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IMPROVING THE REGULATORY PROCESS

Speech to the Canadian Club of Toronto

by

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What I would like to do today is to make some observations about the problems which are caused for the business community by the ease and frequency with which government changes regulations. My observations are based on my experience at seeing first-hand both how government regulatory decisions are made and the unforeseen impact these decisions can have on the business community. The proposals for action which I will suggest reflect my belief that many unnecessary business-government clashes would be avoided if only government realized before new regulations were put into effect what their full impact on the business community would be.

It was, in fact, my concern with regulatory policies and processes which led me to focus much of IRPP's current work on regulation and government intervention issues. I remain very concerned about the impact regulation is having on the economy and the burden it places on the private sector. This burden is not only the cost which firms must bear in meeting the ever-increasing number of regulations which emanate from government. It is also the burden of the uncertainty - the persistent worry - generated by the almost certain knowledge that these regulations will be changed after business has made a major investment decision.

Most of you would agree that uncertainty about possible changes in government policy and regulations is one reason why business people move slowly and cautiously before deciding to make the kind of major new investments which are essential to the growth of the Canadian economy. Indeed,

this uncertainty is the basis for much of the business community's criticism of government. I believe, however, that there are some steps which can, and should, be taken by government to reduce the problem of uncertainty.

To begin with, it is necessary to remind ourselves that the fundamental cause of the problem stems from the general principle of the British parliamentary system: namely, that it is impossible to limit future government actions because Parliament is supreme. This means that Parliament can change the rules of the game anytime it desires. In effect, there is virtually no limit to the power of government as long as it retains the majority of votes in Parliament.

This concept of the sovereignty of Parliament may have made sense back in the days when the British Parliament was investing itself with the authority to override the power of the barons and the church. But it makes little sense today when government is so extensively involved in the economy.

Because government's involvement in the economy is so pervasive, the time has come when government must voluntarily agree to reduce its power to change the rules which affect major business decisions once those decisions have been made. For the current system, whereby the rules can be changed midway through the payback period of a major investment, is an unsettling element which inhibits long-term business investment. Our economy will thrive only if decisions can be made in an environment in which the major factors affecting investment decisions remain as stable as possible over many years. I believe that government has an obligation to do what it can to create this stability.

When I was serving as a member of the Nova Scotia Public Utilities Board, I had a personal experience with the disastrous impact on the business community which changing the rules in mid-stream can have. In 1976, the provincial government decided that the government-owned electric utility, the Nova Scotia Power Corporation, would henceforth be subject to having its rates set by the Nova Scotia Public Utilities Board. When legislation was passed to implement this decision, no reference was made to what should happen to existing long-term electrical energy supply contracts which several major firms in the province had been given as an incentive to attract them to locate in Nova Scotia. In many cases, the price of electricity which these firms were being charged prior to 1976 was discriminatory because the same electrical rates were not being charged to similar firms who were members of the same customer class.

The Nova Scotia Public Utilities Act prohibits discriminatory rates. Therefore the Public Utilities Board had no choice but to rule that the contract rates had to be increased so that all firms in the same customer class would pay the same rate.

When this issue went to court, the Supreme Court of Nova Scotia ruled that because of the supremacy of the provincial legislature, and because the legislature had not explicitly said that the Nova Scotia Power Corporation should continue to honour its long-term contracts, the Public Utilities Board was duty-bound to change the discriminatory contract prices. Consequently, one of the basic factors which led certain firms to locate in Nova Scotia was changed to their considerable disadvantage. In fact, one of them was

forced to go out of business. In other words, government had changed one of the key rules of the game, well after the game had started, with disastrous consequences for the business community.

As long as government retains the power to take the kind of high handed action it did in this case, we cannot expect companies to make large investments in fixed assets from which the payback can come only over a considerable number of years. The calculation of benefits arising from a particular investment is usually based on the assumption that existing regulations will remain constant throughout the investment period. We therefore need to develop a system in which regulations that significantly affect the viability of an investment cannot be changed after the investment is made, without an adequate public hearing into the impact which the proposed changes will have on the private sector.

In saying this, I am not suggesting that government can be expected to exempt specific investments from the effect of future changes in broad policy, such as changes in the general level of taxation which apply to all businesses. Nor am I suggesting that there will be a great reduction in the role of government in the economy in the foreseeable future. For I do not believe this will happen.

Governments everywhere are caught on the horns of a dilemma: the whiplash of popular reaction against the size of government and, simultaneously, increased demands from citizens for greater government regulation in areas such as health, safety, the environment and resource

management. Thus, while there will be some cutbacks in federal and provincial programs, and some moves toward shifting the responsibility for certain programs from one level of government to another (the federal government passing the responsibility - but not the buck - to the provinces, with the provinces doing the same to the municipalities) the role of government in society in general, and in the economy in particular, will continue to grow whether some of us like it or not.

What I am suggesting therefore is that the practical (as opposed to the polemical) question which we should all be asking is not "how to reduce the size of government" but rather "how to make government function more effectively, with less waste and with less uncertainty, particularly in relation to the business community?" In answering this question, I begin from the premise that government processes must be changed because existing business investments must be protected as much as possible from changes - particularly regulatory changes - which are discriminatory in that they affect one industry more than another or one firm within an industry more than another firm in the same industry.

These types of regulatory changes, which are responsible for a great deal of government-generated uncertainty, are normally made without any right of appeal by those most affected and without their being debated in Parliament. This is a relatively recent phenomenon in our system of government, but it is becoming an increasingly important factor in government-business issues.

We have gone from a time when the legal instruments by which government affected business were mostly statutes, passed after lengthy parliamentary debate, to a system which produced many statutes which were little more than legal frameworks for making regulations by order-in-council. Such legislation in effect transferred power from Parliament to the executive branch of government. The Anti-Inflation Act of 1975 is an example in which the regulations pursuant to the Act were several inches thick and were never examined in depth by Parliament.

But now, even regulations resulting from orders-in-council are often little more than legal frameworks on which bureaucrats hang administrative rulings -- rulings which do not require any degree of endorsement or approval by politicians at either the executive or legislative level. Power has thus been transferred one step further down - from the executive to the bureaucracy. This further step away from political accountability is compounded by the fact that often overlapping (and sometimes contradictory) administrative rulings come from different parts of the same government (and even different parts of the same department).

I would therefore like to suggest some specific steps which could be taken to reduce the number of times in which government regulatory changes affecting business are made without careful public examination of their implications. Perhaps these steps could form the basis of something which governments might well consider - a business Bill of Rights.

First, I propose that new regulations be published in the Canada Gazette at least sixty days before they go into effect. This requirement already exists for some government agencies in the United States, such as the Environmental Protection Administration.

Second, if there are significant objections to a proposed new regulation, a formal public hearing procedure before a standing parliamentary committee on regulations should be required. This would guarantee public debate and scrutiny of a regulation before it became law. The U.S. National Highway Traffic Safety Administration now follows such a procedure. If we did the same in Canada, regulations would cease to be mere skeletons whose substance can be fleshed out later by bureaucratic fiat. Regulations would have to be detailed enough that they could be used effectively by administrators. Thus responsibility and accountability would be returned to the political level of government where they belong.

Third, regulations which are deemed by the parliamentary committee on regulations to have a very major effect on the economy should be made subject to a parliamentary vote before implementation. I realize that Parliament is already over-burdened, but perhaps it should review its priorities. What is the sense of Parliament spending its time debating the principles of a bill when the way in which these principles are applied is fundamental to the determination of whether or not the bill should receive parliamentary approval?

Fourth, administrative rulings should be subject to an appeal procedure. An impartial adjudicator should hear both sides of a contentious administrative ruling and hand down a decision before the ruling is implemented. We have made it far too easy for officials - no matter how well-meaning they are - to make rulings which cannot be challenged. Justice requires that the public and the business community should have the right to appeal administrative rulings which they regard as unjust or inequitable.

These proposals are not band aid measures. To be implemented, they require a major change of heart by all governments, provincial as well as federal. They require governments to forfeit their power to change retroactively major conditions which affect business decisions and instead use ~~their power to influence business decisions~~ before they are made.

They would also make it more difficult for new regulations to be enacted. Thus, they can be regarded as a form of regulatory birth control - a situation which I expect many of you would support.

But that is not the principal reason for my suggestions. My principal argument for reform stems from my firm belief that all interested parties should be given an opportunity to express their views on major changes in regulations which affect them before those changes go into effect. In a sense, therefore, these ideas form the basis for not just a business Bill of Rights, but for a Bill of Rights for any private sector group which is affected by regulatory processes.

Most importantly, however, my scheme would also give political decision makers the time to react to community opinion about proposed new regulations, or changes in existing ones, before the decision is made to implement them. This would lead, I hope, to sober second thoughts about many regulatory changes which are now made quickly, based only on information generated within government itself.

What are the chances of government adopting such apparently pro-business ideas? I say apparently because they are really designed to correct the imbalance which now exists between the power of government and the power of other decision-making groups in the community. They are also designed to help reduce avoidable uncertainty and so make at least one part of our economy function more efficiently.

Whether my proposals will be implemented depends on many things. But four stand out: First, government must be prepared to impose on itself at least some of the discipline of self-regulation which it so often urges upon business. Second, in order to be able to influence business decisions before they are made, government must be prepared to undertake the same kind of long-term planning which business must do when it makes long-term investment decisions. Third, government must become more open than it has been in the past; it must be willing to tell the rest of us what it is 'planning' to do. Fourth, government must agree to new decision-making procedures which would ensure that certain types of changes are made - and are seen to be made - only after due deliberation by due process.

I am not particularly optimistic that government will, of itself, be prepared to stick its neck out and plan openly for the future. It is far easier, from a political point of view, to operate in a transactions mode, (to use a metaphor from computers), reacting to problems as they arise and to pressures as they are exerted by special interest groups. Moreover, while the kind of open planning I am suggesting will be greeted with enthusiasm by many senior members of the bureaucracy who are very concerned about the same issue I am, I know that it will be strongly resisted by some bureaucrats who will resent a significant curbing of the power they now enjoy.

But the time for making changes has never been better. The current tide of popular enthusiasm for restraining arbitrary government power provides a unique opportunity to overcome governmental inertia and resistance. The Institute for Research on Public Policy has set as one of its goals to help capitalize on this tide by presenting options for improving regulatory processes in Canada.

We, at the Institute, realize that the proposals I have made will not solve all the business-government problems which face this country. But we believe that by introducing a public element into the regulation making process, governments will exhibit greater restraint in the development of new regulations. This, in turn, will lead to greater predictability in government actions, and, hopefully, will lead us toward a more conciliatory business-government relationship than we have now.