
Oversight of Regulations by Parliamentarians

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Regulations sometimes referred to as delegated legislation or subordinate legislation are a common feature in modern parliamentary democracies in Canada and throughout the world. They give specific form and substance to laws and set out the finer details of an act's operation. The common characteristic is that the parent statute must specify that such orders can be made and for what purpose. This article examines some of the advantages and disadvantages that have arisen from their use. It also discusses those jurisdictions that have developed processes for the review of regulations. Lastly, it will provide some suggestions on how to increase the role of parliamentarians in the review process.



Practical considerations and the administrative needs of modern states have made it unavoidable that legislatures shift some of their lawmaking authority to the executive branch. Governments typically pass hundreds—if not thousands—of pieces of delegated legislation each year in order to function effectively and efficiently.

Obviously, legislative assemblies are simply incapable of processing every regulation in the same manner as a bill. Parliamentary time and resources are simply too scarce. Furthermore, many regulatory initiatives are specific in scope, and would be unlikely to warrant the full consideration of the House.

In addition to logistical considerations, other factors have fuelled the widespread use of delegated legislation. One is the ability of government officials and stakeholders to have input into the regulation-

drafting process. Since departments or ministries are often involved in the drafting of orders and regulations, officials have the opportunity to design legislation that addresses technical matters and, more generally, meet the needs of the oversight agency.

Another reason for delegated legislation stems from the fact that regulations can be passed and brought into force more quickly than formal acts of parliament. Items requiring immediate statutory sanction, such as emergencies, can be dealt with in a timely manner by regulation, and thereby do not require the attention of a House in session.

One notable example of a statute designed to grant emergency powers to the federal cabinet was the *War Measures Act, 1914*. That act, passed near the time of the outbreak of World War I, empowered the Governor-in-Council to proclaim a state of “real or apprehended war, invasion or insurrection” and “to make from time to time such orders and regulations ... for the security, defence, peace, order and welfare of Canada”. The power to declare war is, of course, an extreme example of what a regulation can do.

A more common practice is for regulations to be used for emergency planning and prevention. For instance, in British Columbia, a regulation under the *Wildfire Act* was passed this June restricting the use of campfires in response to the threat of provincial wildfires.

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As these examples indicate, regulations have been used for a wide array of purposes, from clarifying policy *minutiae* to setting national policy.

Criticisms of Delegated Legislation

Although delegated legislation allows for increased administrative efficiency, it also inevitably involves a diffusion of law-making authority away from parliamentarians to ministers, departments, and the cabinet. This shift has been criticized for not only undermining the constitutional values of representative democracy, but also for creating the potential for abuses of power. Like an act of parliament, regulations can direct the way someone must act and also limit rights and freedoms. This leads some to suspect that, when it comes to legislation by delegation, the devil is, indeed, in the details.

The *War Measures Act* provides a good example for discussing this subject. During the 1970 October Crisis in Québec, the federal government invoked the *War Measures Act*, thereby granting the government sweeping powers to arrest and detain civilians, and to deploy military force. At the time, serious concerns were raised about the government's arbitrary ability, by regulation, to exercise far-reaching emergency powers which impacted civil liberties. You may recall that the Prime Minister of the day responded to one such concern with the infamous line "Just watch me".

While few regulations exercise such far-reaching powers, it is entirely possible for significant changes to be enacted by regulation rather than by the parent legislation. This criticism has arisen in the British Columbia Legislative Assembly in recent months. For example, last year, the *Wood First Act* was passed which stipulated the requirement that wood be used as a primary building material. This bill, however, did not specify what the requirements would be or how they would be carried out. That such matters were unspecified in the act and left to regulation was criticized by the opposition during second reading debate.

Criticisms of legislative amendments to the *Islands Trust Act*, passed earlier this year in British Columbia, went even further. During second reading debate, the opposition critic noted a provision that gives the Cabinet the power to make regulations concerning these islands "despite the Act". The critic claimed that this would allow "regulations to be made that are actually contrary to the statute", adding that "we are moving ... into a stage where we allow regulation to almost dominate how statutes are dealt with".

Since regulations are often drafted by a sponsoring department – often through consultation with officials, stakeholders, and experts – to be later approved by cabinet, the potential exists for an act to be implemented through regulation in ways that depart from the spirit or original intent of an act previously endorsed by a parliament.

A second point pertains to the fact that delegated legislation generally receives less attention and publicity than acts of parliament. This has fuelled concerns that delegated legislation may allow governments to enact significant or controversial statutory changes without due parliamentary debate or public scrutiny. It is unrealistic for every regulation or order-in-council to be widely advertised or reported. Accordingly, this raises the possibility that important regulatory changes may be passed without notice by the public or the press.

The specific nature of regulations themselves does little to help this issue. Orders often deal with technical matters, use legalese, and contain no explanatory notes. Since the average person is likely to have a limited understanding of statutes, it can be very difficult for most to comprehend the meaning or application of a regulation, that is, even if they know where to look to find the order-in-council.

Scrutiny by Parliamentarians

Most provinces have statutes or procedures that provide for the filing and publishing of regulations but these tend not to deal with their actual content. There may be an oversight role for parliamentarians to play in reviewing delegated legislation. British Columbia does not currently have a formal review process. However, several other Canadian jurisdictions do.

In the Parliament of Canada, the Standing Joint Committee for the Scrutiny of Regulations has the broad power to "scrutinize any statutory instrument made on or after January 1, 1972". The Committee is composed of eight senators and a proportionate number of MPs, including two joint chairs. In addition to having the same power as other federal standing committees, it has the ability to initiate a process for revoking a regulation.

Provinces also have committees that serve similar functions. For example, Ontario has a Standing Committee on Regulations and Private Bills to which all regulations stand permanently referred. Under its terms of reference, the committee is charged with examining regulations "with particular reference to the scope and method of the exercise of delegated legislative power, without reference to the merits of

the policy or objectives to be effected by the regulations or enabling statutes". When reviewing delegated legislation, the committee observes several guidelines, such as whether regulations correspond to the policy established by the statute, whether they are expressed in precise and unambiguous language, and whether they impose any new taxes.

In addition to Ontario, at least four other provinces and two territories have committees empowered to review delegated legislation, namely, Alberta, Saskatchewan, Manitoba, Québec, Nunavut and the Yukon. Let us turn to look at how each province and territory reviews delegated legislation. Alberta and Saskatchewan, for instance, have empowered their policy field committees with the extra ability to review regulations. Québec's nine sectoral committees are granted similar power under the Standing Orders of the National Assembly. For these provinces, reviews of delegated legislation are a part of a committees' broader mandate to examine policy areas.

Two provinces, Ontario and Manitoba, provide for committees in place to specifically review delegated legislation. All regulations passed in Manitoba stand permanently referred to its Standing Committee on Statutory Regulations and Orders. However, while Manitoba was the first province in Canada to establish a committee for the scrutiny of regulations, the committee has not met frequently for many years.

Review committees have different scopes and mandates. The federal Standing Joint Committee for the Scrutiny of Regulations has a broad mandate that includes review of any statutory instrument, such as orders, regulations, rules, ordinances, letters patents, warrants, proclamations, and by-laws. Nunavut has a committee with an even wider mandate. Its Standing Committee on Legislation reviews all legislative proposals, including bills and regulations that are proposed and/or passed by the government, as well as any other matter referred by the House.

Most of the parliamentary committees that exist in Canada, however, have more limited powers than this. Their mandates tend to focus on the review of only regulations. These committees also are designed to focus predominantly on administrative matters rather than political questions or the merits of the policy behind the legislation. Committees that review delegated legislation typically investigate things such as whether a regulation corresponds to the intent of the parent legislation, involves any new expenditures of public revenue, or exercises unusual authority.

These are a few other interesting ways in which committee mandates differ, such as what regulations can be considered. The Yukon Legislative Assembly's Standing Committee on Statutory Instruments, for instance, has the authority to review any regulation that comes into effect after the committee is formed. In contrast, the federal joint committee can review delegated legislation dating back to 1972, when the committee was initially formed. Some other committees make no such distinction and presumably have the ability to review any regulations, including those passed long before the committee's formation.

Another key difference among committees is in how regulations are referred. Alberta's standing orders empowers its policy field committees to consider regulations, either on their own initiative or at the request of a minister.

Other Methods of Exercising Oversight

As these examples indicate, parliamentary committees are a common way of dealing with delegated legislation and, with good reason. Using scrutiny committees affirms two important constitutional principles: the rule of law and parliamentary supremacy. Committees also offer practical advantages. They are easy to set up, are cheaper than using the courts, have the ability to influence and advise parliament, and are arms-length from the bureaucracy.

At the same time, however, committees are susceptible to their own unique issues. Scrutiny committees may be prone to political partisanship and may, perhaps unnecessarily, impede a government's legislative program. Time constraints and the wishes of parliamentarians are other factors to consider. Committee work may not be the easiest, most rewarding, or the best use of our time. Whether or not we are all versed enough in the workings of statutory law to meaningfully scrutinize regulations is another question.

Other alternatives exist for improving parliamentary oversight of delegated legislation which would not require the creation of a committee. One would be to adopt improved measures for ensuring that enabling legislation clearly defines the content, purpose, and scope of regulations. Such a step might involve clarifying the extent to which law-making power can and should be vested in delegated legislation, as opposed to parent legislation.

A second option would be to table all regulations before the House for the information of members and for parliamentary approval, which could be explicit

or implied, thereby acknowledging the executive's responsibility to the legislature. Private member's time could even be used for this purpose although adding debates on regulations to the order paper would place new pressures on existing House schedules.

Another non-committee option would be to increase public participation and input into the process used to draft legislation. This would afford interested parties and stakeholders the opportunity to shape laws at the preliminary stage, thereby mitigating some of the requirement for subsequent regulation. This occurred in British Columbia with last year's passage of the *Wills, Estates and Succession Act*. That act was drafted with extensive consultation with stakeholders. Furthermore, the act's coming into force date has been delayed for 18 months to help ease the transition to the new act and allow the public to become informed of the changes. More generally, delaying an act's in-force date could allow challenges to be addressed before regulations are made. This would ensure that any regulations, when passed, are both effective and anticipated.

Lastly, I mentioned earlier how the public has a limited understanding of regulations and how they

function. This is fuelled by the fact that regulations are not widely reported or easily accessible. One way to address this would be to make regulations more widely disseminated and publicly available. British Columbia took a step in this direction in January 2009 when it launched BCLaws.ca, a website featuring free full-text access to current British Columbia statutes, including regulations. Previously, they were accessible only in print form or through a paid online subscription.

Also, another way to foster public education and interest in delegated legislation would be to include explanatory notes in regulation bulletins. A few explanatory words could do much to help explain what a regulation does and why.

Conclusion

The different systems that exist in Canada for reviewing regulations provide several options for parliamentarians who might want to move to adopt review processes. Since delegated legislation plays an important part in the operations of modern government, I think we need to ask ourselves, as parliamentarians, how we can best exercise the oversight function.