

**Parliamentary Scrutiny of Delegated Legislation in Canada: Too
Late and Too Little?**

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Let me begin with a quote:

There is in existence, and in certain quarters in the ascendant, a genuine belief that Parliamentary institutions and the Rule of Law have been tried and found wanting.

The author went on to describe a “new despotism”, the goal of which was “to subordinate Parliament, to evade the Courts and to render the will, or the caprice, of the Executive unfettered and supreme.” The main weapon to achieve this was said to be the unfettered growth of executive legislation.

Some will have recognized the source. The year was 1929. What brought these comments considerable attention was that the author was the Lord Chief Justice of England. (The Rt. Hon. Lord Hewart of Bury, *The New Despotism*, London, E. Benn Ltd., Reprinted 1945.)

The immediate response was the appointment of a committee made up of members of Parliament, senior civil servants, academics and practising lawyers to inquire into and report on the issues raised by the Lord Chief Justice. The Report of this Committee on Ministers’ Powers, as it was called, concluded that the criticisms levelled against delegated legislation, though significant, did not destroy the case for its use. Rather they illustrated that there were dangers, that there was the possibility of abuse, but that the problem could be addressed by putting safeguards in place.

The Committee recommended that the time had come to establish parliamentary committees to scrutinize both regulations and bills containing any proposals to delegate legislative powers. It was not until 1944, however, that a committee to scrutinize regulations was first formed.

Meanwhile, at the federal level in Australia, a Senate Regulations and Ordinances Committee had already been established in 1932.

¹ The views expressed in this paper are those of the author and not those of the Standing Joint Committee for the Scrutiny of Regulations or of the Library of Parliament.

Suffice it to say that Canada has never been a leader in this area. Prior to the passage of the *Regulations Act* in 1950, there was not even a general statutory requirement that subordinate legislation be published, or tabled in Parliament.

No provision was made for parliamentary scrutiny by the *Regulations Act*. Eighteen years later, the House of Commons did set up a Special Committee to consider and report on “procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.”

The MacGuigan Committee, as it was known, made a number of recommendations, including that a committee of the House should be instituted, to which all regulations should stand permanently referred. In response, the government promised a new act and agreed to the establishment of a scrutiny committee.

The new act was of course the *Statutory Instruments Act*, which is still with us today. The then Minister of Justice, the Hon. John Turner, stated that the Bill, together with other steps to be taken, was an attempt to restore a measure of parliamentary control over the executive and to redress the balance in the relationship between the individual and the state. In the end it was decided that the scrutiny committee should be a joint committee of both Houses, and the Joint Committee began to function in November of 1974. Better late than never.

Evidently there was considerable antipathy in government circles to the establishment of a parliamentary scrutiny committee. The initial attitude seems to have been that if the Joint Committee was ignored it would soon enough just go away. In any event, nearly 40 years on the Joint Committee is still around.

Unfortunately, the idea of committees of the legislature whose mandate is to scrutinize the exercise of delegated legislative powers has never really caught on in Canada at the provincial level. While there is a long history of active scrutiny committees in the Australian states, we have very few provincial counterparts. Even where provision is made for provincial committees, they are more often than not moribund, or at best intermittent, in their functioning.

So, how effective is the Standing Joint Committee for the Scrutiny of Regulations, and after all these years just what has it accomplished? Well, every year there are dozens of amendments made to regulations in response to matters raised by the Committee. Unquestionably, however, it is far easier to secure agreement on a

point of drafting or clarification than on an issue of substance. Moreover, there are often considerable delays between the time an issue is first raised with a regulation-making authority and the final resolution of the matter in dispute. In fact, much of the Committee's time is taken up in trying to ensure that promised amendments actually get made.

Delays in obtaining replies from regulation-making authorities and in the fulfillment of undertakings appear to be something of a common concern among scrutiny committees in all jurisdictions. To some extent, the degree of concern varies depending upon the manner in which a particular committee carries out its mandate. In some jurisdictions, scrutiny committees simply identify concerns and report them to the legislature. Other committees follow an approach more akin to that reflected in the work of the Standing Joint Committee for the Scrutiny of Regulations, whereby the substance of a response will be pursued with the regulation-maker where the Committee considers the response to be incorrect or otherwise unsatisfactory. Only when the Committee is satisfied that further correspondence serves no purpose will it report on the matter.

This approach clearly increases the volume of correspondence, as well as the time many files remain active. On the other hand, there is no question that many amendments secured by the Committee have been made only after a lengthy debate on the merits of the respective views of the Committee and the regulation-making authority.

In addition, it appears that the Joint Committee has greater difficulty than many other scrutiny committees in securing the timely making of promised amendments. Whether this reflects a particular attitude towards the work of the Committee, or perhaps to Parliament more generally, or is simply a reflection of the pace of federal regulation-making is a matter of speculation. I would suggest that in Canada, the balance between the executive and the legislature tilts more towards the executive than in many comparable jurisdictions.

Where there is an unsatisfactory delay, either in providing a substantive response or in taking promised action, the options available to a scrutiny committee are limited. It can pressure the department or the responsible minister directly, it can call witnesses to explain the delay, it can report the matter to Parliament, and possibly

recommend disallowance. Ultimately, however, it is the government that controls the pace of the process.

In some jurisdictions, greater use is made of the reporting power as a means of dealing with delays. Where a committee is unable to obtain a response within a reasonable time, or when a longstanding undertaking remains in abeyance, the delay itself is reported to the legislature. In this connection, it may be noted that both the Rules of the Senate and the Standing Orders of the House of Commons provide for the tabling of a comprehensive government response to a committee report within 120 days. If the government can be required to prepare and table a comprehensive response to a committee report within 120 days, there is no reason not to expect that a reply to the Joint Committee's correspondence should not be expected within a similar period.

Disallowance procedures are in place in many Commonwealth jurisdictions. In some of these the possibility that a parliamentary committee would recommend disallowing a provision is viewed with sufficient seriousness that merely giving notice of an intended disallowance leads to remedial action. Elsewhere, governments are more inclined to simply seek the defeat of a disallowance motion. The dearth of disallowance reports under the statutory procedure enacted federally in 2003 may indicate that was not as significant a development as might have been thought at the time. Whether disallowance is a dead letter remains to be seen.

One difficulty with the Canadian disallowance procedure is that there may be a reluctance to have recourse to it where the matter in question is relatively minor or where the revocation of a provision might, even if only for a short time, create a legislative void having undesirable consequences. Some jurisdictions have disallowance procedures that permit not only the removal of a provision, but also its amendment. This clearly provides a more refined mechanism for remedying concerns raised by scrutiny committees.

There are other mechanisms besides review by the Joint Committee that are intended to ensure that Parliament maintains some degree of control over how delegated powers are exercised. These include mandating parliamentary review of legislation after it has been in force for a specified period of time, and requiring the tabling of regulations or proposed regulations. All of these, however, take place after the enabling legislation has been passed.

A number of Australian jurisdictions, as well as New Zealand and the United Kingdom, have parliamentary committees whose mandate includes scrutinizing bills specifically to identify provisions that may constitute overly broad delegations of power. Sometimes this is part of a broader mandate to focus on the effect of proposed legislation on individual rights and liberties.

In some jurisdictions, a single committee scrutinizes both bills and delegated legislation, and it will be seen that the focus of the two functions is quite similar, although of course the scrutiny of a bill takes place prior to the passage of the legislation and concerns the delegation of powers and the enabling provisions themselves, rather than their exercise.

The effectiveness of scrutiny of bills committees can be difficult to measure, and no doubt varies from jurisdiction to jurisdiction. In some legislatures it is not unusual for bills to be amended where concerns are raised by scrutiny committees. Elsewhere, bills are rarely changed as a result of comments made by scrutiny committees. The degree to which scrutiny of bills committees may have an effect on the manner in which bills are drafted, thus serving as a deterrent to objectionable practices, is impossible to quantify.

Obviously, the Canadian Parliament has no equivalent to a scrutiny of bills committee. As for whether this means that Canada lags behind, there can be no doubt that too little attention is given to provisions in bills that grant regulation-making authority and otherwise delegate powers to the executive.

The advantages of a scrutiny of bills committee would be that these issues could be addressed in a consistent manner, in a comparatively non-partisan fashion. The committee would develop an expertise on the relevant issues, drawing concerns to the attention of the Houses, or perhaps to the committee studying the bill directly. Over time this could also have an effect on the drafting of legislation more generally.

It is also worth noting that the problems that citizens encounter are often not with the actual regulation *per se*, but with how the regulation is applied and administered. Some jurisdictions, including a number of provinces, have an ombudsman who investigates the administrative actions of government organizations that implement regulations. That ombudsman is typically an officer of the legislature, and so provides another level of oversight of how powers delegated by the legislature are exercised. While specialized complaint offices have been created for specific

purposes, they cover only a small fraction of administrative decisions and actions taken each year at the federal level in Canada.

Parliamentary scrutiny of regulations was a response to the realization that one result of the economic and social demands of the modern state was that the power to establish rules had increasingly been turned over to the executive branch of government. At the same time, Parliament had a duty to ascertain that the delegated powers were exercised in a manner that complies with the letter and spirit of the delegating statute. In many ways, we have now moved into a “post-regulations” era, with more and more rules of conduct found, not in acts of Parliament or in regulations, but in other documents such as manuals, international agreements, third-party standards and executive orders that supplant regulations.

There is no doubt that this has given rise to certain legislative practices that present a significant challenge to effective parliamentary scrutiny. A few examples follow.

It has become routine to provide in statutes that the responsible minister may make so-called “interim orders” containing any provision that may be contained in a regulation made under the act in order to deal with situations of significant risk. Typically, an interim order ceases to have effect 14 days after it is made unless it is approved by the Governor in Council. If so approved, the interim order then ceases to have effect on the earlier of one year after its making or the day on which when a regulation having the same effect as the order comes into force. Interim orders are usually exempted from examination, registration and publication under the *Statutory Instruments Act*, although they are subject to individual publication requirements. The *Aeronautics Act*, *Food and Drugs Act*, *Canadian Environmental Protection Act*, *Canada Consumer Product Safety Act*, and the *Navigation Protection Act* are but some of the statutes that now include such a mechanism.

Thus we come to the case of the *Interim Orders Respecting Private Operators*. These Orders dealt with private operators of Canadian aircraft that are not used to provide commercial air service. They ran to some 35 pages and replaced 27 sections of the *Canadian Aviation Regulations*.

The initial interim order was followed by a series of eight more consecutive interim orders. Each was only published after it had expired. The Governor in Council then approved a series of three one-year interim orders before regulations

were finally made to enact the content of these orders. Thus, the interim order mechanism was used for more than three years.

It was claimed that the need for these interim orders arose from “extraordinary circumstances that warranted immediate measures to address a significant risk to aviation safety”. What were these circumstances? Well, the Department of Transport had decided that it would take over the issuing of private operator certificates from the Canadian Business Aviation Association, but the Department was unable to prepare the necessary new regulations by the date it had announced. Subsequent timelines were also not met, leading to a series of interim orders lasting three plus years. In other words, the extraordinary circumstances that warranted immediate measures to address a significant risk to aviation safety were entirely created by the Department itself.

While it was argued that the repeated use of interim orders was not an attempt to bypass the usual rulemaking process, this was precisely the result. If a succession of eleven orders does not “bypass the usual rulemaking process”, what does?

Another common feature of statutes has become the inclusion of a power to make regulations incorporating material as amended from time to time “regardless of its source”. In other words, the regulation-maker can incorporate its own material as amended from time to time. Where material to be referentially incorporated originates with the regulation-making authority, there is the obvious danger that this technique may be abused in order to circumvent the regulatory process. Moreover, the ambulatory incorporation by reference of such internally produced material in effect transforms a legislative power conferred by Parliament into a power to be exercised as a matter of administrative discretion.

In this connection of course, Bill S-2 which is currently before the House of Commons, would expressly sanction open incorporation by reference in a number of circumstances in which the Committee would currently object. It is worth noting that while the Bill would place some limits on the incorporation of material produced by the regulation-maker, these limits do not touch any power to incorporate by reference that is conferred by another Act. Any limits in Bill S-2 on ambulatory incorporation by reference of internally produced material can be overridden in any given statute, and thus are largely illusory. On a purely practical level, parliamentary scrutiny of revisions to material incorporated as amended from time to time is impossible.

Then there is the increasingly common technique of granting exemptions from all or some of the requirements of the *Statutory Instruments Act* pertaining to examination, registration, publication and review by the Joint Committee. Where instruments such as interim orders are of a legislative nature - inasmuch as they may contain anything that could be set out in a regulation - why should they not at least be subject to the same registration and publication requirements as regulations?

One result of all of this is that, ironically, in an age in which citizens have unprecedented access to information from an infinite variety of sources via the internet, we are in danger of actually regressing in terms of access to the law. Increasingly, the rules citizens must obey, or at least the means by which they are expected to obey them, are scattered across a variety of sources, have different and variable means of publication, and are of variable accessibility. We risk turning the clock back to 1949.

It is simply not sufficient to rely on a vague general requirement that all of this quasi-legislation, documentation and incorporated material “be accessible” or that no one can be convicted of an offence for contravening it if it is not. What does “accessible” mean? The Joint Committee has been told that material is accessible if it can be purchased for \$345.00 from the source organization, if it can be examined at the National Energy Board office in Calgary, and if it can be requested through interlibrary loan. As a citizen, I would disagree. Even government websites are often out of date and incomplete.

Nor is it acceptable that meeting constitutional language requirements be equated with accessibility. Simply because a document that exists in one official language may be constitutionally incorporated by reference does not mean it is accessible. I would like to think we can aim higher than the bare constitutional minimum.

There are jurisdictions in which this kind of material must be made available to the public, including on the internet, or notice must be published as to how the material can be obtained. In some jurisdictions material incorporated by reference is even subject to the same registration and publication requirements as the incorporating legislation. This includes any future amendments.

The *Australian Legislative Instruments Act 2003* sought to expand the ambit of the making, publication and commencement procedures for delegated legislation to all

instruments of legislative character. In Canada, we seem more concerned with finding ways around the regulatory process and restricting the scope of its application.

Speaking of access, another relatively recent phenomenon involves regulations that require those in a particular industry to prepare and implement plans or manuals that set out how the general “goals” of the regulations are to be met. This so-called “performance-based approach” is said to provide greater flexibility and efficiency. So what we have is a statute that gives, for example, a broad power to make regulations respecting safety, a regulation that requires the industry to operate in a safe manner and to prepare a plan for review and approval that sets out how that is going to be done, and a series of plans that contain the actual requirements that must be met. Rather, incredibly, both the government and industry then claim that the contents of these plans, the actual measures that must be taken to comply with the law, and the contravention of which is an offence, constitute confidential third party business information, and therefore cannot be made public. Secret rules - to all intents and purposes secret law.

There is no doubt that the use of these kinds of mechanisms will only increase. There are a number of reasons for this. The ever quickening pace of technology, globalisation and the harmonization of standards and requirements internationally, the need for federal-provincial cooperation, and the value of relying on technical standards developed by non-governmental bodies, to name a few. Globalization aside, in Canada there is always considerable pressure to establish regulatory standards and regimes that are consistent with those of the United States, by far our largest trading partner.

From a purely bureaucratic perspective, there is also administrative convenience. For example open incorporation of material generated by the regulation-maker is frequently justified as being a more “flexible” approach. What this really means is that it allows rules to be imposed without having to go through the regulatory process.

Combine all this with an increasingly ineffective Parliament, and one may even question whether a scrutiny committee remains the most effective model for ensuring accountability.

The *Statutory Instruments Act* provides that all statutory instruments, with a few exceptions, stand permanently referred to the Committee. The Committee does not do a selective review: all instruments referred to it are reviewed. Would it be more useful to undertake a selective inquiry into certain regulations, with more focus on

how they are applied, administered and enforced? Could the role the Joint Committee now assumes be performed by the other parliamentary committees within their respective areas? Is some other mechanism for parliamentary oversight preferable to committee review, such as a parliamentary regulations office? Can parliamentary review of regulations continue to serve a useful purpose, or has Parliament by now simply abandoned the field? All these are legitimate questions.

To end where I began, with the Lord Chief Justice back in 1929, perhaps it is not the Rule of Law that can be found wanting, but rather those who are responsible for protecting it. A public that is largely indifferent to the gradual erosion of principles that it took centuries to establish. Governments unconcerned with means, as opposed to ends. Members of Parliament who abdicate their role as legislators in favour of petty partisanship. A judiciary that is deferential to executive legislators to the point, for instance, at which the difference between a fee and a tax, a distinction fundamental to our constitutional order, has become largely theoretical. Officials who administer programs but do not truly grasp the difference between legislation and administrative documents, and who view the Rule of Law as simply one consideration when “managing risk”. Lawyers who more often than in times past lack a thorough knowledge of some basic tenets of our constitution.

However, the supremacy of Parliament must be more than merely a quaint notion that people used to fight for. Both the legal and the democratic validity of delegated legislation depend on its being authorized by Parliament. It follows that the executive must be accountable to Parliament for the rules it makes. Whether this accountability takes the form of a scrutiny committee or some other mechanism, the underlying principle remains the same.