

Legislative Drafting and Parliamentary Control
Over Delegated Legislation

Notes for a speech by Derek Lee, M.P.
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Two core constitutional principles of Canadian government are "the rule of law" and "parliamentary supremacy". In a parliamentary democracy, the law is supreme and binds all equally, and Parliament is the only source of new law. Much of the work of the Standing Joint Committee for the Scrutiny of Regulations, a committee I co-chair with Senator Normand Grimard, involves a continuing assertion of these constitutional principles vis-à-vis the Executive and other regulation-making bodies. As Parliament alone is vested with the power to create rules of conduct that are binding on citizens and that will be enforced by the courts, the Executive can only legislate when and to the extent Parliament has authorized it to do so. The law made by Parliament being the highest expression of legislative will, the rule of law requires the Executive to exercise the powers delegated to it in strict compliance with the terms of any delegation.

Where it delegates its legislative function to the Executive, Parliament has not only the right but a duty to ascertain that the powers delegated are exercised in a manner that complies with the letter and spirit of the delegating Act. Just as Parliament has a responsibility to

keep the Executive accountable for the use of public monies of which it authorized the expenditure, it has the responsibility to keep the Executive accountable for the use of delegated law-making powers. I submit to you that maintenance of the supremacy of Parliament and adherence to the rule of law ensure, in the long term, the preservation of the rights and freedoms of citizens. Someone once defined a committee as "a group of the unfit, appointed by the unwilling, to do the unnecessary". Without commenting on the first two aspects of this definition, I certainly feel that the work of our Committee at least, is necessary.

I have said that much of the work of a scrutiny committee revolves around the concepts of "parliamentary supremacy" and "the rule of law". Often, however, the relationship between a questionable regulation and these constitutional principles is not immediately apparent. Of necessity, the issues with which the Committee deals are defined in the language of the law, and this makes it difficult for some to view these issues as involving more than "legal technicalities". That the scrutiny of regulations is demanding, politically unglamorous and unrewarding to some is an observation that has frequently been made. Nevertheless, as many of you are keenly aware, much of the law that affects Canadian citizens is not found

in statutes but in the thousands of regulations made pursuant to powers granted by those statutes. While it is tempting to view the British Columbia Prunes Stabilization Regulations, 1987, for example, as merely an obscure instrument with an unintentionally humorous title, these Regulations were surely significant to the plum and prune producers in B.C.

Regulations are made concerning the most unexpected subjects. No doubt most of you here today would be as surprised as the Committee was when it was confronted with regulations providing that, in certain areas, migratory birds may only be hunted with what is termed "non-toxic" ammunition. I'm sure that if they could, the birds would tell us that as far as they are concerned all ammunition is quite lethal. Of course there are sound environmental reasons for eliminating lead shot. The point is that regulations are not just trivial details. Every regulation affects someone, and there are important constitutional constraints on delegated legislation.

Bearing in mind the constitutional perspective on delegated legislation, I would like today to touch upon a number of drafting practices which the Committee encounters

fairly frequently, and which we believe to be inconsistent with the principles to which I have alluded.

When a Labour Government was last elected in the United Kingdom, one prominent member suggested publicly that the Government should not get bogged down in detailed legislation, but should simply pass a Bill stating "The Secretary of State may by regulation nationalise anything the Secretary of State sees fit". While we have not yet reached the point where such suggestions are followed through, it is the case that a great many statutes confer powers on the executive to act in broad, vaguely defined areas by the use of such phrases as "with respect to" or "respecting". Far too often, however, such conferrals of power simply become the means to implement practices which are motivated purely by the desire for administrative convenience. Even so-called "skeletal legislation" should be fairly specific about the regulation-making powers it grants and what can be done under them. For instance:

- if it is considered that dispensations from subordinate laws in favour of individuals will be needed, the enabling statute must so provide;

- if a permit system is to be introduced, the enabling Act should provide for it. Furthermore, the terms and conditions which may attach to a permit should, at least in a general fashion, be established in the subordinate legislation, and not by the official issuing the permit.

For example, subsection 5(5) of the National Parks Businesses Regulations provides that the park superintendent in his discretion may, in a licence to operate a business in a National Park, stipulate any condition under which the licence is issued. In effect, the Superintendent has been subdelegated the power to make rules concerning the functioning of businesses. The superintendent should not have an unfettered discretion to impose any condition whatsoever on a business, but should be guided by an indication in the Regulations of the categories or types of conditions which may be imposed.

- finally, if a Department wishes to have regulations touching a matter peripheral to the subject matter of the enabling power, Parliament should be asked to provide it. One suspects that often, the search for enabling authority seems to commence only after a decision to regulate in a particular manner has already been made.

Statutes sometimes contain provisions authorizing their amendment by regulation. These provisions are commonly known as "Henry VIII clauses". At the federal level, such provisions are most frequently encountered where an easy way is sought to amend the schedules appended to a statute, and paragraph 30(1)(m) of the Food and Drugs Act is a good example of this use of a Henry VIII Clause. Although this particular use may be relatively harmless, critics have unanimously condemned this device as being inconsistent with the principles of Parliamentary government.

Not so innocuous is section 71 of the Public Service Superannuation Act, which permits the Governor in Council, for the purpose of enabling the pension plan provided by the Act to conform to the relevant income tax legislation, to make regulations adapting any provision of the Act or respecting its application. Moreover, it is also provided that in the event of any inconsistency between such regulations and the Act itself, the regulations prevail to the extent of the inconsistency. The Canadian Forces Superannuation Act and the Royal Canadian Mounted Police Superannuation Act both contain identical provisions.

One recent variation on this device is found in section 16 of the Federal Real Property Act. Subsection (2) of section 16 sets out an extensive list of matters in relation to which the Governor in Council is authorized to make Regulations. Subsection (1), however, authorizes the Governor in Council to make administrative decisions on the very same matters, notwithstanding any regulations. In other words, even if Cabinet has adopted delegated legislation regulating the disposition of Crown property, it may in any particular case, or indeed generally, ignore its own legislation and proceed by way of a discretionary administrative decision.

Such a device clearly undermines Parliament's supremacy over the law. A law which can be set aside at will is no law at all, and there seems no point in giving the Executive the authority to provide a legal framework for its dealings if at the same time it may set aside this framework whenever it is deemed to be inconvenient.

It should be remembered that inconsistency with the principles of parliamentary democracy is not the same as unlawfulness. There are those who would counter that if

Parliament does not wish to countenance these devices it should not legislate them into existence. Indeed, there is no question that much greater attention should be paid to enabling clauses when Bills are before Parliament. At the same time, of course, government Bills are prepared and presented by the Executive branch.

Although primarily a technician, the legislative drafter must strive to see legislative proposals against the whole structure of the law. The drafter has a responsibility to recognize areas of potential danger and be sure that those instructing him are made aware of these dangers as well. It has been written that if drafters of legislation are viewed merely as plumbers or electricians then open societies are likely to be doomed. In the same spirit, the noted British authority on statute law, Sir Francis Bennion, has stated that "while the drafter may operate as a technician, the democratic process requires that he does so as an ardent democrat."

Of course the primary mandate of the Joint Committee for the Scrutiny of Regulations is to review the delegated legislation which flows from enabling clauses. Here too there are a number of drafting techniques which result in

the conferral of what the Committee views as undue administration discretion.

A regulation-making authority will often seek to use a subjective test (such as "in the opinion of" an official or "where the Minister is satisfied") instead of an objective one in granting power to determine whether a regulation applies to a particular circumstance. It has been the constant position of the Joint Committee for the last 20 years that the opinion of an official should not be a criterion for action, and that the only purpose such phrases serve is to restrict judicial review. Where the subjective wording is removed, the officials concerned will still have to use their judgment to determine whether each particular situation fits within the prescribed circumstances.

For instance, a regulation might provide that an unemployed person enrolled in a retraining program is entitled to a special allowance where a certain official "is of the opinion" that the person lives more than 50 kilometres from the place at which the program is held. In each instance, however, the question of the distance between a person's home and the site of the program will be an objective one of fact, and should not be transformed into one of opinion.

There are a number of other practices and techniques which produce similar results. I will briefly refer to some of these, giving specific examples.

1. The use of a rule-making power, not to make rules of general application, but to grant discretionary administrative power to deal with individual cases on an ad hoc basis

Section 5(1)(g) of the Farm Improvement and Marketing Cooperatives Loans and Fees Regulations states that where a claim for loss has been paid, the lender shall deal with any remaining security for the loan held by it "in such manner as the Minister may direct." This represents a complete sub-delegation of the power conferred on the Governor in Council by the Act to make regulations "prescribing, in the event of default in the repayment of a loan, ... the procedure to be followed for ... the disposal or realization of any security for the repayment thereof held by the lender." Under the Regulations, the procedure to be followed in this regard has not been prescribed by the Governor in Council, but rather has been left to be determined by the Minister on a case-by-case basis.

2. The granting of discretionary powers unfettered by any criteria or conditions governing their exercise

Section 19(1)(j) of the Seeds Regulations authorizes the Director to define the area in which seed of a non-registered variety is to be sold. Such sales are prohibited by the Act "except as provided by the regulations". The circumstances and extent of exemptions to be granted should not be left to the discretion of the Director, but should be set out in the Regulations.

3. The prohibition of an activity coupled with a discretion unregulated by any expressed standards or criteria to permit that same activity in individual cases

Perhaps the most glaring example of this is found in the Thunder Bay Harbour Operations By-law, which largely consists of a series of prohibitions, while reserving to the Harbour Commission the power to grant exceptions. Clearly, this is not "regulating" the conduct of persons and vessels using the harbour. Rather, almost every activity has been prohibited, subject to the Commission's discretion to permit a prohibited activity.

4. The refusal to impose a duty to act in a certain way on a Minister or an official and the conferring of a discretion to act instead

Section 4(1) of the Aircraft Marking and Registration Regulations provides that where an application meets all relevant requirements the Minister "may" issue or reserve a registration mark. Why should a discretion reside with the Minister to refuse to issue or reserve a registration mark even though all requirements have been fully complied with?

5. The failure to set objective criteria and to require the observance of the minimum standards of natural justice when a decision to act adversely to a subject is taken, for example when a licence or permit is cancelled or suspended.

Whatever the subject's rights to litigate may be, where a licence or permit is cancelled or suspended, or some other action is taken which will have a negative effect on a person or on his or her livelihood, reasons should be required to be given for the decision and an opportunity to show those reasons to be false or inapplicable should be afforded.

This issue was raised in connection with the Technical Data Control Regulations, which were recently amended to provide that where a contractor's certification has been revoked the contractor may, within 30 days, submit to the Minister new or additional information showing why the revocation should not have been made. In such instances the revocation must be reconsidered.

6. The failure to specify when a permit or licence will be suspended, as opposed to being cancelled

Several regulations made pursuant to the Canada Agricultural Products Act (such as the Maple Products Regulations and the Dairy Products Regulations) provide for both the cancellation and the suspension of licences for failure to comply with the Act or Regulations. No indication is given, however, as to the considerations which will lead to one being chosen over the other. Even where criteria are prescribed, often they are virtually the same for both suspension and cancellation. The justification given for this approach is the desire for "administrative flexibility" in determining in each instance whether suspension or cancellation is preferable.

7. The imposition of fees or charges by reference to imprecise or subjective criteria or by reference to variable rates in the public or private sector

Examples of this would be using the power to prescribe the amount of a fee to set an interest charge at "prime plus 1%", to impose a fee for a service of "cost plus 10%" or, as in the case of a number of items in the Federal Elections Fees Tariff, to provide for the paying of fees "in an amount to be determined by the Chief Electoral Officer".

The prescription of a fee or charge involves the establishment of a fixed and ascertained amount to be paid. Thus, where an enabling authority confers the power to prescribe a fee by way of regulations, the Committee expects that the precise amount of the fee will be set out in the regulations themselves. Otherwise, the amount of the fee will be determined as a matter of administrative discretion or will be dependent upon the actions of some other body. In either case, the result is a subdelegation of the power to prescribe the fee in question.

8. The making of substantive rules under ancillary or procedural enabling powers following or preceding an enumeration of specific enabling powers

Frequently, the enumeration of specific enabling powers in a statute either begins or ends with the power to make regulations "for carrying out the purposes and provisions of this Act" or with the conferral of some similar general power. On numerous occasions, such powers have been relied upon to enact substantive provisions placing duties and obligations on the citizen, limiting the rights and liberties of citizens, and even imposing fees. At times fairly complex regulatory regimes have been put in place relying solely on such general conferrals of power. As Professor Driedger (himself a former Deputy Minister of the Department of Justice) has noted in his book "Construction of Statutes", however, it is "doubtful" whether these kinds of general forms "would authorize anything more than purely procedural or administrative regulations." The potential for abuse of these wide grants of power is easily imagined.

What is common to the techniques and practices I have mentioned is the attempt to proceed, not by the making of a rule, but by the conferring of a discretion, usually unfettered, on an official to proceed administratively. It

is administrative discretion which the Committee fights so often.

Civil servants are usually the initiators of program proposals, and even when proposals originate with ministers, it is the officials who work out the details. Naturally, they prefer regulations which will simplify administration and achieve program objectives in the most direct way, and they will be inclined to push whatever statutory powers have been conferred on them to the limit. It must be understood, however, that the democratic validity of delegated legislation depends on its being authorized by Parliament. Respect for the limits of the authority conferred by Parliament is therefore both a political and a legal necessity. Only strict adherence to these limits makes it politically acceptable for rules made by the Executive to be enforced against the citizen. Drafters of subordinate legislation have a particular responsibility to view each proposal bearing in mind this fundamental principle.

Where subordinate legislation is concerned, adopting the most expedient route to achieve a desired end may well be done at the cost of infringing important rights of citizens. In parliamentary democracies, law has come to be

accepted as the favoured instrument of government. At the same time, constraints have evolved which are designed to prevent the arbitrary or oppressive misuse of law. I believe it is absolutely crucial that legislative drafters always be conscious of those constraints and that they provide advice to their employers accordingly.