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# Regulation-Making Powers

REGULATORY FLEXIBILITY, PARLIAMENTARY SOVEREIGNTY,  
& JUDICIAL REVIEW

A Drafter's Perspective

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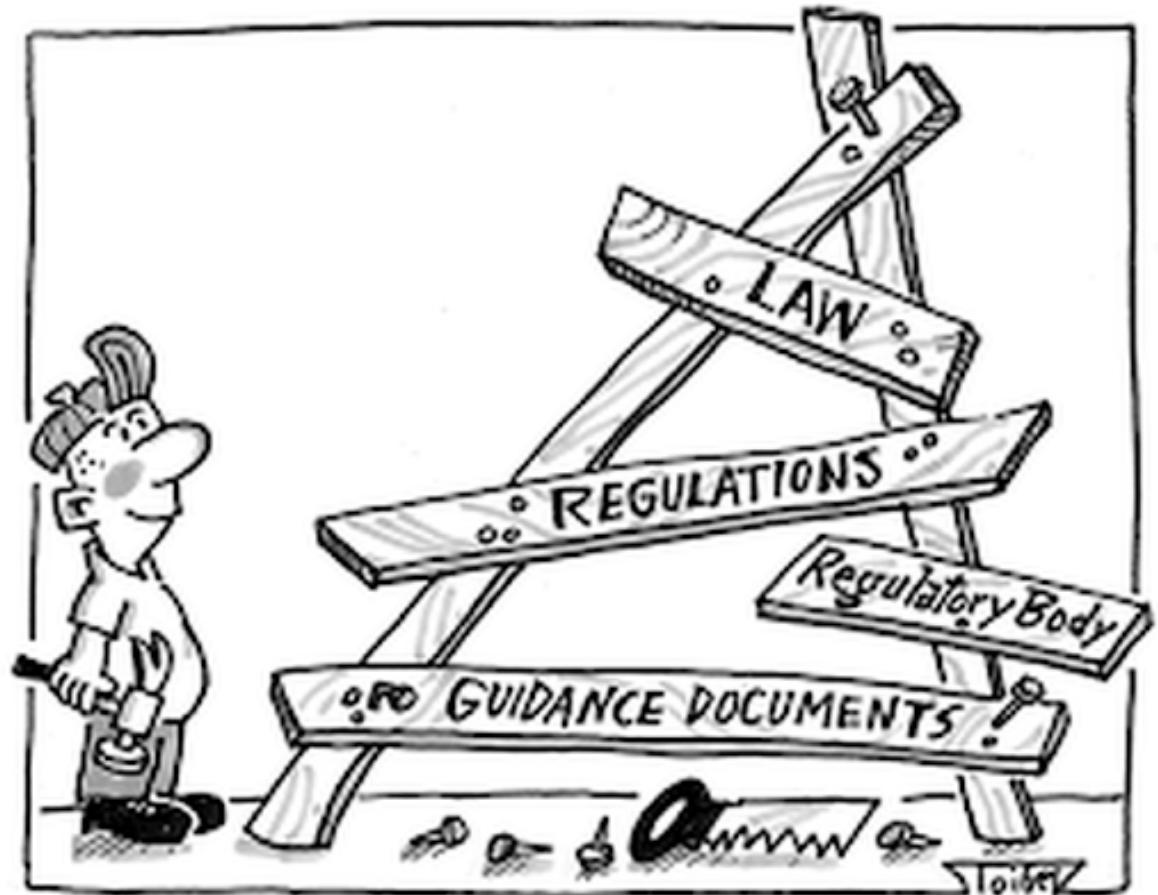
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# Regulations – Scope

- Simple or more complex?
  - “Black letter regulations”
  - Directives, binding guidelines, orders
  - Information circulars, policies and non-binding guidelines
  - Terms and conditions
  - Incorporation by reference - codes and standards



# Regulations – Purpose

- Regulations are useful for the following purposes:
  - To deal with procedural matters
  - To do deal with matters that require constant adjustment (amounts, fees, terms and conditions of licenses or permits)
  - To deal with technical or scientific matters
  - To deal with matters that cannot be finalized until there is some experience with administering the Act
- Flexibility
  - Regulations can be made and amended quickly compared to enacting or amending an Act. This is important particularly where there is an emergency or need to act quickly.

# Parliamentary Sovereignty – SK Legislative Assembly

## *The Legislation Act*

### Copies to Clerk of the Legislative Assembly

4-14 The registrar shall furnish the Clerk of the Legislative Assembly with a copy of every filed regulation.

### Permanent reference to committee of Legislative Assembly

4-15 Every filed regulation stands permanently referred to any committee that the Legislative may appoint for any purpose directed by the Legislative Assembly.

# Parliamentary Sovereignty – SK Legislative Assembly (con'd)

## Procedure if disapproved by Legislative Assembly

4-16(1) The Legislative Assembly may, by resolution:

- (a) disapprove of a regulation or any part of a regulation; or
  - (b) require a regulation or any part of a regulation to be repealed or amended.
- (2) If the Legislative Assembly disapproves of a regulation or part of a regulation or requires a regulation or part of a regulation to be repealed or amended, the Clerk of the Legislative Assembly shall forward the resolution to:
- (a) the authority making the regulation; or
  - (b) in the case of a regulation made by the Lieutenant Governor in Council, the member of the Executive Council to whom for the time being the administration of the regulation is assigned.
- (3) On receipt of the resolution, the authority making the regulation or the Lieutenant Governor in Council, as the case may be, shall repeal or amend the regulation or part of the regulation as required by the resolution.

# Parliamentary Sovereignty – SK Legislative Assembly (con'd)

## *Rules and Procedures of the Legislative Assembly of SK*

### Referral of regulations and bylaws to policy field committees

147(1) Every regulation and bylaw of a professional association, and any amendments, filed with the Legislative Assembly pursuant to any statutory provision shall, in accordance with the guidelines set out in Rule 144, be permanently referred to a policy field committee for review.

# Parliamentary Sovereignty – SK Legislative Assembly (con'd)

## Consideration of regulations by policy field committees

147(2) Policy field committees shall review regulations and all amendments to regulations in order to determine whether the special attention of the Assembly should be drawn to any regulation on any of the following grounds:

- (a) the regulation imposes a charge on the public revenue not specifically provided for by statute;
- (b) the regulation prescribes a payment to be made by any public authority that is not specifically provided for by an Act of the Legislative Assembly;
- (c) the regulation may not be challenged in the courts;
- (d) the regulation makes unusual use of the authority provided for in the parent Act;
- (e) the regulation has an unexpected effect where the parent Act confers no express authority for that effect;
- (f) the regulation purports to have retroactive or retrospective effect where the parent statute confers no express authority to have a retroactive or retrospective effect;
- (g) the regulation has been insufficiently promulgated, is outside the scope of the parent Act, has not been enacted properly, or has been made without the necessary statutory authority;
- (h) the regulation is not clear in meaning;
- (i) the regulation is in any way prejudicial to the public interest.



# Parliamentary Sovereignty – SK Legislative Assembly (con'd)

## Practical Realities



- Lack of resources to fund research staff and hire experts
- Lack of time to deal with complex, technical issues
- Lack of expertise to understand specialized matters
- Small caucuses have to deal with ongoing Parliamentary business (reviewing budgets, raising issues on behalf of constituents)
- Elected officials have duties outside of Parliament – meeting with constituents, consulting with the public, being available to speak at and attend events etc.
- Live in a regulatory state where more matters are subject to regulation, control and direction than were contemplated in 1867 or 1917 (healthcare, social welfare, universal pensions, unemployment insurance, securities regulations etc.)

# Judicial Review – Courts' Approach

- Courts should read into a series of presumptions of matters that Parliament does not intend to delegate:
  - Provisions creating offences or penalties, although, if the Act so authorizes, the provisions of the Act for which an administrative penalty can be imposed may be set out and the amount of the penalty
  - Provisions affecting property and personal rights, such as provisions dealing with searches, investigations and seizures of property;
  - Provisions that impose a tax
  - Provisions having retroactive effect, unless clearly authorized by the Act

## Judicial Review – Courts' Approach (con'd)

- We take a strict construction or “black letter” approach to interpreting regulation-making powers
  - *West Fraser Mills* case
    - Troubling in terms of deference and approach of the courts

# Designing Regulatory Systems – Regulation-making Powers

- Express delegated powers
- Legislators are given the opportunity to question the powers being delegated
- In line with the idea that “Parliament must make its intention to delegate clear”
- Examples of specific regulation-making powers
  - Section 154 of *The Securities Act, 1998* – 17 pages
  - Section 187 of *The Land Titles Act, 2000* – 5 pages

# Designing Regulatory Systems – Expectations

1. Expectations for designing regulatory scheme
  - Establish clear objectives
  - Set out clear powers and responsibilities
  - Reflect proper accountability
  - Ensure compliance with laws
2. Expectations for administering the regulatory program
  - Predictable and consistent outcomes
  - Be fair, proportionate, equitable and respectful
  - Provide notice for proposed decisions and for representations by regulated persons

# Designing Regulatory Systems – Expectations (con'd)

## 2. Expectations for administering the regulatory program (con'd)

- Explain decisions
- Respect confidentiality
- Eliminate unnecessary or duplicative actions
- Have materials available in an accessible and clear format and provide access to those being regulated
- Develop skills of staff
- Innovate and adjust to changing circumstances
- Undertake regular reviews
- Advise minister on a timely basis

❖ *Expectations for Saskatchewan Regulators, Issued by Cabinet on January 21, 2019*

# Designing Regulatory Systems (con'd) - Consultations

- Cabinet Committees, Cabinet and Members of the Legislative Assembly expect consultations on proposed legislation and regulations before they are submitted for their review
- “The right of the House to first access to legislation is one of our oldest conventions. It does and must, however, coexist with the need of governments to consult widely, with the public and stakeholders alike, on issues and policies in the preparation of legislation”

❖ House of Commons Speaker Regan stated on June 8<sup>th</sup>, 2017 and quoted by Speaker Docherty on December 2, 2019

## Designing Regulatory Systems (con'd) – Role of Legislative Crown Counsel

### Drafter's Role

- To review proposals, to identify policy and legal issues that may not be immediately obvious and to suggest wording for the proposals that is clear, concise, legally effective and correct.
- “The popular belief is that the drafter’s main function is to turn policy into some kind of special statutory language. This is a misconception. The drafter’s main and most valuable function is to subject policy ideas to a rigorous intellectual analysis. It is no good putting onto the statute book something that will not stand up. It has to stand up to scrutiny in Parliament and (once enacted) to scrutiny by practitioners and the courts. If the analysis means that ideas collapse, the client will be sent away to think again or might even conclude that the particular project should be abandoned.”

❖ Sir Geoffrey Bowman, “Why is there a Parliamentary Counsel Office?”, (2005) 26 *Statute Law Review*, 69 at page 70

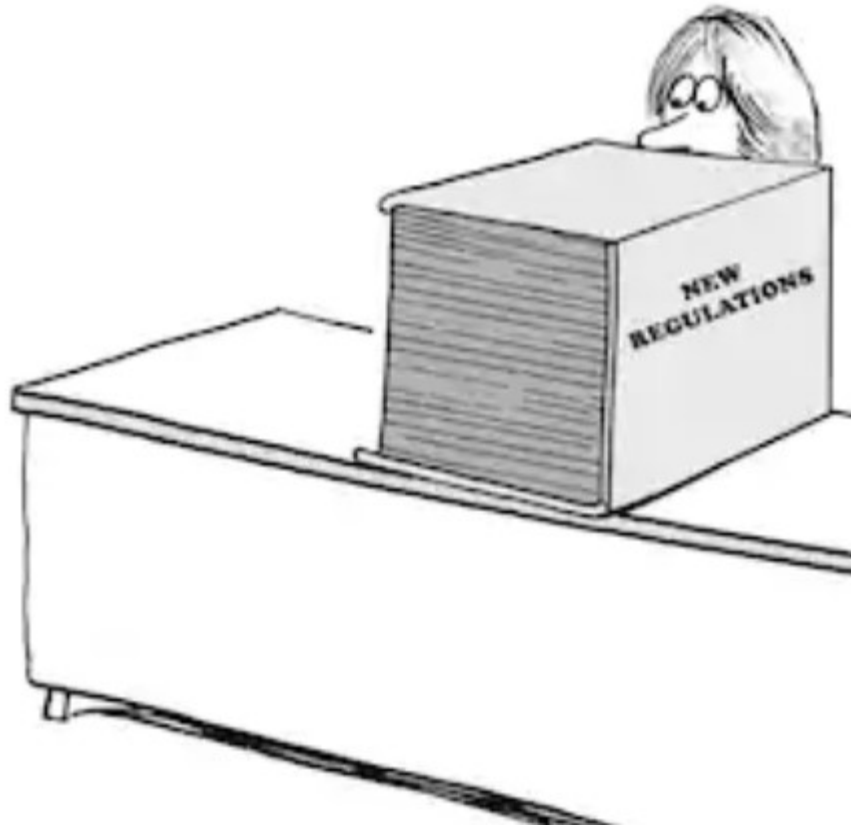


## Designing Regulatory Systems (con'd) – Role of Legislative Crown Counsel

### Drafter as gate-keeper

- “Legislative counsel seem to me to be the gatekeeper in many situations. They have, of course, to act on the instructions of the promoters of the legislation and to draft the legislation as they are instructed but they are also able to advise and should do so where it seems that legislative proposals would offend against general principles of law, including the rule of law itself. It is one of the advantages of having an independent profession of legislative drafters that they should exercise independent judgment on a matter as important as the rule of law. It is an important constitutional safeguard for the citizen. Unlike the courts, drafters will see all or nearly all of the legislation placed before Parliament.”

❖ Honourable Mary Arden, ‘The Impact of Judicial Interpretation on Legislative Drafting’ (2008) *The Loophole* 4, 9.



THANK YOU