



Department of Justice  
Canada

Ministère de la Justice  
Canada

# **AUDIT OF REGULATORY SERVICES**

**Report presented to the Departmental Audit Committee  
by Internal Audit Services  
Department of Justice Canada**

**Approved by the Deputy Minister on March 28, 2017**

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# Executive Summary

## Introduction

In Canada, regulations are made by persons or bodies, such as the Governor in Council, a minister, or an agency to whom Parliament has delegated its authority in an Act. Regulations have binding legal effect and usually set out rules of general application rather than rules that are directed toward a specific person or situation.

The Department of Justice (the Department) plays an important role in supporting the federal regulatory system by:

- Advising on the regulatory process through its interactions with regulatory organizations (federal departments and agencies who regulate). This includes the important role played by the Departmental Legal Services Units (DLSUs) throughout the regulatory development process, including their involvement from the outset, during policy development;
- Providing legal advice on the authority under which regulations are made and determining whether documents are subject to the regulatory process;
- Providing the executive with proposed regulations that are clear, concise and enforceable, that say the same thing in both official languages, that are co-drafted based on bilingual instructions provided by regulatory organizations and, where necessary, that respect and take into account Canada's bijural legal system;
- Examining regulations under the *Statutory Instruments Act* (SIA);
- Ensuring that proposed regulations are consistent with international legal obligations and international trade obligations; and
- Providing legal advice to regulatory organizations to address feedback from the Standing Joint Committee for the Scrutiny of Regulations (SJCSR).

The SIA sets out the requirements for the legal examination, registration and publication of regulations in the *Canada Gazette*. The Department's Public Law and Legislative Services Sector (PLLSS or the Sector) examines proposed regulations under the SIA to ensure that:

- They are within the scope of the enabling authority;
- They do not constitute an unusual or unexpected use of the regulation-making powers;
- They do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
- Their form and draftsmanship are in accordance with established standards.

In the delivery of regulatory services, the PLLSS works collaboratively with key stakeholders including regulatory organizations and central agencies such as the Treasury Board of Canada Secretariat Regulatory Affairs Sector (TBS-RAS) and the Privy Council Office.

The objective of this audit was to assess the processes and practices that are in place to support the Department's delivery of regulatory services to meet the government's regulatory priorities in partnership with central agencies and regulatory organizations.

To achieve this objective, we assessed the activities related to the regulatory services provided by the Department through its Headquarters Regulations Section (HQRS) and the departmental regulations sections that are co-located in departmental offices at Transport Canada and Health Canada. The DLSUs were also considered in their role to support the delivery of regulatory services. Audit findings and recommendations

are addressed directly to the Department and cover the processes and practices that were in place from April 2014 to March 2016.

## **Strengths**

The Sector has introduced planning and prioritization processes at the individual regulatory organization level. To support alignment of its resources with government-wide regulatory priorities, PLLSS has made efforts to increase the exchange of information with TBS-RAS and has established mechanisms at the front-end of the process to confirm prioritization with its partners. There was a clearly defined regulatory services process within the Department that was generally well understood among departmental staff, as well as representatives from its partners. Project management tools were in place to support clarity of roles and responsibilities and help the Sector manage timelines for the significant volume of regulations it examines.

## **Areas for Improvement**

Opportunities to improve the prioritization information gathered from regulatory organizations were identified. Establishing a common prioritization scale, linking regulatory proposals to government-wide priorities and consolidating information across government organizations will help the Sector further improve its planning and prioritization activities. Opportunities to facilitate information-sharing on government-wide priorities through the Sector's participation in cross-departmental committees related to the regulatory process were also identified.

Refinements to further clarify the roles and responsibilities of revisors, jurilinguists and legislative counsel regarding the integration and disposition of comments and/or revisions provided by the revisors and jurilinguists and to support consultation with the Bijuralism Group earlier in the regulatory process were identified.

Finally, opportunities were identified to fully leverage the data in the existing legal case management system to support development of management reporting, decision-making and resource management.

## **Audit Opinion and Conclusion**

In my opinion, the Department has established adequate processes and practices to support the delivery of regulatory services to meet the government's regulatory priorities in partnership with central agencies and regulatory organizations. The PLLSS has established processes to support planning and prioritization through its suite of project management tools. The Sector has made efforts to increase collaboration with TBS-RAS to seek prioritization input on files at the individual department level. Opportunities exist to further leverage prioritization information gathered, in order to continuously strengthen the alignment of its resources with government-wide regulatory priorities. Processes, roles and responsibilities are defined, communicated and generally well understood, with some improvement opportunities identified regarding the engagement of the Revision Services and Bijuralism Groups. Limited monitoring and management reporting tools are in place, presenting significant opportunities for PLLSS to start leveraging its data to support reporting, decision-making and resource management.

## **Management Response**

Management is in agreement with the audit findings, has accepted the recommendations included in this report, and has developed a management action plan to address them. The management action plan has been integrated in this report.

## 1. Statement of Conformance

In my professional judgment as Chief Audit Executive, the audit conforms to the *Internal Auditing Standards for the Government of Canada*, as supported by the results of the Quality Assurance and Improvement Program.

Submitted by:

Original signed by Inanc Yazar  
March 28, 2017

Inanc Yazar, CPA CGA, CIA, CRMA  
Chief Audit Executive  
Department of Justice Canada

## 2. Acknowledgement

The Chief Audit Executive would like to thank the audit team and those individuals who contributed to this engagement and particularly, employees who provided insights and comments as part of this audit.

## 3. Background

As a key policy instrument used by the Government of Canada, regulations are a form of law that enables economic activity and protects the health, safety, security, and environment of Canadians.

In Canada, regulations are made by persons or bodies, such as the Governor in Council, a minister, or an agency to whom Parliament has delegated its authority in an Act. Regulations have binding legal effect and usually set out rules of general application rather than rules that are directed toward a specific person or situation.

Given the impact that regulations can have on Canadians and our economy, the federal regulatory system is highly structured so as to provide a consistent approach to making regulations across government while ensuring that the policy commitments and legal obligations of the Government of Canada are met. As a structured system, it is defined both by specific legal requirements set out in the *Statutory Instruments Act* (SIA) and by policy requirements that are defined by the Treasury Board of Canada Secretariat Regulatory Affairs Sector (TBS-RAS).

There are a number of key organizations involved in the regulatory development process, whose roles and responsibilities include:

- Regulatory organizations: develop and propose regulations in specified areas of public policy. Regulatory organizations include federal departments and agencies such as Transport Canada, Health Canada, Environment Canada and the Canadian Food Inspection Agency to name a few.
- Treasury Board: as a committee of Cabinet ministers, provides advice to the Governor General on regulatory proposals.

- Governor in Council: The Governor General of Canada acting by and with the advice and consent of the Queen's Privy Council of Canada (i.e. Cabinet) makes or approves regulations, other than those for which Ministers or other entities are the delegated regulation-making authority.
- TBS-RAS: provides guidance and advice to departments and agencies on the development of regulatory proposals, reviews and challenges the proposals, promotes policy coherence among new proposals, existing policies and the government's policy agenda.
- Department of Justice Canada: provides regulatory services, which includes (but are not limited to) legal advice, examination of proposed regulations and regulatory drafting services (further described below).
- Privy Council Office: through the Orders in Council division, receives Governor in Council regulatory submissions from regulatory organizations, examines the regulatory proposal in consultation with the Deputy Minister of Justice, advises the Treasury Board Cabinet Committee that the proposed regulations have been examined, and registers regulations after they are made.
- Public Services and Procurement Canada: publishes the *Canada Gazette*, where proposed regulations are published in Part I and regulations that have been made are published in Part II.
- Standing Joint Committee for the Scrutiny of Regulations (SJCSR): Scrutinizes any statutory instrument<sup>1</sup> made on or after January 1, 1972, in accordance with the SIA.

There have been significant changes to the Government of Canada's approach to regulatory management in recent years. The *Cabinet Directive on Regulatory Management* came into effect on April 1, 2012<sup>2</sup>. It takes a "life cycle" approach to regulation making, and impacts all stages of the regulatory life cycle (i.e. planning, development, implementation, evaluation, and review).

### ***Department of Justice's Role***

The Department plays an important role in supporting the federal regulatory system by:

- Advising on the regulatory process through its interactions with regulatory organizations. This includes the important role played by the Departmental Legal Services Units (DLSUs) throughout the regulatory development process, including their involvement from the outset, during policy development;
- Providing legal advice on the authority under which regulations are made and determining whether documents are subject to the regulatory process;
- Providing the executive with proposed regulations that are clear, concise and enforceable, that say the same thing in both official languages, that are co-drafted based on bilingual instructions provided by regulatory organizations and, where necessary, that respect and take into account Canada's bijural legal system;
- Examining<sup>3</sup> regulations under the SIA;
- Ensuring that proposed regulations are consistent with international legal obligations and international trade obligations; and
- Providing legal advice to regulatory organizations to address feedback from the SJCSR.

The SIA sets out the requirements for the legal examination, registration and publication of regulations in the *Canada Gazette*. Legislative counsel examine proposed regulations under the SIA to ensure that:

- They are within the scope of the enabling authority;

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<sup>1</sup> A statutory instrument is "any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established ... in the execution of a power conferred by or under an Act of Parliament. ..."

<sup>2</sup> The *Cabinet Directive on Regulatory Management* is currently under review by the Treasury Board of Canada Secretariat.

<sup>3</sup> It is recognized that as part of the regulatory process, proposed regulations that have been examined under the *Statutory Instruments Act* are stamped by the Regulations Section of the Department of Justice.

- They do not constitute an unusual or unexpected use of the regulation-making powers;
- They do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
- Their form and draftsmanship are in accordance with established standards.

### ***Public Law and Legislative Services Sector***

Legislative counsel are employed by the Department's Public Law and Legislative Services Sector (PLLSS), which was formed in February 2016. Prior to February 2016, legislative counsel providing regulatory services were part of the Legislative Services Branch (LSB). In 2015-16, the LSB represented approximately 6% of the total departmental operating expenditures for legal service costs (i.e. \$23.5M/\$396.6M<sup>4</sup>). There were 127 FTEs providing regulatory services through Headquarters and departmental regulations sections in the two most recent fiscal years, with the total FTEs within the LSB ranging from 122 FTEs to 137 FTEs during the past five years. The regulatory services provided by legislative counsel are delivered through the Headquarters Regulations Section (HQRS) and departmental regulations sections that are co-located in departmental offices at Health Canada, Transport Canada, and National Defence. Departments that do not have a co-located regulations section access HQRS' regulatory services through the DLSUs. As part of the recent update to the Department's funding model, since April 1<sup>st</sup>, 2016 PLLSS' services, other than those of the departmental regulations sections, are included as an overhead component in the legal services rates, rather than being cost-recovered.

It is important to note that the Tax Counsel Division of the DLSU to the Department of Finance prepares tax regulations. As a result, the Assistant Deputy Minister responsible for this DLSU, as Counsel to the Department of Finance, has been delegated the authority to examine regulations under Acts including the *Income Tax Act* and *Excise Tax Act*. This group, as well as the departmental regulations section at National Defence were not included in the scope of the audit.

The regulatory services provided by the HQRS and departmental regulations sections are complemented by PLLSS' Advisory and Legislative Revision Services Group, and Bijuralism Group. The Advisory and Legislative Revision Services Group performs two key functions: advisory work and the revision of legislative texts. The advisory work includes, but is not limited to, advice on legal, policy and language matters related to the drafting, enactment, operation and interpretation of legislative texts. The revision services provide a key quality control measure by assisting legislative counsel in achieving, in both official languages, the highest possible quality of language in the legislative texts prepared for the proposed regulations. As bijural experts, the Bijuralism Group assists legislative counsel in revising their draft legislative texts with respect to bijuralism, in order to ensure, where necessary, that proposed regulations that touch on provincial or territorial private law, respect and take into account both the civil law and common law legal rules, concepts, notions, institutions and terminology in both official languages.

There is a high volume of regulations stamped (for publication in the *Canada Gazette*, Parts I and II) by the PLLSS each year. In addition to examining regulations proposed by sponsoring departments, the legislative counsel in the HQRS also examine:

- Orders in Council made by the Governor in Council to address a wide range of administrative and legislative matters (e.g. proclamations proroguing and recalling Parliament, orders reorganizing portions of the public service, etc.)
- Regulations proposed by Crown Corporations and separate agencies, such as the National Energy Board and the Canadian Radio-Television and Telecommunications Commission.

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<sup>4</sup> Source: Costing and Reporting, Management and CFO Sector, Department of Justice.

The following table summarizes by fiscal year the total number regulations and Orders in Council published in the *Canada Gazette*, Part II by fiscal year.

| Documents published in the <i>Canada Gazette</i> , Part II | 2011 | 2012 | 2013 | 2014 | 2015 |
|--|------|------|------|------|------|
| Total Number of Regulations                                | 330  | 306  | 260  | 322  | 257  |
| Total Number of Orders in Council                          | 121  | 102  | 129  | 112  | 114  |

It is important to note that the HQRS also drafts and examines Orders in Council that are not published in the *Canada Gazette* (approximately 1,000 per year).

#### 4. Audit Objective

The objective of this audit was to assess the processes and practices that are in place to support the Department’s delivery of regulatory services to meet the government’s regulatory priorities in partnership with central agencies and regulatory organizations.

#### 5. Audit Scope

The scope included activities related to the regulatory services provided by the Department through its HQRS and the departmental regulations sections in Transport Canada and Health Canada. The DLSUs were also considered in their role to support the delivery of regulatory services. Emphasis was placed on the regulatory services for Governor-In-Council<sup>5</sup> and Ministerial<sup>6</sup> regulations, recognizing that the SIA does not distinguish between the makers of regulations in terms of the legislative scheme or give priority to one type of regulation.

By focusing on the interactions between the Department, central agencies and regulatory organizations, the audit considered the planning, prioritization, roles, and responsibilities related to the delivery of regulatory services. Audit findings and recommendations are addressed directly to the Department.

The audit scope did not include:

- The Department of National Defence regulations unit, given that the majority of this unit’s work involves the Queen’s Regulations and Orders that are not published in the *Canada Gazette*.
- Examination of tax regulations, as this authority has been delegated to the Tax Counsel Division of the Department of Finance.
- Orders in Council examined by the HQRS and the departmental regulations sections. These legal instruments are made by the Governor in Council pursuant to a statutory authority and address a wide range of administrative and legislative matters (e.g. proclamations proroguing and recalling Parliament, orders reorganizing portions of the public service, etc.).

The audit covered the processes and practices that were in place from April 2014 to March 2016. For the purposes of data and trend analysis, the time period extended back to April 2011.

<sup>5</sup> Governor in Council (GIC) Regulations: The Prime Minister has designated the Treasury Board as the Cabinet Committee advising the Governor General on regulations. GIC regulations are the most common, and are to follow the Treasury Board of Canada Secretariat’s (TBS’) *Guide to the Federal Regulatory Development Process*. This process includes TBS’ central agency review and challenge regulatory proposals.

<sup>6</sup> Ministerial Regulations: The enabling Act gives a minister or head of an agency the authority to make regulations.

## 6. Audit Approach

The audit team carried out its mandate in accordance with Treasury Board's *Policy on Internal Audit* and the *Internal Auditing Standards for the Government of Canada*. The audit employed various techniques including a risk assessment of the audit entity, interviews, and the review and analysis of documentation and illustrative file examples.

## 7. Findings, Recommendations and Management Response and Action Plan

This section outlines observations and recommendations resulting from the audit work performed. For ease of review, observations and recommendations have been structured along the lines of enquiry and audit criteria identified in the planning phase of the audit. For a list of audit criteria please refer to Appendix A.

### 7.1 Planning and Prioritization

The audit examined the extent to which mechanisms are in place within PLLSS to support the planning and prioritization of regulatory services in alignment with government-wide priorities. We considered the information gathered by PLLSS from regulatory organizations, in addition to the mechanisms to support timely information-sharing for planning and priority-setting between the Department, regulatory organizations, and central agencies involved in the process such as TBS-RAS. The observations described below are focused on the activities under the mandate of Justice Canada, where opportunities to increase collaboration have been identified. Effective planning and prioritization mechanisms are important given the significant volume of regulations that are examined by PLLSS (as described in Section 3 above) and the competing demands on resources from the Sector's client base.

We found that the PLLSS has implemented measures to obtain planning and prioritization information at the individual regulatory organization level. The Sector has made efforts to establish open lines of communication with the TBS-RAS to seek input on file readiness and target deadlines, on an ad-hoc, as needed basis. Opportunities exist to continue collaboration efforts with TBS-RAS and other cross-government channels such as the Assistant Deputy Minister (ADM) Steering Committee on Regulatory Management and the Community of Federal Regulators (CFR) ADM Steering Committee, in addition to standardizing and consolidating prioritization information gathered from regulatory organizations to support alignment with government-wide priorities.

#### *PLLSS' Planning and Prioritization practices to support alignment with Government-wide Priorities*

The PLLSS has implemented measures to gather information on regulatory priorities at the individual regulatory organization level. These measures include coordination mechanisms with high-volume regulators to periodically receive forward-looking regulatory project information such as targeted dates for publication in the *Canada Gazette*, coming into force dates and prioritization. The Sector's managers liaise with these high-volume regulators, and their respective DLSUs, to confirm their understanding of regulatory file priorities. Liaison efforts range from weekly coordination at the Health Canada and Transport Canada Regulations Sections, to quarterly and semi-annual meetings with other high-volume regulators. Planning and prioritization for files received from lower-volume regulators occurs on an individual file basis, as regulatory service requests are received.

In addition, PLLSS has implemented mechanisms at the file-opening stage to validate the regulatory organization's readiness and to confirm prioritization of the file in relation to other files the regulatory organization may have in-progress. A file opening form includes ADM sign-off, demonstrating support from the sponsoring regulatory organization at a senior level. This form was introduced a year ago through collaboration between the Department and the TBS-RAS, and was acknowledged by DLSUs as a good practice.

We identified opportunities to refine the file opening form to standardize the prioritization information gathered and leverage prioritization scales established by mature regulatory organizations. Currently, the prioritization information received varies from straight-forward numbered lists to more sophisticated analyses of prioritization, following prioritization scales and guidance set by each regulatory organization. Further, some regulatory organizations make clear linkages between the proposed regulation and government-wide priorities, such as the priorities identified in the Speech from the Throne and the Ministerial Mandate Letter.

Without a common scale to collect consistent prioritization information across regulatory organizations and clearly tying them to government-wide priorities, the Sector's efforts to plan for upcoming demand and balance competing priorities for its services will be challenged. Furthermore, demand for regulatory services could increase as a result of the change in the Department's funding model from cost-recovery to the application of PLLSS' costs as part of the overhead component in the legal service rates. Standardizing planning and prioritization information gathered will help the Sector to continue to align its resources to government-priorities and become more agile when priorities change.

We also identified opportunities for the Sector to consolidate file prioritization information across regulatory organizations centrally. Currently, the Sector does not consolidate the active and expected regulatory file information, along with associated deadlines. Legislative counsel manage their file load and deadlines, but a big-picture view of the current and upcoming demand for regulatory services is not readily available to senior management.

### ***Information-Sharing with central agencies and regulatory organizations***

We found that the Sector has increased its efforts over the past few years to collaborate and share information with the TBS-RAS. The Sector liaises with TBS-RAS to confirm timelines and file readiness for individual files as needed, in addition to receiving aggregate information from TBS-RAS regarding upcoming files. This type of information sharing helps PLLSS become more agile in responding to changing priorities, and also serves to increase the Sector's efficiency by focusing on the highest regulatory priorities.

In addition, PLLSS also participates in cross-departmental committees related to regulatory management, such as the ADM Steering Committee on Regulatory Management and the CFR ADM Steering Committee. PLLSS is a member of the ADM Steering Committee on Regulatory Management, a forum for information-sharing regarding regulatory issues management and policy implementation. Similarly, the department participates in the CFR ADM Steering Committee, a committee that provides strategic direction to the CFR, whose mission is to 'enhance and sustain the capacity of the federal regulatory community through learning, partnerships and best practices'. These committees do not currently provide PLLSS with a forum to discuss the prioritization information at the organizational file level or government-wide.

Interviews conducted with a sample of DLSUs identified an opportunity for the Sector to enhance the proactive sharing of information with regulatory organizations regarding the prioritization of their regulatory files in relation to other active files. While it was recognized that the Sector shares estimated timeline information on an individual file basis, increasing communication with regulatory organizations and their

respective DLSUs on file prioritization across all government organizations could increase transparency on the competing demands on the Sector's resources and help organizations better understand the impact on timelines from changing government-wide priorities.

## **Recommendation 1**

It is recommended that the ADM, PLLSS:

Leverage existing government-wide forums (such as the ADM Steering Committee on Regulatory Management) to improve horizontal prioritization through the use of tools and templates that gather and consolidate regulatory file prioritization information.

### **Management Response and Action Plan**

Management of the PLLSS agrees with this recommendation and will engage with the Privy Council Office, TBS-RAS and ADM Steering Committee on Regulatory Management to improve the consistency in prioritization tools in order to permit the consolidation of regulatory file prioritization information across all government organizations. This would consider (but not be limited to) the following:

- a. Identifying a common prioritization scale, by considering the best practices and prioritization scales used by high-volume mature regulatory organizations such as Environment Canada, Transport Canada, and Health Canada.
- b. Updating PLLSS' file opening form to incorporate the common prioritization scale (determined in item a, above), as well as the linkages to government-wide priorities.
- c. Establishing a process to consolidate the regulatory file prioritization information across all government organizations as means of developing a consolidated list that can be used by PLLSS to get a big-picture view of the current demand for regulation services.

### **Office of Primary Interest**

ADM, PLLSS

### **Due Date**

February 28, 2018

## **7.2 Process, Roles and Responsibilities**

The audit examined the extent to which the Department's roles, responsibilities, processes and practices related to the provision of regulatory services are clearly defined and communicated. This included reviewing the processes, roles and responsibilities of the various groups within the PLLSS including Headquarters Regulations and Departmental Regulations Sections, Advisory Services & Legislative Revision Group, and Bijuralism Group. We also considered PLLSS' interactions with DLSUs on regulatory files. We also examined the mechanisms in place to support quality control and draftsmanship standards. Our audit work included interviews, examination of supporting documentation, and review of illustrative files showing the interactions between legislative counsel with internal and external stakeholders.

We found that the regulatory drafting process is clearly defined and generally well-understood. Opportunities to improve the design of the process were identified, to engage the bilingual experts earlier in the process to fully leverage their expertise. While roles and responsibilities are defined, communicated and generally well understood for Regulations Sections (i.e. Headquarters Regulations and the Departmental Regulations Sections), Advisory and Development Services Section, and DLSUs, opportunities were identified to support consultation with the Bilingualism Group earlier in the regulatory process.

### ***Roles and Responsibilities with External Partners***

We found that the Department's roles and responsibilities for the delivery of regulatory services have been clearly defined and communicated for its interactions with external partners. Regulatory services have been addressed in the Memoranda of Understanding (including addendums and annexes) that are established with each organization. Furthermore, as part of its project management suite, PLLSS has clearly defined its roles and responsibilities, along with those of the regulatory organization, in tools that are shared with organizations as each request for regulatory services is received and undertaken. These communication tools include process flow charts, summaries of roles and responsibilities, along with the *Regulatory Projects Handbook*, which provides additional details regarding the roles and responsibilities for the Instructing Officer, DLSU and Legislative counsel. Interactions between legislative counsel, DLSUs and the regulatory organizations throughout the regulatory services process further serves to strengthen the understanding of roles and responsibilities.

The PLLSS has also undertaken outreach activities to staff in regulatory organizations to support the communication of roles and responsibilities and raise awareness on areas of higher legal policy risk related to regulations (e.g. ambulatory incorporation by reference of internal documents and requests for exemptions from the SIA). In addition to these tailored presentations, the PLLSS also offers training with respect to legislative drafting and the regulatory process that are delivered by counsel, which are free and open to attendance by Justice employees as well as employees of regulatory organizations for general knowledge.

### ***Roles and Responsibilities within the Department***

#### **Interactions with the DLSUs**

We found that roles and responsibilities are defined, communicated and generally well understood for the Regulations Sections, Advisory and Legislative Revision Services Group, and DLSUs with respect to:

- The Regulations Sections' responsibilities to examine the proposed regulation pursuant to the SIA;
- The collaborative interactions between the Regulations Sections and DLSUs throughout the examination and drafting processes;
- The DLSU's responsibilities to review the completeness of bilingual drafting instructions and ensure consistency between these instructions and the policy intent;
- The DLSU's responsibilities to review documents that are to be incorporated by reference to see whether the technique can be used and whether the content of the documents is within the organization's regulation-making authority<sup>7</sup>;
- The Advisory and Development Services Section's roles and responsibilities to provide advice on the usage of incorporation by reference techniques and requests for exemptions from the SIA.

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<sup>7</sup> Incorporation by reference is a drafting technique that includes in a statute or regulation material contained in another document without reproducing the material word for word within the text of the statute or regulation. The material is not only referenced, it is also incorporated into the legislation. It is recognized that for Transport Canada, the Transport Canada Regulations Section is responsible to review documents incorporated by reference.

### Interactions with the Bijuralism Group: Process Design Refinement

The regulatory services process includes consultation with the Bijuralism Group. As bijural experts, the Bijuralism Group assists legislative counsel in revising their draft legislative texts with respect to bijuralism, in order to ensure, where necessary, that proposed regulations that touch on provincial or territorial private law, respect and take into account both the civil law and common law legal rules, concepts, notions, institutions and terminology in both official languages. This consultation occurs towards the end of the regulatory services process when the draft texts are being finalized for acceptance by the sponsoring regulatory organization, which limits the time available to incorporate their input prior to the stamping and publication of the proposed regulation. A process design improvement opportunity exists to move the consultation with the Bijuralism Group earlier in the process, so that their input can be considered and incorporated throughout the process, including at the level of interactions between the DLSUs and the sponsoring regulatory organizations during the development of the regulatory policy in order to identify substantive implementation issues that arise from the various private law rules of the different provinces and territories, and at the level of review of drafting instructions.

### Interactions with the Bijuralism Group: Increasing Consultation & Clarifying Roles and Responsibilities

We examined the extent to which the Bijuralism Group was engaged across regulatory files and confirmed that the Unit has not been consulted in all cases that would have benefited from their review. Bijuralism issues are more likely to arise from regulations touching on commercial and corporate law, security interests and property law. PLLSS has identified categories of regulations which do not require review by the bijural experts, including (but not limited to): repealing regulations, coming into force orders, regulations amending tariffs and quotas. This guidance has been summarized in an exclusions list which is not currently available on the PLLSS internal information-sharing site, as the Sector is in the midst of moving to a new information-sharing platform. Furthermore, the Sector's *Regulatory Projects Handbook*'s description of the bijural experts' responsibilities in the regulatory services process is not entirely consistent with the responsibilities in practice, as the Sector's bijural experts are not required to review every draft regulation as stated in the Handbook.

Increasing the level of consultation with the bijural experts has previously been identified by PLLSS management as an area of focus. The audit work conducted confirmed this opportunity, both to strengthen the understanding of the Unit's responsibilities, and to recommunicate the guidance addressing the types of regulations which require their review. Without a common and consistent understanding of the scope of the Bijuralism Group's expertise and role, the value their early feedback can bring to the regulatory service process, and the easy access to guidance on the type of regulations the Unit should be engaged on, there is a risk that the quality control function played by the Bijuralism Group will not be fully leveraged.

### Interactions with the Legislative Revision Services Section: Increasing Consultation

As part of the established regulatory services process, proposed regulations are reviewed and/or revised by the Legislative Revision Services Section, which provides a key quality control measure by assisting legislative counsel in achieving, in both official languages, the highest possible quality of language in the proposed regulations. The Legislative Revision Services Section includes legistic revisors, who review the French and English versions of the draft regulation to verify the grammar, punctuation, cross-references, historical citations, along with the structure and format. It also includes jurilinguists, who ensure the linguistic quality of the draft regulation by conducting terminological research and comparing the two language versions to ensure they have the same meaning. Proposed regulations are to be reviewed by the legistic revisors at least once during the process, with additional review taking place as needed depending on the extent of changes made to the draft proposed regulation.

Our audit work included interviews with members of the Legislative Revision Services Section and examination of the extent to which the group was engaged across regulatory files. Interviews revealed that PLLSS management had been informed of the concerns raised by each team (i.e. revisors and jurilinguists) in the group regarding the level of consultation sought by legislative counsel from the HQRS on proposed regulations. We also found that there were occasions where regulatory files from HQRS had not been sent for review and/or revision by the revisors and jurilinguists. While management has taken steps to improve the level of consultation by clarifying the process in which regulatory files from HQRS are shared with each of these teams, there is an opportunity to address the concerns raised by these teams regarding the length of time available to perform their work, in light of the file's tight timelines. Furthermore, there is a need to clarify the responsibilities of each these teams (i.e. revisors, jurilinguists, and legislative counsel) to state who has the final authority regarding the integration and disposition of comments and/or revisions provided by the revisors and jurilinguists.

### ***Additional Mechanisms to support quality control***

In addition to the quality control functions played by the Legislative Revision Services Section and Bijuralism Group described above, PLLSS has also established other key mechanisms to support quality control, such as drafting standards and the incorporation of feedback into its regulatory services process. More specifically, there is a process in place to regularly update the Sector's *Federal Regulations Manual* which serves as the primary guidance document capturing the drafting standards that are used by legislative counsel in the development of legislative text for draft regulations that are being prepared for sponsoring regulatory organizations. The process includes a consultative process within the Sector for vetting updates, in addition to engagement by the Sector's Legislative Practice Committee which ultimately recommends the updates to PLLSS management for consideration and approval.

Another source of oversight and feedback on regulations comes from the SJCSR. With their mandate defined under the SIA, the Committee can scrutinize any statutory instrument made on or after January 1, 1972. Supporting regulatory organizations through SJCSR interactions is largely undertaken by the DLSUs, with the Regulations Sections and the Advisory and Development Services Section engaged as required to provide input and/or expertise. Through its engagement, the Advisory and Development Services Section facilitates a forum for DLSUs to maintain awareness of guidance on themes raised by the SJCSR through its Study Group on the SJCSR.

## **Recommendation 2**

It is recommended that the ADM, PLLSS improve consultation with the Revision Services and Bijuralism Groups by:

- a. Updating the design of the regulatory services process to support consultation with the Bijuralism Group earlier in the regulatory process.
- b. Reinforcing the existing quality control mechanisms in the process by:
  - i. Recommunicating guidance regarding the types of regulatory files which require review by the Bijuralism Group.
  - ii. Clarifying the responsibilities of the revisors, jurilinguists, and legislative counsel to clearly state who has the final authority regarding the integration and disposition of comments and/or revisions provided by the revisors and jurilinguists.

## Management Response and Action Plan

Management of the PLLSS agrees with this recommendation and will:

- a. Update the design of the regulatory services process to support consultation with the Bijuralism Group earlier in the regulatory process.
- b. Reinforce the existing quality control mechanisms by:
  - i. Updating the list of files that are excluded from review by the Bijuralism Group, revising the *Regulatory Rtlgevu'J cpf dqqm* to clarify that some regulations are excluded from review and communicating that updated list and revised handbook to all regulatory legislative counsel.
  - ii. Updating Legislative Services Branch guidance documents to clarify the respective roles and responsibilities of the revisors, jurilinguists and legislative counsel to state who has the final authority regarding the integration and disposition of comments or revisions provided by the revisors and jurilinguists.

### Office of Primary Interest

ADM, PLLSS

### Due Date

December 31, 2017

## 7.3 Monitoring, Reporting & Resource Management

The audit examined the monitoring, reporting and resource management processes and practices in place to support the management of the volume of regulatory services. Our work included review of the project management tools in place to support legislative counsel at the individual file level, in addition to assessing the reporting tools available to management to support active monitoring and decision-making.

We found that the PLLSS has implemented a suite of project management tools, in addition to limited monitoring and reporting tools which focus on highlighting exceptional files and files published in the *Canada Gazette* Part II. Opportunities exist to fully leverage the data in the existing legal case management system to support development of management reporting, decision-making and resource management.

### *Project Management Suite*

The PLLSS has developed and implemented a suite of project management tools that have been in place for the last year. There was a high level of awareness of these project management tools among the legislative counsel and DLSU officials interviewed. The project management suite includes:

- Regulatory organization file prioritization information and senior management attestation of the completeness of drafting instructions in a file opening form;

- A breakdown of the estimated timeline, based on complexity, in the project management tool, which is updated and shared between legislative counsel, the responsible DLSU and the sponsoring regulatory organization(s) throughout the regulatory services process;
- A summary of key steps set out in the process flow charts for ministerial regulations and regulations made or approved by the Governor in Council; and
- A description of roles and responsibilities for the Instructing Officer, DLSU and Legislative Counsel; checklists covering drafting preparedness and legal considerations, and project management best practices in the *Regulatory Projects Handbook*.

With the introduction of the Department's *Directive on Legal Project Management* (LegalPM) in October 2016, PLLSS management has recognized the opportunity to review these tools to support alignment with the Directive. We support PLLSS' management in these efforts and have identified opportunities to update the tools to refine the accuracy of estimated project time (in hours) based on actual historical timekeeping data on files for regulatory services.

### ***Environmental Scanning***

The Sector conducts environmental scanning through liaison with higher-volume regulators, as described in Section 7.1, in addition to capturing internal and external environmental factors impacting its operations in their annual Integrated Business Plan. Further, as part of its internal scanning, PLLSS management relies on communication from legislative counsel on exceptional files involving significant timeline pressures or high legal risk. This exceptions reporting is then integrated into periodic reporting to senior management.

### ***Monitoring & Reporting Practices***

We found that there are limited management reporting tools currently in place to support management decision-making. Existing reporting tools focus on regulations which have been published in the *Canada Gazette* Part II and tracking performed by the revision services teams for files sent for their review and/or revision. These reports are manually generated outside of iCase, the Department's timekeeping and legal case management system. Without readily-available reporting on key metrics, such as the time taken to examine and stamp<sup>8</sup> a regulation, PLLSS management capacity to leverage its data to inform decision-making is limited.

In terms of managing the Department's resources to support the alignment with the volume of regulatory services, we found that PLLSS management uses informal processes to match resource capacity with demands for its regulatory services. More specifically, the PLLSS managers confirm capacity when assigning legislative counsel to new regulatory files as requests from sponsoring organizations are received through file opening forms. These regulatory file assignments are then shared among the responsible PLLSS managers as a means of keeping each other apprised. The Sector; however, does not have a central repository of active requests for regulatory services that records key tombstone information for each request received, such as the date, key points of contact, prioritization information, and the legislative counsel assigned to the request for regulatory service, including their estimated timelines and resource requirements (i.e. internal consultation with departmental centers of expertise). Without an overall picture of the total demand for regulatory services, the level of resources already committed to meet existing priorities, and the available time within the pool of resources, ensuring that resources are not overcommitted is a risk. PLLSS was recognized for its responsiveness to requests for regulatory services by the DLSUs interviewed. To ensure that PLLSS can continue to provide the same level of client-service and responsiveness, opportunities have

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<sup>8</sup> It is recognized that as part of the regulatory process, proposed regulations that have been examined are stamped by the Regulations Section.

been identified through the audit to leverage timekeeping and legal case management data to inform decision-making on resource management.

Our audit work included analysis of existing iCase data for files for regulatory services, within the time period covered by the audit. As part of the Department's *National Legal Case Management Practices*, iCase is used to manage all legal information related to files for legal services, including regulatory services. To this end, authorized users from PLLSS (e.g. legislative counsel) are responsible for recording the legal information related to each request for regulatory service into iCase. The key data elements or iCase fields associated with the legal information for regulatory services include, but are not limited to, legal risk, complexity, and publication date in *Canada Gazette* Parts I and II. We found that these key fields have not been consistently used and in many cases, have been left unpopulated in iCase. It is recognized that the populating of the publication date in iCase is not currently mandatory, however, its completion would be beneficial in supporting management's reporting on key metrics. To support PLLSS in maximizing reporting tools within the current iCase system, we have identified opportunities for management to improve the completeness and accuracy of key data fields. Improving the information collected in iCase will support informed decision-making by offering insights into legal practices, risks and productivity levers that could be shared within the PLLSS. Looking forward, plans are underway to move the Department towards a modern and agile legal case management system, which provides a unique opportunity for PLLSS to identify and communicate its reporting needs.

### ***Channels to Facilitate Continuous Improvement***

Although identified by the PLLSS as a best practice for project management in its *Regulatory Projects Handbook*, the audit found that the Sector does not currently conduct reviews at the conclusion of its files for regulatory service that are considered large or complex. Management's efforts to realign the Sector's *Regulatory Projects Handbook* with the requirements set out in the Department's *Legal PM Directive*, will reinforce the need for the Sector to implement its review process at the conclusion of its files.

### **Recommendation 3**

It is recommended that the ADM, PLLSS improve the information collected on regulatory services for reporting and decision making by:

- a. Improving the completeness of key fields in iCase (e.g. legal risk, complexity and publication dates in the *Canada Gazette* I and II).
- b. Integrating the suite of project management tools with the requirements of the *LegalPM Directive*. Integration would consider such items as estimating project time, re-evaluating the average duration of steps in the regulatory project planning tool in light of the department's new method of assessing complexity, and a lessons-learned mechanism.

## **Management Response and Action Plan**

Management of the PLLSS agrees with this recommendation and will:

- a. Establish procedures to ensure improved completeness of key fields in iCase, (e.g., legal risk, complexity, and stamping and publication dates).
- b. Ensure that PLLSS' existing project management tools are integrated with the requirements of the *LegalPM Directive* which will consider estimating project time, re-evaluating the average duration of steps in the regulatory project planning tool in light of the department's new method of assessing complexity, and a lessons-learned mechanism.

## **Office of Primary Interest**

ADM, PLLSS

## **Due Date**

December 31, 2017

## **8. Audit Opinion**

In my opinion, the Department has established adequate processes and practices to support the delivery of regulatory services. The PLLSS has established processes to support planning and prioritization through its suite of project management tools. The Sector has made efforts to increase collaboration with TBS-RAS to seek prioritization input on files at the individual department level. Opportunities exist to further leverage prioritization information gathered, in order to continuously strengthen the alignment of its resources with government-wide regulatory priorities. Processes, roles and responsibilities are defined, communicated and generally well understood, with some improvement opportunities identified regarding the engagement of the Revision Services and Bijuralism Groups. Limited monitoring and management reporting tools are in place, presenting significant opportunities for PLLSS to start leveraging its data to support reporting, decision-making and resource management.

## **Appendix A – Audit Criteria**

### **Line of Enquiry 1 – Planning & Prioritization**

Criterion 1 – Processes and practices are in place to plan and prioritize the requests received for regulatory services in a manner that supports alignment with government-wide priorities.

Sub-Criterion 1.1 – Mechanisms are in place within PLLSS to support the planning and prioritization of the regulatory services requests in alignment with government-wide priorities.

Sub-Criterion 1.2 – Mechanisms are in place to support timely information-sharing for planning and priority-setting with central agencies and regulatory organizations.

### **Line of Enquiry 2 – Process, Roles & Responsibilities**

Criterion 2 – The Department’s roles, responsibilities, processes and practices related to the provision of regulatory services are clearly defined and communicated.

*Within the Department of Justice:*

Sub-Criterion 2.1 – Roles and responsibilities within the delivery of regulatory services are clearly defined, communicated and commonly understood for: Headquarters Regulations/Departmental Regulations Sections, Advisory Services & Legislative Revision Group, Bijuralism Group, and DLSUs.

Sub-Criterion 2.2 – Departmental roles and responsibilities at key points are clearly defined, communicated and commonly understood for the:

- Review of the quality and completeness of bilingual drafting instructions, to ensure consistency between the drafting instructions and the policy intent (DLSU); and
- Examination of the proposed regulation pursuant to the SIA (Regulations Sections).

Sub-Criterion 2.3 – Mechanisms are in place to support quality control (e.g. standards for draftsmanship) and the incorporation of feedback.

*With External Partners:*

Sub-Criterion 2.4 – Information regarding the Department’s roles, responsibilities, processes and practices is communicated with regulatory organizations through the Department’s existing mechanisms (i.e., the MOU for legal services signed with regulatory organizations).

Sub-Criterion 2.5 – Processes are in place to support the communication of the Department’s roles and responsibilities, and areas of higher legal policy risk related to the provision of regulatory services (e.g., incorporation by reference for internal ambulatory documents and requests for exemption from the SIA).

### **Line of Enquiry 3 – Monitoring, Reporting & Resource Management**

Criterion 3 – Monitoring, reporting and resource management processes and practices are in place to support the management of the volume for regulatory services.

Sub-Criterion 3.1 – Internal and external environments are monitored on an ongoing basis to identify changes to policies, processes and operational plans that support the provision of regulatory services (e.g., trend analysis, active scans for changes in the environment, etc.).

Sub-Criterion 3.2 – Project management tools for regulatory services have been communicated and implemented.

Sub-Criterion 3.3 – Reporting information is provided to management to support monitoring, decision-making, and the alignment of the Department’s capacity to meet regulatory services’ needs.

Sub-Criterion 3.4 – Mechanisms are in place to identify and share best practices/ opportunities for improvement related to the processes that support the Department’s delivery of regulatory services.