COMMENTS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON BILL C-25 THE REGULATIONS ACT

presented to the Sub-Committee on Bill C-25
the Regulations Act
Standing Committee on Justice and Legal Affairs

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The Canadian Environmental Law Association

The Canadian Environmental Law Association, (CELA) founded in 1970, is a legal clinic, funded by the Ontario Legal Aid Plan. It provides legal representation to low income individuals and non-profit environmental groups. CELA appreciates having this opportunity to comment to the Sub-committee on the proposed *Regulations Act* (Bill C-25).

Context

The 1990s are an era when regulation of industries in the public interest has become increasingly limited, due to strong and persistent industry lobbies. Indeed, the "public interest" and the "public good" are terms without validity in neo-conservative thought.

A number of influences have speeded de-regulation:

- the growing globalization of economies and liberalized trade, and the signing of the Canada-US Free Trade Agreement, NAFTA, and the Uruguay Round of GATT, which represent wide-ranging de-regulatory initiatives affecting an unprecedented number of sectors;

- shrinking government budgets;

- shrinking government commitment and political will to regulate in the public interest, due to strong lobbies by regulated sectors seeking to be relieved of existing regulatory requirements;

- the internationalization of standard-setting and increasing harmonization of standards; and

- rapid technological change in some sectors, with resulting lags in regulatory currency.

Given this context, we are particularly concerned with any major reforms to administrative laws, including this change to the *Statutory Instruments Act.*

Language of the *Regulations Act*

We congratulate the drafters of the proposed act for rendering the impenetrable circumlocutions of the *Statutory Instruments Act* into simplified language. CELA considers that this overall change will make the basic law of federal regulation-making much more understandable for the public and for the legal system.

Substantive concerns with the proposed *Regulations Act*

CELA's concerns with the proposed Act fall into the following categories:

1. broadened powers of exemption of regulations from the regulatory process;
2. apparent reduction in legal scrutiny of regulations before promulgation.
3. lack of certainty and speed in publication of regulations in the future;
4. implications of the provisions regarding incorporation by reference;
5. failure to ensure open and meaningful public consultation in regulation making.

1. Broadened exemption powers

Section 5 of Bill C-25 provides that

> The Governor in Council may, by regulation, exempt regulations from the application of the regulatory process.

This unfettered exemption power contrasts with the lesser exemption power in Section 20 of the *Statutory Instruments Act,* which permits exemption from the parts of the regulatory process in certain specific circumstances.

Specifically, complete exemption from scrutiny and publication is provided on some regulations concerning federal-provincial relations, international affairs, the defence of Canada, and issues of subversion. Exemption from publication in the Canada Gazette is also provided for regulations affecting limited numbers of people:

> if reasonable steps have been or will be taken for the purpose of bringing the purport thereof to the notice of those persons affected or likely to be affected by it;
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> or
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> if "injustice or undue hardship to a person or in conduct of his affairs would result."[1]

These are broad exemption powers, and the secrecy they ensure makes the officials' exercise

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[1] *Statutory Instruments Act,* Section 20(a),(b),(c).

of discretion in using them unreviewable. However, the unfettered discretion to exempt, granted in Section 5 of Bill C-25 is a new and dangerous extension of these powers. It essentially removes any certainty that regulation making will be broadly accessible to the public scrutiny that is fundamental to democracy. It permits the government of the day to operate almost entirely in secret, if it chooses to do so.

The removal of all criteria for the exercise of this discretion is a serious rollback of basic democratic citizens' rights to ensure that governments are accountable for their actions.

CELA was a leader in the national mobilization to stop the ill-conceived *Regulatory Efficiency Act.* As you may be aware, lawyers for the Standing Joint Committee for the Scrutiny of Regulations analyzed that bill in a scathing report.[2] The authors analyzed federal statutes that permit regulations establishing exemptions from regulations.[3] The exemptive powers considered there are less dangerous than is Section 5 of this Bill, since

> those exemptions will be subject to the same, public law-making process, including for example registration and publication, as are the regulations from which the exemption is to be granted.[4]

Nevertheless,

> When one examines the individual statutes relied upon by the government as precedents....(although) there are instances of the conferral of a blanket power to make regulations exempting persons from any of the provisions of the parent statute or its regulations, the great majority of statutory exemption provisions are much more limited...Even where a relatively broad power is granted by Parliament to make regulations establishing exemptions, the grant of power is usually defined by reference to prescribed circumstances or conditions.[5]

In addition, the authors note that sunsetting (a time limit) or scrutiny by named officials are other means of regulating the exemption powers. The exemption power in Bill C-25 contains none of these limitations.

In addition to the abhorrence of democratic societies for secrecy in government decision-making, and the fundamental dangers it represents for democracy, it should be remembered that the legal process of regulation-making, in itself, has provided a basic level of public notice

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[2]Report on Bill C-62, prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995.

[3]*Ibid,* Appendix A, pp.90-97.

[4]*Ibid.* pp.90-91.

[5]*Ibid.* p.91.

and information, with opportunities for public involvement and accountability through reporting. It has also provided impetus for legitimate public debate. Removal of this process seriously undermines these public values.

The breadth of this exemption raises concerns, similar to those raised by the *Regulatory Efficiency Act,* that Canada will have a two-tier justice system: public laws for most citizens, and private, unpublished regulations for those interests that can lobby for them.

RECOMMENDATION 1:

> **The powers to exempt regulations from the regulatory process should not be expanded beyond those currently in the *Statutory Instruments Act.***

2. Apparent reduction in legal scrutiny of regulations prior to promulgation.

The *Statutory Instruments Act* currently prescribes issues to be considered by the Privy Council Office and the Department of Justice in examining proposed regulations.[6] These include several that are not encompassed in the corresponding provisions of Bill C-25, Sections 6 and 7. The deleted criteria for review include whether the proposed regulation constitutes an "unusual or unexpected use" of authority, and whether it affects existing rights and freedoms, or is inconsistent with the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights.

Further, Bill C-25 removes the mandatory examination of each regulation by the two authorities, the Privy Council and Department of Justice.

These changes may or may not be of significance, depending on the intentions of the government. If the same level of scrutiny is intended, the listed criteria and named reviewers should not be deleted. Sceptics must wonder if this is a cost-cutting measure which will lead to less professional scrutiny of proposed regulations. If the scrutiny will be less, we risk having poorer drafting and more litigation over unauthorized exercise of power by officials.

RECOMMENDATION 2:

> **Current criteria and levels of professionalism for review of proposed regulations should be maintained.**

3. Lack of certainty and speed in publication of regulations in the future.

The *Statutory Instruments Act* requires that the Queen's Printer publish the Canada Gazette and that regulations, with few exceptions, be published there within twenty-three days after

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[6]*Statutory Instruments Act,* Section 3 (2) (a to d).

registration by the Clerk of the Privy Council.[7] Bill C-25 implies that the Canada Gazette will continue, but the timeline of twenty-three days has been changed to "as soon as possible" after registration.[8] This is an unenforceable timeline, and should be replaced with one that is reasonable, in terms of current resources. This deletion is contrary to public demands, from all sectors, for a speedier process of regulation-making.

Further, Section 10(3) of the Bill contemplates increased use of means other that the Canada Gazette for publication, namely means:

> that the Clerk considers will be effective in bringing the substance of the regulation to the notice of persons likely to be affected by it, and in that case notice of the making of the regulation, with a reference to the manner of its publication, must be published in the Canada Gazette as soon as possible after it is registered.[9]

This approach reflects a failure to recognize that all Canadians are affected by our legal structure, and are entitled, as citizens, to have access to regulations. The Canada Gazette provides a basic guarantee of access. It is not good enough for governments to guess at what persons might be affected by a regulation; omissions and mistakes can be made.

An example of this approach can be seen in public notice practices in Ontario regarding timber management planning on Crown lands. Typically, officials of the Ministry of Natural Resources use a hit-and-miss approach to inform "interested persons" of the process. This results in long lists of mailings which typically go to many who are not interested, and miss many who are.

In a time of cost-cutting by governments, this kind of practice may add more complexity, not less, to public notice of regulations.

Furthermore, it undermines enforcement of regulatory requirements by providing more defences for non-compliance. Individuals may argue (honestly or dishonestly) not merely that they did not know the law (an unacceptable defence) but that they could not have known of the law. The provisions of Section 11 of the Bill[10] do not resolve this problem; a court will have to consider whether the steps taken to provide notice were so compelling as to allow it to presume knowledge of the law in the accused.

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[7] *Statutory Instruments Act*, Sections 10 and 11.

[8] Bill C-25, Section 10.

[9] This practice has also been permitted by Section 20(c) of the *Statutory Instruments Act*.

[10] Section 11 provides that no one can be convicted of an offence under a regulation that was not published (under Section 10) unless the person had actual notice, or "reasonable steps had been taken to bring its substance to the notice of persons likely to be affected by it."

RECOMMENDATION 3:

> **A reasonable timeline for publication of regulations in the Canada Gazette should be implanted in Bill C-25, and all regulations subject to the regulatory process should be published in it. Other additional means of publicizing regulations may be appropriate in various instances.**

4. Implications of the provisions regarding incorporation by reference.

The apparent intention of the government to expand incorporation by reference, implied in Sections 16 and 17 of Bill C-25 is fraught with legal and policy problems.

While it can be sensible and efficient to incorporate documents by reference into regulation[11], this should only be done when the incorporated document has been thoroughly reviewed by regulators, and has been subject to meaningful public consultation.

Lack of Standards

The apparent intention to incorporate products of the Standards Council of Canada and industrial or trade organizations raise serious concerns. These bodies are not elected or accountable to the citizens of Canada. They typically operate with unrepresentative, industry-heavy participation, in deliberations that are private or inaccessible to the public for reasons of cost. Their products are developed in the interests of the industries that commission and fund them, not in the public interest. Their documentation, which Bill C-25 proposes to include in the public law of Canada, are typically not available to the public except at cost. For example, the ISO 14000 series on environmental management costs approximately three hundred dollars to purchase; it is not made available otherwise, even in repositories like libraries.

The public has no access whatever to the governmental committees that negotiate world trade agreements. Access to the "standards" bodies mandated by the agreements (ie. Codex Alimentarius) is similarly restricted; membership is overwhelmingly dominated by business interests.

A very relevant example of the dangers of this direction arises from the undeserved prominence being given to documents produced through processes of the International Standardization Organization (ISO). The ISO has done useful work globally in the past regarding standardization of industrial processes. However, it is now promulgating management certification systems which governments are mistakenly citing as substitutes for environmental regulation. A useful critique of its environmental management series, ISO 14000, has been produced for The European Environmental Bureau by Benchmark Consulting

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[11]Such as the Air Navigation Orders pertaining to flight safety in Canada, regulated in the early 1980s.

of Portland, Maine.[12] In summary,

> The International Organization for Standardization (ISO) 14000 series takes the ISO into a new domain of public rather than engineering, standards setting, and pushes the argument for business "self-regulation" into a new phase. Unlike the British BS7750 or the European EMAS, the ISO presents a system for global environmental management that was drafted sans public debate; will be implemented regardless of public opinion or pre-existing international environmental conventions; measures a firm's conformance with its management system, not its environmental, health and safety performance; produces volumes of environmental information that is confidential and need not be given to the public, government authorities or workers; and requires compliance only with local regulation, not with international or even the firm's home country standards.[13]

The process of development of certification of allegedly sustainable forest operations by the Canadian Standards Association, Canadian Pulp and Paper Association, and provincial and federal governments has been similarly widely criticized.[14]

A fundamental deficiency of these processes is that they do not produce standards for performance; they merely produce processes for certifying management systems. Fundamentally, they certify, through confidential auditing, whether a company has a management system that delivers whatever its environmental goals are. These goals need not entail any substantive steps toward environmental protection. The documents do not set standards; they merely require compliance with local standards.

If the government of Canada ceases to set standards through regulation, and incorporates ISO and CSA documents by reference into regulation, we will have no enforceable performance standards. Rather, we'll have ISO requiring compliance with local standards; we'll have no local standards; we will be left with an empty circle of words.

Lack of enforceability

Clearly, the inaccessibility of these documents and their non-publication cause the same problems for enforceability noted above regarding regulations that are not published in the Canada Gazette. However, in addition, since Section 19 of Bill C-25 specifies that incorporation of a document by reference into a regulation does not make the document a

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[12]Benchmark Environmental Consulting: ISO 14000: An Uncommon Perspective; five questions for proponents of ISO 14000 series; October 1995.

[13]*Ibid,* Introduction.

[14]An Environmentalist and First Nations Response to the Canadian Standards Association Proposed Certification System for Sustainable Forest Management. M. Swenarchuk, November 1995.

regulation "for the purposes of this Act",it appears that they will not be enforceable.[15] What then is the purpose of incorporating them in the first place? Merely to substitute for actual, enforceable regulatory standards?

If it is the intention of the government to make materials incorporated by reference enforceable legal standards, (where they incorporate performance standards) the wording of Sections 18 and 19, and the apparent conflict between them, should be resolved.

CELA RECOMMENDATION 4 a. and b.:

> **a. No documents should be incorporated by reference, including from the Standards Council of Canada, industrial or trade organizations, or international bodies, unless they include enforceable performance standards, and have been subject to meaningful public consultation, conducted by the relevant Canadian regulatory authority, which may result in necessary amendments for the purposes of regulation in the public interest.**
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> **b. The apparent contradiction between Sections 18 and 19 of the Bill should be resolved so as to ensure that performance standards incorporated by reference after public consultation are clearly enforceable.**

5. Failure to ensure open and meaningful public consultation in regulation making.

Finally, CELA regrets that the federal government has missed the opportunity presented by this re-write of basic regulatory law, to incorporate meaningful public consultation in all regulatory reform. A partial model can be found in the Ontario Environmental Bill of Rights, which requires posting of notices of significant environmental decision-making on an electronic registry, and the right of the public to comment and/or appeal them. Instead, we foresee fewer opportunities for public involvement in federal regulation making under this Bill.

CELA RECOMMENDATION 5:

> **That the federal government consider means, analogous to those in the Ontario Environmental Bill of Rights, to entrench rights of public notice, comment, and participation in regulatory change.**

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[15]There appears to be a contradiction between Section 19 and section 18 which contemplates that material incorporated by reference could be the basis of an offence and penalty.

SUMMARY OF CELA RECOMMENDATIONS:

1. The powers to exempt regulations from the regulatory process should not be expanded beyond those currently in the *Statutory Instruments Act.*

2. Current criteria and levels of professionalism for review of proposed regulations should be maintained.

3. A reasonable timeline for publication of regulations in the Canada Gazette should be implanted in Bill C-25, and all regulations subject to the regulatory process should be published in it. Other additional means of publicizing regulations may be appropriate in various instances.

4a. No documents should be incorporated by reference, including from the Standards Council of Canada, industrial or trade organizations, or international bodies, unless they include enforceable performance standards, and have been subject to meaningful public consultation, conducted by the relevant Canadian regulatory authority, which may result in necessary amendments for the purposes of regulation in the public interest.

4b. The apparent contradiction between Sections 18 and 19 of the Bill should be resolved so as to ensure that performance standards incorporated by reference after public consultation are clearly enforceable.

5. That the federal government consider means, analogous to those in the Ontario Environmental Bill of Rights, to entrench rights of public notice, comment, and participation in regulatory change.