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LES ENJEUX DE LA RÉGLEMENTATION

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DESIGNING THE REGULATORY SCHEME

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Definition of Regulation : " a rule of Conduct, enacted by a regulation making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons. [1]"

1. Introduction

The regulatory process has substantially improved over time both in terms of fairness and accessibility. We are a far cry from the time when statutes contained omnibus enabling clauses such as : "The Government may make regulations to prescribe anything which must be prescribed by regulation under this Act."

In French, the clause read: "Le gouvernement peut faire des règlements pour prescrire ce qui doit être prescrit par règlement en vertu de la présente loi."

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[1]The essential characteristics of subordinate legislation are reflected in this definition of "regulation" which was adopted by the Special Committee on Statutory Instruments in its Third Report to the House of Commons, Queen's Printer, 1969.

Approximately 1000 "statutory instruments" are passed every year in Canada. Their scope and volume continues to increase. However, the process by which those statutory instruments are passed in Canada is more closely regulated now than a generation ago.

Back in the early 1970s, Canadian citizens could be subject to penalties in advance of publication of some regulations. Pre-publication was not common either.

Gradually, there arose a concern not only about the growing body of delegated legislation in this country, but also about its method of dissemination to the public, given the penalties which could be attached. Penalties could precede publication, in a system which reminds me of the historical criticism of the Common Law made by the political philosopher Jeremy Bentham.

Bentham called the common law "dog law", because you never bother to tell the dog what he can't do, you just kick him when he does something wrong. Regulations used to deliver such surprise kicks to citizens [2].

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[2] The "dog law" problem, less prevalent now than in past centuries, in the current era when the Common law is increasingly statute-and-regulation based, nonetheless offers a reason why Civilians, at least historically, might with justification have claimed superiority for their legal system. I hasten to add that these comments are not intended as an opening salvo in an

But the Third Report of the Special Committee on Statutory Instruments to the House of Commons in 1969 had the effect of restructuring and refining the system and process by which federal delegated legislation comes into being. A similar reform took place at the provincial level. Its thorough review of perceived inadequacies of the regulation-making in 1969 led to the passing of the *Statutory Instruments Act* in 1971. That *Act* provides for the publication, registration and centralization of federal statutory instruments and will continue to do so unless or until it is replaced by Bill C-84, (Appendix B) , *An Act to provide for the review, registration, publication and parliamentary scrutiny of regulations and other documents and to make consequential and related amendments to other Acts*, which has been debated in the House and has now been referred to a House Standing Committee..

After considering the situation in other Commonwealth jurisdictions, The Third Report also advocated the establishment in Canada of a Committee of the House of Commons, or a Joint Committee, with the task of scrutinizing statutory instruments on behalf of Parliament. This Standing Joint Committee was set up in 1973, and still meets once every two weeks.

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entirely different, albeit interesting, debate.

The changes in the last generation, including pre-publication and publication requirements, have ensured greater opportunities for input and criticism from those who are likely to be affected by the regulations or pressure groups who act as watchdogs in the public interest.

Obviously the down side of this process has been a loss of that very flexibility which originally was one of the compelling reasons advanced in support of the regulatory process. In some cases, amending a regulation has becomes so long and cumbersome a process that the legislature goes on to amend the regulation in the legislative bill amending the enabling statute. This is what Quebec did recently when it amended its Labour Relations Act in the building industry (*Loi sur les relations de travail dans l'industrie de la construction*). It amended at the same time the Decree applicable to the building industry.

In terms of contents as well, the regulatory scheme has improved although no one so far has been able to satisfactorily answer the simple questions: What should go in the statute? What should go in the regulations? The problem is not peculiar to Canada.

A recent Report of the Hansard Society Commission on the Legislative Process in

England [3], chaired by Lord Rippon of Hexham concluded at p. 66:

> "A dividing line must be drawn somewhere: someone must decide what should be put in a bill and what left to delegated legislation. At present it appears rather haphazard, with Ministers, departmental officials and Parliamentary Counsel all having a say and differing solutions being adopted....We see great difficulty in laying down precise demarcation rules - the political needs, content, legal import and urgency of each bill differ- but we accept that some standard treatment, which does not appear to exist at present, would be desirable. We ourselves are not in a position to suggests what this might be. We welcome, however, the setting up by the House of Lords of the Delegated Powers Scrutiny Committee, which has been given, as its first task, the consideration of ground rules and criteria on what matters can appropriately be left to delegated legislation."

This Commission also condemned the recent tendency for the British Parliament to make use of Henry VIII clauses in delegated legislation whereby a single Minister is given the power to change the law made by Parliament as a whole. For example, the *Local Government Finance Act 1988* empowered the Secretary of State, by order, to "make such supplementary, incidental,

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[3] Making the Law: The Report of the Hansard Society Commission on the Legislative Process; Hansard Society for Parliamentary Government, Commission on the Legislative Process; London, 1993.

consequential or transitional provisions as appear to him to be necessary or expedient for the general purposes or any particular purpose of the Act" and then provided that such an order might amend, repeal or revoke any provision of any Act of the same or any earlier session.

Similar provisions could be found in other *Acts* of 1985, 1986, 1987 and the *Local Government and Housing Act 1988*, the *Companies Act 1989* and the *Children Act 1989,* to name but a few[4].

Referring to these clauses Lord Rippon of Hexham described the UK phenomenon as a "constitutional outrage[5] ." He was also concerned with the fact that although Bills get longer and longer, they increasingly were mere skeletal legislation leaving vital details to be settled by orders and regulations on the basis that the Minister needs flexibility to bring the Act into operation.

I am not suggesting that this is the situation in Canada and I leave it to others to debate such issues. I simply wanted to point out the fact that any progress made in this field remains

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[4] Id., at p. 67. See also House of Lords Debates Legislation: Scrutiny Proposal, 14 February 1990, 1407-1437

[5] Lord Rippon of Hexham, Henry VIII Clauses, (1989) 10 Statute Law Review 205 at 207

fragile and that there is a need for continuous objective scrutiny of legislation and the regulatory process.

2. A Judicial Perspective

2.1 The need for clearly and reasonably defined delegated powers

From the judicial perspective, there are certain principles which should govern what is in the regulations as opposed to what is in the statute. Of course, all of the challenge of law is in the application of those principles to reality, but let's start with the idea:

We expect to see all the substantive rights and duties of individuals fully-fledged in the statute whereas the details, the procedures are fleshed out in the regulations. In fact, in the late 1980s, the Federal Government even established a Citizens' Code of Regulatory Fairness which contained an enunciation of principles like this.

In contradistinction , the situation is different when the legislation is procedural legislation. Then the procedural rights and obligations will be in the statute while minute details

of implementation of those procedural rights can be found in the rules of practice.

Unfortunately, the line between substance and procedure in law is sometimes as fine as that between twilight and dusk in a day.

Moving onto a plane where clarity in a small sense can be achieved , I believe I speak on behalf of at least those judges I know, when I say that in the ideal judicial world, enabling provisions in the enabling statute would always precisely delineate the scope of the delegation.

Furthermore, the delegated power itself would be clear, reasonable and defined;

Moreover, and this would be like Christmas and Easter rolled into one for a five-year-old child, such would be the excitement it would generate in a panel of judges, but the interaction of the regulations with the enabling statute would be like the operation of a tandem bicycle, well-oiled, I might add.

Unfortunately, quite often the interaction of the statute and the regulations is not that

clear. Not to unfairly single it out, but the *Immigration Act* is a salient example, cited by many of my fellow judges when I asked for their comments on the difficulties they routinely encounter in the interpretation of regulations, of an *Act* that does not impress them as a particularly well-oiled machine.

The Unemployment Insurance Act garnered second place for opacity in the judges' hearts in my random sample , a dubious distinction, to be sure.

The regulations to the *UIA* "change with monotonous regularity, but no-one can figure anything out, while the *Act* stays relatively constant," were the memorable words of a fellow judge, who shall remain nameless. Since I won't be subject to libel, I'll continue with his comments: "The *Unemployment Insurance Act* is not about unemployment, it's not about insurance, and it's not an *Act*, it's a system of social welfare which varies from province to province, and it can't be made sense of from the regulations." A voice of muted despair from the judicial wilderness.

2.2 The difficulty with implied powers and implied restrictions

Turning now to the next item on the judicial wish-list, if the power to make exemptions

was being given to the regulation-making authority, this power would be express in the statute.

It would be known that this power of dispensation was always to be made express, so judges would no longer have to hear arguments concerning the ubiquitous- in argument - but elusive- in reality - doctrine of implied powers or implied restrictions.

In fact, courts often are asked to grapple with the argument of implied powers or implied restrictions which always reminds me of the poem which begins: "As I was going up the stair, I met a man who wasn't there[6]." "The man who wasn't there" is the implied power or the implied restriction - should the Court believe the litigant who says he saw him ? Should the Court go check for itself? Well, yes. But even with the judge checking for the invisible man, how does the advocate persuade the judge, how does the advocate establish the existence of something that admittedly does not exist, at least not expressly? It's an uphill -or should I say upstair-battle, difficult for litigants, judges and advocates.

The recent case of *The Minister of Employment and Immigration v. Jafari* [7], decided by

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[6] Hughes Mearnes, 1875-1965, The Psychoed, found in Bartlett's Familiar Quotations, 16th edition, Little, Brown and Company, 1992, p. 630.

[7] A-442-94, April 11, 1995 (Federal Court of Appeal)

the Federal Court of Appeal earlier this year, is on-point. The Federal Court of Appeal reversed the Federal Court, Trial Division. The issue was whether or not regulations made by the Government were subject to an implied restriction as to their scope, given the wording of the enabling statute. These were regulations establishing a "fast-track" process, enacted to deal with a backlog in the refugee claimant process. They stipulated that a refugee claimant lost his status in the "fast-track" process if he or she left Canada for more than 7 days. The lawyer for the refugee claimant argued that the government was under an implied restriction with respect to the type of regulations it could make. Judge Nadon of the Trial Division found that the implied restriction existed, because the regulations were inconsistent with the humanitarian spirit of the refugee claimant process, whereas the Court of Appeal held that the government was under no such implied restriction with respect to the regulations it was empowered to make.

In other words,

The Trial Division of the Court thought it met the man who wasn't there.
The Appeal Division definitively concluded that the man was not there to be met.
An appeal to the Supreme Court might have yielded the conclusion that the Appeal Division erred; though the man was not there, he should have been met.

2.3 The need for clear, accessible and well-drafted regulations

It is axiomatic, but bears repeating, that what concerns a judge most in dealing with the complexity of modern regulations is that the regulations before us be as clear as possible. This is because what we are most often called upon to do is to interpret regulations .

Now, some, bless them, are as clear as God's instructions to Noah at Genesis 6:13: "God said to Noah,...Make yourself an ark...(That was the statute part, and now, for the regulations:) This is how to make it: the length of the ark is to be 300 cubits, its breadth 50 cubits and its height 30 cubits." These types of regulations rarely pose significant difficulty for us, and it would appear, at least from the scriptures, or from our presence here today, depending on one's beliefs, that Noah had no difficulty with this type of regulation either.

In the ideal litigation (if such a concept is not oxymoronic), all the relevant regulations pertinent to particular case would be before us - at the same time as the litigants. Because of the rapidity with which regulations can change, it is a constant and genuine judicial concern to ensure that we have all the regulations which apply in a given case.

In the ideal litigation, further, all the relevant regulations pertinent to a particular case would be accessible - accessible in the sense that they are readily understood.

Regulations, some of them, are very technical, and, like the *Income Tax Act*, not written in either of Canada's official languages. The expertise required to decipher them is not always that expertise in which we are trained. That sounds like a complaint. That is a complaint.

2.4 The difficulty of ascertaining legislative intent

This idea of accessibility links to the last major point I wish to make today: in cases like that especially, where the subject-matter of the regulation is somewhat obscure, and this comment extends to simply unclearly worded regulations as well, it would be enormously helpful if there were available some tool, somewhere to turn, analogous to Hansard, if the meaning of a particular provision of a regulation required elucidation as to its intent.

I find it ironic that legislation can be analyzed in this fashion, whereas delegated legislation may not. In addition to all the tools of statutory interpretation, a judge may have recourse, if the intent of the legislature is unclear, to the actual debates in the House of Commons upon introduction of the Bill, or subsequent discussions at the stage of the second reading, in the hopes of finding there some insight into the thought-making process which guided the drafting.

Now, this recourse may be a helpful tool; on the other hand, it may not be helpful at all: I am tempted here to offer a tangential editorial comment on the tool of Hansard: I remember an article aptly entitled: If "The Devil Himself Knows Not the Mind of Man", How Possibly Can Judges Know the Motivation of Legislators?". In it the writer, A.S. Miller, commented, and I concur : "Anyone with even a passing knowledge of how legislators operate knows that on many statutes an individual member simply has no intent. [8]"

Nevertheless, as long as the tool exists, the possibility that it might be helpful exists too. But it seems that when Parliament delegates the power to legislate, the process is different, frankly, it is less accessible than that which attends the passing of legislation. However, it would seem a tenable proposition that since regulations have the force of laws, they should be made by processes which as far as possible, within the inherent constraints, approximate the openness of

[8] A.S. Miller, "If 'The Devil Himself Knows Not the Mind of Man', How Possibly Can Judges Know the Motivation of Legislators", (1978) , 15 San Diego Law Review, 1167 at p. 1170.

the general legislative process.

But they don't. For instance, if I want a recourse to ascertain the legislative intent of a federal regulation, for example, I might look to the Regulatory Impact Analysis Statement, or RIAS, which follows the regulation in the Canada Gazette, Part II.

RIAS' inaugural year was 1986. These were proceeded by Explanatory Notes which began in 1980 but tended to be very brief, a few sentences at most. Once upon a time, and I understand that matters are different now, but for the purposes of illustration, once upon a time I am told that the Department of Finance wrote notoriously unhelpful "explanatory notes". These laconic addenda to the amendments to the regulations read, tautologically and unhelpfully, "This amendment has the effect of amending the *Income Tax Act*".

Regulatory Impact Analysis Statements, however, are meant to be more comprehensive, thorough, and transparent.

When one actually does a random check of the Canada Gazette, Part II, RIAS' vary in quality and helpfulness, but in theory, at least, they provide the background behind a new

regulation or an amendment to existing regulations.

I should add a caveat to such a random check, however : It is difficult to ascertain how good a RIAS is in substance, as opposed to form, by simply reading them, in the absence of knowing whether the actual effect of a given regulation is the same or even close to the anticipated effect. But in general from the RIAS one can glean some sense of the intent behind regulations, at least.

The second point is that not all RIAS are of equal difficulty to write - a minor amendment to an existing structure can be fairly easily or even thoroughly explained, but it is much more difficult to explain the anticipated impact of a substantial overhaul of a large piece of legislation, such as the Canada Labour Code, which was amended in 1984.

Alternatively, if I wanted insight into the legislative intent of a federal regulation, a second option would be to check the index of the minutes to the meetings of the Joint Committee. (That is, the Standing Joint Committee for the Scrutiny of Regulations, established in 1973 and still meeting every two weeks). This is an arduous process, made more difficult by the fact that my perusal of a copy of the minutes of one Joint Committee meeting lead me to the conclusion that the more interesting discussions engaged in by the Committee members occur *in*

camera.

3. Conclusion

In summary, the twin tasks, of drafting and interpreting regulations, are formidable. Notwithstanding the difficulties inherent, which really just keeps our professions interesting, I am confident by the show of expertise I see assembled at this conference that the challenge is well in hand. Thank you.