

# OPPOSED TRIANGLES: POLICY AND REGULATION IN CANADA AND THE US

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*The US and Canada go about policy-making and regulation-writing in exactly the opposite way. Canada starts with broad consultations and then gradually limits public participation as the process moves through legislation to the enactment of rules. The US starts with narrow participation as new laws are proposed but then opens up the discussion to universal comment at and even after the rule-making stage. In its ideal state, the Canadian system has virtues that might make it a model for the world.*

*Les États-Unis et le Canada abordent par des voies totalement opposées la mise au point de leurs politiques et la rédaction de leurs lois et règlements respectifs. Au Canada, on commence par de larges consultations, et on limite la participation du public au fur et à mesure que l'on passe à la formulation du projet de loi ou de règlement, puis à sa promulgation. Aux États-Unis, la participation, réservée à de petits cercles lors du dépôt du projet, s'élargit progressivement jusqu'à devenir générale—et peut même se poursuivre après l'adoption. Dans sa forme idéale, le système canadien comporte des vertus qui pourraient en faire un modèle pour les autres pays.*

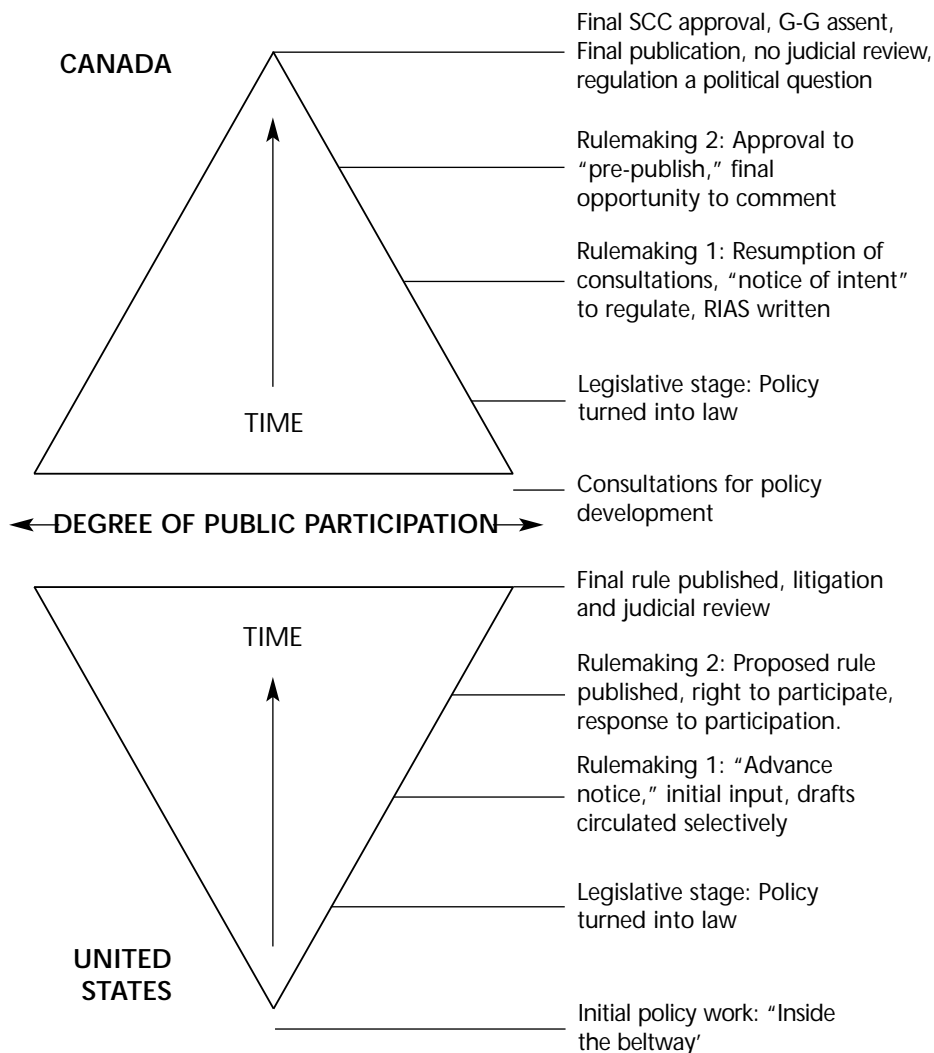
**C**atchwords are an easy way to compare governments. For instance, Canadians enjoy taking the pithy “peace, order and good government” and slamming it up against the United States’ much more licentious “life, liberty and the pursuit of happiness.” Of course the enabling document of US governance, the Constitution, describes its purpose as to “...ensure the domestic Tranquility, provide for the common defence [and] promote the general Welfare...”—which actually sounds pretty much like peace, and order and good government, even if the Fathers at Charlottetown had better editors than the Fathers at Philadelphia.

In fact, the animating philosophies of democratic governance in the United States and Canada *are* very different. Comparing the actual machinery of government in the two countries makes this clear. In their distilled states, when viewed in terms of public access and input, US and Canadian policy-making and regulation-drafting are nearly perfect inverses. Canada uses a hierarchical model, the United States a model based on empowerment and contending power. The Canadian model leads to an efficient but sometimes-lamented centralized power (see “We the people: Reinforcing liberty in Canada” in the Nov. 2000 issue of *Policy Options*). The US

model sometimes leads to the all-out war of litigation and shouting that also gave us the current President.

Using two variables—time and the degree of required public participation—the Canadian and American processes can each be represented as a triangle (see next page). Progressing up each triangle—that is, as one moves forward in time from policy inception through to regulation—a very different thing happens. In Canada, public participation starts wide and becomes progressively narrower. In the US, it starts narrow and becomes progressively wider. How and why this happens says a lot about the two countries’ democratic institutions, their views on the purpose of citizens’ participation, and even their worldviews and cultures.

In Canada, the triangle rests on its base. Public access and input are greatest and the most sought-after at the beginning of the process. Participation then becomes increasingly restricted, until at the end of regulation-drafting, it is neither required nor can it be compelled against the wishes of the government. Canadian courts seldom if ever intervene in regulation-writing and generally do not grant standing to challengers of the finished product. Thus, in this respect at least, the Canadian policy and regulation drafting process is hierarchical in nature. What might be called the collective will is canvassed at the out-



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set and eventually a regulation reflecting it is produced. The only way the regulation can be amended is if the government has a change of heart or if voters bring in a new government.

In the United States, by contrast, the triangle rests on its apex. Public participation and input are especially undesired in early policy discussions and cannot be forced by court action. The government and its opposition—often through surrogates in think tanks—keep nearly all early considerations “inside the Beltway.” Over time, however, individuals gain a continually increasing right to comment and be heard, both in lawmaking and then in rulemaking. At its final stage, the process affords a virtually universal right to participation, and if the government resists this, access can be compelled. Even after taking effect, regulations can be forced to a full stop, or reversed, by a single person with a well-timed, substantiated grievance. This is the ultimate

reflection of the American credo of individualism. Regulations-in-force can be amended against the government’s wishes and without resorting to an election by a single determined person.

**E**vidence to support this “opposed triangle” model can be found in many places. Consider the legal concept of standing. In its most basic form, standing is the right to be heard by a government body. It is the right to bring information to the government’s attention with the goal of influencing, changing or compelling action. Standing is not automatic in either nation. Either government may and often does deny access, refusing to act on, to consider or even to listen to an argument as to why it should do things differently. The circumstances under which the Canadian or US governments will listen are determined by a complex mix of laws, rules and custom.

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It is important to distinguish the concept of “standing-to-be-heard” from the judicial “standing-to-sue” for alleged wrongful acts. There is great latitude to sue in both countries. What is important here is the *right* to be heard and to participate in the policy- and regulation-drafting process. There is a stark difference between the United States and Canada as to when that right can be invoked.

In Washington, policy initially is formulated largely by think tanks, advocacy groups, study groups, consultants and government employees. Broad public consultation at this stage is rare and typically avoided. Even if an individual seeks to compel inclusion into the process, those formulating the initial policy may refuse and the courts may decline to mandate access. For example, the Clinton Administration’s effort to install medical insurance coverage for each US resident began in the quasi-governmental Task Force on National Health Care Reform, chaired by now-Senator Hillary Clinton. Because government-funded universal health care is very controversial in the US, the White House decided that the group would develop a better proposal from behind closed doors. It therefore held no formal meetings, since they could have been subject to sunshine mandates. Even the names of the task force’s 500 or so employees were kept secret.

The task force’s methods of operation made lobbying by excluded stakeholders impossible. One group did sue, trying to force a consultative process, claiming violations of the right to be heard. After preliminary courtroom skirmishes, the US Court of Appeals refused to open any doors: The First Lady, it ruled, was a *de facto* government employee, and had the right by law to work in private, as did other government employees, her task force staff included. The stakeholders therefore had no right to compel the task force to listen.

The Clinton case suggests the closed nature of initial public policy formulation in Washington. The right to participate and be heard begins to expand once the proposed policy enters the legislative stage. Congress typically holds public hearings on proposed legislation, affording a certain number of outsiders an opportunity to be heard. Hearings are not mandatory however, nor is there time to permit all who are concerned to be heard. Deliberations on the House and Senate floors are limited to members only, of course. At this stage, an expanding but still limited right to participate exists. The US triangle has begun to broaden.

Once a policy becomes law, regulations are needed to transform it from an inchoate intent into discrete directives that can guide action and may be enforced. Colin Diver, dean of the University of Pennsylvania Law School and one of the most thoughtful observers of rule-making, describes it this way, “A rule is the skin of a living policy ... Its issuance marks the transformation of policy from a private wish to public expectation... The framing of a rule is the climactic act of the policy-making process.”

In the United States, the right to participate and be heard continues to expand significantly all through the rule-making process. As a first step in the process, an empowered government agency publishes an “Advance notice of proposed rulemaking” in the *Federal Register*. This notice describes the rulemaking task and requests informal public input, which the government may heed or ignore: This first step isn’t so much a right to be heard, as a first opportunity to be heard. The agency then drafts specific wording for the proposed rule, which it may also negotiate with outside stakeholders of its choosing. This language is then circulated both inside the government and among chosen outsiders for a “smell test” to ensure proper form, conformity to the intent of the enabling law, congruency with other laws and regulations and, most importantly, political palatability.

The proposed rule is then published in the *Federal Register*, along with another notice, this time noting a formal right to participate. The governing law specifies that there is a “right to petition for issuance, amendment or repeal of the rule” by “any person” or “interested party.” Comments received are compiled into a permanent public file; on-the-record hearings may also follow. The empowered agency digests all input and answers it collectively in writing, which becomes the proposed rule’s preamble. (As a result preambles often are longer than the rule itself.) If the proposed rule is altered substantially in the wake of public comment, the process must begin anew. If a decision is taken to withdraw the rule entirely, the agency must explain why in another *Federal Register* notice.

The final rule, together with preamble, is published in the *Federal Register* at least 30 days prior to its effective date, thus completing the US rule-drafting process. Congress may rescind final regulations by majority vote for a period of 60 days, although this power has been used only one time in history, in March 2001. Once in force, however, any rule remains subject to challenge by any “adversely affected or aggrieved” person or interested party, in

a full judicial review. Any challenger may seek remedies that include suspension or a complete negation of the rule. The United States itself is the defendant in these proceedings and the suing party does not need to allege actual damage to gain standing. At this point the US triangle reaches its widest. In what may be the ultimate embrace of American individualism, nearly universal standing is afforded, in the first instance before the rule-makers and later before adjudicative bodies to hear from those who may still be dissatisfied.

In sum, in the United States, the right to participate hardly exists at the beginning of the policy-making and rule-drafting process but at the end is virtually impossible to stop. In fact, on the day of his inaugural, President George W. Bush's first act was to order departments to withdraw submitted but still unpublished advance notices of proposed rulemaking. If published, these notices would have expanded the right to participation and so made the task of changing last-minute acts of the Clinton Administration much more difficult. Meanwhile, inside-the-Beltway groups, without public consultation, were merrily "rolling out proposals by the dozen, hoping to set the new national agenda," as the *Financial Times* reported.

Contrast all this to the Canadian policy-making and regulation-drafting model. As we have seen, the Canadian triangle sits on its base, with access and participation easiest at the beginning of policy formulation and most difficult—or even impossible—at the end, when regulations become effective.

Procedure in Canada explicitly fosters early outreach. For instance, the federal government's "Principles of Consultation" gives as its first instruction: "Consultation with Canadians is *intrinsic to effective public policy development* ... It should be a first thought, not an after-thought" (emphasis added). Guidelines for managers in the federal public service require an "ongoing and open consultative culture" with an established strategy on how to access public input fully and fairly. The process typically includes some combination of "advisory bodies, public discussion papers, 'armchair' discussions, targeted briefings, workshops, questionnaires, toll-free telephone lines, and town hall meetings." Financial assistance or other support is often available to financially strapped stakeholders to assure representation in the process at this point. (In Washington, stakeholders generally must fend for themselves.)

As in the United States, early policy inspiration in Canada may come from a variety of

sources, including interest groups, think tanks, or politicians themselves. But in complete contrast to the United States, public consultation often occurs contemporaneously or shortly after a substantive proposal emerges. Public servants in Canada, singularly and in task forces, fan out routinely for public consultations on the federal and provincial levels. Their task is to "gather timely and effective participation ... consistent with provincial direction ... early in the policy process," as the Ontario Forest Policy Panel explained in 1993, for example. It said its clear purpose was to strengthen participation early and to give nearly universal standing to all comers consistent with provincial direction. (Notice this explicit nod to hierarchy.)

The purpose of the consultative process is not solely or even mainly to find consensus. Ideally it is "a process that permits and promotes the two-way flow of ideas and information among all sectors of society and between them and the government," as the guidelines put it. Conversely, great care must taken not to be "drawn into partisan political controversy."

The knowledge gained from consultations informs but does not necessarily determine the formulation of a final policy proposal. In this regard, consultation is usually found to be especially valuable when its results are congruent with the government of the day's thinking. Consultation input is typically drawn up through the ministry in written reports, and sometimes also through discussions, personal knowledge and the like. However aggregated, public input ultimately finds expression in formal policy proposals submitted as the Government's proposed programs to Parliament or the provincial legislatures.

The openness of the legislative function in Ottawa—or the lack of it—is currently at the center of spirited discussions. One stream of thought, typified by the valedictory polemic of MP Lee Morrison, suggests that a vital legislative function is all but dead in Canada, having been replaced by "lackeys" in a "rubber-stamp Parliament." In truth and in practice, the legislative process in Ottawa is not accessible to all input and never was intended to be. The outcomes of this year's debates over the Standing Orders follow the logic of hierarchy that the Commons, the government and Canadian governance have always operated under, even if nowadays that logic is applied in the extreme. At the legislative stage of the Canadian triangle, there is not an unlimited or even an expansive right to participation. The triangle has narrowed.

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In both the US and Canada, the legislative stage serves as the principal inflection point for the policy and regulatory process. In the United States, this stage effectively marks the beginning point for opening up the process to input and participation. In Canada just opposite is true: The legislative stage marks the point at which the damping-down takes strong hold. Henceforth the direction in Canada is for less and less access; at the equivalent point in the United States it is toward greater and greater access. The only thing these two inflection points have in common is that each occurs the legislative stage.

The question now becomes, does the Canadian triangle continue to narrow, and close at the top? Once a proposed policy becomes law, empowered ministries begin to draft regulations. Public participation now is, in fact, an extension of consultations already in progress from the pre-legislative stage. No new standing or wider right to participation is created. If anything, the right narrows. The reason is that the same senior managers who carried out the pre-legislative consultation generally do the post-legislative one, too. Presuming the job was done well initially, these managers understandably are not eager to duplicate work. So at this stage, only that which is starkly new and still germane is heard—and the decision about what is new and germane is entirely within the discretion of the ministry, which will tolerate discussion of the technical aspects of the regulation but usually rules against a re-hashing of policy alternatives of the sort that often takes place in the US. Of course, an astute stakeholder in Canada could cause substantial change in a law's effect through the details of regulation. But those with resources to influence detail are a much smaller universe than those who are eligible and able to participate in earlier consultations. Participation at the regulation-drafting stage is not closed, but it is effectively narrowed.

The government's first notice of its intent to regulate appears in the annual *Federal Regulatory Plan* published by the Treasury Board Secretariat each December. This can be and often is supplemented by a separate "Notice of intent," published by the empowered department in the *Canada Gazette*, at or just after the commencement of the post-legislative stage. This notice, which is "not mandatory," according to the Privy Council's *Federal Regulatory Process Guide*, invites participation "at the outset" and requests any "data, technical specifications, expert commentary or other information" that would help define the regulation. These results are documented and incorpo-

rated in a formal "regulatory impact analysis statement" (RIAS), which is appended to proposed language for the regulation itself and forwarded to the Special Committee of Council (SCC).

The SCC grants approval to "prepublish"—which means to publish the proposed regulation in the *Canada Gazette, Part I*—and returns it to the department. Prepublication by the department provides a "final opportunity to comment." The Treasury Board publication *Managing Regulation in Canada* makes it clear that, by this point, "most identifiable groups [affected] ... will have been consulted before ..." (Note the assumption here that any remaining participation is from "groups," not individuals.) Prepublication ensures that "groups" have access to the wording of the proposed regulation and the opportunity for final comment. The triangle continues to narrow.

The *Federal Regulatory Process Guide* now directs that, if the department receives any comment, it is obliged to weigh its merits and consider changes at its discretion. Major changes, which are rare, require a restart of this stage and a new "prepublication." Once any discretionary reconsideration is done, the final regulation and its accompanying documents are returned to the SCC for the ultimate blessing. With the signature of the Governor General and publication in the *Canada Gazette, Part II*, the regulation goes into effect.

After enactment, broad judicial review of regulations of the sort that so often takes place in the US is not available in Canada. Canadian courts generally will not interfere unless a *Charter* violation can be substantiated, a threshold which is hard to meet. Otherwise regulation is seen as a purely political question. Only a change of heart by the sitting government or an election that brings a new government can amend or negate a regulation. The Canadian policy triangle, which sits on a very broad base of public participation at the beginning, virtually stops any right to input or redress at its top.

The US and Canadian models presented here describe what can be loose, sloppy and untidy processes. They allow us, as models should, to see, perhaps more cleanly than reality does, how public participation and democracy are different in Canada and the United States. At the same time, they can also show where weakness may be creeping into the process, and what to do—and not do—to fix it.

In Canada there is currently, as noted earlier, much talk of legislative impotence. It is no secret that Parliament's legislative function is con-

strained in substantial ways by an ever-continuing devolution to the provinces and an ever-encroaching expansion of the executive. At the same time, it is fair to ask whether the perfect world of public consultation suggested by the Canadian model has in fact ever existed. As things stand now, consultations are ballyhooed when they reach conclusions the government likes. Beyond that, they can be ignored, avoided, poorly done or channeled into ineffectiveness.

Evident dysfunction in Canada's governance has led to calls for structural reform that center around one idea—to create or enhance sources of power to compete with the centralizing executive of the Prime Minister's Office. Here is where the Canadian triangle can itself become a useful tool. In short, reforms that reinforce and strengthen the upright orientation and isosceles shape of the triangle make sense. Those that distort it, such as the establishment of a wholly unaccountable Ethics Counsellor, do not—unless Canadians want to engage in revolutionary rather than incremental reform. Better to try to perfect the system in place. This requires two things: bringing the process of consultation to full maturity, and returning the Parliamentary process to its former maturity.

Ideas for reviving Parliament are many and already widely aired. They include looser party discipline, creation of stronger committee chairmen, an elected Senate, and/or requiring Parliament's approval of judicial appointments. Some of these proposals may indeed help restore the triangle to its regular form.

The concept of consultation, which is so critical to the effective functioning of the Canadian triangle, is not fully developed, however. From the Spicer Commission onward, consultation has in theory become an animating philosophy for Canadian governance, but that is not yet true in practice. It is not done consistently or consistently well, as the Adams Mine landfill flap suggests.

Three innovations could improve consultation at the beginning of the policy process: One, defining it better; two, identifying when to use it; three, professionalizing it.

Defining it means being specific about the the circumstances of consultation and what forms it should take. Not all communications with the government are consultations, although under current practice, any and all can be defined that way at the ministry's whim. Defining consultation also suggests formulating standard methods and work product. A common practice across government will give the public greater confidence in consultation and better understanding on how to

participate in it. Consultation would then become reliable and predictable, and not the *ad hoc* mixture of necessity and public relations it is now.

Finally, a new profession within the public service could emerge whose sole job was to conduct consultations impartially and effectively. Professionalization suggests development of a clearly defined body of knowledge on consultation practices, barriers to entry by non-professionals, and a certification process. These professionals would be analogous to judges in that they would be neutral facilitators whose job was to guide consultations and articulate policy options without prejudice. Of course, ministries would still retain full control over the triggers for consultation and the use of its results, since the process becomes explicitly political as it moves forward to the legislative stage.

**I**f Canada should perfect its own special model of democratic participation, the implications likely would be felt beyond North America. The United States has found an elegant and highly effective solution to citizen participation in its inverted triangle model of policy formulation. But for much of the world, the US model, centered on individualism, has been difficult to implement. Experience suggests that countries that try to install the US model outside its US context are more likely to end up with the tragi-comedy of the Philippines rather than the well-oiled policy-producing machine of the United States.

Canada has a brief but proud history of effective internationalism and leadership. Canadian thinkers have always dreamed of providing the world with a "Canadian way." The Canadian policy-making triangle may be the long sought-after blueprint. Canada's version of democracy, as expressed in its triangle, offers an alternative to the American model that fulfills the democratic need for full public participation while channeling it in a mutually agreed and agreeable way. The American system does this, too. The difference is that the American system forms consensus by giving everyone the right to challenge it, and that does not work well everywhere. Much of the non-US part of the world may need a more workable, more sustainable model for public participation and democracy. It could be the Canadian model, if we are smart enough to perfect it.

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