REPORT TO PARLIAMENT
STATUTORY INSTRUMENTS NO. 10

FOURTH REPORT

for the First Session

of the Thirty-Second Parliament

from the

STANDING JOINT COMMITTEE

OF THE

SENATE AND OF THE HOUSE OF COMMONS

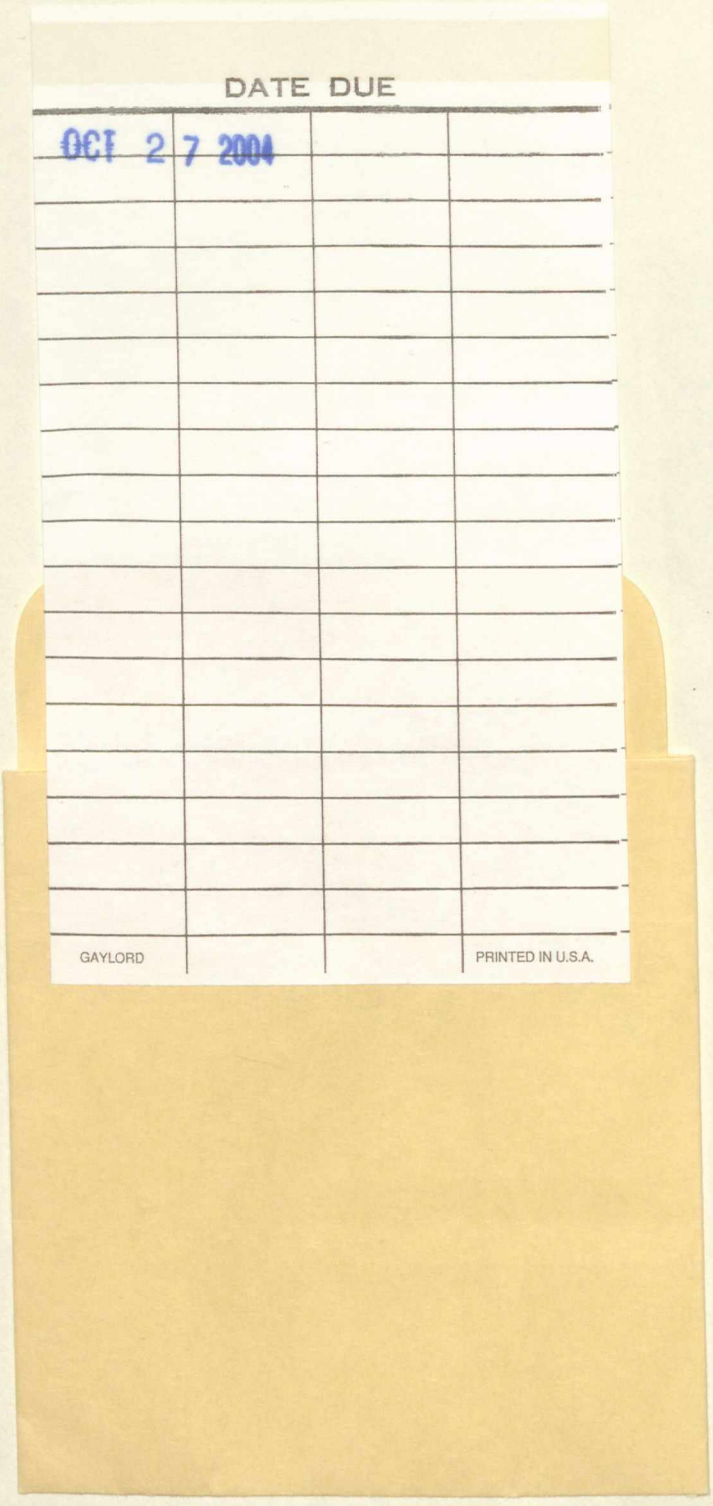
on

REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Joint Chairmen

SENATOR JOHN M. GODFREY, Q.C.

HON. PERRIN BEATTY, M.P.



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Fourth Report, First Session, Thirty-Second Parliament
Statutory Instruments No. 10

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FOURTH REPORT OF COMMITTEE

Thursday, July 17, 1980

The Standing Joint Committee on Regulations and other Statutory Instruments has the honour to present its

FOURTH REPORT

(Statutory Instruments No. 10)

1. Your Committee presents this Report under the terms of reference set out in its First Report (Statutory Instruments No. 9) and approved by both Houses on June 4, 1980. Those terms of reference read as follows:

> Your Committee also reports that in relation to its permanent reference, section 26 of the *Statutory Instruments Act*, 1970-71-72, c. 38 it was empowered during the Fourth Session of the Thirtieth Parliament and during the First Session of the Thirty-First Parliament "to conduct a comprehensive study of the means by which Parliament can better oversee the government regulatory process and in particular to enquire into and report upon:
>
> 1. the appropriate principles and practices to be observed,
>
> (a) in the drafting of powers enabling delegates of Parliament to make subordinate laws;
>
> (b) in the enactment of statutory instrument;
>
> (c) in the use of executive regulation—including delegated powers and subordinate laws;
>
> and the manner in which Parliamentary control should be effected in respect of the same;
>
> 2. the role, functions and powers of the Standing Joint Committee on Regulations and other Statutory Instruments."
>
> Your Committee was unable to complete its study and therefore recommends that the same Order of Reference together with the evidence adduced thereon during the last two Parliaments be again referred to it.
>
> Further reports may be submitted to the Houses as circumstances require.

2. Your Committee's predecessor introduced its general report, the Second Report of the 1976-77 Session, with the following sentences which it is important to reiterate:

> 3. The Committee's primary function is to maintain a watch on the subordinate law made by delegates of Parliament. In the modern era Parqiament has been forced by considerations of time and lack of technical and scientific expertise to leave to subordinates the making of detailed rules and regulations and to confine itself increasingly to setting the main structures of legislative interventions in society. However, Parliament retains responsibility for the law of the land and to the extent that those detailed rules and regulations are not subject to Parliamentary scrutiny Parliament is forfeiting its effective right to settle the laws and that must be obeyed by the people. Parliamentary scrutiny of all such subordinate or delegated law is now an accepted part of the Parliamentary tradition in the Commonwealth.
>
> 14. With the exception of statutory instruments made under the Royal Prerogative, which are original or primary legislation no less so than are statutes, all statutory instruments subject to the Committee's scrutiny fall into that class known as subordinate or delegated legislation. The Committee wishes to emphasize at the outset that subordinate legislation is, and must be regarded as being, subordinate, for otherwise Parliamentary supremacy will have been abandoned. The Committee can make this point no more clearly than did the Committee on Ministers' Powers (Donoughmore Committee) in 1932:
>
> "The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate. Parliament is supreme and its power to legislate is therefore unlimited. It can do the greatest things; it can do the smallest. It can make general laws . . . it can make a particular exception out of them in favour of a particular individual. It can provide . . . for the payment of old age pensions to all who fulfill the statutory conditions; it can also provide—and has in fact provided—for boiling the Bishop of Rochester's cook to death. But any power delegated by Parliament is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated."
>
> The maintenance of parliamentary supremacy and of parliamentary democracy is imperative. The inability of Parliament to consider or to make all the laws necessary in the modern state should not lead to a lessening of the fairness, participation and procedural safeguards in law making which now attend the passing of statutes, but not the making of subordinate legislation by Parliament's delegates. The aggregation of power in the hands of the Crown and its servants, whether Ministers or public servants, as law making delegates of Parliament should not lead to a decrease in accountability to Parliament for law making. Delegated law making is far too wide-spread a practice to be without democratic participation, proce-

dural safeguards and parliamentary accountability. Yet, our present practices are based on the premisses that delegated legislation is abnormal, and that it is confined to matters of detail. There can be no doubt that delegated legislation is now the ordinary and indispensable way of making the bulk of the non-common law of the land. It is beyond question that subordinate legislation is not confined to detail and more often than not embodies and effects policy. The making and control of subordinate law must therefore be regularized and brought into harmony with our constitutional order.

3. There has been much talk of late of "regulatory reform" and of the impact of "regulation" on the public sector. The burden of the discussion has related to the content, burden and cost of the regulatory policies rather that to the legality or propriety of particular regulatory methods. There is a considerable feeling abroad that the policy and cost of regulation should be scrutinized and made subject to the contribution of persons beyond the Government's employ. To prevent confusion as to the subject matter of this Report, it is important to draw some preliminary distinctions. The process of "regulation" as it has been debated is not confined to the making of subordinate laws by delegates of Parliament. Regulation of an activity or a sector of the economy may be achieved by the passing of an Act of Parliament, by orders or decisions of a regulatory agency such as the Canadian Transport Commission, by the application of a settled policy whether announced or unannounced, by changes in tax policy or the giving of incentives and subsidies upon conditions, by government ownership, and by the making of subordinate laws, commonly called regulations, by a delegate of Parliament, usually the Governor in Council, but sometimes a Minister or an agency. Under its permanent terms of reference, section 26 of the Statutory Instruments Act—(1), your Committee is concerned with the subordinate law making of Parliament's delegates. Bodies such as the Economic Council of Canada in its "Regulation Reference" are concerned with the much broader field of regulation, however achieved, of people, of industry and of commerce, of whole sectors of the economy. Your Committee welcomes the scrutiny of the worth, effectiveness and cost of government regulation and sees it as complementary to its own work which concerns subordinate legislation only, the protection of the rights and liberties of the subject and the reassertion of parliamentary sovereignty.

4. Your Committee is well aware of and laments the bewildering terminological confusion that muddles all reference to subordinate or delegated legislation. The confusion is worse compounded by the complexity of the definitions of "statutory instrument" and "regulation" in the Statutory Instruments Act and by the practice of embodying almost all executive acts in Orders in Council. In an attempt to simplify matters, Appendix I on terminology is attached. It should be noted that not all subordinate legislation is included within the definition of "statutory instrument" as the Crown now applies it. Nevertheless, in this Report your Committee deals with all subordinate or delegated legislation however called.

5. Its special terms of reference call on your Committee to report on its role and function. Recommendations in that behalf appear throughout this Report. It is appropriate, in addition, to make some general remarks about the Committee which, after six and one half years of active operation, can not be said to be well known. Its activities are followed by a small circle in the Public Service, more especially in the Department of Justice. It has influence in some quarters but it has not the impact of its counterparts overseas, which influenced the recommendations of the MacGuigan Committee—(2). The reasons for this unhappy situation are several. In part, it stems from the need to work in a setting where subordinate laws are seen only after they are made and in which there are no sanctions to Parliament's hand if a particular subordinate law is disapproved of. There are certainly limitations inherent in the Statutory Instruments Act which were not foreseen by the MacGuigan Committee especially in the parliamentary scrutiny. There are also traditions in the Public Service, most notably in the drafting of both statutes and subordinate legislation, which are more in keeping with administrative ease than accountability to Parliament and observance of the law. The absence of a clearly articulated philosophy of respect for liberty and of propriety in the activities of the executive government of Canada is a most serious problem. Your Committee is also aware that it needs to tighten up its own procedure in the light of the past years' experiences. And it is doing so. Beyond that there need to be the major changes recommended in this Report.

A. LIBERTY, AND THE PROPRIETY AND MERITS OF SUBORDINATE LAW

6. Subordinate legislation is an historically accepted means of governance. There is no longer any point in arguing that it is fundamentally improper or that it should be used only occasionally or for mere matters of detail. What is essential is to surround the making of subordinate legislation with procedural safeguards and measures of control so that the rights and liberties of the subject, which it is the object of our constitutional order to protect while maintaining a viable system of government, may be secured as well under subordinate legislation as under statute. Subordinate legislation must not become a means, even unwittingly, of suppressing rights and liberties or of subverting parliamentary supremacy over the law. The Crown's power has never stood higher; the potential for its abuse has never been greater.

7. Subordinate legislation may be inescapable and the implementation through it of policy, even policy never debated by Parliament, may be inevitable; but that is no reason to allow subordinate legislation to be made without adequate check, without any democratic element in its formation, and embodying any provisions Parliament's delegate chooses. There are still matters which are not meet to be dealt with by delegated legislation and which should be soberly weighed by Parliament. The confining of subordinate law to its proper sphere, and the regularisation of its use will be impossible of accomplishment if Parliament continues in the habit of giving larger and vaguer grants of law making power to the executive in skeletal statutes many of which are devoid of any clear enunciation of policy. Such blanket grants of executive power as are contained in, for example, the Petroleum Administration Act, the Energy Supplies Allocation Act or the Fisheries Act, were rarely made under the Tudor sovereigns who certainly prized

administrative convenience and jealously guarded their control of the machinery of state. It is odd that in a supposedly democratic age government values its convenience, its control of the administrative system and its monopoly of information no less. What future can there be for individual liberty, for the rights of minorities and for democratic and participatory traditions if the highest end of government is its own ease, the exercise of power without public accountability? The need to abide by procedural rules, the stern restraint of the rule of law, the control of arbitrary if well meaning acts, all these may make government awkward. But the rights and liberties of the governed require that government not be untramelled. Liberty is usually prickly and often untidy and asymetrical. It wants, as Professor Hugh Trevor-Roper has observed, that certain beauty of mathematical order so beloved of those who respect power and what it can achieve.

8. In recommending more parliamentary vigilance, especially of enabling powers for the making of subordinate law, your Committee is not blind to the exigencies of the parliamentary timetable or to the pressures on the Houses' time. Nonetheless, a way can be found to direct Parliament's attention to grants of subordinate law making powers in Bills after second reading through their scrutiny by a Standing Joint Committee on Regulatory Review which should replace the present Standing Joint Committee on Regulations and other Statutory Instruments. The deficiencies your Committee and its predecessors have pointed out in existing statutes could be corrected by amending Bills introduced in the Senate upon the recommendation of the Regulatory Review Committee and made the subject of all-party agreement.

9. In acknowledging the present concern with the policy content of subordinate laws, your Committee is not losing sight of the need to police the actual means used to achieve policy ends. Policy is directed to the well being of the national interest, or to that of a particular class or group of the nation. As such, its ends are seen as desirable in themselves and there is often a not unexpected impatience with those who, defending ancient rights and liberties, oppose what to administrators seem to be the most direct and effective means of achieving the policy. It is all too easy to assume that the means employed to achieve the ends of policy are of little consequence and a mere matter of administrative convenience. This is a criticism which can be directed not only at well intentioned and hard pressed servants of the Crown but also at commentators and academic political scientists who find the policy content or ends of subordinate law fascinating and the propriety of the means used to achieve those ends of little consequence. The hard won rights and liberties of the people secured over centuries of constitutional conflict depend upon a constant vigilance to prevent illegal and illegitimate means. That is why parliamentary scrutiny committees on delegated legislation have traditionally concerned themselves with the means of effecting policies as set down in subordinate law and not with the policy ends themselves.

10. Your Committee is vitally concerned to see that the means used are legitimate ones, means that are not simply lawful on an interpretation however limited or stretched of enabling powers, but are also legitimate given the underlying principles and standards of Canada's constitutional order, which is based on individual liberty in person and estate. Even in the short run means can be as important as the ends being pursued, for the means may well clash with the underlying constitutional imperative of liberty. In the long term the means used to achieve government's ends can be far more important than the ends themselves. It is no exaggeration to say that the evolution of our constitutional system since Magna Carta has consisted of a series of controversies and conflicts over means. It is very easy for those responsible for fisheries policy or the protection of wildlife, or for those charged with rendering manpower mobile, checking illegal work by immigrants, trying to reduce Post Office deficits or with protecting Canadian industries from overseas competition to come to see their policy objectives as all important and to consider the means employed to achieve those objectives as subsidiary or even unimportant matters. While administrative efficacy may be the dominant objective of the administrative process, for the community as a whole it is only one object and particularly when seen historically, not necessarily the most important one. The means employed in the administrative process bear upon the individual and since these means are critically important they must be policed. In an historically derived constitutional order such as ours liberty, order, harmony and constitutional balance require that means be legitimately founded in the underlying principles and standards of that constitutional order.

11. A parliamentary democracy also requires that means be subject to public scrutiny and parliamentary control. It also requires that the ends being sought through subordinate legislation be publicly adknowledged and that the Government be accountable for them to Parliament. Fairness requires that subordinate laws be not harsh and oppressive and be made by procedures that are fair, open and responsive to the people that the legislation will affect, whether for good or ill. If all citizens have an interest and a democratic right to concern themselves with the policy furthered by a subordinate law, the protection of the rights and liberties of the subject and hence our constitutional order is also at issue in every exercise of a power to make a subordinate law. While few may be affected by a particular end that is sought, all have an interest in the legality and propriety of the law and the procedures followed in its making.

12. There are many who believe that parliamentary scrutiny is a slight thing if it does not concern itself with the policy of subordinate legislation as well as with its legality and propriety as we have explained it. Your Committee favours parliamentary scrutiny of the policy or merits of subordinate legislation, especially where Parliament has never debated the policy or where the subordinate laws are made under a statute devoid of any policy content. Thus, policy scrutiny of the fishery regulations, to take but one example, would be a very worthwhile endeavour. The making of extensive subordinate laws on important matters such as Via Rail Canada Inc. under Votes in Appropriation Acts also produces laws and policies never debated by Parliament. Your Committee's predecessor called for an end to this practice inimical to parliamentary sovereignty. It should stop and all existing subordinate laws made under Votes should be the subject of review as to merits by the appropriate Parliamentary Standing Committees.

13. Questions have been raised as to whether your Committee should concern itself with the policies or merits of the thousand or so subordinate laws that come before it each year. While this might be a glamorous task and would perhaps rescue the Committee from that obscurity in which its predecessors languished, it would be beyond its capabilities. This is so even though a large part of the subordinate laws made each year consists of relatively straightforward amendments to existing subordinate legislation. Your Committee is well aware that its statutory terms of reference in section 26 of the Statutory Instruments Act do *not* preclude a review of any piece of subordinate legislation on its merits if the Houses so agree. Nevertheless, your Committee believes that it is more appropriate for subordinate legislation to be scrutinized by the appropriate Standing Committees of the Houses as to merits as discussed in paragraph 16 below. The Regulatory Review Committee should continue to review in terms of criteria such as those now used by your Committee and which are found in Appendix II.

14. Your Committee believes that the appropriate stage for the review of subordinate law as to its policy and merits is well before it is finally made. Your Committee also believes that more effective than any scheme of parliamentary scrutiny of the policy of a proposed subordinate law that can now be devised is an obligation to make that proposed law public, to state the reasons for its making and to consider representations from the public, whether individuals or groups. Consequently, a later section of this Report deals in detail with a mandatory notice and comment procedure for all subordinate law. After a subordinate law has been in force for a reasonable time, its effectiveness should be evaluated. Parliamentary Standing Committees could serve a useful role as the public fora in which the continued need for a particular policy and the effectiveness of the subordinate legislation could be scrutinized.

15. Your Committee also recommends in paragraphs 24-30 infra that disallowance of subordinate legislation that has been made and the affirmation of draft subordinate laws (commonly called negative and affirmative vote procedures) be established as regular and invariable parts of the Canadian system of subordinate law. The debate on a resolution to affirm a subordinate law and the actual disallowance procedure recommended by your Committee should provide scope for interested parliamentarians to raise the merits and policy of subordinate legislation. Your Committee has noted the failure of a special merits committee at Westminster where there has been no referral of subordinate legislation to appropriate Standing Committees. It has also noted that while disallowance has frequently been moved and carried in the Senate of the Commonwealth of Australia on grounds of illegality and impropriety, it has but rarely been invoked on ground of merits. Your Committee considers, therefore, that it cannot at this stage recommend the establishment of any new Committee to scrutinize merits. It can do no more now than to recommend referral to appropriate Standing Committees and a system which allows for pre-making scrutiny of proposed subordinate laws by the public and for affirmation and disallowance in the Houses. It will be up to the members of the Houses using these procedures to make good their oft repeated complaints that policy of which they disapprove is settled in regulations by bureaucrats.

16. One proposal that has been aired from time to time for the review of merits is that all subordinate legislation should be referred to the appropriate Standing Committees of the Houses for review on the merits and as to policy. With this your Committee agrees. It would also be desirable to have policies reviewed from time to time to assess their effectiveness and the need to continue them. Your Committee cannot pretend, however, that it is very sanguine about the effectiveness of references to Standing Committees while the membership of Committees of the House of Commons remains so large and subject to frequent replacements, and the Committees themselves lack adequate technical assistance. In any event, it would seem to be a Herculean task to review the merits of and to hold hearings on all regulations, even all new regulations. Perhaps all that can reasonably be aimed for is the review by Parliamentary Standing Committees of the merits and policy of selected subordinate laws. The Rules and Standing Orders of the Houses should be amended to allow such scrutiny and review by Standing Committees either on their own initiative or on reference from the Standing Joint Committee on Regulatory Review. Committees conducting such reviews would need to guard against the danger of their scrutiny of policy being too much influenced by their expert staff who might be simply endeavouring to have their own personal judgments substituted for those of servants of the Crown to whom Parliament had originally delegated subordinate law making authority.

17. Prevention is to be desired above cure and your Committee exhorts the Houses to a much more rigorous examination and scrutiny of the enabling powers in Bills and to insist on clear statements of policy in statutes. The Houses' study of Bills would be greatly facilitated if, when enabling powers are being sought, the proposed subordinate laws to be made under them were to be tabled and studied by the apppropriate Standing Committees at the same time they are studying the Bills. The mandatory notice and comment procedure which your Committee later recommends should act to reduce significantly the number of instances in which regulations are not drafted by the time Bills reach the Committee stage.

18. In addition to parliamentary review, subordinate laws should not, save in exceptional cases, be made at all unless and until there has been an opportunity for public representations on the draft laws. The public can have an influence on Bills through their elected representative and through representations at the Committee stage. Procedures should be in place to afford some approximate opportunity in respect of subordinate laws. Procedure is the handmaid of liberty and your Committee makes no excuse for paying so much attention to it in what follows.

B. CONTROL OF SUBORDINATE LEGISLATION AND LAW MAKING

19. A casual reader of the Statutory Instruments Act might be impressed by the apparent safeguards it contains and by the fact that most subordinate laws in Canada are made not by individual Ministers but by the Governor in Council. The true

position is, however, not at all reassuring. The Statutory Instruments Act provides for the scrutiny of draft "regulations", a subclass of "statutory instruments" by no means including all subordinate laws, by the Legal Advisers to the Privy Council Office who are in fact officers of the Department of Justice, as are the legal officers who draft regulations in Departments and many Agencies. It is doubtless the case that the Legal Advisers have managed to weed out many offensive or *ultra vires* provisions in regulations. Your Committee perhaps flatters itself that its scrutiny has assisted the Legal Advisers in their own work. It must be emphasized, however, that the Legal Advisers can not prevent a regulation being made if the sponsoring Department wishes to put it forward despite the Advisers' adverse report. This, the Committee believes, rarely occurs. The effectiveness of the internal scrutiny of the Legal Advisers is severely hampered because both they and the departmental legal officers are bound by the very traditions of drafting and received legal opinions of the Department of Justice which your Committee has found to be among the chief causes of objectionable provisions in regulations—(3). The fact is that your Committee and its predecessors have objected to a far higher proportion of the regulations they have scrutinized than have their counterparts in the United Kingdom, Australia and Ontario. Your Committee can only conclude that the existing means of checking and controlling subordinate legislation in Canada as to its legality and propriety, while a considerable improvement over the situation existing before the passage of the Statutory Instruments Act, could still be improved further. There is, as so many are now aware, no check or control as to merits or policy.

20. In Canada most regulations, and hence subordinate laws, are made by Order in Council of the Governor in Council. It is, therefore, commonly said that the regulations are made by the Cabinet. Your Committee thinks it important to place on public record that this is not strictly so. Since the Governor General does not preside at his Council, his assent to an Order in Council follows upon its earlier approval by Cabinet members. Very few draft regulations are actually considered by the Cabinet as a deliberative body. Some of these are first considered by Cabinet Subcommittees. By far the greatest number of regulations is recommended for His Excellency's approval by the Special Committee of Council which consists of ten Ministers with a quorum of four. The extent to which draft regulations are scrutinized as to policy, legality and propriety by the Special Committee will depend upon its membership. The decision as to whether a regulation should be considered by a Cabinet Committee or direct by the Cabinet rests fundamentally with the sponsoring Minister according to his view of the regulation's importance and implications. Occasionally, the Cabinet itself may decide that particular regulations when drafted should come before it. Your Committee records this information merely to disabuse the Houses and the public, if that be necessary, of the notion that all the Cabinet members turn their collective attention to each of the thousand and more regulations made each year. The way in which regulations by Order in Council are in fact made gives but little support to the view that there are safeguards in vesting subordinate law making powers in the Governor in Council rather than in individual Ministers. Furthermore, it does nothing to satisfy the need for scrutiny of subordinate laws both as proposed and as made, by the public and particularly by Parliament.

21. Under the Statutory Instruments Act, section 26, your Committee is granted neither power nor jurisdiction to do anything in particular with or to statutory instruments, the very nature and definition of which are obscure. The Committee scrutinizes regulations, other published statutory instruments and such other statutory instruments as it finds after they have been made, and on occasion reports some of them to the Houses either in special reports or in a general report.

22. Parliament has no greater power than has the Committee. Only in twenty-one instances under the Statutes of Canada to the close of the 1976-77 Session is Parliament allowed the opportunity to disallow a statutory instrument or to prevent its coming into or continuing in force by refusing to affirm it—(4). No general machinery is in place under Statute or in the Rules of the Senate or the Standing Orders of the House of Commons to require a debate to be held on a motion to disallow a statutory instrument, in those cases where such is allowed, or to force the motion to come to a vote.

23. While the efforts of your Committee's predecessors to secure changes in particular statutory instruments and in the general principles used in drafting and publishing them have had varying degrees of success often depending on the Department involved the only sanction open to your Committee is to report to the Houses. This is unnecessary in the case of those Departments and agencies which are co-operative with the Committee and of no consequence for those which habitually ignore the Committee's principles and requests or are dilatory in honouring their undertakings to amend or to promote necessary statutory changes. The Committee's methods of proceeding, as outlined in the Second Report for the 1976-77 Session are necessarily not geared to enforcement, or to the control of delegated legislation but to suasion, re-education and scrutiny. These latter functions are not to be despised, and in the long run the re-educative function may be the most potent of all, but they are not enough. There should be means by which Parliament can control the executive in its exercise of the subordinate law-making function Parliament has delegated to it.

24. Your Committee has taken note of the procedures used for this purpose in the United Kingdom and in the Commonwealth of Australia, which are summarized in Appendix III to this Report. It considers that a power in the Houses, soberly used, to disallow subordinate legislation, is essential in Canada and that on far more occasions than at present Parliament should be called upon to affirm a subordinate law before it can have legal life. Your Committee recommends that all subordinate legislation not subject to a statutory affirmative procedure—(5) should be subject to being disallowed on resolution of either House and that the Executive be barred from re-making any statutory instrument so disallowed for a period of six months from its disallowance. Your Committee further recommends that if any resolution for disallowance of a statutory instrument is moved, and is not withdrawn, the statutory instrument should be deemed to have been disallowed if a debate on the resolution does not take place and culminate in a vote within a fixed number of sitting days.

25. Disallowance is, in your Committee's view, a curative measure and prevention is much to be desired. Prevention of *ultra vires*, improper or illegitimate subordinate laws will not be possible if scrutiny of all of them is forbidden before they are made. The Committee realizes that pre-making scrutiny of subordinate legislation is not in all cases possible or even desirable. Indeed, your Committee recommends in paragraph 34 below that a special type of subordinate law should be provided for in the Fisheries Act which by its very nature could not be seen by any parliamentary body before it is made. Yet the Committee is firmly convinced that the publication of draft subordinate legislation is not only possible in most cases but is highly desirable and makes extensive recommendations to that end in Section C below. Such a practice would allow persons or groups interested to make representations and objections to laws which usually affect them more closely than do statutes in the passage of which they often do have an opportunity to give expression to their view. More importantly from Parliament's point of view, publication in draft would allow Parliament to be consulted through the need to have a draft subordinate law affirmed by both Houses before it could become law and through the opportunity to move for disallowance before the law could take effect as under the United Kingdom "21 day" rule set out in Appendix III. Clearly, many statutory instruments are wholly non-controversial and unobjectionable and affirmation would be granted without demur. But the opportunity would exist for Parliament to exercise its sovereign powers. Another important consideration is that whereas your Committee, in keeping with the tradition of bodies of its kind, does not comment on policy, affirmation, as indeed disallowance, could be used by any member of either House to debate the policy of an instrument. The appropriate Standing Committees of either House could consider the merits of a draft subordinate law and its chairman move disallowance or speak against affirmation. In this regard, your Committee wishes to re-emphasize that many regulations are made to give effect to policies which are not embodied in any statute and which Parliament has never considered or even had the opportunity to consider. Under the Canadian habit of using statutes and Votes in Appropriation Acts merely as vehicles for the conferring of powers on the executive, this situation is only too common.

26. It is not possible to specify all those cases in which affirmation would be possible and desirable, although its virtue in cases of subordinate laws made under skeletal statutes is obvious. Affirmation would also be highly desirable in cases where the exercise of enabling powers may

(a) substantially affect the provisions of the enabling or any other statute;

(b) impose or increase taxation, fees or charges;

(c) lay down a policy not clearly identifiable in the enabling Act or make a new departure in policy; or

(d) involve considerations of special importance.

To a great extent the decision as to whether or not to insert in a Bill a provision for affirmation of subordinate legislation must be left to the *bona fides* of the government of the day and to the parliamentary draftsmen. But your Committee recommends that a commitment be made by the Government to use the affirmation procedure where practicable and to follow a 21 day rule wherever possible, even in cases where the notice and comment provisions your Committee recommends are not applied. The Committee recommends that whenever draft instruments are published it should have jurisdiction to scrutinize them as to legality and propriety, to report to the Houses upon them and to make representations to the sponsoring Departments and Agencies. The appropriate Standing Committees should be entitled to scrutinize, report and make representations as to merits.

27. A government will normally wish to see a resolution to affirm a draft subordinate law come to a vote. With the exception of one matter, your Committee is not of a mind at present to recommend any special, required procedure for dealing with affirmative resolutions in either House beyond that already contained in section 28.1 of the Interpretation Act—(6). The Rules and Standing Orders of the Houses should be amended to facilitate that procedure. The Committee notes that the Interpretation Act procedure was not used in the case of the Anti-Inflation Act—(7) where a different procedure was provided for. What must be avoided at all costs is a proliferation of special affirmation procedures applying to different subordinate laws. The one addition which should clearly be made to the present Interpretation Act procedure is the addition of a rule that no debate should be held on a motion to affirm an instrument until the Regulatory Review Committee has been given an opportunity to report on it within a specified time and until the appropriate Standing Committee has reported on its merits or that it does not wish to do so or the specified time has expired. The Rules and Standing Orders of the Houses should specify the times within which Reports must be received.

28. There is no general procedure in the Parliament of Canada for the scrutiny of any instrument in draft for purposes of affirmation. In fact, only under section 18 of the Government Organization Act, R.S.C. 1970 2nd Supplement, C. 14, and section 4(2) of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, C. 48 are orders tabled and laid before Parliament which have no effect until affirmed. Your Committee recommends that this is the type of affirmative procedure that should be adopted in Canada. Your Committee does not favour the type of affirmation which is in use in four instances under statutes of Canada whereby an instrument has legal effect for a certain period (as long as 180 days) but ceases to have effect at the end of the period unless it is affirmed. This procedure is open to abuse in that an instrument can be, and has been, revoked a day or two before the expiration of the fixed period, and a new one made, the consequence being that the substance of the instrument can be given indefinite life despite any action Parliament may take. Draft subordinate laws which are subject to affirmation should stand referred to the Regulatory Review Committee for scrutiny and report before the debate and vote on a motion to affirm takes place.

29. The actual form of disallowance provision which is introduced in the Parliament of Canada and the attendant procedures will determine the worth and effectiveness of the principle. The provisions in section 28.1 of the *Interpretation Act* are inadequate with respect to disallowance. Your Committee places great emphasis on the procedural aspects of its

recommendations. Disallowance by either House should be provided for in a new Subordinate Legislation Act and should possess six essential characteristics:

1. Subordinate laws are void and of no effect if not presented in each House within fifteen sitting days of their making.
2. Notice of motion for disallowance in either House must be moved within fifteen sitting days of the tabling or laying of a subordinate law in that House.
3. A notice of motion for disallowance of a subordinate law must be resolved within twenty sitting days, otherwise that law is deemed to be disallowed.
4. The debate on a motion for disallowance of a subordinate law must not be commenced until the expiry of the time limited for receipt of a report from the Regulatory Review Committee as to that law's legality and propriety and from the appropriate Standing Committee on its merits.
5. If a notice of motion for disallowance is unresolved in the Senate or in the House of Commons at the end of a Session or on dissolution of the House of Commons, the subordinate legislation the subject of the motion is deemed to be presented to the House concerned at the beginning of the next Session.
6. Subordinate legislation the same in substance as that disallowed may not be made within six months after disallowance or deemed disallowance without the consent of the House in which disallowance occurred. (This last is particularly important in the context of disallowance where the notice and comment procedure the Committee recommends have been ignored without good cause shown).

   Your Committee favours a minimum number of five signatures for a motion for disallowance in either House.

30. This form of disallowance will require the restoration of the tabling and laying of subordinate legislation in the Houses, which was abandoned despite the recommendation to the contrary of the MacGuigan Committee. It will also require the carrying forward of the substance of the present section 28.1(2) of the Interpretation Act to ensure that where a subordinate law has been disallowed or is deemed to have been disallowed any law that was revoked or amended by the making of that law shall be deemed to have been revived at the date of disallowance or deemed disallowance.

31. The Houses will, of course, have to adopt Rules and Standing Orders which will facilitate the statutory procedures for affirmation and disallowance, and in particular the referring of subordinate legislation to Standing Committees.

32. Your Committee expects that once a workable disallowance procedure is in place it will be used sparingly and that it will generally be invoked upon report of the Standing Joint Committee on Regulatory Review on questions of legality and propriety. The opportunity, however, will exist for Standing Committees to report on substance and merits and for any of their members to move disallowance. And five members of either House will have the opportunity to cause a debate and a vote thus holding the executive government responsible in a public fashion.

33. Your Committee neither expects a flood of motions for disallowance nor considers that the number likely to be moved will clog the Parliamentary timetable. If the British House of Commons could find time to debate ninety-two motions for disallowance on the floor of the Chamber in 1975-76, there can be no reason why the rules and practices of the Houses in Canada should not accommodate a goodly number of motions if they were moved. There would seem to be Senate time and Opposition days available. To put minds at rest on this issue your Committee wishes it known that neither it nor its predecessors would have sought to disallow any number approaching ninety-two subordinate laws in any Session. Moreover, it expects that the possibility of a motion for disallowance and a debate will cause most Departments and Agencies to agree quickly to remove from their subordinate laws any objectionable features which have survived the notice and comment procedures your Committee recommends.

34. Your Committee has become aware from scrutiny of regulations under the Fisheries Act that there are serious defects in many of those regulations which can not be cured without amendment of both the Statutory Instruments Act and the Fisheries Act. The Department of Fisheries and Oceans finds it impossible to make detailed subordinate laws governing the peripatetic fisheries resources under the time constraints and delays in the making of regulations inherent in the Statutory Instruments Act. Consequently, the Department draws its regulations in such a way as to grant discretions to officers to act, to prohibit or to issue licences. No criteria are spelled out in the regulations in accordance with which officers are to exercise their discretions so that the actual law enforced lies in the officers' mouths. Your Committee objects to this procedure on the grounds that it amounts to sub-delegation of rule-making power not provided for in the Fisheries Act, and to an arbitrary exercise of power which can not be checked because the rules actually applied by officers are not contained in any law. In fact, a great deal of guidance is given to officers by departmental instructions and guidelines which contain many of the real rules but which are not subjct to your Committee's scrutiny and are not legally binding on anyone. Your Committee recommends that the Fisheries Act should be amended to permit of sub-delegated law-making by the Minister and by designated officials. Such sub-delegated laws should be exempt from all notice and comment requirements and from the pre-scrutiny requirements of examination by the Legal Advisers to the Privy Council Office. They should come into force on their being made known locally where they are to apply. They would, however, remain subject to *ex post facto* scrutiny by the Regulatory Review Committee, to which they should be required to be sent. Only by this means does your Committee conceive that the Department of Fisheries can make the law swiftly as it sometimes needs to do and Parliament can be assured that the actual rules applied in the control and preservation of the fishery will be included in legally effective rules, binding fisherfolk and Crown alike and subject to parliamentary scrutiny. The Regulatory Review Committee would, of course, be expected to maintain a close watch on such sub-delegated subordinate laws to ensure that they were not used unnecessarily as a means of avoiding public scrutiny

and representations, and examination in draft by the Legal Advisers to the Privy Council Office.

35. Your Committee notes the significant contribution to the improvement of administrative practices made by the Administrative Conference of the United States, a statutory body established in 1964 consisting of government and agency officials, practising lawyers, academics and experts on administrative procedure. The Council on Tribunals of the United Kingdom also exercises a valuable supervisory role over aspects of administrative law in the United Kingdom. An external body with a general mandate to survey and report on regulatory activity in Canada is much to be desired. Your Committee, therefore, recommends the establishment of a Regulatory Council composed of members from the regulatory agencies, government departments, public interest groups and industry and labour. The Council should maintain a continuous review of the regulatory process, including the making and scrutiny of subordinate law, and of means of eliminating unnecessary regulatory effort. It should pay particular attention to the effectiveness of the notice and comment procedure your Committee later recommends and should make reports suggesting alterations in procedures and alternative methods of giving publicity to proposed subordinate law making. It should also study the area of "quasi-law": the issuing of interpretative and policy statements, guidelines and manuals to be applied by administrators.

C. NOTICE AND COMMENT PROCEDURES

36. Your Committee has reconsidered the procedure by which the substance of subordinate legislation comes into being and has found it wanting. It is truly the secret garden of the Crown. Of recent years there has been some movement towards the publication of draft regulations and a willingness to receive representations from the public on those drafts. This procedure has been endorsed by the Economic Council of Canada—(8). But it is not new. It is widely used in the United States and is generally considered to be successful. It was considered and rejected by the McRuer Commission on Civil Rights in Ontario. It was abandoned in the United Kingdom in 1946 in favour of consultation during the formulative stage of proposed laws because the exceptions to the notice and comment procedure had been habitually abused by Departments which always pleaded urgent circumstances. A notice and comment procedure was in force in the Commonwealth of Australia but was discontinued in 1916. The MacGuigan Committee considered such a procedure and, while recommending that its use be provided for in new statutes where suitable, did not recommend that notice and consultation or comment be made a general rule applying to the making of all subordinate legislation.

37. At the time the MacGuigan Committee reported, there were but two statutes of Canada which required notice of a draft regulation and the affording of opportunity to comment upon it to interested persons. No opportunity was extended to members of the public generally. In several other statutes which provided for the giving of notice an opportunity to make representations could probably be implied. The tenor of the evidence before the Committee was clearly in favour of extensive informal consultation with those peculiarly affected by draft regulations but against a formalised notice and comment procedure being made available to the public at large. Nevertheless, in the ensuing years there has been a considerable movement in that direction. A number of statutes now provide for notice of draft regulations or guidelines to be given sixty days before they are made and for an opportunity to members of the public to make representations. These, however, usually relate to the imposition of technical standards on industry. Moreover, the statutes usually provide that where a draft has been altered as a result of the representations received it need not be republished.

In 1978 the Honourable the Treasury Board introduced a notice and comment procedure for those major, non-emergency, "health, safety and fairness" regulations made under specific, listed statutes, which meet certain criteria as to direct and indirect social costs. The definitions of all these terms are found in Chapter 490 of the Board's Administrative Policy Manual—(9). Every such draft regulation must be published at least sixty days before it is to be made and be accompanied by a "socio-economic impact analysis" and a statement of the legal authority for and the purposes of the regulation. It is too early to tell how revealing such analyses and statements will be, and whether they will afford a sufficient enunciation of the policy of the proposed regulation and the reasons for it. Similarly, it cannot now be said whether the number of proposed regulations subject to this procedure, which could be abolished by the Treasury Board at any moment, will be significant. Only two have so far been published—(10). The procedure does not extend to "guidelines" or administrative procedures. One feature of the Health, Safety and Fairness procedure deserves special commendation. Each sponsoring department or agency must respond to comments from non-government bodies on its proposed regulation. The Committee trusts that "bodies" is interpreted as including individuals.

Your Committee is also aware of a parallel development in that of recent years the Canadian Transport Commission and the Canadian Radio-Television Commission have held hearings to assist them in their rule-making functions, thus exposing both policy and draft rules to intense scrutiny.

38. More recently, the Economic Council of Canada has recommended a sixty day notice and comment procedure for all new regulations which have significant implication in terms of cost or impact on the distribution of income and are susceptible to cost benefit analyses. The Council appears to use "regulations" in its generic sense as indicating all subordinate legislation. Of one thing your Committee is certain, notice and comment procedures should not, in the case of subordinate legislation, be confined to regulations which meet economic or monetary criteria or are susceptible to cost benefit analyses. The important objective is to allow the reasons for and the policy of all subordinate legislation to be subject to the light of public scrutiny.

39. The Economic Council identified seven deficiencies in the present regulatory system as follows:

inadequate notice of new regulatory initiatives (statutes, amendments and subordinate legislation) to interested persons;

inadequate consultation with interested persons during the development of proposals for new regulations;

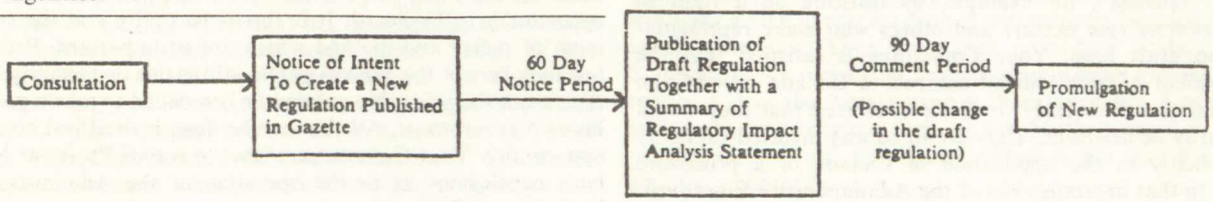
failure to assess the costs and benefits of new regulations to society as a whole;
failure to evaluate periodically the large stock of existing regulatory activities;
lack of central co-ordination of regulatory activity;
inadequate public access to information regarding the regulatory actions of government; and
unequal opportunities for participation in decisions concerning new regulations and existing regulatory programs by those who have an interest in them.

Your Committee endorses the conclusions as expressed by the Economic Council provided the phrase "interested persons" is not confined to those who, like an affected industry, have a particular interest in regulatory programmes. Not only industry but public interest groups and the public generally must be able to make representations. It is the public interest which must be paramount and not that of the "interested person". Your Committee deprecates any attempt to intrude a corporatist bias into regulatory reform or any assumption that the concerns of an industry subject to control by subordinate legislation warrant any pre-eminent consideration. Your Committee has no reservation, however, in assenting to the basic propositions set forth by the Council as the bases for its recommendations:

"1. governments should provide advance notice of their intent to propose major new regulations (i.e. subordinate legislation) and allow an opportunity for consultation;
2. governments, before imposing major new regulations, should assess the costs and benefits of such regulations; and
3. governments should periodically, on a systematic basis, evaluate their existing stock of regulatory programs and agencies."

The second and third of these bases relate to merits with which this report is not primarily concerned. The first raises the question: why should there be participation in the subordinate law making process? First, the proponents and draftsmen of subordinate laws cannot know or have thought of everything. It is possible they do not have command of all relevant information. Secondly, all the consequences and problems flowing from a proposed subordinate law may not have been foreseen. Thirdly, participation by those outside the government may help to offset any biases or cloudy thinking that has gone into the preparatory work for the draft. Fourthly, a satisfactory alternative not requiring a law may be suggested. Fifthly, and most important of all, participation goes some way to legitimizing the policy of the subordinate law which eventually emerges.

40. The Council proposed a new procedure which would begin with an Advance Notice of Intent to propose new regulations, which meet its criteria, at least sixty days prior to further action. Thereafter, the proposed regulations would be subject to a regulatory impact analysis. A draft of the regulations together with a summary of the analysis would be published and at least ninety days be made available for comment "by interested individuals and groups" before making. The only regulations subject to this system would be those having significant implications in terms of cost or distribution of income. Thresholds would be set which could be raised or lowered as desired to catch more or fewer regulations. Different thresholds would be set for Advance Notice and Prior Assessment. The whole scheme would be subject to an emergency "by-pass" procedure. The Council's diagram illustrating the whole scheme is this:



The Committee agrees with this system in so far as it goes. However, limited as it is to what could be a very narrow range of "major" new regulations of great economic impact, it alone will not serve the Committee's purpose. Consequently, your Committee has been led to recommend a more basic, less sophisticated but mandatory system covering all new subordinate legislation to be augmented by the publication of a regulatory budget and as much advance consultation in the formative stages of draft regulation making as circumstances will permit. Simple procedures have a greater chance of being accepted by those who must operate them and give promise of swifter results.

41. Despite the reluctance of the MacGuigan Committee to recommend a mandatory notice and comment procedure, your Committee believes that it should now be introduced in Canada. Informal consultations are no doubt of great value but they are essentially haphazard and on occasion savour of regulatory capture.

"These proposals for consultation demonstrate the fundamental weakness of informal consultation, in that all too often no adequate early opportunity is given to other than established interests to influence the development of policy. It is misleadingly simplistic simply to ask: "Is there consultation? The real questions are: "With whom will there be consultation?" "At what stage of policy development will this consultation take place?" and "What will be the effect of all this consultation?" Moreover, without at least some degree of formality or structure, there is a very real danger that consultation in an atmosphere of intimacy will drift into dictation by corporate interests. This is particularly important in transport regulation because, as John Langford has noted, "Transportation policy-making at the federal level has always been characterized by an extremely close rela-

tionship between the transportation industry and its interest groups and the bureaucracies of the various agencies involved in the policy-making process". All in all, it would seem that it would be inadvisable to leave consultation and participation in policy-making to a totally informal process."—(11)

42. Your Committee's predecessor but one travelled to Washington and studied the operation of section 553 of the United States Administrative Procedures Act—(12) which has been in effect since 1946. It was satisfied that it worked very well. Its view coincides with that of informed commentators and the Administrative Conference of the United States. Professor K.C. Davis, in *Administrative Law of the Seventies*, is equally enthusiastic about the appropriateness of the notice and comment procedure, asserting that '(t)he system is simple and overwhelmingly successful'. This Committee believes that in adapting the Administrative Procedures Act procedure to Canada certain improvements in it could be made. It also believes that the recent voluntary developments within the Government of Canada and its regulatory agencies mark out a path which should be followed vigorously. Your Committee does not believe that the fact that subordinate legislation is far more commonly made in Canada by the Governor in Council and by Ministers than by independent or quasi-independent regulatory agencies in any way affects the desirability and practicability of a notice and comment procedure. Nor does it believe that there is anything in such a procedure which is inimical to responsible government. The procedure was in force for half a century in the United Kingdom and was never thought to be contrary to the basic tenets of the constitution.

43. There is in the United States a significant trend for the courts to impose judicial control on the rule making process to ensure "fairness", for example, by insisting on a right to cross-examine rule makers and others who make representations on draft laws. Your Committee is satisfied that the development of such judicial controls in Canada on common law principles is unlikely. It is not convinced that they would necessarily be desirable. They are in no way involved expressly or implicitly in the application in Canada of a procedure similar to that in section 553 of the Administrative Procedures Act. A subordinate law made in defiance of the procedure as a condition precedent to law making should be a nullity but the mere right to be informed and to make representations and to receive a response involves little opportunity for judicial creativity.

44. Your Committee acknowledges that any new system of notice and comment in subordinate law making will give rise to manpower and paperwork costs. This must be true also in the United States, yet commentators and rule makers there favour the system and one aspect of the improvement, the legitimacy of the rules that are made, can not be measured. Presumably, savings will be generated in the future if better laws are developed in the first instance. In this connection the United States Commission on Federal Paperwork has this to say:

> The necessary paperwork which would be added through greater participation in rule-making is temporary. It ends when a proposed rule is put into effect. The "bad" paperwork of a poorly written rule which is allowed to go into effect, however, can be endless.—(13)

Both the Treasury Board and the Economic Council appear to have accepted that the costs of notice and comment, albeit on an as yet unknown scale, can be borne. Professor Mullan also says:

> The extra workload it has imposed on many regulatory agencies and departments of state seems to have been accepted willingly because of the valuable information generated by the "notice and comment" procedure and, also in part, because of the fact that the opportunity for prior involvement in the development of rules has the tendency of defusing criticism and making those rules more acceptable politically."—(14)

45. The procedures of the Administrative Procedures Act as they relate to rule making are widely misunderstood.—(15) Commentators refer to rule making hearings. But in fact under section 553 there are no hearings in the sense of a formalized tribunal setting. There is notice of rule making in the Federal Register thirty days before a rule is to come into effect and the reception of representations. The notice discloses the terms or substance of a proposed rule and a description of the subjects and issues involved. The actual draft rule is not necessarily included in the notice which does, however, give the address and particulars of the agency office which should be contacted. The Congress has on many occasions imposed more stringent requirements than those of section 553 in respect of some rules and some agencies. Those requirements sometimes include true hearings. The formulation of rules in a formal hearing before an agency is not frequent and is held in disfavour by many commentators and administrative lawyers. The notice and comment procedure gives those particularly interested and any member of the public an adequate opportunity to be heard. It is this opportunity and the statement of policy and method which are so important. Perhaps few members of the general public utilize this opportunity. But that is not the point. No one can be compelled to take a part in his own government. All that can be done is to afford him the opportunity. Your Committee wishes to record Professor Mullan's conclusions as to the operation of the Administrative Procedures Act procedure:

> "From the research I have conducted, there is no doubt at all that the "notice and comment" procedure adopted in section 4 (now 553) of the *Administrative Procedure Act* of 1946 has become an entrenched part of the federal administrative procedure. The worth of such procedures to rule-making at the federal level in the United States seems to be acknowledged universally. That the statute is not perfect, at least now, some thirty-two years later, has perhaps to be admitted. The exemptions may be too wide. The alternative of a full adjudicative hearing when rule-making is required to be on the record is not acceptable. Nevertheless, much of the discontent with the present situation in relation to rule-making procedures seems to stem not so much from the *Act* itself as from the excesses of procedure provided for in some individual statutes, and the need for legislative draftsmen to pay more attention to devising alternatives in some situations between the informality of "notice and comment" and the formality of formal adjudicative-type hearings.

There is also some concern that, at least in some instances, "notice and comment" opportunities come too late, and this has led to suggestions from a number of quarters for formal provision for an opportunity for public input at a stage prior to and during the actual drafting of the legislation.

Yet, to someone observing the American scene from the outside, despite all these proposals for reform both general and specific, one of the striking things about the "notice and comment" procedure of the *APA* and perhaps one of the explanations for its seeming success is the modesty of its aims. Certainly, it does not cover even a majority of agency rule-making at the federal level in the United States. Certainly, it does not spell out very elaborate procedures. Certainly, it does nothing by way of mandating rule-making rather than adjudication in certain situations. However, if it had done any of these things, at least initially, it may well have been overreaching. Instead, because of its modest aims and comparatively low level of imposition on the overall work of the administrative agencies, it was readily tolerated and in time came to be seen as an extremely valuable adjunct to the administrative process. It may also be for that reason that many of the current proposals for reform are seemingly being treated with equanimity even on the part of the agencies."—(16)

46. What your Committee finds so lacking in the present Canadian system is any avowal of the policy being effected by subordinate legislation and any opportunity to comment on or contribute to it. Equally, there is no general advance notice of the means to be employed and little opportunity to comment on them. Accordingly, it recommends that the notice to be published of a proposed subordinate law should be accompanied by a clear statement of the reasons for the proposed regulation, the policy to be furthered by it, and the socio-economic impact analysis where that has been developed pursuant to the existing Health, Safety and Fairness policy of the Treasury Board or the recommendation of the Economic Council. The period of notice should be sixty days as suggested by the Economic Council and not thirty days as in the United States. Your Committee favours the publication of an economic impact statement with proposed subordinate laws, as this requirement would force the identification of costs and alternative methods of achieving policy ends. Consequently, it favours the extension of the socio-economic impact analysis to as many new regulations as practicable. Because of the costs that could be involved in such a system, of which your Committee has no evidence, it does not propose that the publication of an economic impact analysis be made mandatory beyond those cases covered by the existing Treasury Board policy and the recommendations of the Economic Council of Canada. Your Committee does recommend, however, that all relevant opinions of advisory bodies and councils should be tabled in Parliament with new subordinate laws to assist any member who wishes to debate the merits of the law.

47. The notice of a proposed subordinate law should be published in the Canada Gazette. That journal is not a widely read document and publication elsewhere, in trade journals, newspapers, etc., is obviously desirable in very many cases. It is not possible to specify all those cases and places of publication now. Departments should be encouraged to publicize their draft subordinate laws widely and the Regulatory Council should have the power to study particular instances and to recommend the use of additional means and places of publication.

48. Your Committee wishes to emphasize that notice and comment procedures must be open to, indeed directed to, the general public. The public interest may not be fully protected if the opportunity to comment is afforded only to those paticularly affected by a subordinate law or if there is too close a relationship between Government and industry. Your Committee, therefore, recommends that both the document which forms the factual basis of the decision to make a new subordinate law and the comments submitted on it should be open to public scrutiny and that any freedom of information legislation which is introduced should so provide. This requirement is particularly important where new technological standards are proposed. Experts are often bitterly divided on such standards and it is often to the advantage of a particular industry to seek to delay the adoption of more advanced standards. Your Committee also recommends that submissions be responded to. If a draft subordinate law is significantly altered as a result of submissions received, it should be readvertised with a further opportunity to comment provided. A thirty day time limit would be appropriate in that event.

49. Very often policy has become frozen by the time a draft regulation is prepared. Attempts at modification, change or abandonment are likely to be met with resistance. Therefore, your Committee recommends that wherever possible notice of proposed regulation making should be given before a draft regulation is prepared and published. The notice should indicate the policy to be effected and the object to be achieved and invite representations as to both the policy itself and the means to be employed. It is always possible that some representation will show a way to reach a desired end without the need for yet another new law. Your Committee notes that in the United States there is a movement beyond the minimum procedures of section 553 of the Administrative Procedures Act. Sometimes additional requirements such as the publication of a "rule-making record" are mandated by statute, but they are often adopted voluntarily.

50. The need to give sixty days notice of proposed regulations will require Departments and Agencies to plan their regulation making activities well ahead and to follow a schedule for the enactment of subordinate laws. Consequently, it should be a relatively simple matter for Departments and Agencies to contribute to a regulatory budget. Such a budget published for a twelve month period would give clear notice of all planned non-emergency subordinate laws and would provide even greater opportunity for representations and contributions by citizens. Your Committee recommends that a regulatory budget be prepared, and updated and brought forward every quarter. The budget should be published each quarter in the Canada Gazette. Consideration should be given to other avenues of publicity for it.

51. Your Committee is aware that many subordinate laws are made in urgent circumstances and that it is impracticable and would be unwise to subject them to a sixty day or even to any notification and comment procedure. Some subordinate laws involve small scale amendments to existing laws, others

are of a housekeeping or domestic nature governing matters within the civil service, others apply to only one, or two or a small number of people while still others affect national defence and security. It may be that specific exemptions can be ordained at the outset of the new system *by statute*. One such exception should be made for the lower tier of fishery regulations referred to in paragraph 34 of this Report. Other specific exemptions come readily to mind such as the Queen's Regulations and Orders for the Canadian Armed Forces and the Administrative Orders of the Chief of the Defence Staff. Beyond the exemption for cause shown discussed below, your Committee is opposed to any generally worded exemptions. Some of the exemptions in the United States Administrative Procedures Act have been the subject of much criticism and there has been a tendency to abandon them voluntarily. All the United States exemptions are vaguely and generally worded and would invite both abuse and interpretational argument, as has the present definition of a "statutory instrument". They appear in the United States to have afforded some opportunity to avoid the notice and comment procedure and have been criticised by the Administrative Conference of the United States. Your Committee is even more opposed to the granting of exemptions by regulations of the Governor in Council. The present exemptions under the Statutory Instruments Regulations are an object lesson in that regard. Instead, it recommends that the maker of a subordinate law should be able to proceed to make that law, without first giving sixty days or any period of notice and receiving comment, under the following conditions:

(i) as soon as a draft is prepared it is sent to the Standing Joint Committee on Regulatory Review with a statement as to why the subordinate legislation or its equivalent need not wait upon a sixty day notice period. While the Committee is sitting cause would have to be shown immediately. If a subordinate law or its equivalent is made when there is no Committee, cause would have to be shown as soon as the Committee is reconstituted;

(ii) in any case where the Committee considers cause has not been shown, it shall report the fact to the Houses forthwith and recommend disallowance where the regulation has already been made and refusal of affirmation where the regulation has not yet been made.

Your Committee believes these stringent conditions are necessary. The failure of the United Kingdom system before 1946 was caused by Departments always pleading urgent circumstances and the need to be exempted on that ground. While "cause" will cover far more than urgency, its interpretation will be in parliamentary hands.

Your Committee appreciates that in the case of hundreds of subordinate laws made each year there is no need to burden the administrative system with an advance notice and comment procedure. It is not generally appreciated how many "regulations" made each year amend existing "regulations" in quite minor ways. It is not now possible, however, to draft an exemption which will include the minor, the urgent and the trivial but exclude the sensitive, the significant and the potentially contentious. Consequently, your Committee recommends that the exceptions to the general, mandatory notice and comment procedure for all subordinate laws should consist of specific statutory exceptions and exceptions agreed to by the Regulatory Review Committee for good cause shown. The definition of what constitutes good cause will be addressed by your Committee in a further report.

52. Because your Committee's recommendation is for a simple, general procedure applying across the board, it recommends that the Regulatory Council review the operation of the notice and comment procedure at regular intervals to see if more stringent or different procedural requirements are necessary in particular cases of subordinate law making or in respect of particular agencies or Departments of the Government.

53. The Economic Council of Canada in its interim report "Responsible Regulation" was of the view that the enforcement of notice and comment procedures should be an administrative and not a judicial responsibility. It recommended that

> "If governments implement the suggested procedural reforms they should take the appropriate precautionary steps to preclude or minimize the possibility of judicial review."

Given the importance your Committee attaches to procedure as the safeguard of liberty, it cannot agree with this recommendation. A subordinate law which is subject to a condition precedent to its making, which is not met, should be a nullity as it is under the present law, be that condition precedent ever so new. The sanction for failure to observe the condition precedent for notice and comment or to show cause to the Regulatory Review Committee should be the invalidity of the subordinate law.

54. There is in Canada a developed habit of making regulations rather than rulings on individual cases. It is possible, however, that faced with notice and comment procedures, and the tighter parliamentary control of subordinate legislation recommended elsewhere in this Report, any Government may incline towards the formulation of policies, not expressed in subordinate laws, and the taking of decisions in individual cases in light of those policies, guidelines and interpretative statements issued to explain them. In view of the fact that the impact of interpretative rulings, guidelines and statements of policy is often virtually indistinguishable from that of subordinate legislation, and in order to ensure public input in their formulation, their making should be attended by the same notice and comment procedure recommended in this Report for subordinate legislation and subject to the same exemptions. The Regulatory Council should keep the area of "quasi-law" under close surveillance.

55. Once subordinate laws are made and have survived their parliamentary scrutiny, they should not be left to continue in force without further parliamentary attention. Your Committee endorses the Economic Council's call for periodic evaluation of existing regulations, and of the consequences flowing from them, according to a regular schedule. While such evaluations will of necessity have generally to be performed by Government Departments and Agencies, your Committee recommends, as does the Economic Council, that they be referred to the appropriate Standing Committees of the Houses for review. Your Committee has noted the uses to which so called sunset laws might be put in connection with subordinate legislation.

D. A NEW SUBORDINATE LEGISLATION ACT

56. Perhaps as fundamental to the control of subordinate law as the prepublication of proposed regulations and the introduction of affirmative resolution procedures or a power to disallow statutory instruments is the pressing necessity for a thorough revision of the Statutory Instruments Act. This matter was discussed in considerable detail in our predecessor's Second Report of the 1976-77 Session. Since there is no established practice in Canada, as there is in the United Kingdom and in the Commonwealth of Australia, that the Government responds in detail to reports of Parliamentary Committees, there is no evidence so far that our predecessor's remonstrations have been taken seriously. This emphasizes the need for the institution of a system under which the responsible Minister will make a report to Parliament, or the Government will publish a White Paper, outlining the action the Government will take with respect to subordinate legislation and law making within three months of the presentation to a House of Parliament of a Committee report on subordinate legislation or law making. Each of the Houses should maintain a register recording the tabling dates of appropriate Committee reports and the date of presentation to the House of any Government statement on it or the date of any White Paper published in response to it.

57. The definition of a statutory instrument is obscure and the interpretation placed upon it by the Department of Justice, so far as it has become known to your Committee, is artificial and produces quite ludicrous results. The distinction between a statutory instrument and a regulation is also obscure in some respects, notably in the meaning to be given to the phrase "made in the exercise of a legislative power", and is again artificial and productive of ludicrous results. Your Committee once more recommends that there should be but one class of subordinate law, and that, by whatever name it is known, should be defined generally in the terms suggested by the MacGuigan committee in 1969—(17). It should be made clear that your Committee rejects any definitions which make the safeguards of parliamentary control and notice and comment procedures dependent on whether the draftsman of a statute inserts a certain form of words such as "by order" in the enabling powers in a Bill. This is the current and wholly unsatisfactory situation. Your Committee does not know on what principles magic formulae are inserted in or left out of enabling clauses. The Department of Justice has refused to say whether instructions to the parliamentary draftsmen exist and, if so, what they are. If the matter is now left entirely to the discretion of sponsoring Departments, it should not be.

58. Your Committee fails to understand why the sensible and cogent recommendation of the MacGuigan Committee as to the definition of "regulation" was departed from in drafting the Statutory Instruments Act. Your Committee believes that the recommendations of Parliamentary Committees are entitled to the utmost respect from the Government. If any Government wishes to depart from or reject a specific recommendation of a Parliamentary Committee, it should only do so for very good reasons which it should explain in detail. In the absence of any discernible good reason or explanation in this instance, your Committee is at a complete loss to understand what prompted the definitions of "statutory instrument" and "regulation", the distinctions between them and the deliberate attempt to exclude some subordinate legislation from the definition of a statutory instrument by the use of artificial formulae.

59. The MacGuigan Committee made other particular recommendations which have not been implemented and in which your Committee concurs. These are set out once again by way of emphasis.

1. The quaterly consolidated index and table of statutory instruments should include reference to all regulations which have been exempted from publication, according to their title (which should be as descriptive as possible), the Act and the section or sections under which they were made, their date and the date of their registration.
2. All subordinate legislation should be tabled and laid in Parliament immediately on registration. The Votes and Proceedings of the Commons and the Minutes and Proceedings of the Senate should list under "Returns and Reports Deposited with the Clerk" the title of each subordinate law, the Act and the section or sections under which it is made and its date of registration.

Your Committee adds that there could be no objection to a special document being published setting out subordinate legislation laid upon the Table. Whatever method is used the latest date on which notice may be given of a motion to disallow should always be given.

3. All departmental directives and guidelines as to the exercise of discretion under a statute or subordinate law where the public is directly affected by such discretion should be published and also subject to parliamentary scrutiny.
4. Statutes should resort more than they do now to the use of provisions stating that regulations made thereunder or under specified sections thereof do not become effective until published, or some specified period thereafter.

Appendix VI lists the disposition by the Government of the recommendations of our predecessor's Second Report for the 1976-77 Session.

60. While at present all "statutory instruments", except certain excluded categories, stand permanently referred to your Committee pursuant to section 26 of the Statutory Instruments Act, there is no law or mechanism in place which compels those who make statutory instruments to send them to the Committee. Those statutory instruments which are either regulations or are in fact published appear in Part II of the Canada Gazette and by subscribing to the Gazette the Committee sees them. The Committee has no means of identifying or receiving all those other statutory instruments which do not appear in the Gazette. Indeed, there appears to be no mechanism in place whereby the Government itself maintains any central register or record of all statutory instruments.

It is essential that the Government, which has resources, should undertake a survey of the statutes and known subordinate law of Canada to identify all subordinate laws. All subordinate laws, and all policy and interpretative statements and guidelines which have virtually the same impact, should be governed by the procedures recommended in this Report. Other instruments which do not fall into the foregoing catego-

ries should stand referred to the Regulatory Review Committee, but should not be subject to notice and comment procedures or to the general power of disallowance. It is imperative that statute provides that all instruments be referred to and be made available to the Committee, for the determination of what is legislative in character and thus subordinate law must be in Parliament's hands, or in those of an independent Review Committee, and not in those of the Department of Justice.

61. The present Statutory Instruments Act will have to be extensively rewritten to reflect the changed definitions, and to provide for the notice and comment procedures. The procedures governing disallowance and affirmation should be taken out of the Interpretation Act and included in a new Act which should be renamed simply "The Subordinate Legislation Act". The Act should provide that all subordinate legislation and other instruments stand permanently referred to a Standing Joint Committee on Regulatory Review, expressly provided for, thus putting the Committee's existence on a permanent footing.

62. The Committee's criteria for scrutiny should also be included in the Act.

63. Any enabling power in the Subordinate Legislation Act which provides for the making of regulations exempting any subordinate law from any provision of the Act should be subject to affirmation by both Houses.

64. The Subordinate Legislation Act should include, apart from the procedural and other requirements recommended in this Report, a provision stating three basic rules or presumptions which are necessary for effective scrutiny and control of subordinate law making. These are the presumption of invalidity of sub-delegation of law making power, the presumption against retroactivity of subordinate laws and the rule that incorporation of an external standard into subordinate law by reference is valid only if it is of a fixed and not a variable standard unless it is of a statute or another subordinate law.

65. The present section 11 of the Statutory Instruments Act should be amended to require that the onus rests on the Crown of proving publication of a subordinate law in the Canada Gazette at the time of the alleged commission of an offence of contravening that law or that adequate steps had been taken at that time to draw the subordinate law to the alleged offender's attention.

E. DRAFTING OF ENABLING POWERS AND OF SUBORDINATE LAWS

66. Certain drafting practices have grown up in Canada which are inimical to the development of the sort of delegated legislation that is consistent with your Committee's present criteria for scrutiny. The success of a scrutiny committee on subordinate legislation will, in the long run, depend upon the abandonment of some of those practices, the modification of others and the development of new principles indicative of self-restraint on the part of both Government and Parliament in the conferring of powers upon the executive.

67. Canada has a deservedly high reputation in the Commonwealth for the clarity of its parliamentary drafting and its advances in the art or skill of drafting. This reputation is largely due to the work of Dr. E.A. Driedger, Q.C., who established the first regular course in draftsmanship in the Commonwealth as a postgraduate programme at the University of Ottawa. Nevertheless, it is apparent to your Committee that clarity of drafting and the relative ease with which a Canadian statute can be read have not been achieved without a price. Far too many statutes contain little or no indication of legislative policy and are neutral documents the object of which is merely to confer powers on the executive to act in certain vaguely defined fields. Moreover, these powers are granted in very broad terms so that little or no detail is given as to the content or type of delegated legislation that can be made. It is too easy to dismiss this type of statute as "skeletal"; the problem is more serious than that. Even a skeletal statute can be fairly specific about the powers it grants and what can be done under them. Too many Canadian statutes are not specific in that way.

68. The problem is aggravated because of certain traditions in the Department of Justice as to the effect of divers phrases in general use in the conferring of power to make delegated legislation. Your Committee is convinced that there is no foundation in law for the consequences claimed for the phrases it has questioned. In particular, the Committee can not agree that a power to make delegated laws "with respect to" or "respecting" a subject matter permits the delegate to make any law touching or connected with that subject matter, directly, indirectly or even remotely that Parliament itself could make, or that standing alone it permits the delegate to sub-delegate his rule-making power to someone else, either completely or in part, or to grant dispensations from the laws he does make in favour of individuals. There can be no substitute for the enumeration of the actual subordinate law-making powers to be granted.

69. Your Committee is concerned by the lack of specificity in the enabling powers commonly granted in statutes. If it is desired to enable a delegate to sub-delegate, an Act should say so. If it is considered that dispensations from subordinate laws in favour of individuals will be needed, the enabling statute should provide for them. If it is thought that a certain activity will have to be prohibited in whole or in part, the enabling powers should be drawn so as to confer that power. If a permit system is to be introduced, the enabling Act should provide for it and for the setting by subordinate legislation and not by the issuing officers of any terms and conditions which may attach to a permit. If a Department wishes to have regulations touching a matter peripheral to the subject matter of the enabling power, Parliament should be asked to provide it. If it is desired to charge a fee, Parliament should give the necessary authority. These are principles habitually observed in drafting in the United Kingdom and in the Commonwealth of Australia and the Committee considers that they should be adopted here forthwith. It is far too great a temptation to Departments and to Ministers to grant general enabling powers and to rely on their exercise being confined to the "four corners of the Act". They are certain, and the Committee speaks in the light of its predecessors' experience, to be used, and probably abused, in the pursuit of administrative convenience, to make subordinate laws never imagined by parliamentarians at the time of passage of Bills. Your Committee is convinced that the so-called principles used by the Department of Justice to justify the

inordinate breadth with which powers are invested after passage are simply rationalisations for practices of great convenience to administrators but subversive of parliamentary supremacy over the law. The true practice and principle is simply this: the intentions of Parliament in delegating powers and the scope of the delegation should be beyond all doubt and clearly limited.

70. Insufficient attention is paid to enabling clauses in Bills before Parliament. They should be the subject of searching scrutiny during the Committee stage. The Regulatory Review Committee is well placed to undertake such scrutiny as it sees week by week the consequences of the powers so readily granted by Parliament in the past. Your Committee, therefore, further recommends that the Regulatory Review Committee be charged with the duty and responsibility of examining and reporting upon all powers in Bills to make subordinate law or to issue, make or establish other instruments. Its reports should be made to the appropriate Standing Committees of the Houses having the committee stages of the Bills.

71. The enabling powers in some existing statutes cause your Committee grave disquiet—especially when it sees the uses to which they are habitually put. In particular, your Committee considers that it is necessary to draw to the Houses' attention section 34 of the Fisheries Act which is ripe for root and branch reform. The Department of Fisheries and Oceans persists in promoting regulations Your Committee considers go beyond the brief provisions of section 34 and which sub-delegate law making power from the Governor in Council to officials. Far more regulations are made under this section than under any other ten enabling powers in the Statutes of Canada. The need for some sort of sub-delegated rule making in the regulation of the fisheries is evident and Parliament should be asked to consider and dispose of a Bill to that end. Your Committee recommends that a reference be given to the Standing Committee on Fisheries to engage at once in a detailed study of all aspects of the Fisheries Act and the policies pursued under it and that your Committee be empowered to report on all subordinate law making powers contained in the present Act. Your Committee also recommends that a new Subordinate Legislation Act authorize the Standing Joint Committee on Regulatory Reform to report to the Houses on the enabling powers it encounters in its scrutiny of subordinate legislation.

72. It is not only in the conferring of subordinate powers in Bills that your Committee considers that drafting habits should change. There are serious flaws in the traditional methods and formulae used in drafting the subordinate laws themselves. Your Committee's predecessors expended a great deal of effort taking up aspects of the drafting of subordinate laws which, taken individually, might appear picayune, but which, in the aggregate, constitute abuses of administrative power and the establishment of discretionary powers of such a scope as to amount almost to institutionalised lawlessness.

An understanding of the invalidity and illigetimacy of unauthorised sub-delegation of rule making power is taking a long time to seep through the many layers of officials, legal and non-legal, involved in the making of subordinate laws. An appreciation of the degree to which current subordinate legislation grants unreviewable discretionary powers to act is also long in coming. Your Committee is forced to be particularly concerned about such discretionary powers because of the absence of any general system of administrative review in Canada and the unavailability of judicial review of most administrative action. Your Committee commends to the earnest study of the Houses, the Press and the Government the Administrative Review Tribunal established of recent years in the Commonwealth of Australia.

73. Your Committee specifically condemns certain practices and devices commonly employed in the drafting of subordinate laws:

(i) the use of subjective instead of objective tests in granting power to determine whether a regulation applies to a particular set of circumstances; The bare opinion of an official should not be a criterion for action. The only purpose of the use of phrases such as "in the opinion of" or "where the Minister is satisfied" is to impede judicial review. Under an objectively worded test administrators will still have to bring their professional skill and judgment to bear to determine whether the test is satisfied;

(ii) the practice of using a rule-making power, not to make rules of general application but to grant discretionary administrative power to deal with individual cases *ad hoc*;

(iii) the granting of discretionary powers unfettered by any criteria or conditions governing their exercise;

(iv) the prohibition of an activity coupled with a discretion unregulated by any expressed standards or criteria to permit that same activity in individual cases; To illustrate that with careful drafting a regulated discretion to permit is possible, your Committee refers the Houses to section 95.1 of the Animal Contagious Diseases Regulations as made by SOR/79-295;

(v) the refusal to lay a duty to act in a certain way on a Minister or an official and the conferring of a discretion to act instead;

(vi) the failure to set objective criteria and to require the observance of the minimum standards of natural justice when a decision to act adversely to a subject is taken, for example, when a licence or permission is suspended or cancelled. Whatever the subject's rights to litigate may be, reasons should be given for the decision and an opportunity to show those reasons to be false or inapplicable should be accorded;

(vii) The cancellation of a licence for alleged breach of a regulation despite an acquittal on a charge of breaching that regulation or the failure to bring any charge; The Committee commends to the attention of all draftsmen of subordinate law section 8 of the National Parks Fishing Regulations as made by SOR/80-51;

(viii) the failure to specify when a permission or licence will be suspended, as opposed to being cancelled;

(ix) the failure to be reasonably specific in stating the information which persons subject to regulations must provide to officials;

(x) the failure to require inspectors to show their authority and identification;

(xi) the conferring of powers, especially of search and seizure, on officials in the same terms as are contained in statutes, usually very old, passed by Parliament;

(xii) the failure to specify precisely the powers officials are to have over the subject;
(xiii) the failure to disclose that a statutory instrument is being used to make rules to give effect to the substance or the general tenor of an international agreement;
(xiv) the imposition of fees or charges by reference to imprecise criteria, e.g. "by arrangement" or by reference to variable rates in the private or public sector;
(xv) the imposition of fees or charges without express authority in the enabling Act;
(xvi) the use of section 13(b) of the Financial Administration Act to set fees or charges where those fees or charges are already set by statute; Your Committee recommends that the wording of section 13(b) should be amended to make clear its true intent that where the Governor in Council is empowered by statute to set a fee or charge he may sub-delegate that power to a Minister.
(xvii) enjoining obedience to "rules" contained in documents which are neither regulations nor statutory instruments;
(xviii) the making of substantive rules under ancillary and procedural enabling powers following or preceding an enumeration of specific enabling powers;
(xix) the exploitation of enabling powers to their fullest extent as conceived by the Department of Justice in accordance with its received traditions. This absence of self-restraint leads to a failure to revise enabling powers to accord with modern conditions.

74. Your Committee will give more extensive treatment to drafting matters in its next General Report which it trusts will assist the Attorney General to issue circular instructions to all draftsmen of subordinate legislation to be policed by the Legal Advisers to the Privy Council. It wishes now to draw the Houses' attention to a paragraph from a recent report of the United Kingdom Joint Committee on Statutory Instruments—(18) which your Committee endorses without qualification.

> "The Committee fully appreciate that the justification for the granting of delegated legislative powers is to remove subsidiary or procedural details from the Statute Book and to afford to the Executive flexibility and the ability to alter detailed provisions to fit changing circumstances, without the need to enact a new Statute. The corollary of this, however, must be that the delegated legislation itself should be detailed, specific and self-explanatory and should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling Statute. Circulars explaining or amplifying the contents of either primary or delegated legislation can be very useful to the general public and to the administrators. But the Committee hope that Parliament will condemn subordinate legislation by Departmental Circular when Parliament itself passed a parent Act which requires such legislation to be by statutory instrument."

F. THE COMMITTEE'S OWN PROCEDURES

75. In its formative years the Standing Joint Committee on Regulations and other Statutory Instruments was necessarily relatively circumspect in its dealing with the Departments and Agencies of the Government. Embarked on an entirely new venture in the Canadian Parliament, it had to feel its way. Great difficulties were encountered in establishing a proper machinery for handling the Committee's criticisms of statutory instruments. Even more difficulty was experienced in securing prompt amendment of objectionable instruments or the presentation of a report to the Houses. Many Departments tended to adopt a dilatory or delaying stance because the Committee itself was less than ruthless in exacting unequivocal commitments and remedial action. This problem was undoubtedly exacerbated over the past three years by the long periods in which there was no Parliament or an imminent dissolution was expected. These difficulties should now be left behind. Your Committee will follow a tight operating schedule for the consideration of instruments: departmental explanations of them, the receiving of undertakings to amend or revoke statutory instruments and the reporting of instruments to the Houses. This tightening up is desirable in itself and will be necessary if the Committee is to have time to handle the extra business the recommendations in this Report will generate.

76. The Committee will in future report more instruments to the Houses, not merely as a last resort but also to illustrate or draw attention to undesirable or praiseworthy provisions. It will in future draw to their attention instances where Ministers, Departments or Agencies of the Government of Canada have failed to honour within a reasonable time their undertakings to amend or to revoke statutory instruments or to take other action to remedy some defect in an enabling power. Your Committee will also draw the Houses' attention to particular, objectionable or inadequate enabling powers which it encounters in existing legislation. This action is, of course, an essential complement to that recommended in paragraph 70 above. Your Committee will, if disallowace and affirmation procedures are put in place, be reporting more frequently in connection with those procedures.

77. Your Committee will be less tolerant than its predecessors of promises by Departments and Agencies to do or to refrain from doing something in future. Such promises leave the objectionable or defective subordinate law in force, unless it is or is soon to become spent. They are also exceedingly difficult to keep track of. Even if the Committee had staff for such a purpose, it would be an unjustified waste of manpower. It appears, too, that Departments and Agencies who have given such promises in the past have had difficulty in remembering them and seeing that they are honoured.

78. In future, where the Committee has a criticism of a statutory instrument and is not satisfied with the explanation or the promise of remedial action promised by the Designated Instruments Officer of the Department or Agency concerned, the Committee will forthwith communicate its objection direct to the Minister and request appropriate remedial action. The Minister will be given an opportunity to communicate or to appear before the Committee before a report is made to the Houses. If the Minister fails to respond within a short space or if the Committee is not satisfied with the Minister's explanations or proposed action, the matter will be reported forthwith to the Houses, with a recommendation for disallowance or refusal of affirmation if the procedures recommended in this Report are in place.

79. In its scrutiny of subordinate legislation your Committee has on many occasions to consider the question of legality, that

is whether a law is *ultra* or *intra vires* the enabling powers granted by Parliament. Very often in the past Committees have been told that there is an opinion of the Department of Justice that a statutory instrument is *intra vires*. Sometimes it is said that there is an opinion of the law officers of the Crown to this effect. Your Committee notes that there is only one law officer of the Crown in Canada, the Attorney General, and he is *ex officio*. Nevertheless, the Committee's precedessors were careful not to ask for a copy of the actual legal opinion furnished by one of the solicitors in the employ of the Department of Justice. However, the Committee can not see why, in principle, copies of such opinions should not be made available when they have been expressly relied upon by a Minister or a senior official. Certainly when an opinion on some aspect of a subordinate law is given by the only law officer of the Crown at the national level, the Attorney General, or by his deputy, and is referred to as the justification for government action, the Committee considers that it should be made available to it, as recommended in your Committee's predecessors' Report of the 1977 Session on Freedom of Information:

> "Documents the disclosure of which would reveal . . . (b) legal opinions or advice provided for the use of the Government unless a Minister or other senior Government official refers to a legal opinion in support of a Government action in which case the legal opinion would not be protected."

In the Commonwealth of Australia the Senate Committee on Regulations and Ordinances is supplied with the opinions of the Law Officers given in connection with the validity or consequences of subordinate legislation.

The Committee wishes to reaffirm that a mere statement that a particular course of action or omission is *intra vires* or is supported by an opinion of a solicitor of the Department of Justice, or of the Attorney General himself, is an affront to the Houses. At the very least, reasoned argument should always be given both to the Committee and to the Houses. Your Committee sees no reason why legal opinions expressly relied upon should not be made available, especially when the Committee's legal advice is a matter of public record and is communicated in detail to Departments and Agencies of the Government of Canada.

80. Statutory Instruments published in Part II of the Canada Gazette or purchased individually from the Privy Council Office are now accompanied by Explanatory Notes. Each note sets out in simple language the purport of the instrument, often in synoptic form. This is a great step forward and was accomplished after several years prodding by the Committee in the 30th Parliament. When that Committee first began operations, it sought to have supplied to it for each statutory instrument an Explanatory Memorandum which would set out the rationale of the instrument and explain its provisions. Such a memorandum is routinely provided to the Statutory Instruments Committee at Westminster. At Canberra the Regulations and Ordinances Committee is supplied with what is in fact a copy of the memoramdum to the Governor General with only the heading and address removed. A request for either a separate memorandum on each instrument or a "copy" of the explanation accompanying the submission to the Governor in Council was rejected. The latter document was said to be secret. Your Committee readily acknowledges that it cannot expect to be supplied with documents prepared expressly for or in connection with the deliberations of the Cabinet or of a Cabinet Committee except those documents composed of mainly factual or statistical material.

Recently, examples of the explanations accompanying some submissions to Council or to Ministers for statutory instruments have come to light in a new, and very well produced, "Information Manual for the Processing of Orders-in-Council and Other Statutory Instruments" put out by the Department of National Revenue (Customs and Excise). Some of the statutory instruments involved have been scrutinized by your Committee's predecessors. The substance of these explanations, had it been routinely available to those Committees, would have obviated the need in each case for at least one exchange of correspondence which must have absorbed as much labour and effort at the Customs' as it did at the Committee's end. Very often requests have to be made in writing for an explanation of an instrument and some provision in it. If explanatory memoranda can be supplied at both Westminster and Canberra, your Committee should receive them also. Given the time limits that will attend the recommended disallowance and affirmation procedures, the Committee must be in a position to consider a subordinate law, or a draft of one, as soon as it is received. An accompanying explanatory memorandum setting out in detail the purport, antecedents, and authority for the law will be essential. In particular, the Committee will need to be informed in detail where

(a) new powers are being exercised;

(b) substantial changes are being made in the existing legislation;

(c) the powers exercised are linked with some other legislation, convention or treaty which is not referred to in the new subordinate law or its accompanying explanatory note, especially when that legislative connection or treaty is recent;

(d) the enabling powers are difficult to follow and an annotation or explanation of them would aid comprehension; or

(e) a subordinate law is to be amended which itself has been subject to previous amendment so that it is difficult to follow what is proposed.

81. Your Committee's efforts to scrutinize subordinate legislation will be of no effect whatever if the Government does not commit itself to respecting the Committee's criteria for scrutiny. Those criteria cover the question of the legality of subordinate law—the issue of *ultra vires*—and fourteen instances of impropriety not necessarrily involving illegality. In the reaction of government spokesmen to the reports your Committee's predecessors made to the Houses and in correspondence with those Committees, it is apparent that there is a marked tendency to ignore those other fourteen criteria and to dwell on *vires*. If the Committee reports that a subordinate law is *ultra vires*, it is said that it is not a court and that the Government's legal opinion is that the subordinate law is valid. If the Committee reports that a subordinate law infringes one or more of the other fourteen criteria, it is said that since it is not alleged that the law is *ultra vires* it is proper that it stand. Your Committee's effectiveness will be severely hampered if its criteria relating to impropriety continue to be so ignored.

G. HARD WORK FOR ALL

82. Your Committee is well aware that the recommendations contained in this Report will throw a considerable burden on its own members. They will also cause not only a deal of hard work in Departments and Agencies of the Government, but also the abandonment of many long followed practices and deeply ingrained attitudes. Neither Parliament nor the Executive will serve the people by evading urgent and important reform or by slipping aside from difficulty. "Difficulty", Burke said, "is a severe instructor", but, as your Committee thinks, an indispensable one. "This amicable conflict with difficulty obliges us to an intimate acquaintance with our object and compels us to consider it in all its relations. It will not suffice us to be superficial. It is the want of nerves for understanding for such a task; it is the degenerate fondness for taking short-cuts, and little fallacious facilities, that has in so many parts of the world created governments with arbitrary powers . . . ".

SUMMARY OF RECOMMENDATIONS

A NEW "SUBORDINATE LEGISLATION ACT"

1. That a new Act, entitled "The Subordinate Legislation Act", replace the present Statutory Instruments Act and the relevant sections of the Interpretation Act.—paragraph 61.

2. That the new Subordinate Legislation Act contain the definition of subordinate legislation as generally recommended by the MacGuigan Committee in 1969.—paragraphs 57, 61.

3. That the new Act expressly provide for the Standing Joint Committee on Regulatory Review thus putting the Committee's existence on a permanent footing.—paragraph 61.

4. That the Act should provide that all subordinate legislation and other instruments stand permanently referred to the Standing Joint Committee on Regulatory Review.—paragraph 61.

5. That the Committee's criteria for scrutiny be included in the new Act.—paragraph 62.

6. That the Subordinate Legislation Act include three basic rules or presumptions:

a) the invalidity of sub-delegation of law making power;

b) the presumption against retroactivity of subordinate laws, and

c) the rule that the incorporation of an external standard into subordinate law by reference is only valid if it is of a fixed and not a variable standard.—paragraph 64.

7. That the present section 11 of the Statutory Instruments Act be amended to require that the onus rests on the Crown of proving publication of a subordinate law in the Canada Gazette at the time of an alleged commission of an offence of contravening that law.—paragraph 65.

8. That the procedures governing disallowance and affirmation, ordered according to the following recommendations, should be included in the new "Subordinate Legislation Act".—paragraph 61.

9. That the new Act provide for the notice and comment procedures recommended by the Committee.—paragraph 61.

10. That all subordinate laws, guidelines and interpretative rulings and policy statements should stand referred to Committee.—paragraph 60.

11. That the Government should undertake a survey of the statutes and known subordinate laws of Canada to identify all subordinate laws.—paragraph 59.

ENABLING CLAUSES

12. That the deficiencies your Committee and its predecessors have pointed out in existing statutes be corrected by amending Bills introduced in the Senate upon the recommendation of the Regulatory Review Committee and made the subject of all-party agreement.—paragraph 8.

13. That the Regulatory Review Committee be charged with the duty and responsibility of examining and reporting upon all powers in Bills to make subordinate law or to issue, make or establish other instruments.—paragraph 70.

14. That enqbling clauses in Bills be more specifically drafted as is suggested in paragraph 69.

15. That, when enabling powers are being sought, the proposed subordinate laws to be made under them be tabled and studied by the appropriate Standing Committees at the same time they are studying the Bills.—paragraph 17.

16. That there be instituted a system under which the responsible Minister will make a report to Parliament, or the Government will publish a White Paper, outlining the action the Government will take on any report of a Parliamentary Committee with respect to subordinate legislation and law making within three months of the report's presentation to a House of Parliament. Each of the Houses should maintain a register recording the tabling dates of appropriate Committee reports and the date of presentation to the House of any Government statement on it or the date of any White Paper published in response to it.—paragraph 56.

17. That all subordinate legislation should be tabled and laid before Parliament immediately on registration. The Votes and Proceedings of the Commons and the Minutes and Proceedings of the Senate should list under "Returns and Reports Deposited with the Clerk" the title of each subordinate law, the Act and the section or sections under which it is made, its date of registration and the last date on which disallowance may be moved.—paragraph 59.

18. That the Rules and Standing Orders of the Houses should be amended to allow scrutiny and review by Standing Committees of subordinate legislation, either on policy or on merits, on their own initiative or on reference from the Standing Joint Committee on Regulatory Review.—paragraph 16.

19. That the Standing Joint Committee on Regulatory Review have jurisdiction to scrutinize draft instruments as to legality and propriety, to report to the Houses upon them and to make representations to the sponsoring Departments and Agencies.—paragraph 26.

DISALLOWANCE AND AFFIRMATION PROCEDURES

20. That disallowance of subordinate legislation that has been made and the affirmation of draft subordinate laws (commonly called negative and affirmative vote procedures) be established as regular and invariable parts of the Canadian system of subordinate law.—paragraph 15.

21. That all subordinate legislation not subject to a statutory affirmative procedure be subject to being disallowed on resolution of either House and that the Executive be barred from re-making any statutory instrument so disallowed for a period of six months from its disallowance.—paragraph 24.

22. That if any resolution for disallowance of a statutory instrument is moved, and is not withdrawn, the statutory instrument shall be deemed to have been disallowed if a debate on the resolution does not take place and culminate in a vote within a fixed number of sitting days.—paragraph 24.

23. That the affirmation procedure should be used where the exercise of the enabling powers may:

a) substantially affect the provisions of the enabling or any other statute;

b) impose or increase taxation, fees or charges;

c) lay down a policy not clearly identifiable in the enabling Act or make a new departure in policy; or

d) involve considerations of special importance.—paragraph 26.

24. That a commitment be made by the Government to use the affirmation procedure where practicable and to follow a 21 day rule wherever possible, even in cases where the notice and comment provisions are not applied.—paragraph 26.

25. That the procedure for affirmative resolutions in either House be that contained in section 28.1 of the Interpretation Act.—paragraph 27.

26. That the Rules and Standing Orders of the Houses be amended to facilitate the affirmation procedure.—paragraph 26.

27. That the Interpretation Act provide that: no debate be held on a motion to affirm an instrument until the Regulatory Review Committee has been given an opportunity to report on it within a specified time and until the appropriate Standing Committee has reported on its merits or that it does not wish to do so or the specified time has expired.—paragraph 27.

28. That the affirmative procedure under section 18 of the Government Organization Act, R.S.C. 1970 2nd Supplement, C. 14, and section 4(2) of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, C. 48, should be adopted for general use in Canada, as the orders tabled and laid before Parliament under them have no effect until affirmed.—paragraph 28.

29. That draft subordinate laws which are subject to affirmation should stand referred to the Regulatory Review Committee for scrutiny and report before the debate and vote on a motion to affirm takes place.—paragraph 28.

30. That, as the disallowance procedure in section 28.1 of the Interpretation Act is inadequate, and that the six following principles should be followed:

1. Subordinate laws are void and of no effect if not presented in each House within fifteen sitting days of their making.

2. Notice of motion for disallowance in either House must be moved within fifteen sitting days of the tabling or laying of a subordinate law in that House.

3. A notice of motion for disallowance of a subordinate law must be resolved within twenty sitting days, otherwise that law is deemed to be disallowed.

4. The debate on a motion for disallowance of a subordinate law must not be commenced until the expiry of the time limit for receipt of a report from the Regulatory Review Committee as to that law's legality and propriety and from the appropriate Standing Committee on its merits.

5. If a notice of motion for disallowance is unresolved in the Senate or in the House of Commons at the end of a Session or on dissolution of the House of Commons, the subordinate legislation which is the subject of the motion is deemed to be presented to the House concerned at the beginning of the next Session.

6. Subordinate legislation the same in substance as that disallowed may not be made within six months after disallowance or deemed disallowance without the consent of the House in which disallowance occurred.—paragraph 29.

31. That a minimum number of five signatures be required for a motion for disallowance in either House.—paragraph 29.

32. That any enabling power in the Subordinate Legislation Act which provides for the making of regulations exempting any subordinate law from any provision of the Act be made subject to affirmation by both Houses.—paragraph 63.

33. That section 28.1(2) of the Interpretation Act be carried forward so that where a subordinate law has been disallowed or is deemed to have been disallowed any law that was revoked or amended by the making of that law shall be deemed to have been revived at the date of disallowance.—paragraph 30.

NOTICE AND COMMENT PROCEDURES

34. That a mandatory notice and comment procedure covering all new subordinate legislation be introduced in Canada.—paragraph 41.

35. That the Committee supports the Economic Council of Canada in its recommendation that a sixty day notice and comment procedure for all new regulations which have a significant implication in terms of cost or impact on the distribution of income and are susceptible to cost benefit analyses. The Committee, however, would extend the use of notice and comment procedures to all new regulations.—paragraphs 38, 46.

36. That a notice to be published of a proposed subordinate law should be accompanied by a clear statement of the reasons for the proposed regulation, the policy to be furthered by it, and the socio-economic impact analysis where that has been developed pursuant to the existing Health, Safety and Fairness policy of the Treasury Board on the recommendation of the Economic Council of Canada.—paragraph 46.

37. That the socio-economic impact analysis be extended to as many new regulations as is possible.—paragraph 46.

38. That all opinions of advisory bodies and councils be tabled in Parliament with new subordinate laws or draft

ones under a Canadian 21 day rule to assist any member who wishes to debate the merits of the law.—paragraph 46.

39. That the notice of a proposed subordinate law be published in the Canada Gazette.—paragraph 47.

40. That both the document which forms the factual basis of the decision to make a new subordinate law and the comments submitted on it should be open to public scrutiny and that any Freedom of Information legislation which is introduced so provide.—paragraph 48.

41. That the notice indicate the policy to be effected and the object to be achieved and invite representations as to both the policy and the means to be employed.—paragraph 49.

42. That, wherever possible, notice of proposed regulation making should be given before a draft regulation is prepared and published.—paragraph 49.

43. That, if a draft subordinate law is significantly altered as a result of submissions received, it should be readvertised with a further 30 day time limit for comments.—paragraph 48.

44. That a regulatory budget, giving a clear notice of all planned non-emergency subordinate laws be prepared, updated and brought forth every quarter.—paragraph 50.

45. That any subordinate legislation exempted from the notice and comment procedures be subject to the following conditions:

a) as soon as a draft is prepared for the Legal Advisors to the Privy Council, it is sent to the Standing Joint Committee on Regulatory Review;

b) cause is shown to the Committee why the regulation is required urgently or need not wait upon the sixty day notice period. While the Committee is sitting cause would have to be shown immediately. If a regulation is made when there is no Committee, cause would have to be shown as soon as the Committee was reconstituted.

c) In any case where the Committee considers cause has not been shown, it shall report the fact to the Houses forthwith and recommend disallowance where the regulation has already been made and refusal of affirmation where the regulation is subject to either of those procedures.—paragraph 51.

46. That the sanction for failure to show cause or to observe the conditions precedent for notice and comment to the Regulatory Review Committee be the invalidity of the subordinate law.—paragraph 53.

47. That interpretative rulings, Departmental guidelines and statements of policy to be applied to individual cases be subject to public input in their formation and be subject to the notice and comment procedure recommended for subordinate legislation.—paragraphs 54, 59.

48. That the quarterly consolidated index and table of statutory instruments should include reference to regulations which have been exempted from publication, according to their title (which should be as descriptive as possible), the Act and the section or sections under which they were made, their date and the date of their registration.—paragraph 59.

49. That statutes make use of a provision stating that regulations made thereunder or under specified sections thereof do not become effective until published or some specified time thereafter.—paragraph 59.

EXPLANATORY MEMORANDUM

50. That an explanatory memorandum be supplied to the Standing Joint Committee on Regulatory Review with each new subordinate law, whether in draft or in final form.—paragraph 80.

51. That such an explanatory memorandum contain explanations in detail of:

a) new powers which are being exercised;

b) substantial changes which are being made in the existing legislation;

c) the powers exercised which are linked with some other legislation, convention or treaty which is not referred to in the new subordinate law or its accompanying explanatory note, especially when that legislative connection or treaty is recent;

d) the enabling powers which are difficult to follow and for which an annotation or explanation of them would aid comprehension; and

e) a subordinate law which is to be amended and which itself has been subject to previous amendment so that it is difficult to follow what is proposed.—paragraph 80.

REGULATORY COUNCIL

52. That a Regulatory Council should be established with members from the regulatory agencies, government departments, public interest groups and industry.—paragraph 35.

53. That the Regulatory Council should maintain a continuous review of the regulatory process, including the making and scrutiny of subordinate law and of means of eliminating unnecessary regulatory effort.—paragraph 35.

54. That the Regulatory Council should make any reports they deem necessary suggesting alterations in procedures and alternative methods of giving publicity to proposed subordinate law making.—paragraph 35.

55. That the Regulatory Council review the operation of the notice and comment procedure at regular intervals to see if more stringent or different procedural requirements are necessary in particular cases of subordinate law-making or in respect of particular agencies or departments of Government.—paragraph 52.

56. That the Regulatory Council be given a mandate to study the whole question of "quasi-law" of interpretative and policy statements, guidelines and manuals, applied by administrators.—paragraph 35.

57. That all departmental directives and guidelines as to the exercise of discretion under a statute or subordinate law where the public is affected by such discretion be published and subject to parliamentary scrutiny.—paragraph 59.

VOTES IN APPROPRIATION ACTS

58. That the making of extensive subordinate laws under Votes in Appropriation Acts should stop and that all existing subordinate laws made under Votes be subject to review as to merits by the appropriate Standing Committees.—paragraph 12.

LEGAL OPINIONS OF THE DEPARTMENT OF JUSTICE

59. That the legal opinions given by a solicitor of the Department of Justice or of the Attorney-General himself, when expressly relied upon for a particular course of action

or omission in subordinate law making, be made available to the Committee and to the public.—paragraph 79.

DRAFTING PRINCIPLES

60. That the principles and techniques for the drafting of subordinate legislation detailed in paragraphs 68 to 73, be scrupulously followed.

REGULATIONS UNDER THE FISHERIES ACT

61. That the Fisheries Act be amended to permit sub-delegated law-making by the Minister and by designated officials.—paragraph 34.

62. That such sub-delegated laws be exempt from all notice and comment procedures and from the pre-scrutiny requirements of examination by the Legal Advisors to the Privy Council Office.—paragraph 34.

63. That these laws come into force on their being made known locally where they are to apply.—paragraph 34.

64. That these laws remain subject to *ex post facto* scrutiny by the Regulatory Review Committee, to which they should be required to be sent.—paragraph 34.

65. That a reference be given to the Standing Committee on Fisheries and Forestry to engage in a detailed study of all aspects of the Fisheries Act and the policies pursued under it, and that the Standing Joint Committee on Regulatory Review be empowered to report on all subordinate law making powers contained in the present Act.—paragraph 71.

SUNSET PROCEDURES

66. That, after a subordinate law has been in force for a reasonable time, its effectiveness should be evaluated. While such evaluations will of necessity have to be generally performed by Government Departments and Agencies, your Committee recommends, as does the Economic Council of Canada, that they be referred to the appropriate Standing Committees of the Houses for review.—paragraphs 14, 55.

FOOTNOTES

—1 "26. Every statutory instrument issued, made or established after the coming into force of this Act, other than an instrument the inspection of which and the obtaining of copies of which are precluded by any regulations made pursuant to paragraph (d) of section 27, 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." S.C. 1970-71-72, c. 38.

—2 Third Report of the Special Committee of the House of Commons on Statutory Instruments, 1968-69 Session.

—3 These traditions and opinions are referred to in section E of this Report.

—4 Laid in draft and no effect until affirmed (2); Ceases to have effect after fixed period unless affirmed (4); Disallowance by both Houses (11); Disallowance by either House (2); Disallowance by House of Commons alone (2).

—5 This will necessarily include almost every statutory instrument made under existing statutes.

—6 S.C. 1975, C. 75, section 46.

—7 R.S.C. 2nd Supplement, C. 29, section 1(3).

—8 "Responsible Regulation", November 1979, Interim Report of the Economic Council of Canada under its Regulation Reference.

—9 The definitions of "health, safety and fairness" and the listed Statutes will be found in Appendix IV along with a summary of the Treasury Board procedures, prepared by G. Walter Miller of the Library of Parliament.

—10 Aerosol Sprays, March 1979 and Use of Arsenic in Gold Roasting, October 1979.

—11 H. Janisch: Policy Making in Regulations 1979, 17 OHLJ, 46 at 95, quoted D.J. Mullan "Rule-Making Hearings: A General Statute for Ontario" Research Publication No. 9, Ontario Commission on Freedom of Information and Individual Privacy, page 114.

—12 No. 553. *Rule* (a) This section applies, according to the provisions thereof, except to the extent that there is involved; (1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include; (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply; (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection. (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except; (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule. (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383).

The Committee is indebted to Professor D.J. Mullan for his commentary on the MacGuigan and McRuer objections to

notice and comment procedures and for his analysis of the Administrative Procedures Act provisions and of the exceptions contained in section 553. See Commission on Freedom of Information and Individual Privacy: "Rule-making Hearings: A General Statute for Ontario" Research Publication No. 9.

—13 *A Report of the Commission on Federal Paperwork: Rule-making* (Washington: U.S. Government Printing Office, 1977) p. 48 quoted Mullan, op cit, p. 156.

—14 Mullan, op cit, p. 141.

—15 A summary of those procedures prepared by G. Walter Miller of the Library of Parliament, Research Branch, is attached as Appendix V. A more detailed study will be found in Mullan, op. cit. Chapter V.

—16 *Ibid*, p. 43-44.

—17 Third Report of the Special Committee of the House of Commons of Canada on Statutory Instruments, Session 1968-69.

—18 First Special Report from the Joint Committee on Statutory Instruments, Session 1977-78, H.L. 51; H.C. 169; para. 12.

APPENDIX I

SUBORDINATE LAW, ORDERS IN COUNCIL, "MINISTERIAL ORDERS", REGULATIONS, STATUTORY INSTRUMENTS AND OFFICIAL DOCUMENTS

1. There is no magic in nomenclature. It is generally the nature of a document which is important, not its name. (Unfortunately, there are exceptions to this proposition within the definitions of "regulation" and of "statutory instrument" in the Statutory Instruments Act.)

2. Virtually all acts of the Crown, of its servants and agents, which have legal effect are carried out by or evidenced in writing. The resulting documents bear many names and there is little consistency in the names of documents (regulation, order, by-law, warrant, etc.) in which acts or powers are executed, exercised or evidenced. The form of some documents and of appointments to some offices, the sealing requirements and the signatures required are set out in the Formal Documents Regulations made under the Seals Act.

3. The formal decision of the Governor in Council to issue a document or to make an appointment is in almost all cases embodied in an Order in Council. Similarly, the decision to issue a Proclamation is embodied in an Order in Council.

4. An Order in Council is an Order of the Sovereign, or of Her representative for the time being whether Governor-General or Administrator, made after receiving the advice (not necessarily the consent although that is now, politically, always essential) of the Privy Council. For the giving of advice no particular quorum of Council is now required by law. By tradition dating from 1627 a minimum of three Councillors, in addition to the Sovereign, is required. This replaced an earlier requirement of Henry VIII that a minimum of two Councillors attend upon the Sovereign. In Canada a quorum of four seems customarily to have sat. Queen Victoria's Instructions to the first Governor General, Viscount Monck, provided for a quorum of four Councillors and this requirement has been followed as a tradition ever since. In contrast with the practice in the other countries of the Monarchical Commonwealth, the Governor General does not preside at meetings of the Council and has not done so for many decades. Dr. Forsey advises that the last occasion occurred during the Great War, H.R.H. the Duke of Connaught presiding.

5. The Order in Council is the universal work horse of Canadian administration. This is particularly so since so many statutes provide that the subordinate laws made under them and the administrative acts and appointments required by them shall be done and made by the "Governor in Council". The consequence of this is that, since the Governor in Council acts by Order in Council, subordinate laws, appointments and administrative acts are all embodied in or authorized by Orders in Council, although the documents that result may be termed regulations, orders, warrants, rules or anything else Parliament called them in the enabling statutes. The form of making them all is an Order in Council.

6. In many cases Parliament provides that some delegate may make laws or do some act "with the approval of the Governor in Council". The approval, when it is forthcoming, is signified in an Order in Council.

7. Consequently, of all the Orders in Council made in any year only a proportion, at present about one fifth, can be classified as making or as approving the making of subordinate laws, whether those subordinate laws go under the name of regulations, rules, by-laws, orders, tariffs or whatever. In answer to a question of Mr. Leonard Jones (H.C. Debates October 17, 1977 p. 8259) the following statistics were given:

Total number of Orders in Council made in 1976		3326
Pursuant to Statute	3265	
Under the Royal Prerogative	61	

DESCRIPTION OF ORDERS IN COUNCIL FOR THE YEAR 1976

	Number	Percentage
Appointments (includes re-appointments, resignations and fixing salaries)	750	22.55
Regulations and other Statutory Instruments	653	19.63
Lands and other property (includes exchanges, acquisitions, transfers to or from a Province, sales of lands under the surplus Crown Assets Act and under the Veterans' Land Act)	481	14.46
Contracts and other agreements	289	8.70
Pardons and Revocations (under Criminal Records Act)	234	7.03
Foreign Investment Reveiw Act	232	6.97

Payments, loans, contributions, grants and gifts	161	4.84
Remission Orders	82	2.46
Satisfied Securities	75	2.25
Judges Act, other than appointments (annuities to widows, approving residence, retirements, etc.)	55	1.65
Railways	41	1.23
Ex gratis payments	35	1.05
Other	238	7.18
Total	3,326	100.00

8. Parliament occasionally delegates subordinate law-making power to persons other than the Governor General in Council. The Post Office Act, for example, confers extensive subordinate law-making power direct on the Postmaster General. The Aeronautics Act allows the Governor in Council to empower the Minister of Transport to make extensive subordinate laws (confusingly called "Orders"). Under a series of Acts, the Canadian Transport Commission enjoys extensive law-making power.

9. Amongst subordinate laws the Statutory Instruments Act introduces a series of highly artificial distinctions. Some subordinate laws, by whomsoever they are made, are categorized as "statutory instruments" and of these some are further categorized as "regulations" (although they may be called regulations, by-laws, tariffs, rules or whatever). Only "regulations" and certain other statutory instruments and types of statutory instruments, as determined by Parliament or by the Clerk of the Privy Council, must be registered in the Privy Council Office and published in the Canada Gazette, Part II.

10. A list or schedule of all Orders in Council made is tabled in the House of Commons monthly and copies of the list are available from the Sessional Papers Office. No such list is tabled in the Senate. A copy of any Order in Council, other than one exempted from inspection pursuant to the Statutory Instruments Act—(1) may be obtained from the office of the Assistant Clerk of the Privy Council, 15th Floor, Varette Building, 130 Albert Street, Ottawa.

11. It follows from the foregoing that

(i) subordinate laws not made by or approved by Order in Council will not appear on the monthly list of Orders in Council;

(ii) only a portion of the Orders in Council on the monthly list will be subordinate legislation whether regulations or other statutory instruments;

(iii) only a portion of the Orders in Council on the monthly list will appear in Canada Gazette Part II; others may appear in Part I of the Gazette or not be published at all.

12. In other jurisdictions of the British Commonwealth enjoying the same constitutional forms as does Canada, it is far more common to confer subordinate law-making power on Ministers and on boards, commissions and tribunals. Consequently, in those jurisdictions there will be far fewer instances of subordinate laws being embodied in Orders in Council or Minutes of the Privy or Executive Council.

13. In the United Kingdom, in particular, use of the Order in Council to make subordinate law is rare, being confined largely to emergency laws, and constitutional arrangements for colonies and dependencies. In addition, the United Kingdom displays a greater sophistication in the use of royal instruments and seals than does Canada with the result that the numbers of Orders in Council necessary to authorize appointments and governmental actions is correspondingly less.

14. In the United Kingdom most primary subordinate law is made by Secretaries of State or by other Ministers of the Crown. Virtually all primary subordinate laws falls into the United Kingdom definition of statutory instrument. Again, however, the documents in which subordinate laws are contained go under various names, regulations, orders, schemes, directions, by-laws, warrants, resolutions, although by far the greater number of them all is made by Ministers.

15. In considering United Kingdom subordinate legislation, there is no magic, special significance or even specific meaning in the phrase "Ministerial order".

16. An analysis of United Kingdom statutory instruments made in 1976 is attached.

17. There is no reason to suppose from statistics now available that Canada is any more or less governed by laws made outside Parliament than is the United Kingdom. While it may appear that the total number of statutory instruments or their equivalents in Canada, Dominion and Provincial, would far exceed the 2,248 for the United Kingdom in 1976, it must be remembered that

(i) the functions of local government are far more extensive in the United Kingdom than in Canada;

(ii) there has developed in the United Kingdom an orderly system of Ministerial Circulars, Letters and Directives which contain many subordinate rules but which are not included in the category "statutory instrument". It is known that much the same practice obtains in Departments of the Government of Canada through the issuing of "Guidelines" and "Manuals". However, these are generally secret, unlike their United Kingdom counterparts, and it is impossible to form any estimate as to their number or as to the number of substantive rules in them.

(iii) the definition of "statutory instrument" in the United Kingdom has been treated as not extending to include rules made in the exercise of a sub-delegated power.

18. It is often said in the Press, and is popularly believed, that in Canada the Cabinet makes all regulations (and other statutory instruments) made by Order in Council. This is not true. First, the Governor General, whose approval is an essential element, is not part of the Cabinet. Secondly, while the Cabinet, sometimes after a recommendation of a Cabinet Committee, does consider some especially important or sensitive regulations, by far the greater number is recommended for His Excellency's approval by the Special Committee of Council, which consists of ten Privy Councillors with a quorum of four. The decision as to whether a regulation has sufficient policy implications to warrant going to a Cabinet Committee or direct to Cabinet is made essentially by the recommending Minister, occasionally by Cabinet itself.

FOOTNOTE

—1 The details are set out in section 21 of the Statutory Instruments Regulations. In peacetime this restriction, so far as it bears on Orders in Council, relates to pardons and the precise salary portions of appointments.

STATUTORY INSTRUMENTS MADE IN THE U.K. IN 1976

1. General statutory instruments	1,114
Local statutory instruments	1,134
	2,248

NOTE The local instruments are not always printed and are not included in the annual volume of statutory instruments.

2. Analysis of the 1,114 general statutory instruments:

Orders	484
Regulations	381
Orders in Council	128
Rules	53
Acts of Sederunt	39
Acts of Adjournment	4
Schemes	13
Approval instruments	4
Orders of Council	3
Directions	2
Byelaws	1
Warrant	1
Resolution	1

NOTES (a) Acts of Sederunt and Act of Adjournal are rules governing procedure of Scottish Courts.

(b) Orders of Council are orders made by the Privy Council, not in the presence of the Sovereign, approving rules regulating professional education and conduct in regard to certain professions, e.g. doctors, dentists, opticians.

3. Of the general statutory instruments mentioned in paragraph 2,

(a) 103 required affirmative approval of both Houses;

(b) 627 were subject to annulment by either House;

(c) 42 required affirmative approval of the House of Commons only;

(d) 95 were subject to annulment by the House of Commons.

4. Prerogative Orders in Council—167

NOTE These are order made under the prerogative, not under statutory powers, relating to colonies, mostly providing new constitutions.

APPENDIX II

CRITERIA FOR SCRUTINY OF STATUTORY INSTRUMENTS

In scrutinizing statutory instruments the Standing Joint Committee on Regulations and other Statutory Instruments uses the following criteria, approved in their present form by the two Houses in February, 1978:

Whether any Regulation or other Statutory Instrument within its terms of reference, in the judgement of the Committee:

1. (a) is not authorized by the terms of the enabling statute, or, if it is made pursuant to the prerogative, its terms are not in conformity with the common law; or

(b) does not clearly state therein the precise authority for the making of the Instrument;

2. has not complied with the provisions of the *Statutory Instruments Act* with respect to transmittal, recording, numbering or publication;

3. (a) has not complied with any tabling provision or other condition set forth in the enabling statute; or

(b) does not clearly state therein the time and manner of compliance with any such condition;

4. makes some unusual or unexpected use of the powers conferred by the enabling statute or by the prerogative;

5. trespasses unduly on the rights and liberties of the subject;

6. (a) tends directly or indirectly to exclude the jurisdiction of the Courts without explicit authorization therefor in the enabling statute; or

(b) makes the rights and liberties of the subject dependent on administrative discretion rather than on the judicial process;

7. purports to have retroactive effect where the enabling statute confers no express authority so to provide or, where such authority is so provided, the retroactive effect appears to be oppressive, harsh or unnecessary;

8. appears for any reason to infringe the rule of law or the rules of natural justice;

9. provides without good and sufficient reason that it shall come into force before registration by the Clerk of the Privy Council;

10. in the absence of express authority to that effect in the enabling statute or prerogative, appears to amount to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment, and not merely to the formulation of subordinate provisions of a technical or administrative character properly the subject of delegated legislation;

11. without express provision to the effect having been made in the enabling statute or prerogative, imposes a fine, imprisonment or other penalty, or shifts the onus of proof of innocence to the person accused of an offence;

12. imposes a charge on the public revenues or contains provisions requiring payment to be made to the Crown or to any other authority in consideration of any license or service to be rendered, or prescribes the amount of any such charge or payment, without express authority to that effect having been provided in the enabling statute or prerogative;

13. is not in conformity with the *Canadian Bill of Rights*;

14. is unclear in its meaning or otherwise defective in its drafting;

15. for any other reason requires elucidation as to its form or purport.

APPENDIX III

PROCEDURES FOR PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION IN THE UNITED KINGDOM AND IN THE COMMONWEALTH OF AUSTRALIA

A. *The United Kingdom*

1. Statutory instruments fall into four classes:

(i) those having been laid before Parliament subject to annulment (i.e. disallowance) by either House or by the House of Commons alone with respect to instruments under financial legislation, within forty sitting days of laying;

(ii) (a) those which must be laid in draft and which can not be made unless affirmed by both Houses, or the Commons alone in the case of financial instruments, within twenty-eight or forty days, usually the latter;

(b) those which having been made must be laid and cease to have effect unless affirmed within twenty-eight or forty days, usually the latter;

(iii) those which must be laid but need not be affirmed and can not be disallowed; and

(iv) those which need not be laid and need not be affirmed and can not be disallowed.

2. The Standing Joint Committee on Statutory Instruments has jurisdiction to scrutinize and draw the attention of the Houses (or the House of Commons alone with respect to financial instruments) to any instrument from any of the four classes. Classes (i) and (ii)—those subject to affirmation or annulment—constitute approximately two thirds of all instruments, and a higher proportion of those under modern legislation. Class (i) comprises approximately one half of all instruments.

3. No debate on or vote for affirmation of an instrument takes place until the Committee has scrutinized it and reported to the Houses or the House of Commons as the case may be.

4. The Government follows a practice of tabling the drafts of instruments subject to annulment at least twenty-one days before they are made to allow greater time for Committee scrutiny and Committee report. This is called the "21 day rule". Some procedures are in place including debate in a Standing Committee to facilitate prayers for annulment.

5. Whether a Bill provides for affirmation or annulment of instruments to be made under it when enacted is a matter decided upon by the Minister introducing the Bill. However, skeletal statutes generally require affirmation for instruments made under them.

B. *The Commonwealth of Australia (Sections 48-50 of the Acts Interpretation Act)*

1. Regulations must be notified in the Commonwealth Gazette and take effect from the date of notification or some later date. They must also be laid before each House within fifteen sitting days of their making. Regulations not so laid are void.

2. Either House may by passage of a resolution disallow any regulation provided notice of motion is given within fifteen sitting days (usually a period of five weeks) of this being laid.

3. If a motion for a resolution to disallow is not called on and disposed of within fifteen sitting days of notice of the motion, the regulation specified in the motion is deemed to have been disallowed on that fifteenth day.

4. Disallowance or deemed disallowance has the same effect as repeal.

5. Where a regulation has been disallowed, or is deemed to have been disallowed, no regulation, being the same in substance as that disallowed or deemed to have been disallowed, may be made within six months of disallowance unless the House disallowing or in which deemed disallowance took place approves.

6. Territorial Ordinances and Regulations, Rules of Court and By-laws of public sector corporations and some orders of regulating authorities under the Broadcasting and Television Act are subject to the same procedures as above.

7. The House of Representatives has never taken any part in the scrutiny and control of delegated legislation, which has been a function zealously pursued by the Senate. Motions for disallowance usually follow upon an adverse report from the Regulations and Ordinances Committee of the Senate (at work since 1932). Instruments disapproved of by that Committee, if not withdrawn by the Government, are habitually disallowed by the Senate.

APPENDIX IV

SOCIO-ECONOMIC IMPACT ANALYSIS OF THE TREASURY BOARD

Regulation: a regulation as defined by Section 2(1) of the *Statutory Instruments Act*. (This definition includes amendments to existing regulations.) Where a standard or set of standards is incorporated by reference into a regulation, the standard or set of standards should be considered as a part of the regulation for the purposes of the SEIA policy.

Health or safety regulation: a regulation or an amendment to a regulation made pursuant to any of the statutes listed in Appendix A, which

(a) concerns the health or safety (in the broadest sense) of the general public or of particular segments thereof, or the protection of the environment, except that

(b) *to the extent that* a regulation concerns economic rate-setting, metric conversion, the eligibility criteria for health or safety programs or policies, *or* the financial administration of health or safety programs, it is deemed not to be a Health or safety regulation for the purposes of the SEIA policy.

For example, regulations concerning environmental contaminants, hazardous or potentially hazardous goods or substances, food contamination prevention, occupational health or safety, fall within the definition. Regulations (such as the *Canada Assistance Plan* regulations) concerning eligibility criteria or the mechanics of health funding or expenditures do not. Note that a proposed regulation falling within the definition and also containing aspects of economic rate-setting, metric conversion or eligibility criteria would be subject to the policy but the excluded areas need not be addressed.

Fairness regulation: a regulation or an amendment to a regulation, made pursuant to any of the statutes listed in Appendix A, which

(a) concerns protection against fraud, deception, or inaccuracy in the reporting of information, except that

(b) *to the extent that* a regulation concerns economic rate-setting or metric conversion, it is deemed not to be a Fairness regulation for the purposes of the SEIA poiicy.

For example, regulations prescribing minimum or mandatory quality standards, prescribing grade names in the broadest sense, requiring accuracy in weighing or measuring, requiring the accurate disclosure of information or requiring that disclosed information be accurate fall within the definition. Note that a regulation which would otherwise fall completely within the definition is only excluded to the extent that it concerns economic rate-setting or metric conversion; this means that such a regulation might still have aspects which would fall within the area of fairness, and consequently, would still be subject to the requirements of the SEIA policy.

New HSF regulation: an HSF regulation or an amendment to an HSF regulation which was promulgated on August 1, 1978 or thereafter, *and* which was made under the authority of any statute listed in Appendix A on the date on which the regulation or amendment was promulgated; or any proposed HSF regulation or any proposed amendment to an HSF regulation which is to be made under the authority of any statute listed in Appendix A.

Major HSF regulation: an HSF regulation whose economic or social impact either exceeds the cost criteria *or* entails a sizeable potential adverse effect on specific groups or on technological progress, market structure and competition. The precise cost criteria and the other criteria for distinguishing between major and minor new HSF regulations are described in Appendix B. Most major HSF regulations will be considered major because of the cost criteria. The other criteria are included to ensure that no HSF regulation which has other important implications of potential concern to interested groups, or the public at large, goes unassessed.

.3.3 *Content of analysis*

.3.3.1 *Content of the SEIA* References are made to examples of socio-economic impact analyses in Appendix E. These examples provide guidance on the information and detail to be included in an SEIA.

At present, a prescribed format for all SEIAs is not considered appropriate. However, it is possible that a suitable format for the majority of SEIAs may emerge as the number performed increases. Until such time, *departments and agencies shall ensure that each SEIA provides the following information presented in the order given*:

(a) Background information on the proposed regulation: a description of the proposed regulation including its terms and legal authority; its purpose and objectives; brief outline of how the concern arose; the nature and role of consultations which took place in the development of the proposed regulation; and why an SEIA was performed.

(b) Analysis of the potential allocative effects:

—identification of the methodology used to carry out the analysis and of the time horizon used in the analysis;

—section on costs: identification and estimation of all costs associated with compliance with the proposed regulation including all assumptions made; identification of data sources used in estimates; the discounted present value(s) of the total costs including identification of the real rate(s) of discount used; outline of any sensitivity analysis performed; tables, graphs etc. as appropriate;

—section on benefits: same information as for costs; when cost-effectiveness methodology is used, a brief explanation of why estimates were or were not discounted;

—cost-benefit or cost-effectiveness comparisons: net present values, benefit-cost or cost-effectiveness ratios for all cases, i.e. including different assumptions used in performing sensitivity analyses or when different sets of data are available, etc.;

—section on alternatives: identification of all technological and policy-instrument alternatives considered and discussion of feasibility of each alternative, including the status-quo alternative; for each feasible alternative, costs and benefits should be identified, estimated and compared as is appropriate.

(c) Analysis of the non-allocative effects: a discussion of the potential impact of the proposed regulation on the distribution of income, market structure and competition, technological progress, international competitiveness, output, employment, the balance of payments, inflation, etc.; details of the size and/or direction of such impacts which are significant.

(d) Summary and conclusions including the reasons for omitting any of the above identified items.

(e) Identification of the office or person(s) to contact regarding the SEIA.

.3.3.2 *Contents of the summary of the SEIA* The terms of, the legal authority for, and the purpose of a major new HSF regulation shall be published in advance in Part I of the *Canada Gazette*, along with a summary of the SEIA. The following paragraphs list the type of information which shall be included in the summary of the SEIA to be published:

(a) a statement of the reason(s) why the proposed HSF regulation is considered as major (e.g. the proposed HSF regulation was identified as major and subjected to a socio-economic impact analysis because it could lead to increased social costs for the national economy of $10 million or more in any one year);

(b) a statement on the methodology (e.g. benefit-cost, cost-effectiveness) and on the time horizon used to analyze the allocative effects of the proposed HSF regulation;

(c) a summary of the expected social costs (e.g. capital expenditures, operating and maintenance costs required for compliance) and their present values under the real social discount rates suggested and, when appropriate, under different sets of assumptions;

(d) a summary of the expected social benefits (e.g. to save energy, to reduce injuries, to save lives) and of either their present values under the real social discount rates suggested (when cost-benefit analysis can be used) or their magnitude (when the social benefits can only be expressed in physical terms). When appropriate, a range should be provided in view of different sets of assumptions;

(e) a statement on the net present values, benefit-cost or cost-effectiveness ratios obtained from using various sets of assumptions;

(f) a summary of the technological or policy-instrument (when appropriate) alternatives considered in order to meet the same objective(s) as the proposed HSF regulation and, if the alternatives are practicable, the net present values, benefit-cost or cost-effectiveness ratios shall be provided;

(g) a summary of the potential non-allocative effects considered within the complete SEIA (e.g. impact on the distribution of income, on prices, on international trade, on market structure and competition). For those variables on which the proposed HSF regulation is expected to have an impact, the size and direction of the impact shall be provided;

(h) when appropriate, a statement of the reason(s) why one or more of the above items were not considered;

(i) identification of the office from which and person(s) from whom the complete SEIA can be obtained.

Sponsoring departments should consult their respective information divisions on the development and issue of general publicity packages. For example, an SEIA of proposed school bus safety standards would likely have the following interested audiences: school boards, school bus manufacturers, transportation specialists and safety organizations. All groups have publications related to their special interest and news releases should be prepared for each of them. Special efforts should be made to reach small groups (e.g. the small-business community) that may be affected by the regulation.

LIST OF RELEVANT STATUTES

The statutes that confer the power to make regulations in the health, safety and fairness area include:

Aeronautics
Animal Disease and Protection
Arctic Waters Pollution Prevention
Atomic Energy Control
Canada Agricultural Products Standards
Canada Dairy Products
Canada Grain
Canada Labour Code
Canada Shipping
Canada Water
Clean Air
Consumer Packaging and Labelling
Criminal Code (Section 188); February 1979
Department of National Health and Welfare
Department of Transport
Electricity Inspection
Environmental Contaminants
Explosives
Fair Wages and Hours of Labour
Feeds
Fertilizers
Fish Inspection
Fisheries (Section 33)
Food and Drugs
Fruit, Vegetables and Honey
Gas Inspection
Government Harbours and Piers
Hamilton Harbour Commissioners
Harbour Commissions
Hay and Straw Inspection
Hazardous Products
Inspection and Sale
Livestock and Livestock Products
Maple Products Industry
Meat Inspection
Milk Test
Motor Vehicle Safety
Motor Vehicle Tire Safety
Narcotic Control
National Energy Board
National Harbours Board
National Housing
National Parks
National Trade Mark and True Labelling
Navigable Waters Protection
Northern Inland Waters
Ocean Dumping Control
Oil and Gas Production and Conservation
Pest Control Products
Pilotage
Plant Quarantine
Precious Metals Marking
Public Lands Grants
Quarantine
Radiation Emitting Devices
Railway
St. Lawrence Seaway Authority
Seeds
Territorial Lands
Textile Labelling
Toronto Harbour Commissioners
Weights and Measures

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A. The Canadian SEIA

On December 14, 1977 the President of the Treasury Board and the Minister of Consumer and Corporate Affairs announced changes to the regulation-making process by requiring a Socio-Economic Impact Analysis (SEIA) program, for major proposed health, safety and fairness—(2) regulations.—(3) The program, which came into effect August 1, 1978, provides an opportunity for increased public participation in regulation-making through a "notice and comment" procedure and requires regulations in the areas of health, safety, fairness, and environmental protection to be subjected to a socio-economic impact analysis.—(4) The program constitutes an important movement toward reform of the regulatory process as it requires an evaluation of the policy effects of proposed new regulations.—(5)

The SEIA program will subject only new regulations to the system of evaluation, and only *major* regulations in the health,

safety, fairness and environmental protection field will be included; the magnitude of "social costs"—(6) is to be the major criterion for distinguishing between major and minor regulations, with those, for example, with expected social costs of over $10 million in one year classified as "major". Special procedures are provided for major new health, safety and fairness regulations related to cases of emergency, when fast action is necessary.

Federal departments and agencies are responsible for initiating consultations with interested parties when new regulations are contemplated, for identifying major new health, safety, fairness and environmental regulations and for preparing the socio-economic impact analyses, using guidelines provided by the Technical Advisory Group on Impact Assessment (TAG). That Group maintains and assistance and advisory role, providing guidance on the preparation of SEIA's and advising whether proposed regulations are within the class of health, safety, fairness, and environmental protection.

A proposed regulation within the class and a summary of the SEIA must be published in the *Canada Gazette* at least sixty days prior to the date when the regulation is to be promulgated.

The summary of the SEIA to be pre-published is to include—(7): a statement of the reasons why the regulation is considered as major; a statement on the methodology and time horizon used to analyse the effects of the regulation; a summary of the expected social costs and expected social benefits; a summary of the alternatives considered to meet the same objectives as the proposed regulation; a summary of the potential non-allocative effects considered (for example, impact on the distribution of income, on prices, on international trade, on market structure and competiton); identification of the office from which and the person from whom the complete SEIA can be obtained. The responsible department or agency is required to make the complete SEIA publicly available and must respond to comments and requests for changes.

As noted above, the SEIA only became effective on August 1, 1978; as of December 1979, only one report has actually been released to the public, an evaluation of the socio-economic effects of various proposals for regulating the use of chlorofuoromethanes in aerosol sprays.—(8) Thus it is too early to assess the effectiveness of the program. It can be questioned whether the policy will actually affect regulatory decision-making or whether it will be used as a method of rationalizing decisions already taken.—(9) The requirement of consultation with non-government interest groups when new regulations are contemplated would appear to be very beneficial in this regard. In this consultation, it is necessary that participation of diverse interests in encouraged so that the process not serve to further only the special interests of politically effective groups.

Another consideration to be examined is whether the SEIA process would be more useful in an extensive though less intensive review of existing regulations; both examination of new proposals and existing regulations are, of course, beneficial. Finally, consideration should be given to extending the process to cover economic as well as health, safety and fairness regulations, as is the situation in the U.S.

FOOTNOTES

—2 The term "fairness" refers to protection against fraud or deceptive practices.

—3 The details of this program are contained in Treasury Board Canada, *Administrative Policy Manual*, chapter 490.

—4 Thus all economic or rate-setting regulations are expressly excluded.

—5 The SEIA program is discussed in Robert D. Anderson, forthcoming.

—6 The "social costs" are the value of all the additional resources which would have to be used to meet the requirements of the regulation or which would have to be transferred outside the country to meet the higher costs of imported goods and services as a result of the regulation.

—7 *Administrative Policy Manual*, chapter 490, s. .3.3.2.

—8 Environment Canada, *Preliminary Study of Socio-Economic Impact of the Proposed Regulation of Chlorofluoromethanes Act*, Ottawa Environment Canada Planning, Policy and Analysis Branch, April 1979.

—9 As the U.S. experience illustrates. See discussion below.

APPENDIX V

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B. The United States Experience

In the United States provision is made for public input into the regulation-making process, by requiring publication of proposed rules and consideration of responses, and at the discretion of the rule-maker, the possibility of an oral hearing on the proposed rules.

The U.S. *Administrative Procedure Act*, passed in 1946, provides for a "notice and comment" procedure. The Act requires notice in the Federal Register, the U.S. equivalent of the *Canada Gazette*, of proposed rule-making to be given at least thirty days before its effective date. The notice must include the time, place and nature of public rule-making proceedings, if any, reference to the legal authority under which the rules—(1) is proposed and information on the rule or the issues involved. Agencies—(2) are required to give interested persons an opportunity to participate in rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation. The agency is obliged, after taking account of the material submitted, to incorporate in the rules a concise statement of their basis and purpose.

These rule-making provisions apply only to substantive rules; they do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, as well as rules involving military or foreign affairs. An agency itself may ignore the notice and public procedure requirements if "for good cause", they are 'impracticable, unnecessary, or contrary to the public interest—(3).

The requirements concerning thirty-day notice only may be avoided in cases involving a substantive rule which grants or recognizes an exemption or relieves a restriction; interpretative rules and statements of policy; or as otherwise provided by the agency for good cause found and published with the rule—(4).

Section 553 applies to so-called "informal rule-making". Other statutes may contain requirements that rules be made on the record after a hearing; in these cases, while the notice provisions in section 553 apply, the public participation in the rule-making process is governed by sections 556 and 557, which provide for such matters as the taking of evidence, handing down decisions, and compiling a record.

There appears to be a general satisfaction with the procedures:

> "A survey of the American periodical literature and the various administrative law texts some thirty-two years after the enactment of the *Administration Procedure Act* reveals no suggestion at all that section 553 should be repealed. The extra workload it has imposed on many regulatory agencies and departments of state seems to have been accepted willingly because of the valuable information generated by the 'notice and comment' procedure and, also in part, because of the fact that the opportunity for prior involvement in the development of rules has the tendency of defusing criticism and making those rules more acceptable politically—(5).

And, as stated by Professor K. C. Davis in Administrative Law of the Seventies, "(t)he system is simple and overwhelmingly successful—(6).

Movement for reform has instead been in the other direction: for a narrowing of the exceptions to the "notice and comment" procedure. Professor Davis has called for such a move:

> "Unfortunately, a large portion of all legislative rules are issued without party participation, because of the many exceptions to s. 553. Congress should and probably will scale down those exceptions—(7).

The Administrative Conference of the United States—(8), at its Fifteenth Plenary Session in December 1976, urged administrative agencies to follow the section 553 procedure for interpretative rules of general applicability if likely to have a "substantial impact" on the public—(9), noting that it was extremely difficult to distinguish interpretative rules, exempted from the Act, from substantive rules, which are subject to the Act. In addition to this and other calls for removal or restriction on exemptions, there have been indications that the Act does not provide for an appropriate level of public participation. There have been suggestions, for example, that, while trial-type hearings may be inappropriate for rule-making, something more than "notice and comment" procedures may be required, as for example legislative-type hearings, a discovery system, the imposition of formal rules governing the compilation of a rule-making record, or perhaps consultation before publication of a rule in the Federal Register—(10).

The need for change has also been recognized by legislators, as evidenced by the number of statutes enacted in the past few years which require some procedures in addition to "notice and comment" during rule-making—(11). In addition, many regulatory agencies have voluntarily adopted procedures going beyond the requirements of the *Administrative Procedure Act*—(12). U.S. federal courts have also at times extended the requirements applying to the rule-making procedure: in requiring rule-making hearings for certain types of interpretative and procedural rules, in deciding that the procedures set out in the *Administrative Procedure Act* should be treated as a minimum requirement, and requiring much fuller participation in some cases, as for example, where the rule-making involves the determination of narrow adjudicative facts—(13).

The Commission on Federal Paperwork has recommended that the Act be amended to provide for greater opportunity for input at the early drafting stages of a rule by those likely to be affected, presumably so that by the time of publication a rule would have wider acceptance, and thus bring about a reduction in paperwork at later stages of the rule-making process. The Commission also noted that public participation resulted in better rules, and the necessary paperwork added through greater participation is temporary, whereas the paperwork associated with a poorly written rule allowed to go into effect can be endless—(14).

Another consideration that is worthy of note is the rejection by commentators of trial-type procedures in the development of rules—(15).

> "The actual agency experience with these procedural requirements raises serious doubts about their desirability. At best, some agencies have learned to live with them, even though preferable procedures are probably available. At worst, these procedures have warped regulatory programs or resulted in virtual abandonment of them . . . "—(16).

In summation, it appears that there is an overall satisfaction with the Act; concern with the Act centers on the exemptions, and on the fact that there are only two extremes provided for: the "notice and comment" procedure and a trial-like adjudicatory hearing.

Executive Order 12044—(17), issued in March 1978, contains a requirement for executive agencies to follow a "notice and comment" procedure. The Order requires that executive agencies give the public "an early and meaningful opportunity to participate" in the development of regulations—(18). A number of possible methods are listed: publishing an advance notice of proposed rule-making, holding open conferences or public hearings; sending notices of proposed regulations to publications likely to be read by those affected; and notifying parties directly. Agencies are required to give the public 60 days to comment on proposed significant regulations, and where this does not prove possible, the regulation must be accompanied by a brief statement of the reasons for the shorter time period.

The Executive Order also requires executive agencies to make use of a "regulatory calendar"—(19). In order to give the public adequate notice the agencies are required to publish at least semi-annually an agenda of significant regulations under development or review. On the first Monday in October each agency must publish in the Federal Register a schedule showing when their semi-annual agenda will be published; supplements to the agenda may be published at other times if necessary. Each published agenda must, at a minimum, describe the regulations being considered by the agency, the need and legal basis for the action being taken, and the status of regulations previously listed in the agenda. In addition, the agenda must state whether or not a regulatory analysis will be

required, and include existing regulations scheduled to be reviewed—(20).

FOOTNOTES

—1 A "rule" is defined as the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency, and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

—2 "Agency" is defined as any authority of the government of the United States whether or not it is subject to review by another agency, but does not include: the Congress; the courts; the governments of territories or possessions or the District of Columbia; agencies composed of representatives of the parties or representatives of organizations of the parties to the disputes determined by them; courts martial; military authority exercised in the field in time of war or in occupied territory; and certain specific exemptions in other statutes.

—3 5 U.S.C.A. 553(b)(A).

—4 *Ibid.*, 553(d).

—5 Mullan (1979), p. 141.

—6 K. C. Davis, Administrative Law of the Seventies, The Lawyers' Co-operative Publishing Co., Rochester, 1976, at B.01-1, 170.

—7 *Ibid.*, p. 168.

—8 A body consisting of government and agency officials, practicing lawyers, academics and others knowledgeable about federal administrative procedures.

—9 Recommendation 76-5.

—10 These various suggestions are detailed in Mullan (1979), p. 149-50, footnotes 312-317.

—11 Mullan (1979), p. 150.

—12 *Ibid.*, p. 151.

—13 *Ibid.*, p. 152.

—14 *Ibid.*, p. 156.

—15 Approximately fifteen federal statutes require formal trial-type hearings for rule-making.

—16 Mullan (1979), p. 158 quoting Robert W. Hamilton.

—17 3 Code of Federal Regulations (1978) 152. An Executive Order is the most important method by which the President exercises his power, although there is no precise definition of the term.

—18 Section 2(c).

—19 This can be contrasted with the position taken by the Economic Council of Canada set out below.

—20 The regulatory analysis and review of existing regulations are discussed below.

APPENDIX VI

DISPOSITION BY THE GOVERNMENT OF RECOMMENDATIONS IN THE SECOND REPORT OF THE STANDING JOINT COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS FOR THE 1976-77 SESSION

B. The Committee's criteria for scrutiny of Statutory Instruments

(*Paragraphs 9-13*)

Not acted upon

1. The Committee's criteria for scrutiny should be written into the Statutory Instruments Act so that they will not need to be adopted and concurred in anew by the two Houses at the commencement of every Session and Parliament.

Acted Upon

2. An additional criterion should be added, namely, whether a statutory instrument trespasses unduly on the rights and liberties of the subject.

E. Defects in the Statutory Instruments Act, principally the definition of a Statutory Instrument

(*Paragraphs 21-55*)

Rejected

1. As a general rule no subordinate legislation should come into effect before it is published.

Not acted upon

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.

Not acted upon

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.

Not acted upon

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.

Not acted upon

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.

Not acted upon

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".

Not acted upon

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.

Not acted upon

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.

Not acted upon

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.

Not acted upon

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.

Not acted upon

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.

Overtaken by the Consolidation of the Regulations

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*)

Acted upon

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.

Acted upon

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.

Acted upon

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.

Acted upon

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.

Acted Upon

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.

G. The withholding of information from the Committee

(*Paragraphs 70-80*)

Acted upon

Those Departments of State and Authorities which make, or propose to the Governor in Council the making of subordinate legislation should explain to the Committee, if called upon, how it is that a particular piece of subordinate legislation does not infringe one or more of the criteria for scrutiny. An explanation should include legal reasons where such are called for as where the Committee has questioned the vires of a statutory instrument, the interpretation of some apparently obscure or ambiguous provision, or the status of a document as being or not being a statutory instrument.

H. Sub-delegation of rule-making power

(*Paragraphs 81-84*)

Not acted upon

If it is desired or thought necessary to give to a delegate of Parliament power to sub-delegate rule-making power, the power should and must be conferred expressly by the enabling statute.

I. The Language of Delegation

(*Paragraphs 85-95*)

Not acted upon

1. The precise limits of subordinate law-making power should always be defined in clear language in the enabling statute.

Rejected

2. Enabling powers cast in terms of subject matter, and commonly introduced by the word "respecting" should not be included in enabling statutes whilstever the view is held by the Crown that such powers permit both sub-delegation of rule-making power and a power of dispensation in favour of individuals.

Appears no longer to be done

3. No enabling power should confer upon Parliament's delegate the authority to determine or to declare the scope of his own delegated power or the true intention of the enabling statute.

J. The pretended power of dispensing with regulations in favour of individuals

(*Paragraphs 96-103*)

Not acted upon

The pretended power of dispensing with the provisions of subordinate legislation in favour of individuals under colour of enacting further subordinate legislation, being illegal unless expressly authorized by the enabling statute, should be abandoned forthwith.

K. Enabling powers in appropriation acts

(*Paragraphs 104-113*)

Not acted upon)

1. The practice of using Votes, whether substantive or dollar Votes, and Items in the Estimates as vehicles for the conferring of enabling powers should come to an end. Subordinate legislation should be made under enabling authority contained in ordinary statutes.

Not acted upon

2. Even if the practice is not terminated immediately, the following particular abuses should stop, viz:

(a) the conferring of subordinate law-making power in Votes and Items in terms which, in the view of the Crown, excludes the subordinate legislation, when made, from the definition of a "statutory instrument", and thus from Parliamentary scrutiny;

(b) the conferring of subordinate law-making power by use of the words "subject to terms and conditions approved by the Governor in Council";

(c) the extension and amplification of the purposes of old votes by a series of subsequent Votes.

L. Scrutiny of enabling powers

(*Paragraph 114*)

Not acted upon

Enabling clauses in Bills should be scrutinized while the Bills are before Parliament by the appropriate Standing Committees or by the Standing Joint Committee on Regulations and other Statutory Instruments.

M. The Text of Instruments subject to amendment

(*Paragraphs 115-118*)

Not acted upon

Statutory instruments that have been much amended should be revoked and remade in complete form. An instrument in respect of which a process of constant amendment is forseeable should be revoked and remade in consolidated form at regular intervals, perhaps annually.

P. Implementation of international agreements by statutory instrument—Remission orders under section 17 of the Financial Administration Act

(*Paragraphs 123-125*)

Not acted upon

Remission Orders made pursuant to section 17 of the Financial Administration Act should be regarded as subordinate legislation and as subject to Parliamentary scrutiny. The exclusion of any class of such Orders from scrutiny should occur only if expressly provided for in the Statutory Instruments Act.

S. Powers of Officers of Agricultural Agencies

(*Paragraphs 128-131*)

Acted upon

1. Rights of entry, powers of inspection and of seizure and the power to demand or take information should be confined exactly within the limits provided for in enabling legislation.

T. Discretionary administrative decisions, The rules of natural justice and a right of appeal

(*Paragraphs 132-138*)

Not acted upon

1. As a general rule, subordinate legislation should set objective criteria governing the taking of decisions provided for in that legislation.

Not acted upon

2. Where tests are set for eligibility or as prerequisites to the taking of some action under subordinate legislation, the test should be cast in objective and not in subjective terms. Tests, prerequisites or criteria dependent upon the formation of opinions or the satisfaction of individuals should be avoided.

Not acted upon

3. The granting of discretionary powers is properly the subject of a statute and not of subordinate law.

Not acted upon

4. Any person aggrieved by a refusal to grant a licence or permit, or by a suspension, cancellation or revocation of a licence or permit, pursuant to subordinate legislation, should be accorded in the subordinate legislation itself a right to be heard in objection, a right to be given reasons and a right to be apprised of any adverse material in any report submitted to the determining official. These rights should be accorded even where a right of appeal might exist, for the subject should not be forced unnecessarily to litigation, and their presence will assist in guaranteeing jurisdiction in the Federal Court under section 28 of the Federal Court Act.

U. Exemptions from Civil Liability

(*Paragraph 139*)

Not acted upon

Subordinate legislation should not attempt to exempt governmental agencies from the legal consequences of their acts or defaults or of those of their employees in either tort or contract.

V. Statutory Instruments made under the Income Tax Act
(*Paragraphs 140-141*)

Not acted upon

The Status of the National Revenue Department's Interpretation Bulletins and Information Circulars, and their equivalents in other Departments of State and agencies, must be carefully examined when the definition of a statutory instrument is amended.

W. Affirmation and disallowance of Statutory Instruments by the House of Parliament

(*Paragraph 142*)

Not acted upon

1. Greater use should be made of affirmative and negative resolution procedures in the drafting of Bills.

Not acted upon

2. A complete code governing both affirmative and negative resolutions should be adopted either by the amendment of section 28A of the Interpretation Act or by the adoption by the two Houses of Standing Orders (preferably identical) setting out in detail the procedures to be followed in the two Houses.