Understanding the Regulation Making Process

by Paul Salembier and Peter Bernhardt

The first part of this article provides an overview of the regulation making process of the Government of Canada. It examines the kinds of documents that are associated with that process and discusses the difference between the substance of what is found in an act and a regulation. The second part discusses the role of the Standing Joint Committee for the Scrutiny of Regulations, its jurisdiction, its working procedures, and its powers.

Paul Salembier (Justice Canada): The idea for a regulation starts in the sponsoring department. It is charged with developing the policy behind the regulation, including preliminary consultations with stakeholders, members of the industry and the public in general.

The department will then get internal approval for its policy. Formerly this was required to be done at the Deputy Minister level, and has now been delegated to the person in charge of the subject-matter of the regulation.

The department then sends a request over to the Department of Justice to examine the regulation under the *Statutory Instruments Act*. In fact the job description of the Regulation Section of Justice is written out in subsection 3(2) of that Act.

What the Act requires is first that the Deputy Minister of Justice ensure that every regulation is within the power of the statute under which it is made. Secondly, it says the regulation must not constitute an unusual or unexpected use of the regulation-making power. Thirdly, we check to see if the regulation is in compliance with the *Charter* and the *Canadian Bill of Rights* and that it does not unduly infringe on the liberties of Canadians. Fourthly, we have to be sure that the regulation is in proper legislative language. In practice this means regulations are usually largely rewritten by the time they leave the Department of Justice. Drafting is a unique style of writing and requires a very formal organisation of material. Normally, when officials of a client department put their ideas in writing, the ideas come to us in a very informal form.

Next the Department of Justice does something called "blue-stamping" of the regulation. If you work for a Minister you may see copies of regulations that have a blue stamp. This means that they have been seen by the Department of Justice. It should be noted that Justice does not hold out the stamp to be certification that the regulation is in compliance with the statute, the Charter or the common law.

If the Department of Justice has concerns regarding the legality of the regulation (for example, whether Cabinet has the authority to make the regulation in question), those concerns are conveyed to the instructing officer in the department sponsoring the regulation. That officer then decides whether to bring those concerns to the attention of their own Minister who in turn will decide whether to bring them to the attention of Cabinet.

Sometimes, but not always, there is a Department of Justice legal officer from the departmental legal services unit involved. That lawyer may decide, when a file is going to a Minister for signature, to note any legal concerns.

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Under the *Statutory Instruments Act*, the Deputy Minister is required to advise the Clerk of the Privy Council about legal concerns. In practice this is only done if there is virtual certainty that the authority does not exist for the proposed regulation. Virtual certainty is a rare thing. Only about four times in the last twenty years has the Clerk of the Privy Council been so advised.

When the regulation leaves the Department of Justice, it goes back to the sponsoring department. When the department has received ministerial sign-off, they forward the proposed regulation to the Privy Council Office, which reviews the regulatory package, including what is called the Regulatory Analysis Impact Statement (RIAS) and the communications plan. The regulation then goes to Cabinet, which wants to see it at the proposal stage to approve it from a policy perspective. They will then approve it for pre-publication. The Privy Council Office usually wants to see the documentation 10 days before the Cabinet meeting.

Some statutes require that a regulation be put out for public comment before it can be made. Such statutes normally set a period of 45 or 60 days for comment. Most of the regulations are pre-published as a matter of policy. The government wants to make sure that the Canadian public is aware of what the executive branch is planning. Before they make the regulation, Cabinet wants to know that the public was informed and the regulation was made available for comment. Normally the Cabinet sets a 30-day period for public comment.

What happens after pre-publication? It is possible that after public comments are received the whole regulation has to be rethought, in which case it is possible that Cabinet will require it to be pre-published again. However, if the changes are minor, the regulation will go forward without a requirement to pre-publish again.

Departments can request an exemption from pre-publication. This exemption can be statutory or policy-based. The odd statute will say that a regulation is not required to be pre-published but most exemptions are policy-based. Policy-based exemptions are given only on very limited grounds. In fact, the department does not actually apply for an exemption, although people speak as if they do. Instead, they forward their regulations to Cabinet and say, in effect, "we have not pre-published this, but these are our reasons for wanting our regulations made right away without public comment". Some of the reasons that allow departments to short-circuit the system are emergency situations, where there are risks to health, safety or the environment, cases of political sensitivity, or where pre-publication would cause adverse effects or undermine the intent of the regulation. Exemptions may also be granted for minor changes such as correction of grammatical errors or French-English inconsistency, and for repetitive regulations, such as where board members have to be appointed every two years. These will be routinely exempted from the requirement to pre-publish.

Following Cabinet approval for pre-publication, the regulation goes to the *Canada Gazette*. Proposed regulations are published in Part I of the *Gazette*. Parliamentarians receive the *Canada Gazette* automatically, free of charge. Part I contains official government notices and copies of proposed regulations. Once the regulations have been pre-published in the *Canada Gazette*, the sponsoring department collects and reviews the public comments and makes any necessary changes to the regulation. If there are any changes that need to be made, then they go back a few steps in the process and re-submit those changes to the Department of Justice for examination (this includes blue-stamping again).

Once the department receives the final set of regulations that are blue-stamped, they again forward them to the Minister's office for approval. This includes the signing of a ministerial recommendation to Cabinet. The regulations then once again go back to the Privy Council Office, which reviews the regulatory package once again.

From the Privy Council Office, regulations go back to the Special Committee of Cabinet, which this time makes the regulation. The committee can consider many regulations at a single meeting. From there the regulations are sent over to the Governor General's office, and she signs one sheet on the top of the package of regulations. At that point the regulations become law. They are then brought back to the Privy Council Office for registration. Every regulation is given a number, usually preceded by the letters SOR, and is then sent to the *Canada Gazette* where it is published again, this time in Part II.

After the regulations have been made, they stand permanently referred to the Standing Joint Committee for the Scrutiny of Regulations.

Let me now talk about some of the documentation that accompanies regulations as they move through the process.

The first and probably the most important document is the (Regulatory Impact Analysis Statement) RIAS. It consists of 6 parts:

- Description
- Alternatives
- Cost benefit analysis
- Description of consultation
- Compliance and enforcement mechanism
- Contacts

The RIAS has two main purposes. First it accompanies the regulation as it moves through the approval process and provides information to officials and ministers who

must evaluate the regulation. Secondly, it is published with the regulation and constitutes what we might consider as a layman's guide to the regulation. It gives context to what is being done by the regulation. It is not legally part of the regulation, although on occasion courts have used it to determine the circumstances that surrounded the enactment of the regulation. The RIAS is prepared by the department sponsoring the regulation and is sent to the Department of Justice when the regulation is being examined. The RIAS itself is not examined by the Department of Justice. In preparing a RIAS the Privy Council Office has asked departments to keep in mind that the RIAS make sense, that it is consistent with government policy, that it is complete and that it is written in clear language, so that members of the public and members of Parliament can understand it.

The Description section of the RIAS outlines the purpose of the regulations as well as the current problem and explains why regulatory action is necessary.

The Alternatives section sets out other options that were considered to achieve the objectives of the regulation, including the status quo (doing nothing), as well as non-regulatory alternatives, such as voluntary standards, taxation and user charges, that could have been used to alter behaviour instead of using the law, and describes what lesser regulatory alternatives were considered. It explains why each of the rejected alternatives was rejected and why there are no other alternatives available.

The Cost-Benefit section is fairly self-descriptive. The onus is on the sponsoring department to demonstrate that the proposed regulation maximises the benefits to citizens and that these benefits outweigh the anticipated costs. The costs that are usually taken into account include environmental impact, health impact and the cost of enforcement.

The Consultation section describes who was consulted and how. It provides a summary of the comments received and the responses to the comments. Sponsoring departments are asked to consult in proportion to the anticipated impact of the regulation. One thing the Privy Council Office makes clear is that pre-publication is not a substitute for consultation.

The Compliance and Enforcement section of the RIAS gives an overview of the procedures and resources to be used to ensure compliance. It gives a description of how non-compliance will be detected, who will enforce the regulation and what the penalties are for non-compliance.

The Contacts section simply gives the name of the official to whom clients can address their comments regarding the proposal.

Other documents that may be of interest include the Ministerial recommendation, the communication plan, and a supplementary note.

The ministerial recommendation is signed by each Minister whose name will appear on the Order in Council that accompanies the regulation. Sometimes a statute will require that a particular Minister or a particular set of Ministers must recommend a regulation. In that case, each of those ministers must sign the ministerial recommendation to Cabinet before the regulation can be made.

One area where sponsoring departments can run into trouble when they are mapping out the timeline for regulations is if they do not leave enough time in the process to get the Minister's approval. At the time the recommendation is required, the Minister may be travelling or, if the House is not sitting, he or she may be in their constituency.

A communications plan is required for all regulations that go to the Governor in Council. There is no reference to this in the Privy Council Office publication Guide to the Regulatory Process but they have confirmed that it is still required. There is an older 1992 document produced by the Treasury Board (entitled Federal Regulatory Process), which outlines what goes into a communication plan.

A communication plan is for Ministers only. It is a confidential document that sets out the objectives of each component of the regulation, how the public has been encouraged to participate in the development of the proposal, who the effected parties are, and to whom and how the regulation will be communicated. Usually the latter is done by publication in the Canada Gazette, but there can be additional things like mailings or press releases and newspaper notices. These other means can be crucial for regulations that are exempt from publication, as some are (military regulations, for example).

On the political side, the communications plan identifies possibilities for a good news story or warns of possible negative reaction to the regulation. The purpose of the plan is to show that the regulation is consistent with and in fact furthers the government's overall policy objectives, that public participation has been encouraged and that the recommendation will be effectively communicated to the public and to target audiences. The amount of detail in the communication plan will vary with the anticipated impact of the regulation.

Another required document is known as the supplementary note. This is basically a briefing note to ministers, which is included to give them background information that is not included in the RIAS. The supplementary might include secret or proprietary information that would not be appropriate to publish.

A document called the "Cabinet Directive on Law-Making", available on the Privy Council Office web site, states that certain powers should not be put into regulations unless those powers have been specifically requested and have been justified in the memorandum to Cabinet that precedes a bill on its way to becoming a statute.

In particular, it says that if you want to give a power to make regulations to do certain things, you need to request specific authority to draft them into the bill. These include:

- powers that substantially affect personal rights and liberties
- powers to amend or add to another statute of Parliament
- powers that would exclude the ordinary jurisdiction of the courts (for example, by establishing a tribunal and saying there is no appeal from a decision of that tribunal)
- powers to make regulations that have a retroactive effect
- powers to subdelegate regulation-making authority
- powers to impose charges on the public other than fees for service
- powers that set penalties for serious offences.

There are other principles regarding the split between Acts and regulations that departments have to keep in mind. The first is that Acts and regulations are really interdependent and should be developed in conjunction with one another. In fact, if a regulation is going to form a substantial part of a legislative scheme, it should be developed at the same time as the statute. Of course this does not always happen in practice. A bill the government wants quickly may be rushed through in a matter of weeks and it is all the sponsoring department can do to address what is going into the statute, let alone worrying about what they are going to put into the regulations. In addition, if at the end of the drafting process for the bill there is just not time to include a whole subject area, the instructing officials may simply insert a regulation-making power, giving themselves the ability to make those laws at a later date when they can address their minds to them.

Now let me talk a bit about what role Members of Parliament and Senators might have in the regulation-making process. If an MP or Senator is a Minister, he or she will have a role in the policy approval or sign-off of his or her department's regulations. Also Ministers may sit on the Special Committee of Cabinet and therefore participate in the approval of all regulations. If the member is a member of the Standing Committee for the Scrutiny of Regulations, he or she will have an ex post facto role in reviewing and commenting on published regulations. In rare cases, regulations may be made subject to the affirmative or negative resolution of Parliament or the House of Commons, in which case the regulation must be laid before Parliament within 15 days after it is made or within 15 days after Parliament recommences sitting.

If it is subject to an affirmative resolution, the regulation will not come into force unless or until it is affirmed by Parliament. This has only been used in four statutes in respect of Parliament as a whole and never in respect of the House of Commons alone. The requirement for an affirmative resolution is usually added only for regulations that are politically sensitive, such as the firearms registration regulations. In fact, as I understand it, the substance of the regulation is not actually distributed to all members of Parliament but the resolution instead refers to the regulation by name and it left to the MP to obtain a copy.

The problem with these kinds of procedures is, first, that if the regulation is subject to an affirmative resolution it results in delay, particularly if Parliament is not sitting. The regulation will not come into force until it is affirmed. If the regulation is subject to a negative resolution it creates uncertainty, because technically the regulation has already become law and you are just waiting to see if Parliament will negate it. If it does, then the regulation ceases to be law but it has been in force for a period of time and people may have structured their affairs accordingly. To my knowledge there has never been a regulation that has been rejected by Parliament, although I do know that there have been problems in getting regulations laid before Parliament in accordance with statute in at least a couple of cases.

Peter Bernhardt (Legal Counsel, Standing Joint Committee for the Scrutiny of Regulations): It has been observed by some that the scrutiny of regulations is demanding, politically unglamorous and at times unrewarding. It is true that the Committee carries out its work pretty much in obscurity. Yet given government control of the legislative agenda in Parliament, work on a scrutiny committee may be one of the better opportunities that many members of Parliament have to influence the law.

Two core constitutional principles in our form of government are "the rule of law" and "parliamentary supremacy". Much of the work of a scrutiny committee involves the continuing assertion of these principles vis-à-vis regulation-making bodies.

The executive can only legislate if, when, and to the extent Parliament has authorised it to do so. Where it has delegated its legislative function to the executive, Parlia-

ment has in effect loaned out its law-making power. Parliament remains the ultimate source of that power. Thus, it has both a right and a duty to ascertain that the powers delegated are exercised in a manner that complies with the letter and spirit of the delegating statute. Just as Parliament has a responsibility to keep the executive accountable for the use of public monies of which it authorised the expenditure (and everyone is familiar with the role of the Auditor General in this regard), it also has the responsibility to keep the executive accountable for the use of delegated law-making powers. It is through the Standing Joint Committee that Parliament has chosen to carry out this responsibility.

The relationship between these lofty principles and a questionable regulation may not always be readily apparent, and it is sometimes difficult to view individual issues dealt with by the Committee as involving more than "legal technicalities". Nevertheless, these are the underlying concepts on which the Committee's work is founded.

Parliamentary "watch dog" committees were established in Great Britain in 1925 and at the federal level in Australia in 1931. By contrast, parliamentary scrutiny of delegated legislation at the federal level in Canada is a more recent development.

In 1969, the report of the House of Commons Special Committee on Statutory Instruments (which came to be known as the McGuigan committee) recommended that a committee be established to scrutinize delegated legislation. This reiterated a recommendation made five years earlier by the Special Committee on Procedure and Organization of the House of Commons.

Shortly after, the government introduced the *Statutory Instruments Act*, which implemented many of the recommendations made by the McGuigan committee, and included a provision allowing for the establishment of a scrutiny committee by either or both Houses of Parliament. The *Statutory Instruments Act* came into force on January 1, 1972, and in the end, it was decided that the committee should be a joint committee of the Senate and the House of Commons. A committee was first appointed in 1973. (At present, six senators and seventeen members of the House of Commons sit on the Committee.)

At the beginning of each session, the Committee appoints two joint chairs and a vice-chair. By tradition, the joint chair for the Senate is of the same party as the government and the joint chair for the House of Commons is a member of the official opposition in that house. The vice-chair will be a member of the government party in the Commons. These arrangements, which were designed to promote non-partisanship, have for the most part worked quite well over the years. There have been two times in the Committee's history where this tradition was not followed. In both cases, an exception was agreed to in order to allow a member with considerable experience on the committee to take the chair.

Compared to other committees, it can generally be said that the Committee functions in a relatively non-partisan manner.

The mandate of the Joint Committee, as set out in section 19 of the *Statutory Instruments Act*, is to "review and scrutinize" every statutory instrument made after January 1, 1972, although there are a few exceptions. As well, subsection 19(3) of the *Statute Revision Act* refers to the Committee any statutory instrument made before January 1, 1972 so long as the instrument was included in the 1978 consolidated regulations. Finally, the Senate and the Commons, at the beginning of each session, have given the Committee a general order of reference which allows it to inquire into and report, for example, on the appropriate principles and practices to be observed in the enactment and use of delegated legislation and on the role, functions and powers of the Committee itself. Taken together, the Committee's statutory and sessional orders of reference afford it a broad jurisdiction to deal with the making of delegated legislation at the federal level.

The Committee has chosen to exercise its authority to "review and scrutinize" statutory instruments on the basis of thirteen scrutiny criteria. These criteria are adopted by the Committee at the beginning of each session. They range from whether or not an instrument is authorised by the enabling legislation, to whether it makes the rights and liberties of the person unduly dependent on administrative discretion, to whether its drafting is defective.

It is often said that the Committee does not deal with the merits of subordinate legislation or the policy reflected in that legislation but that it deals instead with legal and procedural issues. This is true to a point. The reasons for which scrutiny committees (whether here or elsewhere) usually refrain from reviewing the merits of delegated legislation are firstly that this makes it easier to preserve a non-partisan approach and secondly that regulations often deal with complex technical matters. Scrutiny committees simply do not have access to the kind of resources and breadth of technical expertise that would be required to review regulations from a policy point of view.

It would be incorrect to say that parliamentary scrutiny is exclusively concerned with issues of substantive and procedural legality. If one looks at the scrutiny criteria, it will be apparent that to a greater or lesser extent, the application of a number of them may involve the taking into consideration of issues or facts that have little to do with legality. For example, deciding that a regulation

makes an unusual or unexpected use of the enabling power or that it amounts to the exercise of a power that is more properly the subject of direct parliamentary enactment are not decisions that can be taken on the basis of legal precedents. They are political decisions and, as such, they are concerned with what might best be termed propriety.

How does the Committee carry out its duties? The Committee's legal staff will review all instruments published in the *Canada Gazette*, as well as some categories of instruments that have been exempted from registration and publication, and will make a preliminary determination as to whether the instrument contravenes any of the scrutiny criteria. If the instrument presents no problem, the instrument is formally submitted to the Committee without comment.

If it is determined that an instrument contravenes one of the scrutiny criteria or simply requires further explanation, counsel will prepare a letter to the responsible department or agency detailing the objection or seeking information. If a problem can be solved by amending the instrument (which will be the case in most instances) an assurance will be sought that an amendment will be made.

The file will be submitted to the Committee once the department or agency has provided a full statement of reasons for their position. Files are placed on the Committee's agenda under a series of categories, such as "action promised", "reply satisfactory" and "reply unsatisfactory".

Where the Committee agrees that the position taken by a department is not satisfactory, it will usually instruct counsel to communicate its view and supporting reasons to the department concerned. Exchanges of correspondence between counsel and a regulation-making authority will be continued until the Committee is satisfied they serve no further purpose. At this stage, if the matter warrants it, a letter will go to the minister responsible from the joint and vice chairs seeking reconsideration of a position taken by his or her department. Only when this process does not yield a satisfactory solution will the Committee consider making a report to both Houses or possibly recommending disallowance.

The Committee is empowered to report to the Houses on any matter within the scope of its statutory or sessional references and of course has all of the powers which the Rules of the Senate and the Standing Orders of the House of Commons grant to standing committees generally, including the power to compel the attendance of witnesses or to send for papers and records.

The calling of departmental officials as witnesses can be useful, particularly where there are delays in providing responses to the committee's enquiries or in taking promised action. It bears noting that much of the Committee's time is taken up in trying to ensure that promised amendments actually get made, and significant delays are not uncommon.

The Joint Committee may also invoke Standing Order 109 of the House of Commons, and request the tabling of a formal "comprehensive" government response to one of its reports within 150 days of the tabling of the report in the House of Commons.

This mechanism has sometimes proven quite useful as well. It has happened that a department that has previously rejected the committee's views will accept them at this point. Because a formal response must be tabled in the House in the name of the government, the scope of consultation within the government may have been expanded outside the department in question, for example by consulting specialized units within the Department of Justice. The fact that a formal response had to be tabled in the House may have led to a more rigorous assessment by the department of its position.

One special power that deserves closer attention is the power of disallowance. Until 1986, no general disallowance procedure was in place in Canada, although a few statutes do include a negative resolution procedure whereby Parliament may annul specific regulations or other instruments. The Canadian procedure does not have a statutory basis but was put in place through amendments to the Standing Orders of the House of Commons. This choice of approach has two important consequences: the first is that the whole disallowance process takes place in the House of Commons and the Senate is not involved at all. The second is that the disallowance procedure only applies to statutory instruments made by the Governor in Council or by a minister of the crown. This is because the present procedure relies upon resolutions and orders, which are not by their nature binding on those outside the House. Regulations made by bodies such as the National Energy Board or the CRTC are therefore not subject to disallowance. The Committee has long argued that this defect should be remedied by placing the disallowance procedure on a statutory footing.

Only the Standing Joint Committee can initiate disallowance. In any case where the Committee is of the view that a regulation, or part of a regulation, should be revoked, it can make a report to the House of Commons containing a resolution to this effect. Once the report is tabled in the Commons, the applicable procedure will depend on a decision by the responsible minister.

It is important to note right from the outset, however, that the Committee only recommends disallowance. That recommendation must then be accepted by the House of Commons.

Within 15 sitting days of the appearance on the order paper of the notice of motion for concurrence in a disallowance report, a minister may request that the report be considered by the House. If such a request is made, the House meets at 1:00 o'clock on the next Wednesday to consider the report. The Standing Orders allow a debate of a maximum duration of one hour, with a 10-minute limit on interventions by members. At the conclusion of the debate, a vote is taken on the motion for concurrence. If the House defeats the motion for concurrence, that is the end of the matter. If, on the other hand, the House supports the motion, the resolution set out in the Committee's report is to be treated as an order of the House of Commons that the Governor in Council or the appropriate minister revoke the regulation.

The Standing Orders also provide that where no request is made by a minister for a debate, the resolution contained in the report is deemed to be concurred in by the House at the expiration of 15 sitting days. In this case as well, the resolution is then treated as an order of the House that the regulation be revoked.

Where a regulation is disallowed, the actual revocation of the regulation must still be carried out by the authority that adopted that regulation, whether this be the Governor in Council or a minister. Should the appropriate authority neglect or refuse to comply with a disallowance order, the House could in theory deal with the matter as one of contempt. There are, however, no other legal sanctions or consequences that arise from a failure to comply with a disallowance order. As a matter of law, an order of the House of Commons that a particular regulation be revoked cannot be enforced by a court. There is thus a potential source of conflict, although this could also be removed were the disallowance procedure established by statute, since the statute could then provide for the deemed revocation of a disallowed provision.

Since its inception, the disallowance procedure has been invoked on eight occasions by the Standing Joint Committee. For a number of reasons, the first disallowance report was not dealt with in accordance with the procedure set out in the Standing Orders, but was referred back to the Committee for further consideration. In the next six instances, the Committee's reports were concurred in without debate and the government complied with orders that the relevant provisions be revoked. The most recent disallowance report was concurred in without debate as of late September and we are now awaiting revocation of the offending provision.

I want to underscore the fact that not every report made by the Joint Committee contains a disallowance resolution. A report could well recommend that a regulation be revoked and still not involve disallowance, and the Committee does continue to make these types of reports. Unless the report states that it is made pursuant to Standing Order 123 of the House of Commons and includes language appropriate to a resolution, it is not a disallowance report.