Feature

Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation

This article highlights the increasing use of regulations, or subordinate legislation, as a source of federal law. Notably, the Supreme Court of Canada has observed the importance of regulations in ascertaining a legislature's intent with regard to a certain matter even though it is the executive and not Parliament that makes regulations. The author explains the current process in place to provide parliamentary oversight to regulations and suggests that Canada may want to adapt the UK model by dividing the existing Joint Committee for the Scrutiny of Regulations into two separate committees. Methodologically screening new regulations under the proposed committee system would play an important role in supporting transparency in government by helping to publicize the exercise of legislative power by the executive, alleviating concern over governments using the regulation-making process to shield important public policy choices from public scrutiny.

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Regulations, also known as secondary or subordinate legislation, are made by ministers or specialist bodies under legislative powers delegated to them by Acts of Parliament. Like primary legislation, regulations have the full force of law.[1] Historically, the power to make regulations was delegated to the Governor in Council (effectively the federal cabinet) where particulars needed to be filled in to complete a legislative package. The main benefit was that regulations could be made and updated quickly by the executive through an Order in Council as opposed to the more cumbersome parliamentary process.[2] Historically, many delegated powers were defined in relation to certain details left out of a statute (though the devil is known to reside in legal details).[3] For example, the fee charged for filing an application for a patent is not included in the *Patent Act* but rather prescribed by regulation.[4] As a matter of law, regulations must remain strictly inside the limits of the grant of authority provided by the enabling legislation. Given that they work to supplement primary legislation, regulations are essential to knowing the current state of the law.

In recent decades, the use of regulations as a source of law has grown considerably. Modern regulations touch every aspect of life and are often detailed and complex, dealing with a wide variety of significant matters that would have been previously set out in primary legislation. Notably, the Canadian law of statutory interpretation reflects this changing locus of decision-making with respect to significant policy matters from within Parliament to the executive. For example, the Supreme Court of Canada has observed that while "a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the *legislature's* intention with regard to a particular matter, especially where the statute and regulations are 'closely meshed'".[5] Arguably, a governmental preference for making policy through regulation instead of primary legislation can be seen as reflecting a desire to avoid opposition or scrutiny of what might be perceived as unpopular policy choices as the making of subordinate legislation, being outside of the highly visible parliamentary process, is significantly less likely to attract media and public attention.[6] While there is an established process for drafting and enacting federal regulations pursuant to cabinet directive and certain legislative requirements, there is no open and public study or debate of regulations akin to the parliamentary process.[7]

Even while regulations are being made by ministers and specialist bodies, Parliament maintains an important supervisory role in relation to regulations. It can, at any time, repeal or amend its initial grant of authority by simply passing new legislation. In addition, the *Statutory Instruments Act* provides that every statutory instrument

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(including regulations) made after December 31, 1971 "shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments".[8] The *Act* also provides a simplified mechanism for the parliamentary revocation of a regulation. Pursuant to the terms of the *Act*, a joint committee may introduce a report to the Senate and the House of Commons containing a resolution that a regulation or part of a regulation be revoked (provided 30 days advance notice is given to the regulation-making authority).[9] Only one report is permitted to be laid before the Senate and or House of Commons during each sitting day.[10] The report is deemed to be adopted by the Senate or the House of Commons after 15 sitting days unless a minister files a motion that the resolution should not be adopted, in which case the resolution is debated by the House.[11] In the case where both Houses adopt (or are deemed to adopt) the joint committee's report and resolution, the authority that originally made the regulation is required to revoke it within 30 days or a later date specified by the resolution.[12]

In 1971, the Standing Joint Committee for the Scrutiny of Regulations was established. It is comprised of eight members of the Senate and twelve members of the House of Commons and is jointly chaired by a member of the Senate representing the governing party and a member of the Official Opposition in the House of Commons. The Committee's mandate acknowledges that the work of scrutinizing regulations is important as "Parliament increasingly delegates legislative authority to the Executive branch of government".[13] In addition to its powers of review and revocation under the *Statutory Instruments Act*, the Committee's order of reference authorizes it to enquire and report on principles and practices for drafting statutory provisions used to delegate legislative powers and the use of regulations more generally.[14] The Committee scrutinizes regulations based upon the following criteria:

> Whether any regulation or other statutory instrument within its terms of reference, in the judgment of the committee:
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> - is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;
> - is not in conformity with the *Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights;*
> - purports to have retroactive effect without express authority having been provided for in the enabling legislation;
> - imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;
> - imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
> - tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;
> - has not complied with the *Statutory Instruments Act* with respect to transmission, registration or publication;
> - appears for any reason to infringe the rule of law;
> - trespasses unduly on rights and liberties;
> - makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
> - makes some unusual or unexpected use of the powers conferred by the enabling legislation;
> - amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment; or
> - is defective in its drafting or for any other reason requires elucidation as to its form or purport.[15]

Even though the Committee enjoys a broad mandate to scrutinize regulations and report on associated matters, it has only recommended revocation on fewer than 20 occasions from 1986 to the end of the 41st Parliament in 2015. In the 41st Parliament, while the Committee did not recommend revocation of any regulations, it used its reporting power to draw to the attention of the Senate and the House of Commons matters related to the existence of concurrent delegated powers to impose fees for national parks and food inspections,[16] difficulties in ascertaining the date of an *Act* coming into force by way of an order,[17] and the problematic use of vague or general terms such as 'forthwith', 'immediately', 'as soon as practicable', and 'without delay', within which a person or body must act.[18] What is particularly noteworthy about the reports of the Committee is the dialogue that can be seen between the legislature and the courts. Many of the Committee's reports discuss recent case law from the courts that provides new interpretations of the law or introduces new legal requirements. In turn, the courts have referred on a number of occasions to Committee reports in deciding cases, particularly when interpreting regulations and the interaction between regulations and primary legislation.[19]

While the Committee has played a positive role in encouraging the executive to correct problematic regulations, and has provided valuable guidance to

Parliament in relation to particular regulations and the use (and misuse) of delegated powers more generally, the committee process must be revitalized given the extensive use of regulations in the modern state and real democratic concerns of government rule by regulation. In the year 2014 alone, 75 new federal regulations and hundreds of additional statutory instruments and orders were made, which comprise several thousand pages. Existing regulations are also routinely amended. Under its current process, Committee staff conduct an "initial review" of all regulations and other statutory instruments, while members of the Committee focus principally on regulations identified by staff as problematic or non-conforming.[20] Notably, the Committee's past practice evidences a limited use of its power to report to Parliament, with or without a recommendation for revocation. Instead of producing detailed reports, the Committee has adopted a course of action to communicate directly with the ministry or agency responsible when problems are discovered.[21] In many cases it appears that problems can be quickly corrected directly by the regulation-making authority following this communication, which indicates a good working relationship between the legislature and the executive. If, however, a resolution to the problem is not forthcoming, the Committee may write to the responsible Minister.[22] Only if this process fails to resolve the Committee's concerns, will it consider making a formal report to Parliament.[23]

In choosing to communicate directly with the executive and report to Parliament only on a small number of regulations, the Committee may have proven more effective in having its concerns addressed. It also avoided parliamentary defeat of its recommendations. The downside is that this approach, while providing an important mode of accountability, does little to further transparency by bringing to broader public attention and open parliamentary debate the possible misuse of delegated lawmaking authority. Given that the Committee was not provided with the direct power to set aside, vary or amend regulations under the *Statutory Instruments Act*, it would seem especially important that the Committee provide more frequent reports to Parliament on problematic regulations. It is, after all, exercising its powers as a delegate of Parliament. This also appears to be the intention of Parliament in providing committee scrutiny powers under the *Act*. Following committee study of the proposed amendments to the *Act*, the Minister of Justice observed that "the power of the [scrutiny] committee really is to draw to the attention of the government, Parliament and the public the fact that regulations *may* contravene the criteria which have been advanced by the committee on statutory instruments and *may* go beyond the powers that are given in the statute".[24] The Minister also envisioned the Committee as routinely reporting to Parliament and only in "appropriate circumstances" communicating with the ministry or agency concerned to encourage an amendment to the regulation.[25]

It is clear that Parliament must go beyond the existing Committee process to revitalize its supervisory power over regulations. It should implement a new process to achieve a more fulsome review of regulations, including a merits-based assessment on a reasonableness standard, openly and transparently. Precedent exists in other parliamentary systems for a much stronger and more effective role of parliamentarians in the scrutiny of regulations. For example, in the United Kingdom, the House of Lords maintains two committees to review regulations. First, the House of Lords Delegated Powers Scrutiny Committee reviews the extent of legislative powers delegated by primary legislation to government ministers and examines all Bills that delegate legislative authority at the time the Bill is introduced into the House of Lords. In looking at the delegation of law-making authority in a Bill, the Committee:

- considers whether the grant of secondary power is appropriate. This includes expressing a view on whether the power is so important that it should only be one granted by primary legislation;
- always pays special attention to Henry VIII powers - a provision in a bill which enables primary legislation to be amended or repealed by subordinate legislation with or without further parliamentary scrutiny;
- considers what form of parliamentary control is appropriate and, in particular, whether the proposed power calls for the affirmative rather than the negative resolution procedure; and
- considers whether the legislation should provide for consultation in draft form before the regulation is laid before Parliament, and whether its operation should be governed by a Code of Conduct.[26]

Second, the House of Lords Secondary Legislation Scrutiny Committee looks at all regulations (approximately 1200 each year) that are required to be laid before Parliament to determine whether any special attention should be drawn to the House of Lords on one or more of the following grounds:

- it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- it may be inappropriate in view of the changed circumstances since the passage of the parent Act;
- it may inappropriately implement EU legislation;

- it may imperfectly achieve its policy objectives;
- the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation; or
- there appear to be inadequacies in the consultation process which relates to the instrument.[27]

This Committee meets and makes recommendations to be considered by the House of Lords every week during a parliamentary sitting. In addition to the two House of Lords committees, the United Kingdom Parliament has also struck a Joint Committee on Statutory Instruments, which meets weekly and can examine in detail the "technical qualities" of any regulation, including:

- that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- that its parent legislation says that it cannot be challenged in the courts;
- that it appears to have retrospective effect without the express authority of the parent legislation;
- that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- that its form or meaning needs to be explained;
- that its drafting appears to be defective;
- any other ground which does not go to its merits or the policy behind it.[28]

The Joint Committee is highly active in reviewing regulations. In 2014, it made 27 reports to both Houses of Parliament drawing special attention to 72 regulations on grounds including that the regulation at issue required further elucidation, was defective in its drafting, was of questionable legality, had an unexpected use of the enabling power, failed to comply with ordinary legislative practice, failed to give effect to a statutory requirement, and that it was unjustifiably delayed in coming before Parliament.[29] This system of committees in the UK Parliament provides a much more robust system of parliamentary supervision of subordinate legislation as compared to the existing Canadian practice.

In Canada, to better give effect to Parliament's important supervisory role in the making of subordinate legislation, it is proposed that the existing Joint Committee for the Scrutiny of Regulations' scope of review, along with some additional powers, be divided into two separate committees. The first committee, the 'Joint Committee for the Scrutiny of Regulations' could examine any existing regulation, under both existing grounds and a new merits-based review on a reasonableness standard, with the power to recommend parliamentary revocation. It could additionally take on the task of scrutinizing provisions in Bills that delegate legislative powers to ensure that these provisions meet appropriate standards in terms of their form and the scope of delegation. This is a critical role as it is increasingly common for legislation to delegate sweeping lawmaking powers. Grants of authority must be carefully calibrated in all cases to provide only what is necessary to complement the legislative scheme as opposed to broad discretion that allows significant policy matters to be determined through subordinate legislation. A second committee, the 'Joint Committee for the Review of New Regulations' would focus on reviewing all newly made regulations published in Part II of the *Canada Gazette*.[30] It could also be required to provide detailed reports to Parliament on its examination of regulations, including the name of each regulation examined, the criteria applied to the regulation, the names of individuals who reviewed the regulation, and any comments on the regulation or the use of the delegated legislative power. While this second committee could not be expected to engage in a fulsome review of every new regulation (which would quickly generate a large backlog), it could act as an open and public 'first response' screening mechanism to identify defects or immediate problems with new regulations. Such regulations could then be referred to the first committee for more detailed study and possible parliamentary revocation.

By screening new regulations and reporting to Parliament, the proposed Committee for the Review of New Regulations would play an important role in supporting transparency in government by helping to publicize the exercise of legislative power by the executive, alleviating concern over governments using the regulation-making process to shield important policy choices from public scrutiny. It would also help to identify problems at an early stage that could be quickly corrected, which could avoid legal challenges in the courts with the associated financial costs and legal risks for the government. The reports produced by the proposed Committee and the subsequent debate in Parliament would provide an important record that could be drawn on by courts and other institutions in

interpreting and applying regulations and primary legislation. And finally, but just as importantly, by highlighting problematic regulations and drawing their attention to the Senate and the House of Commons, the proposed Committee would reassert and reinvigorate the role of our elected Parliament as the ultimate lawmaker in one of the most significant modern sources of law.

Notes

1 Section 41(2) of the *Interpretation Act*, RSBC 1996, c. 238 and *In Re George Edwin Gray*, [1918] SCR 150.

2 See Caroline Morris and Ryan Malone, "Regulations Review in the New Zealand Parliament" (2004) *Macquarie Law Journal* 2. In certain cases, the delegation of authority to make regulations is motivated by the expertise of a specialized person or body. For example, pursuant to section 10 of the *Broadcasting Act*, SC 1991, c. 11, the Canadian Radio-television and Telecommunications Commission is empowered to make a variety of regulations in the furtherance of its mandate to regulate radio, television and telecommunications in Canada.

3 Although there are earlier illustrations of much broader delegations of legislative authority such as that of section 6 of the *War Measures Act*, 1914, which delegated extensive powers to the Governor in Council do "acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." This delegation of authority was upheld by the Supreme Court of Canada in the case of *In Re George Edwin Gray*, note 1.

4 Sections 12(1)(e) and 27(2) of the *Patent Act*, RSC 1985, c. P-4 provide the grant of authority to make fees by regulation, and section 3(2) and Schedule II of the *Patent Rules*, SOR/96-423 establishes the fees to be paid.

5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152 at para. 35 (emphasis added). See also *R. v. Campbell*, [1999] 1 SCR 565 at para. 26.

6 See, *e.g.*, "Caught in the Act", a report of the Ombudsman of Ontario with respect to Ontario Regulation 233/10 made under the *Public Works Protection Act*, RSO 1990, c. P. 55 in advance of the G20 Summit held in Toronto in 2010, in which the Ombudsman observed at page 6 that the Regulation, which provided police with sweeping powers over a large geographic area, was "hidden in plain sight … announced not in newspapers, public service messages, or on ministry or police websites, but in the government's seldom-read and little-known electronic legislative database and then in the *Ontario Gazette*, a publication of interest only to civil servants, pundits and the occasional lawyer."

7 See the Cabinet Directive on Regulatory Management and the requirements of the *Statutory Instruments Act*, RSC, 1985, c. S-22.

8 Section 19 of the *Statutory Instruments Act*, *ibid*.

9 Sections 19.1(1) and (2) of the *Statutory Instruments Act*, *ibid*.

10 Section 19.1(3) of the *Statutory Instruments Act*, *ibid*.

11 Section 19.1(5) of the *Statutory Instruments Act*, *ibid*.

12 Section 19.1(9) of the *Statutory Instruments Act*, *ibid*.

13 Parliament of Canada, Mandate of the Standing Joint Committee for the Scrutiny of Regulations (http://www.parl.gc.ca/CommitteeBusiness/AboutCommittees.aspx?Cmte=REGS&Language=E&Mode=1&Parl=41&Ses=2&CmteInst=joint).

14 *Ibid.*

15 Parliament of Canada, First Report of the Standing Joint Committee on Scrutiny of Regulations, 41st Parliament, 2nd Session.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 See, *e.g.*, *Canadian Association of Broadcasters v. Canada*, [2007] 4 FCR 170 (discussing a report from the Committee on the distinction between fees and taxes), *Buenaventura Jr. v. Telecommunications Workers Union*, 2012 FCA 69 (noting the Committee's conclusion that a section of a regulation served no purpose), and *Vancouver Island Peace Society v. Canada*, [1994] 1 FCR 102 (noting the Committee's discussion of a principle that delegation of legislative power should not be interpreted to include the authority to make individual exemptions).

20 Parliament of Canada, About the Standing Joint Committee for the Scrutiny of Regulations (http://www.parl.gc.ca/Committees/en/REGS/About).

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 Parliament of Canada, Commons Debates, 28th Parliament, 3rd Session, vol. 4, March 8, 1971, col. 4068, emphasis added.

25 *Ibid.*, col. 4067.

26 United Kingdom Parliament, House of Lords: Select Committee on Delegated Powers and Deregulation (http://www.publications.parliament.uk/pa/ld199798/ldselect/lddelder.htm).

27 United Kingdom Parliament, "Delegated Legislation" (http://www.parliament.uk/about/how/laws/delegated/).

28 United Kingdom Parliament, First Report of the Joint Committee on Statutory Instruments.

29 United Kingdom Parliament, Joint Committee on Statutory Instruments, Publications (http://www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/publications/?type=&session=26&sort=false&inquiry=all).

30 Section 11(1) of the *Statutory Instruments Act*, note 7.