

E. DEFECTS IN THE STATUTORY INSTRUMENTS ACT, PRINCIPALLY THE DEFINITION OF A STATUTORY INSTRUMENT

(Paragraphs 21-55)

1. As a general rule no subordinate legislation should come into effect before it is published.
2. All subordinate legislation, unless expressly excepted by the terms of the Statutory Instruments Act, should be registered, published and transmitted to the Standing Joint Committee on Regulations and Other Statutory Instruments.
3. The definitions of "statutory instrument" and "regulation" at present contained in the Statutory Instruments Act should be repealed and replaced by a clear definition of a statutory instrument as a piece of subordinate legislation, with any exceptions from the definition, being also the exceptions to Parliamentary scrutiny, specifically and clearly set out.
4. The distinction between "regulations" and "other statutory instruments" provided for in the Statutory Instruments Act should be abandoned. There should be but one class of subordinate laws, called statutory instruments, broadly defined in accordance, in general terms, with the definition of "regulation" as contained in the Interpretation Act.
5. All documents contained within the single class of statutory instruments should be subject to uniform procedure as to registration, publication and restriction on retroactive effect.
6. The definition of a statutory instrument should not be made to depend upon the insertion in an enabling power of the name of any particular type of document or instrument preceded by the preposition "by".
7. The new definition of a statutory instrument should be arrived at by taking the sum of the law-making and rule-making exercised by the Crown and its agencies and by any other delegate or sub-delegate of Parliament, and whether made pursuant to or under a statute or to the Prerogative, and by declaring the whole to be subject to Parliamentary scrutiny. If it is then desired to exclude any documents or classes of documents from scrutiny, from registration and publication, those documents or classes of documents would need to be defined expressly. Such definitions should be construed narrowly and a statutory direction to this effect should be included in the Statutory Instruments Act.
8. The Statutory Instruments Act should provide for a Statutory Instruments Reference Committee having the authority to issue a conclusive determination for the purposes of Parliamentary scrutiny as to whether any particular document is a statutory instrument or not.
9. Any Departmental Guidelines, Directives or Manuals which contain substantive rules not contained in statutes or in other statutory instruments should be included within the definition of a statutory instrument and be subject to Parliamentary scrutiny. This inclusion should extend to Guidelines, Directives, etc. which constitute instructions to staff where the rules so made are applied to or in respect of

non-staff members or where the breach of the rules can lead to disciplinary action against the staff member committing the breach.

10. Where any statutory instrument is to come into force before registration and publication, the reasons therefor should be provided to the Standing Joint Committee on Regulations and Other Statutory Instruments.

11. Should the distinction between "regulations" and "other statutory instruments" be retained, the words "regulation-making authority" in the Statutory Instruments Act should be re-defined to make clear that in respect of regulations made by the Governor in Council by Order in Council they mean the Department, Ministry or other body which recommends the draft Order to the Governor in Council.

12. Section 32 of the Statutory Instruments Act should be amended to require the publication of the regulations that have been registered under that section.

F. MATTERS RELATING TO THE FORM OF STATUTORY INSTRUMENTS

(Paragraphs 56-69)

1. Both the enabling authority for subordinate legislation and other documents or statutory instruments referred to within the body of a statutory instrument should be clearly and adequately identified with the actual place of publication being disclosed.
2. The references to intermediate enabling authority, not being statutes, and to all instruments mentioned within a statutory instrument, should be given by a footnote showing the place and date of publication, and registration number if one exists. The giving of footnote references should not be confined to instruments the details of whose registration and publication can not be traced through Part II of the Canada Gazette.
3. When a statutory enabling power has been amended since the last Revision of the Statutes of Canada, the preamble to a statutory instrument made in reliance on that power should recite not only the relevant section number or numbers and the name of the Act but also the reference to any amending statute which has amended the enabling power.
4. The footnotes to an amending statutory instrument should disclose all the prior amendments relevant to the provision or provisions of the statutory instrument now to be amended.
5. Statutory instruments should be accompanied by Explanatory Notes. This is especially to be desired in the case of amending statutory instruments. An Explanatory Note should describe the subject matter dealt with in such a way as to indicate the point of the statutory instrument in a purely informative way without entering into justification, argumentation or construction of the law.