 5.1   Is there a system in place for measuring whether goals are being met?
>>> 5.2   Do you clearly articulate compliance and enforcement policies and make them accessible to regulators, regulated parties, program beneficiaries and the canadian public?

> Theme area   Communicating effectively
>> Sample questions:
>>> 6.1   Are there people involved in writing regulations who are trained in writing plain language documents?
>>> 6.2   Are there procedures in place to give assurances that afected persons know about and understand proposed regulatory requirements?

> Theme area   Preparing regulatory impact analysis statement
>> Sample question:
>>> 7.1   Do you have a system to ensure that RIAS (Regulatory Impact Assessment Statements) are comprehensive and complete?

Theme area   Consulting stakeholders
      Sample questions:
      8.1   Is the consultation process open, transparent and carried out with mutual respect for the legitimacy and point of view of all participants?
      8.2   Do you have procedures for consulting with participants on the consultation itself, including timing, the method, the issues and the way in which input will be incorporated into the final regulatory recommendations to the government?

Theme area   Documenting the process
      Sample questions:
      9.1   Are the lines of authority, the roles and responsibilities, the accountabilities and relationships of personnel involved in managing the regulatory process clearly documented and available to those working in the system?
      9.2   Do your procedures require you to document your decisions throughout the regulatory development process?

Theme area   Making continuous improvement
      Sample questions:
      10.1   Do you use the feedback from the complaint resolution system to improve regulatory programs and services?
      10.2   Are there sufficient resources to train people involved in regulatory programs?