

Chapter 3

Department of Agriculture and Rural Development

Review of Legislation

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Department of Agriculture and Rural Development Review of Legislation

Background

3.1 Legislators spend a significant portion of their time in the Legislative Assembly debating proposed new legislation and amendments to existing legislation. After they have determined that there is a need for legislation in a particular area, it becomes their responsibility to ensure that the legislation they ultimately approve can be effective in meeting its intended purposes. Therefore, legislators should be held accountable for providing a legislative framework within which an identified need can be effectively met.

3.2 As administrators of that legislation, departments have a key role in ensuring legislation actually achieves its intended purposes. Departments to which the legislation has been assigned should therefore be held accountable for administering it efficiently and effectively within the framework established by legislation.

3.3 During the past couple of years, we have expressed concern that legislation is not always complied with within government. Several instances where legislation has not been complied with have been reported in recent Reports of the Auditor General. For example, the Board of the New Brunswick Liquor Corporation did not select their corporate CEO despite the fact that the *New Brunswick Liquor Corporation Act* gives the Board the power to do so. In another case, the *Financial Administration Act* required that all government contracts be submitted to the Comptroller, but this was not happening. The work reported on in this chapter is, in part, in response to concerns such as these.

3.4 A review of legislation could have been undertaken in any department of government. However, during a preliminary review of the Department of Agriculture and Rural Development we noted that the Department had been assigned responsibility for between thirty and forty pieces of legislation, by far the most of any department of government. Departmental representatives expressed some concern with the effectiveness of certain pieces of legislation and the resources available to administer them. Given an environment of limited

resources, we felt the risk of effectiveness and administrative problems with individual pieces of legislation would be much greater considering the large number of Acts and Regulations under departmental administration. Therefore, we decided to build a project around the review of a sample of legislation administered by the Department of Agriculture and Rural Development.

3.5 Despite the fact that the legislation reviewed in this project was all under the administration of the Department of Agriculture and Rural Development, we feel that the findings of the project have wider applicability. In our opinion the legislation we reviewed represents a good cross section of provincial legislation in general. Therefore, we believe that the general recommendations we make in this chapter may be applied to all government departments, and not just to the Department of Agriculture and Rural Development.

3.6 Subsequent to the completion of the conducting phase of this review, a major reorganization of government departments was announced. The bulk of legislation formerly handled by the Department of Agriculture and Rural Development will likely become the responsibility of the new Department of Agriculture, Fisheries, and Aquaculture. However, due to the uncertainty surrounding the eventual assignment of the legislation we reviewed, we refer to the old department in this chapter.

Scope

3.7 The objectives of our review of the Department of Agriculture and Rural Development legislation were the following:

To determine if appropriate systems and practices are in place:

- *to ensure compliance with legislation;*
- *to measure and report on the effectiveness of the legislation; and*
- *to ensure that resources committed to the administration of legislation are managed with due regard for economy and efficiency.*

3.8 When we speak of effectiveness in this chapter, we are referring to how well the concerns that led to the establishment of legislation are being met under the established legislative framework.

3.9 The audit project included making an assessment of how well the Department was meeting its administrative responsibilities pertaining to legislation it had been assigned. Also, we attempted to determine if these results were being adequately measured and reported to the Legislative Assembly.

3.10 In order to allow for sufficient depth in our review, we chose to review a total of six pieces of legislation. We selected a mix of new and

older legislation, and ensured that it covered various areas of the Department and the agriculture industry in general. In addition to reviewing the selected Acts and Regulations, we conducted interviews with departmental staff, reviewed related documentation, and performed walkthroughs and some additional testing on administrative systems.

Results in brief

General

3.11 None of the six pieces of legislation we reviewed included a purpose section that would help readers to understand why the legislation was put in place or give them a benchmark for measuring the degree to which the legislation has been successful. We recommend that a clear statement of purpose be included in all new or amended legislation.

3.12 There was no reporting to the Legislative Assembly that provided information on the effectiveness of any of the six pieces of legislation we reviewed. We recommend that the Legislative Assembly be provided with regular written reports on the effectiveness of legislation in meeting its intended purpose. These reports should include comments on all legislation under the administration of a Department.

3.13 There are no regularly scheduled reviews of any of the six pieces of legislation we looked at. Such reviews would identify problem areas in the administration of, compliance with, and enforcement of that legislation and suggest appropriate actions to take to improve the situation. However we did note that five of the six have been subject to varying degrees of review in the past few years, some very extensive. Only the *Apiary Inspection Act* has not been looked at recently, although the Regulation under that Act was drafted in 1997.

3.14 The Department is providing no feedback to the Legislative Assembly through its annual report as to how well it is doing in administering the legislation it has been assigned. Since the effective and efficient administration of assigned legislation is an integral part of the duties of the Department, we feel that the Department should be reporting on its performance in this area.

3.15 We are concerned that the recently-announced downsizing of the Department may mean that less resources are allocated to the administration of these and other pieces of legislation addressing agricultural issues. This may mean that the effectiveness of legislation will be reduced.

3.16 Departmental representatives noted two recent cases, one under the *Topsoil Preservation Act* and the other under the *Potato Disease Eradication Act*, where the Department of Justice did not feel it was able to enforce the legislation in obvious cases of non-compliance. This led to continued defiance of the legislation. In general, we feel that a lack of successful enforcement activity will lead

to a higher level of non-compliance than would otherwise be the case, thereby reducing the effectiveness of legislation.

Specific to legislation

3.17 We found that the *Apiary Inspection Act*, the *Topsoil Preservation Act*, and the *Agricultural Land Protection and Development Act* were not achieving their purposes as interpreted by the Department. Based upon our review, we believe that these pieces of legislation cannot achieve their purposes unless additional resources are assigned within the Department or legislative changes are made or both.

3.18 We recommended that the Department consider the continued need for legislation to support the apiary industry in the Province and make appropriate recommendations with regard to the *Apiary Inspection Act* and Regulation to government.

3.19 We recommended that the Department develop a workable alternative to the current *Topsoil Preservation Act* and Regulation that will better achieve the purpose of the original legislation.

3.20 We recommended that appropriate steps be taken to improve the effectiveness of the *Agricultural Land Protection and Development Act* in achieving its purpose of allowing farmers to farm without undue restrictions and to protect farmland from urban sprawl. This will require improvements in rural land use planning in general, not just amendments to this Act and Regulations.

3.21 We recommended that the Department consider extending the coverage of the *Livestock Operations Act*.

Legislation reviewed

3.22 We reviewed six pieces of legislation administered by the Department of Agriculture and Rural Development pursuant to this project. They were:

- *Agricultural Development Act* – New Entrant Farmer Loan Regulation;
- *Agricultural Land Protection and Development Act* and Regulation;
- *Apiary Inspection Act* and Regulation;
- *Livestock Operations Act* and Regulation;
- *Potato Disease Eradication Act* and Regulation; and
- *Topsoil Preservation Act* and Regulation.

3.23 There are many reasons why legislation might not be effective in meeting its purposes.

- It might be poorly drafted or poorly conceived.
- Circumstances might have changed since the legislation was drafted or last amended.
- There may not be enough resources provided to the responsible Department for necessary administrative activities to take place.

- The Department assigned responsibility may not be administering the legislation appropriately.

3.24 In our opinion, legislators can greatly enhance the potential success of a piece of legislation by ensuring that three key requirements are in place before an Act is approved.

3.25 First, the legislation must have a clearly stated purpose that is documented within the Act itself. This will allow stakeholders to understand what is intended. It also provides a benchmark they can use in evaluating the “success” of the legislation. As well, having a clearly stated purpose within the Act will allow future legislators to consider whether the purposes of the legislation are still valid in light of changing societal needs.

3.26 Second, the Legislative Assembly must be committed to providing sufficient resources on an ongoing basis through the budget approval process to allow the responsible Department to effectively administer the Act and related Regulations. Every piece of legislation that is enacted has a cost, both to those who must comply with it and those who must administer it. Inherent in the decision to legislate is a consideration of whether the benefit of having a piece of legislation in place outweighs the costs of administering and complying with it.

3.27 Third, success in achieving the purposes of the legislation must be reported back to the Legislative Assembly. There should be two distinct components to this feedback. A report indicating the effectiveness of the legislation in meeting its stated purposes will allow legislators to determine if changes to the legislation are warranted in order to ensure that legislative purposes are achieved. Additionally, reporting will be necessary that provides assurance that the Department is administering the legislation appropriately. Feedback to the Legislative Assembly of the type discussed in this paragraph will allow legislators to satisfy themselves that the work that went into drafting and approving legislation has led to the desired results. If it has not, it will allow them to take corrective action.

3.28 In this chapter, we will be addressing the above areas, as well as areas more specific to the administration of the six individual pieces of legislation we reviewed. The sample of legislation taken from the Department of Agriculture and Rural Development indicates that some provincial legislation is ineffective. Because our review was limited to one department, we cannot say how common this problem is. However, it is an area that is so intrinsic to the role of the Legislative Assembly that even a limited indication of problems should be a cause for concern.

3.29 For illustrative purposes we have also included our detailed observations and recommendations on one of the pieces of legislation we examined, the *Topsoil Preservation Act* and Regulation, in an appendix

to this chapter. That particular piece of legislation has not been effective in achieving the purposes for which it was intended.

Purpose of legislation

3.30 None of the six pieces of legislation we reviewed included a purpose section that would help readers to understand why the legislation was put in place or give them a benchmark for measuring the degree to which the legislation has been successful. Staff within the Department have made their own interpretations as to the purpose of each piece of legislation and are acting based upon those interpretations. However, we feel that if legislators want to be sure that their legislative intentions are complied with, a good start is providing a written purpose section within legislation. That will give every stakeholder access to the same information up front. It will also allow future legislators to consider whether the purpose of the legislation is still valid in light of changing circumstances. We feel that legislation must be understandable and stand on its own in order to be effective.

3.31 An example of the problems that the lack of a purpose can cause is illustrated by the *Topsoil Preservation Act*. That Act contains no clear statement of its purpose. This has led the public and other stakeholders to make interpretations of the scope of the legislation that are not appropriate. (e.g. The public interpretation is that the government can stop topsoil removal in any circumstance.) This has created a lot of confusion and negative feelings towards the Department as it cannot meet these public expectations. It is in no one's best interest for such a situation to exist.

3.32 The following is an example of legislation in the Province that does contain a purpose section. Section 2 of the *Clean Air Act* states:

“The purpose of this Act and the regulations is to support and promote the protection, restoration, enhancement and wise use of the environment in keeping with the following principles....”

3.33 It goes on to identify a number of principles that should be adhered to. We find the description of the purpose of the *Clean Air Act* very clear.

Recommendation

3.34 **We recommended that a clear statement of purpose be included in all proposed new legislation. We further recommended that a statement of purpose be included for existing legislation whenever such legislation is being amended.**

Departmental response

3.35 The Department of Justice provided the following comments on this recommendation:

In interpreting legislation, Courts tend to examine the substantive provisions of the Act and not merely look to the descriptive components to determine the true purpose and

intent of the Act. Given that background, and from a legal perspective, it may be difficult to comply with your recommendation.

Reporting effectiveness of legislation

3.36 One of the most important duties of legislators is to consider and approve pieces of legislation. However, in our opinion, that is not an end in itself. It is rather a means towards the goal of achieving the purpose intended by the legislation on an ongoing basis. In order for legislators to satisfy themselves that the intended purpose is being achieved, they need feedback. That feedback should allow legislators to satisfy themselves that the work that went into drafting and approving legislation has led to the desired results. Or, if it has not, they can take corrective action to improve results.

3.37 We feel there should be two distinct components to this feedback. The first component would be a report indicating the effectiveness of the legislation in meeting its stated purposes. Such a report would allow legislators to determine if changes to the legislation are warranted in order to ensure that the purpose of a piece of legislation will be achieved. The second component of this feedback would be reporting on administrative activity being undertaken by the Department in support of the legislation; this is discussed later in this chapter.

3.38 There was no reporting on the effectiveness for any of the six pieces of legislation we reviewed. However, this is required for at least one other piece of provincial legislation. Section 9 of the *Clean Air Act* states:

The Minister shall, in each year, table a written report in the Legislative Assembly respecting the success in achieving the objectives and respecting such other matters as the Minister considers appropriate.

3.39 While providing effectiveness reporting annually, as required by the *Clean Air Act*, may not be necessary for all legislation, we do feel that the Legislative Assembly should receive regular feedback on each piece of provincial legislation. We would suggest that such feedback be provided every three to four years.

Recommendation

3.40 We recommended that the Department provide the Legislative Assembly with regular (e.g. every three or four years) written reports on the effectiveness of the legislation it administers in meeting intended purposes.

Periodic review of legislation

3.41 There are no regularly scheduled reviews of any of the six pieces of legislation we looked at. However, five of the six have been subject to varying degrees of review in the past few years, some very extensive. Only the *Apiary Inspection Act* has not been updated recently, although the related Regulation was drafted in 1997. There are some clauses that are obviously out of date in that Act, one being a reference to arsenic

spraying. Branch representatives indicated that the *Apiary Inspection Act* is considered low priority legislation within the Department, and that was why it has not been reviewed or updated. However, we feel that every piece of legislation should be periodically reviewed and updated to ensure that it continues to achieve the purposes of the Legislative Assembly. This process would also be of use in generating effectiveness reporting information for the Legislative Assembly, as discussed in the previous section. We understand that the federal government requires such reviews be conducted every five years. The cost of performing these necessary reviews should be factored into the decision whether or not to proceed with drafting a new piece of legislation.

Recommendation

3.42 We recommended that reviews of legislation under departmental administration be conducted periodically (e.g. every four years) to ensure it is up-to-date, that its stated purposes are still valid, and that it provides an effective framework within which those purposes can be achieved. Results of such reviews could be communicated to the Legislative Assembly.

Departmental accountability for achieving legislative purposes

3.43 Each piece of legislation is assigned to a particular Department to administer in an effective and efficient manner. The Department is accountable to the Legislative Assembly for its own performance in administering that legislation.

3.44 In conjunction with the assignment of responsibility, the Legislative Assembly has a duty to provide sufficient funding through the annual appropriations process to allow the Department to administer the legislation effectively. The *Procedures Manual for Executive Council Documents* recognizes that requirement, and establishes the cost-related information that must accompany the background section of the *Memorandum to Executive Council* and the *Legislative Approval Process for Enacting New or Amending Acts*. It states:

Financial Considerations – The importance of this section cannot be overstated, and every effort should be made to develop accurate cost and revenue estimates for the legislation being contemplated. If this cannot be done, then the reasons should be clearly stated. The financial impact on other departments and agencies as well as external groups and organizations should also be included. Assembling this information will help to determine the economic development implications that must be documented in the Background section.

The cost, if any, of the proposal for the current fiscal year and each of the succeeding two fiscal years should be shown. If expenditures are to be incurred in the current fiscal year, the Program to which expenditures will be charged should be cited. The estimate of cost should include all direct and

indirect expenditures and should take into account all cost recovery potential or increased revenues.

Savings that will result from the proposed action for the current fiscal year and each of the succeeding two fiscal years should also be shown.

3.45 The Legislative Assembly cannot hold a department accountable for poor performance if they do not provide them with adequate resources to administer a piece of legislation. We have a concern that the recently announced cuts to the Department of Agriculture and Rural Development will make it more difficult or even impossible for the Department to successfully achieve the purposes of legislation for which it is responsible.

3.46 We noted during our review that in two cases, Branches did not feel sufficient resources were being allocated to appropriately administer pieces of legislation. In one case, the *Topsoil Preservation Act*, the Land Resources Branch felt that sufficient resources were not available within the Department, but felt that adding additional resources would not improve effectiveness unless significant legislative change occurred first. In another case, the *Apiary Inspection Act*, the Potato and Horticulture Branch had made a conscious decision that administration of the legislation was of lower priority to the Department than other pieces of legislation it had been assigned. Therefore, limited resources were provided and the level of activity connected with that legislation was lower than would be required to ensure its success in meeting its purpose. This decision appears to have resulted from a need to prioritize the allocation of scarce resources within the Department.

3.47 We feel that cases where resource limitations are having a negative impact on the Department's ability to administer legislation should be reported to the Legislative Assembly. The appropriate vehicle for this reporting would appear to be the Department's annual report.

3.48 The annual report policy of the Province of New Brunswick states that the primary accountability vehicle for departments is to be the annual report. Since the effective and efficient administration of assigned legislation is an integral part of the duties of the Department, we feel that the Department should be reporting on this area through its annual report. This would require the development of a departmental strategic objective covering administration of legislation. One or more performance indicators could then be set to measure success in achieving this strategic objective, and annual targets could be set for each performance indicator. Actual performance in administering legislation could be compared with the targets and explanations could be provided where targets are not achieved. Such information would be provided through the departmental annual report.

3.49 During our review, we noted that individual performance indicators had not been established that specifically addressed the administration of the six pieces of legislation we looked at. In most cases operating statistics for these pieces of legislation were provided through the 1998-99 departmental annual report, although there was nothing included for the *Topsoil Preservation Act*. We agree that some pieces of legislation have relatively low levels of activity associated with them at the present time. However, it would be appropriate to formalize standards for those with higher activity levels. For example, the percentage of census agricultural land that is registered as agricultural under the *Agricultural Land Protection and Development Act* could be used as an indicator of performance for that piece of legislation. A target percentage could then be set each year to encourage staff to promote the registry. Establishing such indicators and reporting them in summary form through the departmental annual report would allow readers to evaluate administrative activities undertaken by the Department in support of assigned legislation. At the operating level, it would also help staff prioritize their own work activities.

Recommendations

3.50 We recommended that the Department develop performance indicators that it can use to evaluate administrative activities undertaken by the Department in support of legislation.

3.51 We further recommended that the Department report on its administrative activities related to legislation through the departmental annual report. Where annual targets have not been met, explanations (e.g. negative impacts of resource limitations) should be provided.

Departmental enforcement system

3.52 A majority of affected parties will comply with a piece of legislation if they are aware of it, regardless of associated penalties. However, some will only comply if they see negative consequences associated with non-compliance. Therefore, in order to minimize non-compliance with a piece of legislation, it is necessary to have an effective enforcement system in place. There are two components required in an enforcement system that provides an effective deterrent. First, the penalties must be of sufficient magnitude. Second, the Department must be willing and able to enforce the legislation.

3.53 In general, the Department indicated that penalties under the various pieces of legislation would be an adequate deterrent if they were applied. They also indicated that most cases of non-compliance with legislation are dealt with on an escalating basis, and are resolved before reaching the level where prosecution would be the only remaining option. However, in the two cases of which we are aware where prosecution became the only option remaining to support compliance with a piece of legislation, it was not pursued successfully.

3.54 In a recent case, a farmer would not produce the required certificates showing he had planted seed potatoes, as required under the

Potato Disease Eradication Act and Regulation. This has occurred over a period of a few years. Other remedies were attempted, but proved unsuccessful. However, the Department of Justice felt it was unable to prosecute unless a great deal of evidence was gathered, more than was feasible in the circumstances. It is unclear whether this is a problem with the way the legislation is drafted or something else. In any event, the inability or unwillingness to enforce the legislation sends a message to growers that they may not have to comply because the threat of penalties is an empty one.

3.55 The *Topsoil Preservation Act* appears to have even more problems in this area. First, the Department considers the level of fines to be insufficient. The minimum fine is only \$120, about the equivalent of one truckload of topsoil. In relation to enforcement, the Branch has gone to the extent of hiring costly private investigators to gather evidence in cases of non-compliance. However, for a number of reasons, as discussed in the Appendix to this chapter, they have not been able to develop a strong enough case to convince the Crown prosecutor to attempt a prosecution under this legislation. Not surprisingly, the Branch has noted repeated cases of non-compliance among certain topsoil removers. Branch representatives have also noted some slippage in terms of the number of permits being issued, and attribute this to the lack of successful enforcement activity.

Recommendation

3.56 We recommended that the Department, in co-operation with the Department of Justice, make any changes necessary to facilitate successful enforcement in the future for all legislation under departmental administration. Changes may involve enhancing or increasing administrative penalties such as fines, employing different techniques for evidence gathering, or proposing amendments to legislation.

Evaluation of legislation examined

3.57 The main purposes of the *Apiary Inspection Act*, per Potato and Horticulture branch staff, are to register all beekeepers in the Province of New Brunswick and to prevent the spread of bee diseases and parasites into, and throughout, the Province. During our review we were told that only between thirty-three and sixty percent of active beekeepers in the Province have been registered in the provincial system. Additionally, we noted that there are few general inspections of bees in the Province, and that bees being imported into the Province are not being checked for certification. Therefore, we feel that the purposes of this legislation are not currently being achieved. Branch staff indicated that this legislation has a low priority in relation to other legislation administered by the Department. Consequently, few resources have been allocated to its administration.

3.58 The main purpose of the *Topsoil Preservation Act*, per Land Resources Branch staff, is to protect agricultural land from degradation caused by topsoil removal. For a number of reasons, as discussed in the

Appendix to this chapter, the purpose of this legislation is not being achieved. Major among those reasons is that the framework established by the legislation is not working in practice.

3.59 The main purpose of the *Agricultural Land Protection and Development Act*, per Land Resources Branch staff, is to allow farmers to farm without unwarranted restrictions imposed by local bylaws, and to protect farmland against urban sprawl. Additional legislation and amendments to existing legislation that were expected to be developed in conjunction with this Act have not yet been enacted. As a result, there is no current legislative protection for farmland, and the purpose of this legislation is not being achieved.

3.60 The other three pieces of legislation we reviewed, the *Agricultural Development Act – New Entrant Farmer Loan Regulation*, the *Livestock Operations Act*, and the *Potato Disease Eradication Act*, are achieving their purposes at present.

3.61 However, the scope of the *Livestock Operations Act* is extremely limited. As of March 2000, five new livestock operations had been licensed under the legislation. An estimated 1,500 livestock operations were in existence when the legislation came into effect and are currently exempt from the terms of the Act and Regulation. Over time, in order for the Department to be truly successful in achieving the purpose of the legislation, we would expect to see a larger percentage of livestock operations subject to the licensing requirements. We feel that the Department should consider recommending to government that the coverage of this piece of legislation be extended.

Recommendations

3.62 We recommended that appropriate steps be taken to improve the effectiveness of the *Agricultural Land Protection and Development Act* in achieving its purpose of allowing farmers to farm without undue restrictions and to protect farmland from urban sprawl. This will require improvements in rural land use planning in general, not just amendments to this Act and Regulations.

3.63 We recommended that the Department consider the continued need for legislation to support the apiary industry in the Province and make appropriate recommendations to government with regard to the *Apiary Inspection Act* and Regulation.

3.64 We recommended that the Department develop a workable alternative to the current *Topsoil Preservation Act* and Regulation that will better achieve the purpose intended for the legislation. That alternative should be presented to government for consideration. If a workable alternative cannot be developed in the near term, the Department should strongly consider recommending to government that the Act and Regulation be suspended until such an alternative has been developed.

3.65 We recommended that the Department consider extending the coverage of the *Livestock Operations Act* to more livestock operations and make recommendations to government as considered appropriate.

Conclusion

3.66 The objectives of our review of the Department of Agriculture and Rural Development legislation were the following.

To determine if appropriate systems and practices are in place:

- *to ensure compliance with legislation;*
- *to measure and report on the effectiveness of the legislation;*
and
- *to ensure that resources committed to the administration of legislation are managed with due regard for economy and efficiency.*

3.67 In relation to these objectives, we would make the following conclusions:

- In our opinion, the Department is making reasonable efforts to comply with duties assigned to it under legislation. However, the current downsizing plan for the Department increases the risk that sufficient resources will not be available to allow necessary administrative activities under legislation to take place in the future.
- For a variety of reasons as discussed in this chapter, compliance with the legislation we reviewed varies greatly. For example, enforcement of legislation has been a problem, in some cases due to poorly drafted legislation that does not appear to be legally enforceable. (e.g. the *Topsoil Preservation Act*)
- We feel that measurement and reporting of success to the Legislative Assembly in achieving intended legislative purposes should be improved. One important step in facilitating this would be to ensure that the purpose of each piece of legislation is clearly documented. Another important step would be to periodically review and update each piece of legislation under departmental administration to ensure it continues to be current and relevant. Additional steps would include providing regular reporting to the Legislative Assembly on legislative effectiveness and enhancing performance reporting in the departmental annual report relating to administrative activities.
- In our opinion, only three of the six pieces of legislation we reviewed are currently effective in achieving their purposes. These include the New Entrant Farmer Loan Regulation under the *Agricultural Development Act*, the *Livestock Operations Act*, and the *Potato Disease Eradication Act*. The *Agricultural Land Protection and Development Act*, *Apiary Inspection Act*, and the *Topsoil Preservation Act* appear to be ineffective in achieving their purposes.

- We saw nothing during our review that would lead us to believe that resources committed to the administration of legislation are not managed with due regard for economy and efficiency.

Departmental responses

3.68 Subsequent to the completion of our work, the Department of the Environment and Local Government took over responsibility for the administration of the *Topsoil Preservation Act*. The Department provided the following comments on our observations and recommendations:

The Department agrees with your determination that the act is not currently achieving its purpose. We also agree with your recommendation that we develop, and present to [government], a workable alternative to the current Topsoil Preservation Act and regulation. In developing an alternative approach, the recommendations made in your report will be carefully considered.

3.69 The Department of Agriculture, Fisheries and Aquaculture responded positively to our recommendations.

Appendix - Topsoil Preservation Act

The Topsoil Preservation Act was proclaimed in 1995. Associated Regulation 95-66 was also filed in 1995. At the time of our review, this Legislation was administered by the Land Resources Branch in the Department. It is our understanding that administration of the Topsoil Preservation Act and Regulation 95-66 has been transferred to the new Department of Environment and Local Government effective 1 April 2000. It is unclear how this will affect the legal status of topsoil removal permits issued by the Department after that date since they have been signed by a representative of the Minister of Agriculture and Rural Development.

Representatives of Land Resources Branch indicated that the purpose of the Legislation is to protect agricultural land from degradation caused by topsoil removal. They also indicated that the Department of Environment envisioned it as a way of protecting watercourses.

The Land Resources Branch has indicated that the purpose of the Legislation cannot be achieved given the way the Act and Regulation are currently drafted. The approach established by the Legislation is not working in practice. The Legislation has proven difficult to administer and apply equitably. Consequently, its overall effectiveness has been very limited. Additionally, the existing Legislation creates public expectations that cannot be met, which reflects negatively on the government's ability to regulate topsoil removal.

Several concerns have been raised in relation to this Legislation and its administration.

- The Legislation allows for the removal of a total of only 5% of topsoil from a parcel of land that has been used for agricultural production in the last twenty years. From a monitoring and enforcement perspective, it is difficult to acquire evidence proving agricultural use of land during the last twenty years. It is also difficult to establish the area that was farmed.
- The "5% rule" also raises an issue of equity. A significant number of topsoil contractors have purchased and used parcels of land for the single purpose of topsoil removal. When the Legislation came into effect, these topsoil removers suddenly found that they could no longer use the land for the purpose they had intended. In a couple of cases, this led to sustainable operations being abandoned.
- Allowing the removal of topsoil from even 5% of a parcel of agricultural land allows part of it to be ruined. This does not appear to be consistent with the purpose of the Legislation.
- The Department has had a great deal of difficulty in legally establishing that it was topsoil that was removed based upon the definition of "topsoil" in the Legislation. This is one of the main reasons why there have been no prosecutions for non-compliance under this Legislation. The others relate to the legal establishment of property boundaries.
- The Department has had difficulty in some cases in determining whether proposals for certain undertakings are legitimate. (e.g. Development of private roads, construction sites, cranberry land, etc.) Topsoil removal in those cases is exempt from the terms of the Legislation, a significant loophole that the branch feels has been exploited.
- Inspection staff designated under the Legislation are regional staff of the Department. For the most part, they are agriculture professionals who do not have experience as inspectors. Also, they are normally supporters of the agriculture industry and have indicated they find it hard to act as unbiased enforcers of the Legislation. A move to experienced, independent inspectors might be beneficial in the future.
- The existing Legislation demands a far greater commitment of resources than is currently feasible. In general, the Branch does not feel there is sufficient staff available to properly administer, monitor and enforce terms of the Legislation. However, until the effectiveness of the Legislation has been improved, they do not recommend adding more resources.

- Because of limited staff resources available for the administration of this Legislation, the Branch puts most of its efforts into ensuring that permit applications received are dealt with on a timely basis. However, they do not feel they have been particularly successful in encouraging topsoil removers to obtain permits. The number of permit holders has been gradually dropping. They feel that it is likely due to the Department's inability to successfully prosecute anyone under this Legislation.
- The Branch does little proactive monitoring to identify cases of non-compliance. They rely on complaints from the public, agricultural organizations, and other topsoil removers. This has contributed to the ineffectiveness of the Act and its inequitable application.
- The Branch considers the fines associated with non-compliance with this Legislation insufficient. Minimum fines start at \$120, about the value of one truckload of topsoil.
- In relation to enforcement, the Branch has gone to the extent of hiring private investigators to gather evidence in cases of non-compliance. However, they have not been able to develop a compelling-enough case to convince the Crown prosecutor to attempt a prosecution under this Legislation. Not surprisingly, the Branch has noted repeated cases of non-compliance among certain topsoil removers.
- The cost of collecting evidence is high. Branch staff has indicated that costs could rise to the \$5,000 level if an investigator was required to testify in court.

Feedback from stakeholders with regard to the Legislation has been consistently negative.

- The perception of the general public has been that this Legislation allows the Department to stop the removal of topsoil in any circumstances. The inability of the Department to meet these expectations has caused conflict, and staff sometimes spend hours explaining why they can't take action against a particular topsoil remover. Many complaints and calls have nothing to do with agricultural land. Aesthetics, neighbourhood feuds, noise, and dust are common reasons for complaints, none of which are specifically covered in the Legislation.
- Topsoil removers feel that government is interfering in their business, and that it is their land to use as they see fit. Some topsoil removers complain that they are following the rules while others are not. Members of the New Brunswick Horticultural Trades Association, some of whose members are topsoil removers, have been very proactive. Otherwise, there has been little interest shown by industry.
- Farmers and farm organizations feel that the Department is not effectively protecting farmland from topsoil removal.

The Branch has been proactive in attempting to improve success in achieving the purpose of the Legislation. They have developed two alternative proposals for improving the effectiveness of the Legislation. The first involves a proposed major shift in the approach taken to try to limit removal of topsoil from agricultural land. It involves placing a general prohibition on the removal of soil from all parcels of land in the Province. Exemptions would then be provided for all parcels of land except those registered under the Agricultural Land Protection and Development Act. Alternatively, the Branch would recommend suspending the current Act and undertaking a comprehensive consultation with stakeholders to determine the need for controlling topsoil removal, and to determine if legislation is the most appropriate instrument for accomplishing this purpose. We understand that these proposals have not progressed beyond the departmental level to date due to concerns within the Department of Justice with the approach being proposed.