

JUDICIAL REVIEW OF RULEMAKING

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TOPIC AND IMPORTANCE

Traditionally, Canadian courts have limited their role to ensuring that rules and regulations—which are essentially ‘sub-laws’ developed to elaborate on existing statutes—made by the government were merely legally “authorized.” This means that courts only had to evaluate whether the rules were allowed by and seemed like they could support the goals of the law they came from. However, there has been a recent push by legal scholars and courts suggesting that courts should also review whether these rules are reasonable and based on evidence, including how these rules could affect interested parties.

This article focuses on what subjecting government rule-making to this “reasonableness review” could mean for the rule-making process as a whole. This is important because rules have so much influence on our lives. Rules have to do with everything from protecting the environment, to immigration, to national security. Though their introduction often helps the public, they can also sometimes be costly and harmful. Therefore, how these rules are made, reviewed, and challenged profoundly affects all Canadians.

MAIN ARGUMENTS

Because rules can be so impactful, some argue that making courts evaluate whether rules are “reasonable” by looking at how they might affect people in real life could ensure that rule-makers don't act without considering the potential costs of their decisions. However, others feel that such a review process could give powerful interest groups (like big companies) more influence. These groups could use their resources to complicate the rulemaking process by forcing courts and rule-makers to engage in extra-detailed analyses of these new rules. This would make it longer and more expensive to create regulations that are meant to help everyone.

To avoid this problem, this article argues that courts should review rules for reasonableness in a way that understands the challenges rule-makers face. This includes acknowledging the difficulty of predicting the

exact effects of new rules, which sometimes forces rule-makers to act in uncertain conditions. Rather than obliging rule-makers to address every criticism about how rules might work in the future, courts could encourage them to revisit and update rules over time based on how well they actually work.

CONCLUSION AND ADDITIONAL CONSIDERATIONS

While reasonableness review could improve accountability and quality of rules, it needs to be designed to prevent powerful groups from using it to frustrate public-interest regulations. Courts should allow rule-makers enough flexibility to test and adapt their rules as they learn from the rules' practical effects. When done right, court review can lead to better regulations that are based on new information and stay focused on helping the public.