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CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

L'INSTITUT CANADIEN DU DROIT ET DE LA POLITIQUE DE L'ENVIRONNEMENT

**BRIEF TO THE STANDING COMMITTEE ON JUSTICE AND LEGAL AFFAIRS
REGARDING BILL C-25, *THE REGULATIONS ACT***

CIELAP Brief 96/12

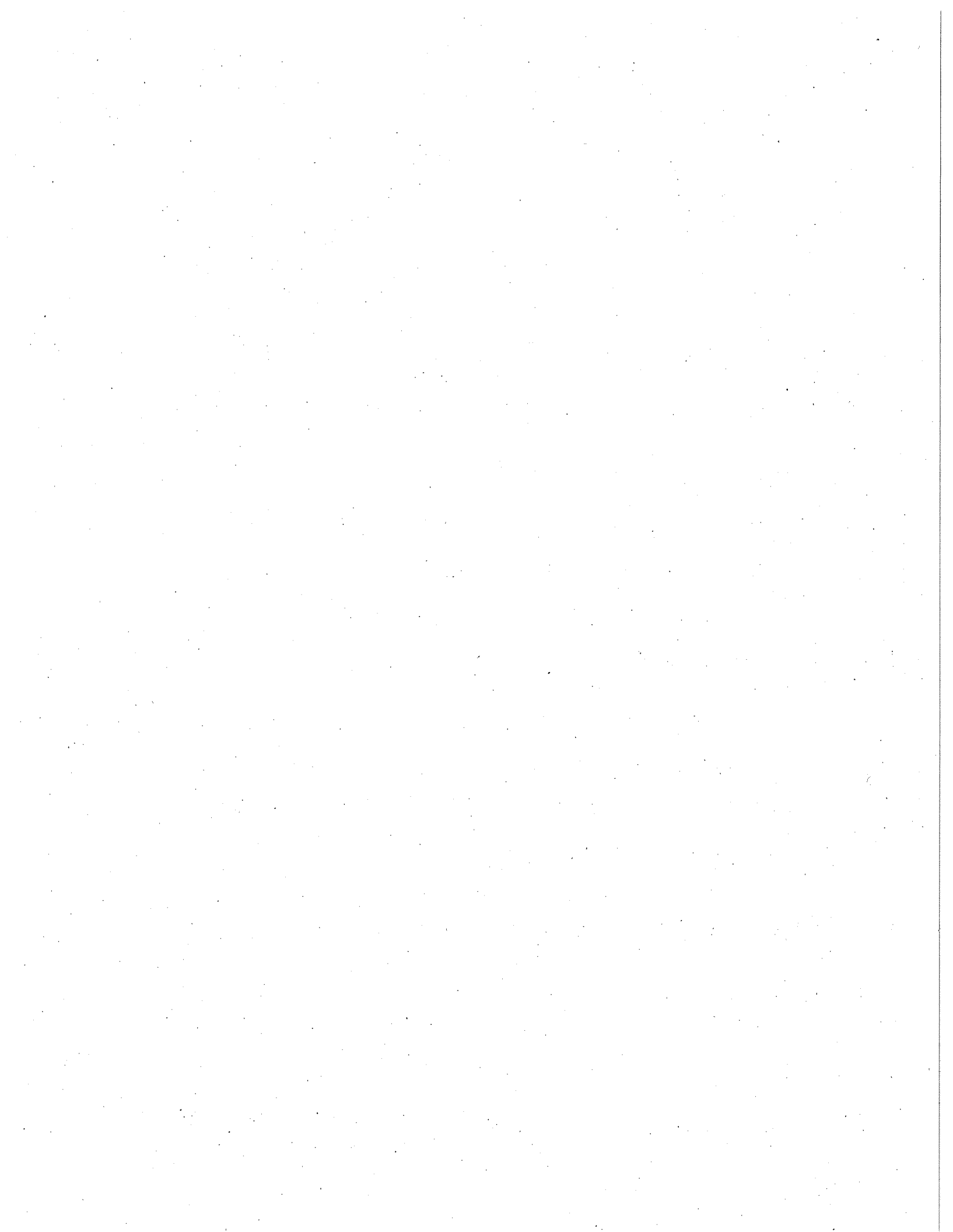
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November 1996

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CANADIAN INSTITUTE FOR
ENVIRONMENTAL LAW AND POLICY
Brief to the Standing Committee
on Justice and Legal Affairs, 1996





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1. Introduction

The Canadian Institute for Environmental Law and Policy (CIELAP) is pleased to comment on Bill C-25, the proposed *Regulations Act*. The reform of administrative law, particularly as it relates to the environment, has been a central element of the Institute's work over its 25 year history.

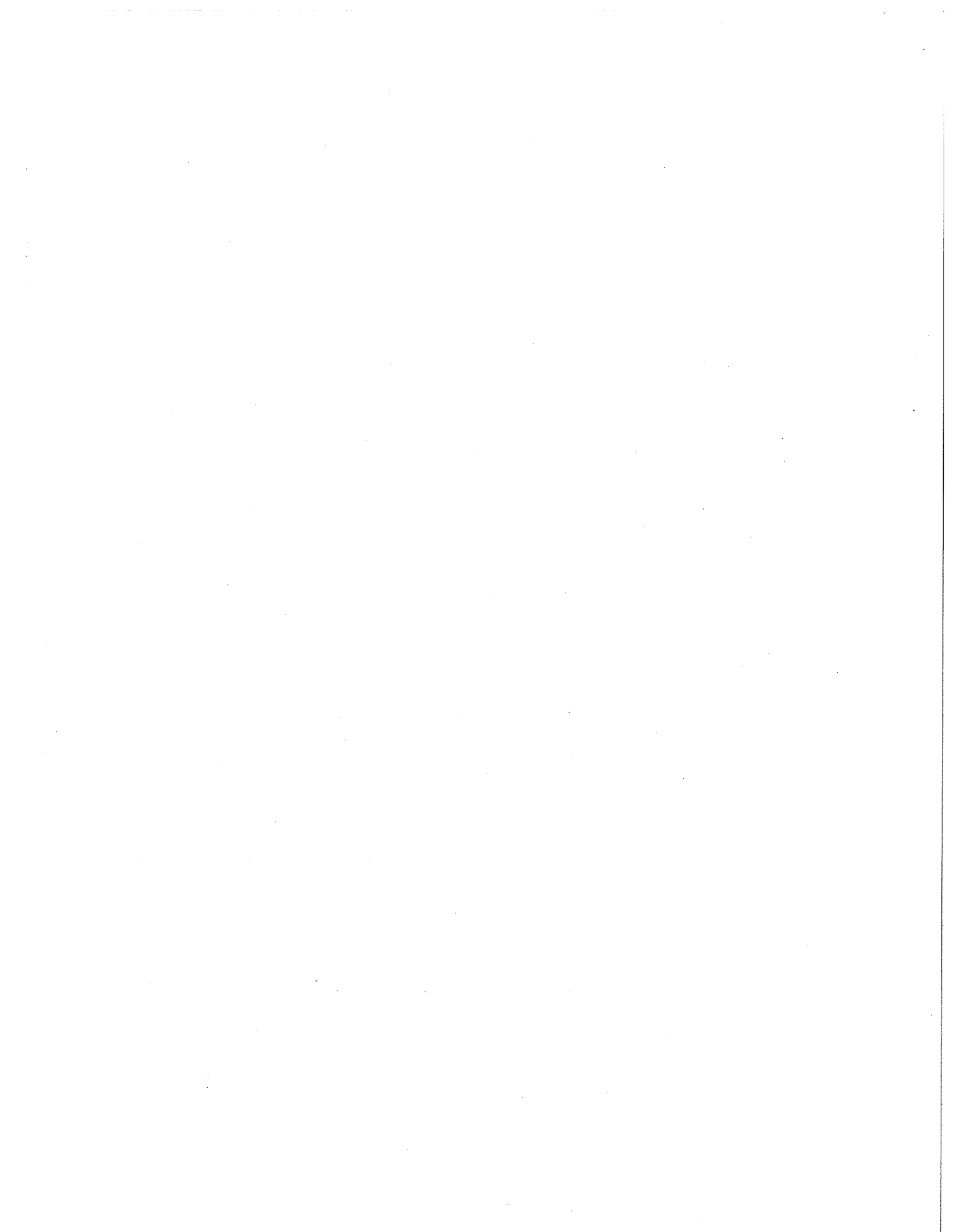
CIELAP welcomes the stated intention of Bill C-25 to modernize regulations, streamline the regulatory process, to enable regulations to be put into effect more easily, and to clarify the law. In some ways, such as requiring that regulations be written in clear language, the Bill fulfills these aims. However, some of its aspects raise serious questions, and should be considered carefully. The Bill's provisions regarding the registration and publication of regulations, and with respect to the incorporation of referenced documents into regulations are of particular concern in this regard.

Bill C-25, in its present form, also potentially represents a lost opportunity to improve the regulatory process in a number of ways. Among the most important would be to add basic requirements for public consultation in the regulatory process. This would include requirements for public notice of regulatory proposals, accompanied minimum public comment periods prior to the promulgation of regulations. Such provisions would follow the model of the Quebec *Regulations Act*, and the Ontario *Environmental Bill of Rights*.

Our comments with respect to specific sections of the Bill are as follows.

2. Section 5(1) - Exemptions from the Regulatory Process

This section gives the Governor-in-Council the unqualified power to exempt regulations from the regulatory process. Subsection 5(4) offers the public some safeguards that regulatory goals, such as the protection of safety, health, the environment and sustainable development, will be protected. However, there is no binding obligation to fulfil this requirement, and no remedy or sanction is available through the Bill if this obligation is not fulfilled.



Recommendation:

- 1) *Bill C-25 should be amended so that exemptions from the regulatory process can only be provided in the case of emergencies.*

3. Section 6(1) - Plain Language Drafting

This section requires that regulations be written clearly in both official languages. CIELAP strongly supports this requirement for plain language drafting. Obscure drafting has been a longstanding complaint by many stakeholders regarding federal regulatory requirements.¹

4. Section 7(4) - Exemptions from the Regulatory Process

This section provides for exemptions from the regulatory process established by section 6 of the Bill, effectively removing the requirement for review by the Deputy Minister of Justice. Of particular concern are the provisions related to the amendment of lists of persons, places, products, substances and other things (s.7(4)(c)), and technical amendments to a regulation (s.(7(4)(d)). These things are often the essence of regulations and may have enormous impact on the scope and impact of regulations and affect the rights of Canadians.

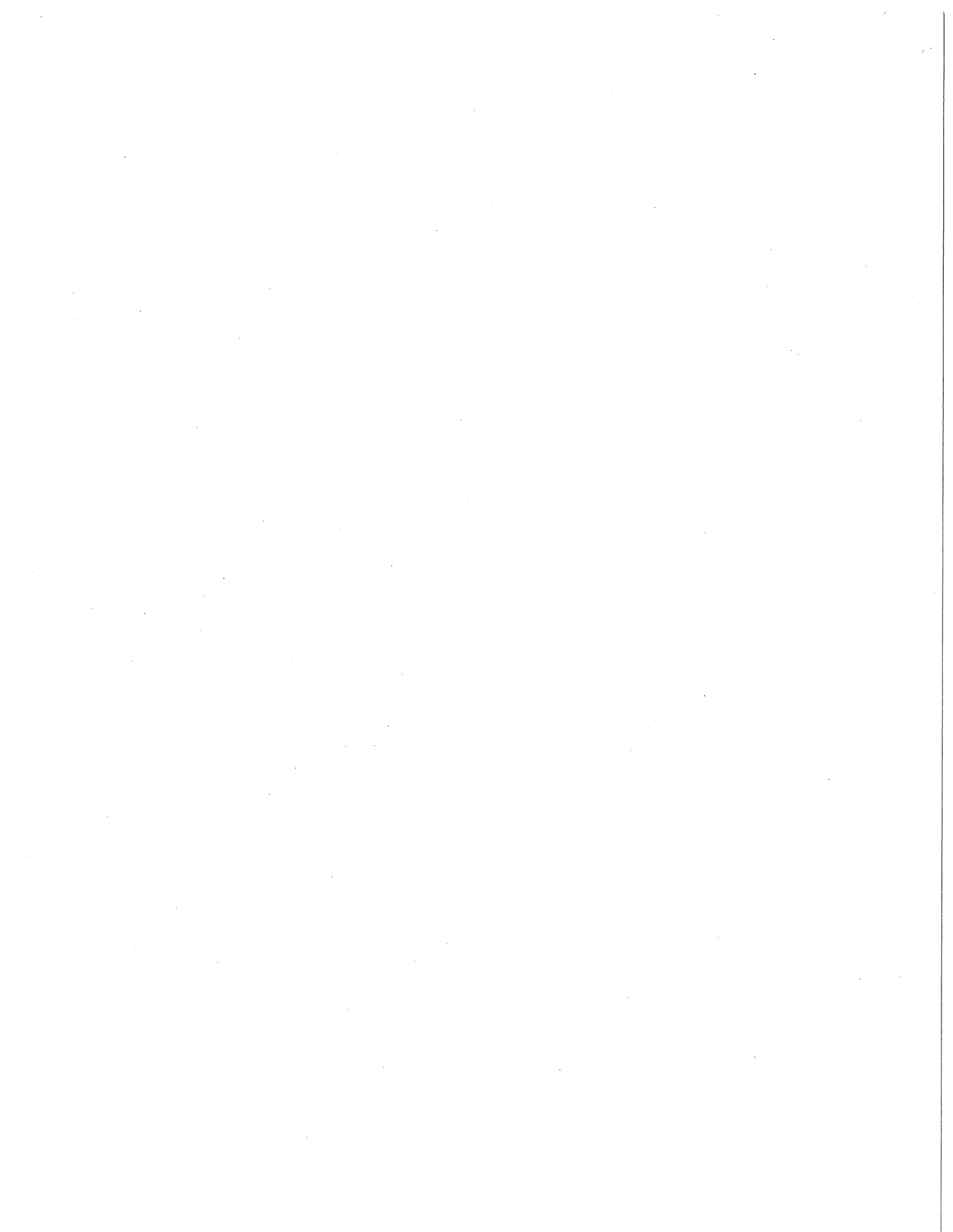
Recommendation:

- 2) *Section 7(4)(c) should be deleted and section 7(4)(c) should be amended to only apply to "miscellaneous regulatory amendments" as defined in the Treasury Board Secretariat Document entitled Miscellaneous Regulatory Amendments dated June 13, 1995 (attached).*

5. Section 7(4)(e) - Model Regulations

Section 7(4)(e) provides for exemptions from the regulatory process for regulations drafted following a model provided by the Deputy Minister of Justice. However, no oversight or audit mechanisms are provided regarding the application of such models by regulatory authorities.

6. Section 11 - Publication of Regulations



This section requires the publication of regulations as soon as possible after registration. Section 11(3) allows for the publication of regulations through means other than the *Canada Gazette*. This provision raises a significant concern. The *Canada Gazette* is considered the definitive form of publication for regulations. This role should not be undermined. Many stakeholders have expressed concern over the accessibility of regulations,² and this problem may be exacerbated if they have to monitor multiple potential outlets for the publication of regulations. Access to regulations should not be a function of being on the right distribution list.

Recommendation:

- 3) *Section 11(3) should be amended to permit the publication of regulations in other formats in addition to publication in the Canada Gazette. In particular, the establishment of an electronic, on-line registry, similar to that established through the Ontario Environmental Bill of Rights,³ should be considered.*

7. Sections 11(4) and (5) - Validity and Effect of Regulations

This section raises serious concerns, similar to those which have been raised regarding section 10 of Bill C-62, the proposed *Regulatory Efficiency Act*. In effect, a person could be convicted under a regulation of which they had no official knowledge had "reasonable steps been taken to bring its substance to" their notice. This is inconsistent with the approach taken in other Canadian jurisdictions. Under the *Ontario Regulations Act*, for example, a regulation that is not officially published in the *Ontario Gazette* is not considered effective against a person who has not had actual notice of it.⁴

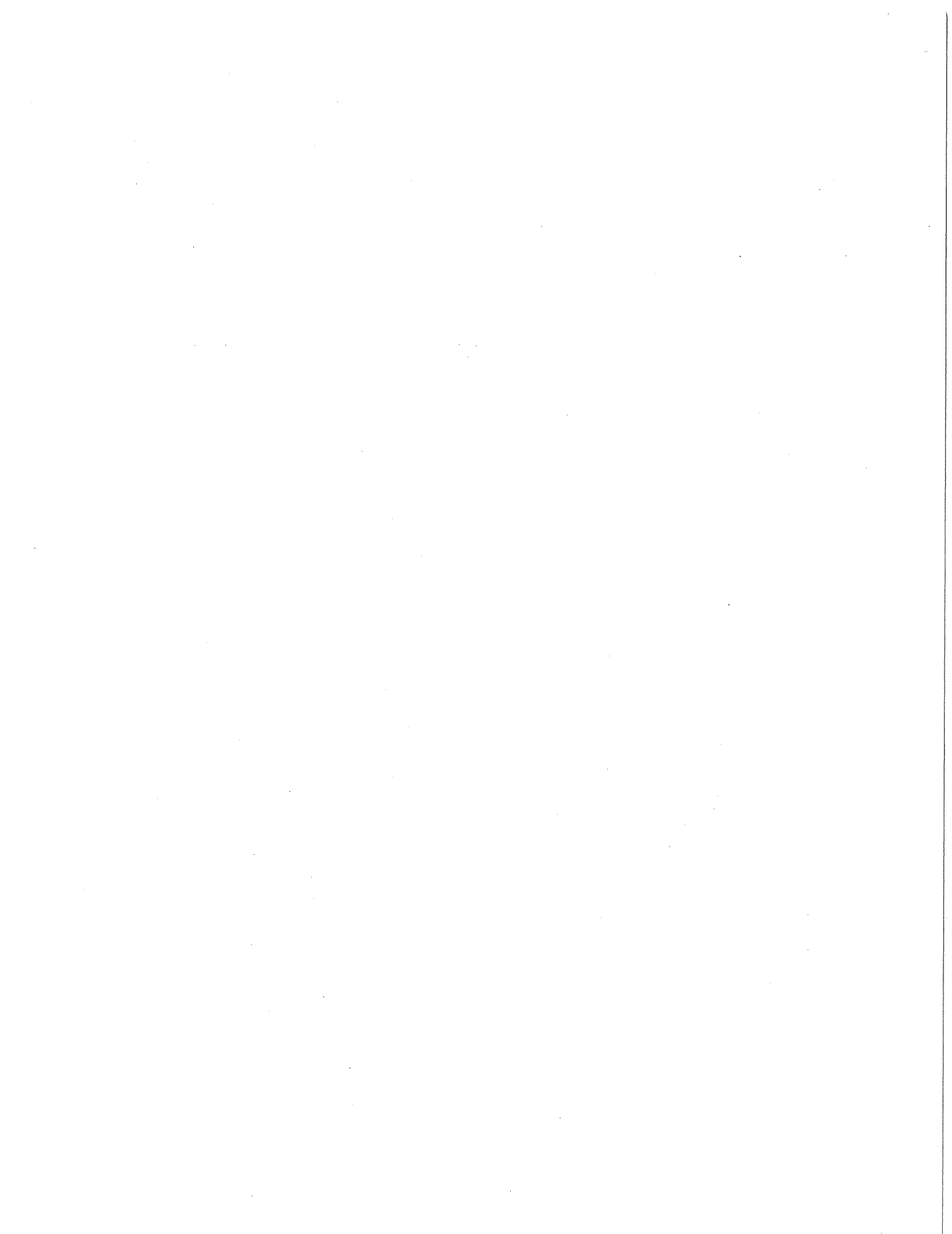
Recommendation:

- 4) *Section 11(5) should be amended in a manner consistent with section 5(3) of the Ontario Regulations Act so that an unpublished regulation is not effective against a person who has not had actual notice of it.*

8. Section 16 - Incorporation of Materials by Reference

This section deals with the incorporation into regulations of materials produced by persons or bodies other than regulatory authorities. Some aspects of this section reflect established practice, such as referencing technical standards, standards produced by professional bodies and Codes of Practice, such as the Fire Code. In general, where technical and similar standards are concerned, this is a welcome addition.

However, this section also gives rise to a concern that it may also allow the



referencing of standards which are political (i.e. they lay down policies), and not technical in nature. The International Standards Organization (ISO), for example, produces documents which incorporate policies, procedures, practices and managerial decision-making models, in addition to traditional technical standards. This leads to democratic concerns over the appropriateness of the direct incorporation of such policy elements into Canadian public law. Often these documents are not formulated through processes involving all affected parties, including governments themselves.

Recommendation:

- 5) *Bill C-25 should be amended to make it clear that documents and standards will only be referenced where they refer to tangible technical standards, or where its is clear what procedures have to be followed to achieve compliance and in order to facilitate enforcement. In general, the referencing of standards which refer to policy should not be allowed. Policies should be embodied in the texts of regulations themselves.*

9. Section 18 - Defenses

This section raises many of the same concerns as section 11(5).

Recommendation:

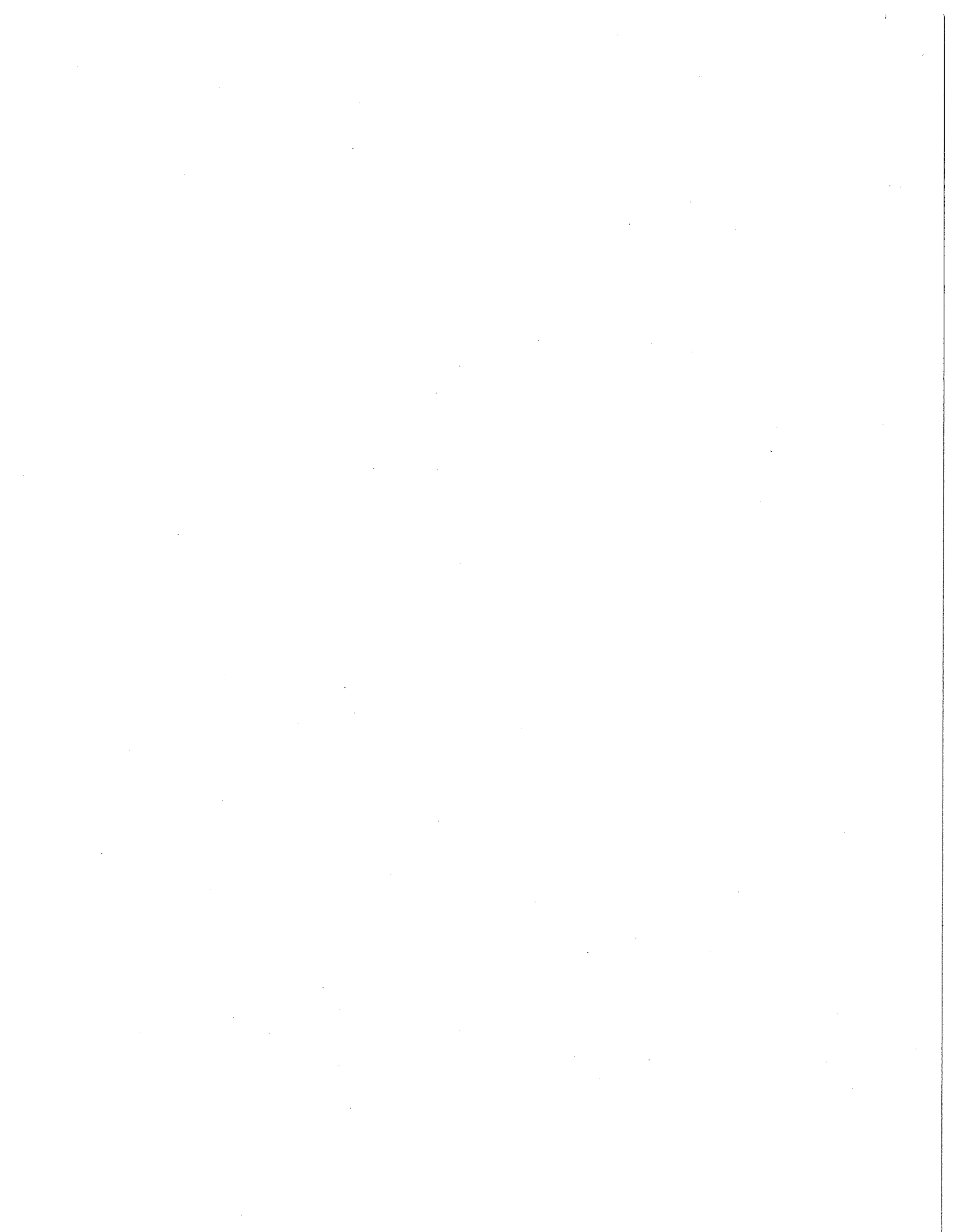
- 6) *Materials incorporated into regulation should be required to be published in the Canada Gazette with the regulation, or be made available by the regulatory authority, free of charge, to any person likely to be affected by the regulation.*

10. Section 19 - Incorporated Material is Not a Regulation

This section provides that referenced materials do not become part of a regulation for the purposes of the Act. This is a bizarre provision, particularly as section 18 makes it clear that convictions for offenses related to referenced materials are contemplated under the Act.

Recommendation:

- 7) *This section should be amended to provide that:*
 - * *referenced material is considered part of the legal text of a regulation containing referenced material;*
 - * *the regulatory process (i.e. Department of Justice review) applies to*



- referenced materials as well as to the regulation itself; and*
- * *materials incorporated into a regulation have the same legal force and authority as the regulation itself.*

11. Section 26(g) - Exemptions from Publication, indexing, inspection and Copying

This section allows the Governor-in-Council to withhold the publication, indexing, inspection and copying of a regulation if these steps could reasonably be expected to injure federal-provincial relations (i), the conduct of international affairs (ii), or national defence. Such provisions are, to our knowledge, unprecedented. There can be no such thing as secret public law in a democracy.

Recommendation:

- 8) *Section 26(g) of the Bill C-25 should be deleted.*

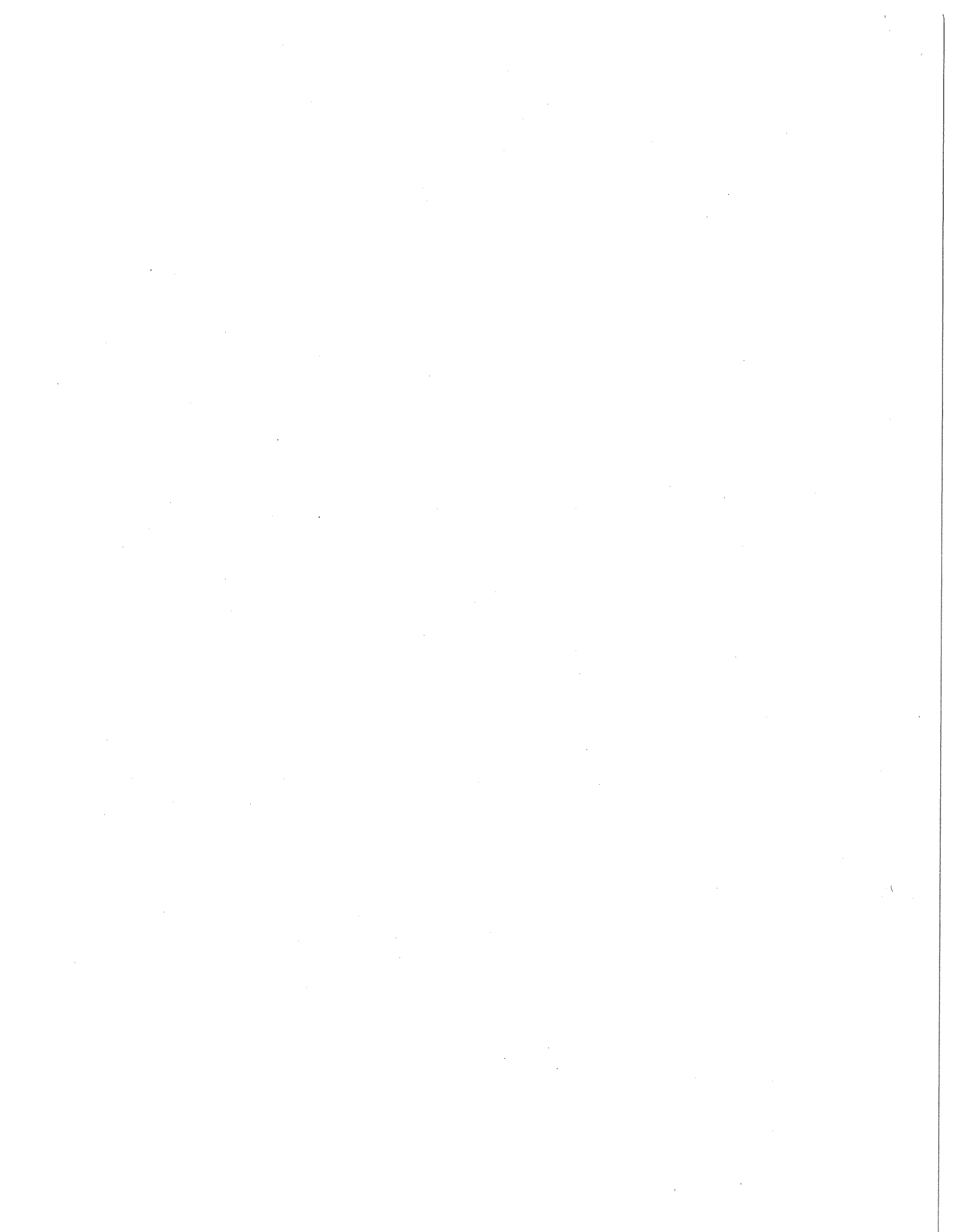
12. Additional Opportunities for Public Consultation in Regulatory Process.

One of the most disappointing aspects of this Bill is its failure to take the opportunity to provide for greater public participation and accountability in the regulatory process. This could be achieved through the addition of requirements for the pre-publication of proposed regulations, followed by a minimum public comment period. Pre-publication has been a federal *policy* requirement since 1986. In addition pre-publication, followed by a minimum 45-day public comment period, is required for all proposed regulations under the *Quebec Regulations Act*.⁵

Similarly, under the Ontario *Environmental Bill of Rights*, public notice, followed by a minimum 30 day public comment period is required for all proposed regulations.⁶ The Ontario *Environmental Bill of Rights* also requires that Ministers "take every reasonable step to ensure that all comments relevant to the proposal (including a regulation) ... are considered when decisions about the proposal are made by the ministry."⁷

Recommendation:

- 9) *Bill C-25 should be amended to require the pre-publication of all proposed regulations, followed by a minimum 45 day public comment period. Exceptions to this requirement should only be made in cases of genuine emergencies endangering public health, safety or the environment. Bill C-25 should also be amended to require that ministers take all reasonable steps to ensure that all comments relevant to the proposed regulation are considered when decisions about*

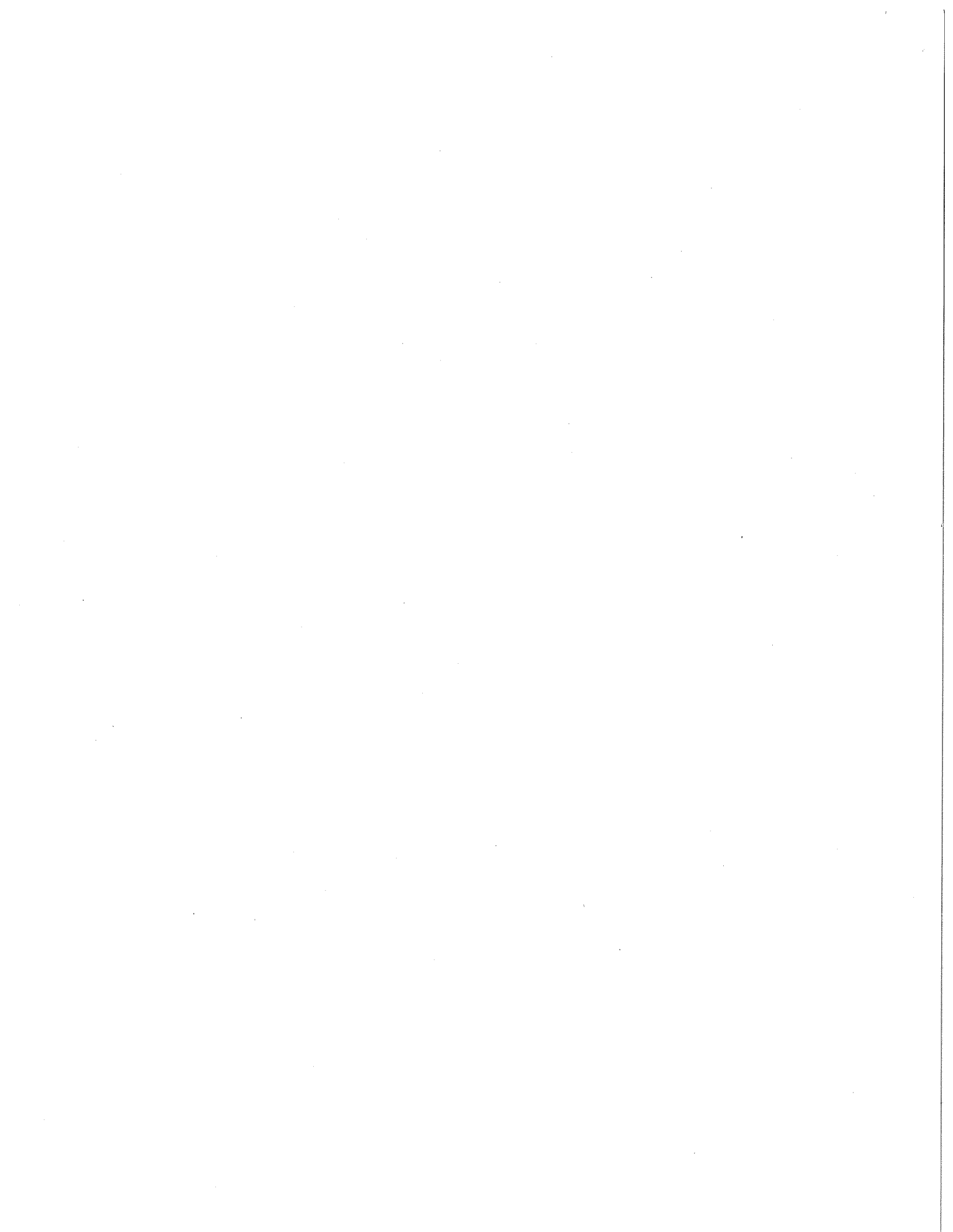


the proposed regulation are made by the minister.

Conclusions

Bill C-25 contains a number of potentially useful elements such as the requirement for clear language drafting of regulatory requirements. However it also requires significant amendments to be consistent with the administrative law of other Canadian jurisdictions, and to ensure the fair and just application of federal regulations. In particular, the Bill should be amended so that regulations only come into force once they have been published in the *Canada Gazette*, to define the circumstances under which materials can be incorporated into regulations, and to require the publication of all regulations and other legally binding instruments made by the government of Canada.

In addition, the opportunity should be taken to provide for greater public participation and accountability in the regulatory process through further amendments to Bill C-25. In particular, Bill C-25 should be amended to require the pre-publication of all proposed regulations, followed by a minimum 45 day public comment period. Exceptions to this requirement should only be made in cases of genuine emergencies endangering public health, safety or the environment. Bill C-25 should also be amended to require that responsible Ministers take reasonable steps to ensure that all comments received relevant to a proposed regulation are considered when decisions about a proposed regulation are made.



ENDNOTES

1. See, for example, House of Commons Standing Committee on Finance, Subcommittee on Regulations and Competitiveness, Regulations and Competitiveness (Ottawa: Queen's Printer, 1993), p.5.

2. See, for example, Standing Committee on Regulations and Private Bills, Second Report (Toronto: Legislative Assembly of Ontario, 1988), p.sep. Chapter VI.

3. S.O., 1993, ss.5 and 6.

4. *Regulations Act*, R.S.O., 1990, Chap R.21, s.5(3).

5. L.R.Q., c.R-18.1.

6. *Environmental Bill of Rights*, S.O. 1993, ch.18, s.16.

7. ibid., s.35.

