HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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PROCEEDINGS

No. 1

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WEDNESDAY, NOVEMBER 13, 1968

THURSDAY, FEBRUARY 13, 1969

---

*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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THE QUEEN'S PRINTER, OTTAWA, 1969

29813—1

SPECIAL COMMITTEE
ON
STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan
*Vice-Chairman:* Mr. Gilles Marceau
and Messrs.

Baldwin,
Brewin,
Forest,
Gibson,
Hogarth,
McIntosh,
Muir (*Cape Breton-The Sydneys*),
Murphy,
Stafford,
Tétrault—(12).

(Quorum 7)

Fernand Despatie,
*Clerk of the Committee.*

## ORDERS OF REFERENCE

HOUSE OF COMMONS

MONDAY, September 30, 1968.

*Resolved,*—That a Special Committee of twelve Members, to be named at a later date, be appointed to consider and, from time to time, to report on procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.

FRIDAY, November 8, 1968.

*Ordered,*—That the Special Committee on Statutory Instruments appointed on September 30, 1968, be composed of the following Members: Messrs. Baldwin, Brewin, Forest, Gibson, Hogarth, MacGuigan, Marceau, McIntosh, Muir (*Cape Breton-The Sydneys*), Murphy, Stafford and Tétrault.

MONDAY, November 18, 1968.

*Ordered,*—That the Special Committee on Statutory Instruments be empowered to send for persons, papers and records and to print such papers and evidence as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto.

*ATTEST:*

ALISTAIR FRASER,

*The Clerk of the House of Commons.*



29813—1½

## REPORTS TO THE HOUSE

THURSDAY, November 14, 1968.

The Special Committee on Statutory Instruments has the honour to present its

### FIRST REPORT

Your Committee recommends that it be empowered:

(1) to send for persons, papers and records;

(2) to print such papers and evidence as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto.

Respectfully submitted,

MARK MacGZIGAN,
*Chairman.*

*(Concurred in on Monday, November 18, 1968)*

FRIDAY, February 14, 1969.

The Special Committee on Statutory Instruments has the honour to present its

### SECOND REPORT

Your Committee recommends that it be empowered to sit while the House is sitting, to sit during periods when the House stands adjourned, to delegate to subcommittees all or any of the powers of the Committee except the power to report direct to the House; to retain the services of Counsel and Assistant Counsel.

Respectfully submitted,

MARK MacGUIGAN,
*Chairman.*

# MINUTES OF PROCEEDINGS

(*Text*)

WEDNESDAY, November 13, 1968.
(1)

The Special Committee on Statutory Instruments met at 2.03 p.m. this day, for organization purposes.

*Members present:* Messrs. Baldwin, Brewin, Forest, Hogarth, MacGuigan, Marceau, Stafford, Tétrault—(8).

The Clerk of the Committee opened the meeting and presided over the election of the Chairman of the Committee.

Mr. Forest moved, seconded by Mr. Hogarth,
—That Mr. MacGuigan be elected Chairman of the Committee.

It was *agreed* that nominations be closed.

The question being put on the motion, it was *resolved* in the affirmative. The Clerk of the Committee declared Mr. MacGuigan duly elected Chairman of the Committee.

Mr. MacGuigan took the Chair and thanked the Committee for the honour conferred upon him.

The Chairman called for motions for the election of a Vice-Chairman.

Mr. Hogarth moved, seconded by Mr. Forest,
—That Mr. Marceau be elected Vice-Chairman of the Committee.

Mr. Brewin moved, seconded by Mr. Tétrault,
—That Mr. Baldwin be elected Vice-Chairman of the Committee.

On motion of Mr. Hogarth, seconded by Mr. Forest, it was *Agreed*,—That nominations be closed.

The question being put on the first motion, it was *resolved* in the affirmative. The Chairman declared Mr. Marceau duly elected Vice-Chairman of the Committee.

The Clerk of the Committee read the Committee's Order of Reference dated September 30, 1968.

On motion of Mr. Baldwin, seconded by Mr. Hogarth, it was
*Resolved*,—That the Committee seek permission:

1) to send for persons, papers and records;
2) to print such papers and evidence as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto.

On motion of Mr. Marceau, seconded by Mr. Tétrault, it was

*Agreed,*—That, when power to print is granted, the Committee print 750 copies in English and 350 copies in French of its Minutes of Proceedings and Evidence.

On motion of Mr. Baldwin, seconded by Mr. Marceau, it was

*Resolved,*—That the Subcommittee on Agenda and Procedure be comprised of the Chairman, the Vice-Chairman and four other members appointed by the Chairman after the usual consultations with the Whips of the different parties.

On motion of Mr. Baldwin, seconded by Mr. Brewin, it was

*Agreed,*—That the Subcommittee on Agenda and Procedure and/or the Chairman of the Committee be authorized to obtain, and purchase if necessary, material concerning the Committee's terms of reference, in the form of statutes, articles, books and memoranda, both from Canada and other jurisdictions, and that the members of the Committee be supplied with such material.

Opinions were expressed regarding the procedure to be followed by the Committee in considering its Order of Reference and the Chairman indicated that the Subcommittee on Agenda and Procedure would meet in the near future to discuss this matter.

At 2.30 p.m., the Committee adjourned to the call of the Chair.

THURSDAY, February 13, 1969.
(2)

The Special Committee on Statutory Instruments met at 9:40 a.m. this day. The Chairman, Mr. MacGuigan, presided.

*Members present:* Messrs. Baldwin, Brewin, Gibson, MacGuigan, Marceau, Muir (*Cape Breton-The Sydneys*), Murphy, Stafford—(8).

The Chairman announced the names of those who have been designated to act with him and the Vice-Chairman (Mr. Marceau) on the Subcommittee on Agenda and Procedure, namely Messrs. Baldwin, Brewin, Hogarth and Tétrault.

The Chairman referred to various documents distributed to members of the Committee and, on motion of Mr. Marceau, it was

*Agreed,*—That the list of documents distributed be printed as an appendix to this day's Proceedings. (*See Appendix A*)

The Chairman presented the First Report of the Subcommittee on Agenda and Procedure, dated February 5, 1969, which is as follows:

The Subcommittee on Agenda and Procedure of the Special Committee on Statutory Instruments met at 3:20 p.m. this day, with the following members *in attendance:* Messrs. Baldwin, Hogarth, MacGuigan, Marceau—(4).

The Subcommittee agreed to recommend as follows:

(a) That the Suggested Work Plan be approved.

(b) That the Committee complete its study before the end of June 1969; that a final report be prepared during the summer for presentation to the House in the fall; that, if circumstances so require, a progress report

be made before prorogation, with a recommendation that the Committee be re-appointed at the commencement of the following session.

(c) That the Committee seek permission

to sit while the House is sitting, to sit during periods when the House stands adjourned, to delegate to subcommittees all or any of the powers of the Committee except the power to report direct to the House;

to retain the services of Counsel and Assistant Counsel.

(d) That, when power to retain the services of Counsel is granted, Mr. Gilles Pepin, Dean of the Faculty of Civil Law at the University of Ottawa, be appointed thereto; that the Chairman be asked to make a recommendation regarding the Assistant Counsel appointment on the basis of proposals discussed at the Subcommittee meeting.

(e) That the Chairman be authorized to hold meetings to receive and authorize the printing of evidence when a quorum is not present, provided that at least three members are present and that both the Government and Opposition are represented.

(f) That the Subcommittee an Agenda and Procedure be authorized to prepare and utilize a questionnaire pertaining to practices in the drafting of statutory instruments, to be completed by officials from various government departments as well as from bodies who have power to make statutory instruments.

At 4:00 p.m., the Subcommittee adjourned.

The Committee approved certain changes in the Work Plan, as suggested by the Chairman, and it was

*Agreed,*—That the Work Plan, as revised, be printed as an appendix to this day's Proceedings. (*See Appendix B*)

On motion of Mr. Gibson, seconded by Mr. Murphy, the First Report of the Subcommittee on Agenda and Procedure was *approved.*

On motion of Mr. Gibson, it was

*Resolved,*—That, when power to retain the services of Counsel is granted, Mr. Gilles Pepin, Dean of the Faculty of Civil Law at the University of Ottawa, be appointed thereto and that he be paid, subject to the approval of Mr. Speaker, at the rate of $200 per day devoted to the work of the Committee.

On motion of Mr. Gibson, it was

*Resolved,*—That, when power to retain the services of Assistant Counsel is granted, Mr. John Morden, Barrister, Toronto, be appointed thereto and that he be paid, subject to the approval of Mr. Speaker, at the rate of $200 per day devoted to the work of the Committee; and that reasonable living and travelling expenses be paid to Mr. Morden.

The Chairman informed the members that the Committee could avail itself of the services, on a part-time basis, of Mrs. Henriette Immarigeon, Lawyer in the Research Branch of the Library of Parliament.

As suggested by Mr. Baldwin, it was agreed that a copy of the questionnaire, to be prepared by the Subcommittee on Agenda and Procedure, be sent to each member of the Committee before its utilization, in order to allow members to make representations if they wish to do so.

On motion of Mr. Marceau, it was

*Resolved*,—That the Clerk of the Committee be authorized to purchase, for the use of the Committee, 16 copies of the following books:

PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION—The United Kingdom, Australia, New Zealand and Canada. By John E. Kersell.

COMMITTEE ON MINISTERS' POWERS—REPORT

Presented by the Lord High Chancellor to Parliament by Command of His Majesty, April, 1932.

Certain suggestions were made concerning the work of the Committee.

At 10:10 a.m., the Committee adjourned to the call of the Chair.

Fernand Despatie,
*Clerk of the Committee.*

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Thursday 13 February 1969**

• 0943

**The Chairman:** Gentlemen, we now have our quorum so we can begin the meeting. Those who have been designated to act with the Chairman and Vice-Chairman on the subcommittee on agenda and procedure are as follows: Messrs. Baldwin, Brewin, Hogarth, and Tétrault.

A number of documents were distributed to members of the Committee.

**Mr. Marceau:** I move that the list of those documents be printed as an appendix to today's Minutes of Proceedings.

**Some hon. Members:** Agreed.

**The Chairman:** I will read the first report of the subcommittee on agenda and procedure for the meeting on February 5. (See Minutes of Proceedings)

• 0945

Perhaps we might have some comments on various aspects of the Subcommittee's Report. The first item in the Subcommittee's Report was that the Suggested Work Plan be approved. Since the meeting of the Subcommittee I have had some discussions with the Privy Council Office to whom I submitted a copy of the tentative Work Plan, and they suggested as well that another section be added to focus more directly on a point which they felt, from their considerable experience, needed a great deal more emphasis. This is the section on the exemptions, there being some eight or nine statutes which are completely exempted from any of the requirements in the Regulations Act. So as a result of this I would propose to add to Part One of the Work Plan a section VI on "Exemptions", making the present Section VI on "Operation" Section VII. Under "Exemptions" I would put in two questions:

A. What is the reason for the exemptions (provided for by the Regulations Act and the regulations thereunder) from the usual requirements of transmission, recording, publication, and laying?

B. What is the character of the regulations made under these exemptions?

SOURCES: evidence from public servants and ministers.

In addition to that, since this document has to go across the whole country to people who might be interested in appearing before us, I would suggest certain revisions in Section I. These are not material, they are really just rewordings, but I will read them to you. In A. and C. I add the question "and why?" and in the other ones I just rephrased the question.

Starting at the top of Section I:

I STATUTORY AUTHORITY FOR DELEGATED LEGISLATION

A. To whom is the power of making statutory instruments delegated and why?

B. Is there any traceable relationship between the decision on this point and the department of government or the minister involved?

On looking this over again during the week it did not seem to me that the original phrasing made clear to those who are not intimately connected with the committee just what was in mind in B. I think it makes it clearer if we illustrate more specifically that we are interested in any subjective link that might exist between the powers granted and the minister or the department involved.

In C, I would add "and why?":

C. What degree of discretion is given to the secondary legislator and why?

Then D rephrased:

D. Is there any traceable relationship between the decision on this point and the department of government or the minister involved?

And to "Sources", I would add to the sources there given:

and evidence from public servants and ministers.

In Section II B we might add the question "In what language?". I would like your opinion on that.

**Mr. Gibson:** Is this under II?

**The Chairman:** This is II B, which now reads:

B. By whom is the actual drafting done?

I was saying that we might add the additional question there, "In what language?". This is a question which was studied by the Royal Commission on Bilingualism and Biculturalism. As we will be obtaining the results of their study I do not think that it will be necessary for us to focus on this very directly. However, I believe that we will have the evidence available from them, so if we wanted to make that part of our study as well I see no reason that we should not. I suppose this is a valid part of the whole question.

• 0950

In III I would like to add another question, the question B, making the present question B question C. The new question B would be:

B. What is the nature of the consultation under that Act

that is the Regulations Act

with the Deputy Minister of Justice?

I have given the Clerk copies of these suggestions and, if they are agreeable, we will change the work plan immediately and distribute it to you in the revised form.

I think that is the limit of my second thoughts on the Work Plan. I was trying to make it more meaningful to those to whom we may be sending it and also to make it a bit more complete by adding those questions.

**Mr. Baldwin:** Mr. Chairman, have you any thoughts about this, as ultimately amended and approved, being made an appendix to the transcript?

**The Chairman:** I think it would be a good idea to have it done that way. I think we would also want to have it mimeographed for distribution.

**Mr. Baldwin:** Yes.

**The Chairman:** Would you suggest this be made an exhibit or appended as an appendix?

**The Clerk:** I would suggest it be made an appendix so it can be printed.

**The Chairman:** I think that is an excellent suggestion.

I take it that it is agreed that the Work Plan, with the variations that I have suggested, s hould be adopted and printed as an appendix to today's minutes.

The next matter of business is the appointment of Counsel. However, we have not yet formally approved the Report of the Subcommittee and the recommendations thereto. Are you agreeable to the recommendations contained in the Report of the Subcommittee on Agenda and Procedure?

**Mr. Gibson:** I move the adoption of the said report.

On motion of Mr. Gibson, seconded by Mr. Murphy, the First Report of the Subcommittee on Agenda and Procedure was approved.

**Mr. Baldwin:** I may say by way of comment that the Chairman has done very well in view of present difficulties to secure counsel and experts who are not already engaged in existing task forces or other bodies. I think he has done very well in the calibre of the people that he has suggested.

**The Chairman:** Thank you, Mr. Baldwin. I was to report on one of those, the Assistant Counsel. I have spoken with Mr. John Morden of Toronto and he is agreeable to serving with us as Assistant Counsel. He was a counsel with the McRuer Royal Commission which canvassed in part the same subject. There is a chapter in its report on this very subject, recommending the establishment of a scrutiny committee in the Ontario Legislature. So Mr. Modern comes to us with some previous knowledge of this area. His name is not in the Report because I had not had an opportunity to speak to him before the Subcommittee meeting to see if he would be interested in the job. But he is interested and I would recommend him to you as our Assistant Counsel.

We will need formal motions on both Counsel and Assistant Counsel. The motion I would suggest in respect of Counsel would be as follows: That, when power to retain the services of Counsel is granted—as it must be by the House—Mr. Gilles Pepin, Dean of the Faculty of Civil Law at the University of Ottawa, be appointed thereto and that he be paid, subject to the approval of Mr. Speaker, at the rate of $200 per day devoted to the work of the Committee.

There would be a similar motion with respect to Mr. Morden, which would read as follows: That, when power to retain the services of Assistant Counsel is granted, Mr. John Morden, Barrister, Toronto, be appointed thereto and that he be paid, subject to the approval of Mr. Speaker, a the rate of $200 per day devoted to the work of the Committee; and that reasonable living and travelling expenses be paid to Mr. Morden.

• 0955

Would someone move that motion in respect of Counsel.

**Mr. Gibson:** I so move.

Motion agreed to.

**The Chairman:** Now the motion with regard to Assistant Counsel.

**Mr. Gibson:** I so move.

Motion agreed to.

**The Chairman:** We do have available to us, on a part-time basis, the services of Mme Henriette Immarigeon who is a lawyer in the Research Branch of the Library of Parliament. She has already done several research papers for us which I think will be of considerable assistance. We will have the benefit of a certain amount of her time during the spring—to the extent that Mr. Laundy can spare her from her other library duties.

I want to discuss with you the questionnaire. There being so many government departments involved was the reason for the recommendation of the subcommittee that we prepare a questionnaire which would then be followed at some later stage perhaps by the presentation of oral evidence by certain departments, or certain ministers or certain public servants. There are probably about thirty or forty governmental agencies and some twenty-five government departments which have the right to make regulations of various kinds, but I think if we were to attempt to call all these before us individually to give an oral presentation, we might find the work of this Committee extended over a period of many years. It seemed reasonable to the subcommittee that we should prepare some kind of questionnaire to send to these departments, and on the basis of this questionnaire, perhaps independently, decide which ones we might want to call orally. Certainly we will want to hear orally from the officials of the Privy Council office and the Department of Justice, who are both directly involved with this matter, although much of the work is done in the departments. I think we will probably have to select from among the departments those we believe will be of more assistance to us.

Would you like to have a meeting of the full Committee when the questionnaire is drafted? I presume the questionnaire will be drafted by our Counsel. Would you like to have a meeting of this full Committee at that point, or would it be agreeable to have the questionnaire approved by the Subcommittee on Agenda and Procedure? Copies are being sent to all members of this Committee, and unless there is some problem or objection we will have authority to send this to the departments at that time. The reason I put it that way is that this may be the only matter on which we would have to meet at that point. If there is no other reason for meeting, perhaps the sending of the copies would be satisfactory, with my undertaking that I would call a meeting if anybody was troubled by anything in the questionnaire.

**Mr. Baldwin:** I want to suggest, Mr. Chairman, that the present meeting give authority to the Chairman and the steering committee to approve a form of questionnaire subject to its first being circulated to members of the Committee so that they may have an opportunity to make representations to the steering committee or direct to the Chairman if certain aspects of the questionnaire, in their opinion, could be reformed or changed. Unless there was any reason for calling another meeting at which this could be discussed, I think this would probably be the better way of handling this.

**The Chairman:** Is this agreed?

**Some hon. Members:** Agreed.

• 1000

**The Chairman:** It seems to me it might be appropriate if the Clerk were to acquire for all of us copies of these two volumes which are about the only significant matters available in this area. One is the book by Kersell, *Parliamentary Supervision of Delegated Legislation,* which surveys a number of countries. The other is the report of the *Committee on Ministers Powers* in Great Britain. I do not know if copies of these are available, but alternatively we could have them photocopied, although I suspect that it is just as cheap to buy the books as it is to have something of this size photocopied.

I do not know if we need a motion for that. We might authorize the Clerk to bring us such material as may be necessary for the work of the Committee. I suppose we would need copies for the Counsel and the Clerk. We would need about 15 copies of anything we were able to obtain. May I have a motion on that?

**Mr. Marceau:** I move that the Clerk of the Committee be authorized to purchase, for the use of the Committee, 16 copies of the following books:

—PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION—The United Kingdom, Australia, New Zealand and Canada. By John E. Kersell.

—COMMITTEE ON MINISTERS' POWERS—Report presented by the Lord High Chancellor to Parliament by Command of His Majesty, April, 1932.

Motion agreed to.

**The Chairman:** The only other matter that I would like to mention is that, as I suggested earlier, a report is shortly to be published by the Royal Commission on Bilingualism and Biculturalism which will deal with the problem of languages in the law, and a part of this study, which was by Mr. Claude Armand Sheppard of the Montreal Bar, is devoted to language in statutory regulations. I have discussed this with the Royal Commission office and I am hopeful of being able to get copies of this report for all of us. I understand it will be printed before too long, but that we might get copies in advance. Mr. Sheppard himself used a questionnaire to elicit material from the various departments. I would hope that we could get the actual questionnaire results so that we would have them at the time we were preparing our questionnaire and this might be some guide to us as to what further questions we might want to ask. The focal point of this study was, of course, quite different from ours, but still he did gather much of the basic material in which we are interested. I think that his study should be of some help to us.

If there is no other business a motion for adjournment would be in order.

**Mr. Murphy:** I have one more question, Mr. Chairman, which I probably should have asked before. As a newcomer here, what is the significance of getting permission for this Committee to sit during periods when the House stands adjourned? Is there a suggestion that this Committee might be sitting during the summertime?

**The Chairman:** It is, of course, subject to the approval of this Committee when it sits, but this gives us the power to do so if we want. This is a power which the standing committees automatically received under the new rules. We are in effect asking for the same power which the standing committees have, so that if, during the week of Easter recess, for example, we decide to have a day's hearings, we would have the power from the House to do that.

**Mr. Baldwin:** There is another point, Mr. Chairman, which we discussed at the steering committee meeting. Under the new rules standing committees, to use the quaint language in the rules, endure from session to session, but a special committee is functus officio and ends. There was some suggestion in the procedure committee that we might follow the United Kingdom practice of not proroguing at the end of June or the beginning of July, but rather simply have the House adjourned until a day or two before the new session opens and the Speech of the Throne is read, so that a committee such as this could sit, and reports, as a matter of fact, could be received. Otherwise our Committee passes out of existence at prorogation because it is a special committee. I do not know what will happen, but this is something to bear in mind. I personally would like to see, certainly, a preliminary report giving some views as to what we have in mind and at least recommending that we be reinstituted at the beginning of the new session. That is one of the reasons I think the language is along these lines.

**Mr. Murphy:** Thank you, Mr. Chairman and Mr. Baldwin.

**The Chairman:** It occurs to me that it would probably be helpful to us if we sent a copy of this work plan to all the university departments of political science and of law in the country and invited submissions to our Committee from anybody who might be interested in appearing before us. On this basis I would suggest that they be required to make some kind of advance written submission to enable us to judge whether or not we

want to hear them. I would not want to give carte blanche to any academic in the country who wanted to come to Ottawa to automatically have the right to appear before us.

• 1005

Are there any other groups that we should circularize by way of asking for assistance?

I suppose we could write to the law society in each province to invite members or anyone on their behalf to make submissions to us.

A motion for adjournment would be in order.

**Mr. Murphy:** I move that the meeting be adjourned.

Motion agreed to.

## APPENDIX "A"

SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

Documents distributed to members of the Committee

Delegated Legislation—prepared by the Research Branch, Library of Parliament, November 2, 1966 (with following enclosures, listed on last page of document):

Extract from Delegated Legislation—Recent changes in Machinery. Article published in Canadian Public Administration —J. E. Hodgetts and D. C. Corbett (The MacMillan Co.—1960)—pp. 504-514.

From Baldur Kristjanson. Some Thoughts on Planning at the Federal Level. CANADIAN PUBLIC ADMINISTRATION. Vol. 8, No. 2, 1965 pp. 146-151.

E. A. Driedger. THE COMPOSITION OF LEGISLATION. Ottawa, Queen's Printer 1957. pp. 146-151 Chap. XVII, Delegated Legislation.

REGULATIONS ACT 1950.

Subordinate Legislation—Special lecture given to the law students at Queen's University, Kingston, on October 26, 1959, by Elmer A. Driedger, Q.C., B.A., LL.B., Assistant Deputy Minister of Justice, Ottawa, and Lecturer in Legislation and Administrative Law at the University of Ottawa Law Faculty.

Recommendations to the Governor in Council—Orders in Council Section, Privy Council Office.

Reading List—October 2, 1968.

Reading List—October 3, 1968.

Legislative Review of Delegated Legislation—Mark MacGuigan.

Delegated Legislation in the U.S.A.—prepared by the Research Branch, Library of Parliament, January 9, 1969.

Copy of letter from Mr. G. S. Rutherford, Revising Officer, Legislative Building, Winnipeg, Manitoba, to Mr. Mark MacGuigan, M.P.—dated January 8, 1969.

Copy of letter from Mr. MacGuigan to Mr. Rutherford—dated January 16, 1969.

Suggested Work Plan—Projet de programme des travaux.

## APPENDIX "B"

SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS WORK PLAN

PART ONE: STUDY OF THE PRESENT SYSTEM

I STATUTORY AUTHORITY FOR DELEGATED LEGISLATION

A.—To whom is the power of making statutory instruments delegated and why?

B.—Is there any traceable relationship between the decision on this point and the department of government or the minister involved?

C.—What degree of discretion is given to the secondary legislator and why?

D.—Is there any traceable relationship between the decision on this point and the department of government or the minister involved?

SOURCES: Accurate answers to these questions will necessitate a complete survey of the statutes of Canada, and evidence from public servants and ministers.

II DRAFTING OF STATUTORY INSTRUMENTS

A—Who makes the decision to draft instruments and why?

B.—By whom is the actual drafting done and in what language?

C.—To what extent is the plenitude of power conferred by the statute utilized?

SOURCES: Evidence from public servants and ministers, and for question C a comparison of statutes and instruments.

III SCRUTINY OF INSTRUMENTS

A.—What scrutiny is given by the Clerk of the Privy Council under the Regulations Act?

B.—What is the nature of the consultation under that Act with the Deputy Minister of Justice?

C.—What scrutiny is given by the Minister of Justice under the Bill of Rights?

SOURCES: Evidence from public servants.

IV ENACTMENT OF REGULATIONS

A.—By the Governor in Council

B.—By Ministers or other persons

C.—What regulations must be laid before Parliament and why?

D.—In what circumstances are other regulations laid before Parliament?

SOURCES: Evidence from public servants and ministers, for question C a survey of statutory requirements for laying, and for question D the parliamentary record.

V PUBLICATION

A.—What regulations are published?

B.—Who decides what is published?

C.—How can the published regulations be categorized?

D.—Is any public scrutiny possible of unpublished regulations?

SOURCES: Evidence of public servants, and a complete survey of all published regulations.

VI EXEMPTIONS

A.—What is the reason for the exemptions (provided for by the Regulations Act and the regulations thereunder) from the usual requirements of transmission, recording, publication, and laying?

B.—What is the character of the regulations made under these exemptions?

SOURCES: Evidence from public servants and ministers.

VII OPERATION

A.—What administrative scrutiny is there of the operational effect of statutory instruments?

B.—To what extent is judicial review likely?

C.—To what extent is judicial review of delegated legislation excluded by statute?

SOURCES: Evidence of public servants, a study of the relevant law, and a survey of the enabling statutes.

PART TWO: THE EXPERIENCE OF OTHER COUNTRIES

The studies in this part might be conducted under the same headings as in Part One, with the addition of a section on Legislative Supervision. The most rewarding systems for study would appear to be Great Britain, Australia, New Zealand, the United States and a Scandinavian country.

PART THREE: PROPOSALS

At this point the Committee will have to decide the following questions:

I—Is there any need for different delegating, drafting, enacting or publishing procedures for statutory instruments?

II—Should there be some scrutiny of delegated legislation by Parliament?

III—If so, which Chamber of Parliament should perform the task?

IV—If it is the House of Commons, should the reviewing body be a new standing committee for that purpose, an existing standing committee, or a parliamentary counsel or clerk reporting either directly or indirectly to the House?

V—What criteria should be employed in passing judgment upon statutory regulations?

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 2

TUESDAY, APRIL 22, 1969

*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

WITNESSES:

(*See Minutes of Proceedings*)

29815—1

SPECIAL COMMITTEE
ON
STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

Baldwin,
Brewin,
Forest,
Gibson,
Hogarth,
[1] McCleave,
Muir (*Cape Breton-The Sydneys*),
Murphy,
Stafford,
Tétrault—(12).

(Quorum 7)

Fernand Despatie,
*Clerk of the Committee.*

Pursuant to S.O. 65 (4) (*b*)—

[1] Replaced Mr. McIntosh on April 21, 1969.

## ORDER OF REFERENCE

MONDAY, February 17, 1969.

*Ordered,*—That the Special Committee on Statutory Instruments be empowered to sit while the House is sitting, to sit during periods when the House stands adjourned, to delegate to subcommittees all or any of the powers of the Committee except the power to report direct to the House; to retain the services of Counsel and Assistant Counsel.

*ATTEST:*

ALISTAIR FRASER,
*The Clerk of the House of Commons.*



29815—1½

[*Text*]

# MINUTES OF PROCEEDINGS

TUESDAY, April 22, 1969.
(3)

The Special Committee on Statutory Instruments met at 9:55 a.m. this day. The Chairman, Mr. MacGuigan, presided.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave, Stafford—(8).

*Also present:* Mr. John Morden, Assistant Counsel to the Committee; Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness:* Professor H. W. Arthurs, Associate Dean, Osgoode Hall Law School, Toronto.

The Chairman gave a progress report on activities since the previous meeting. He mentioned particularly the Committee's work plan, the questionnaire pertaining to practices in the drafting of statutory instruments and the calling of witnesses.

On motion of Mr. Marceau, it was

*Agreed,*—That the Committee's questionnaire be printed as an appendix to this day's Minutes of Proceedings and Evidence. (*See Appendix C*)

On motion of Mr. Gibson, it was

*Agreed,*—That the second list of documents distributed to members of the Committee be printed as an appendix to this day's Minutes of Proceedings and Evidence. (*See Appendix D*)

On motion of Mr. McCleave, it was

*Agreed,*—That reasonable travelling and living expenses, and a "per diem" allowance of $50 be paid respectively to Professors H. W. Arthurs, C. L. Brown-John, J. R. Mallory and A. S. Abel, who are to appear before the Special Committee on Statutory Instruments.

The Chairman introduced Professor Arthurs, who made a statement concerning the question of regulations. The statement covered the following aspects of the subject: mandate for regulation-making; procedure by which regulations are made; who should make regulations; review of regulations; publication and consolidation.

Following his statement, the witness answered questions.

The Chairman thanked Professor Arthurs for his appearance before the Committee.

At 11:35 a.m., the Committee adjourned to 3:30 p.m. this day.

AFTERNOON SITTING
(4)

The Special Committee on Statutory Instruments met at 4:08 p.m. this day. The Chairman, Mr. MacGuigan, presided.

*Members present:* Messrs. Baldwin, Gibson, MacGuigan, Murphy, Stafford—(5).

*Also present:* Mr. John Morden, Assistant Counsel to the Committee; Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness:* Mr. C. L. Brown-John, Assistant Professor of Political Science, University of Windsor.

The Chairman introduced Professor Brown-John, who made a statement wherein he expressed opinions concerning the question of delegated legislation. The witness gave examples of authorities delegated by Parliament and made comments on this subject; he also made comments regarding the following documents, copies of which were distributed to the members of the Committee:

STATISTICAL SUMMARY;
SOR/51-197;
SOR/53-35;
SOR/53-111.

Professor Brown-John made certain recommendations; he elaborated his proposal concerning a committee on statutory instruments.

It was agreed to supply the members of the Committee with the following documents submitted by the witness:

PROPOSED COMMITTEE ON STATUTORY INSTUMENTS; PARLIAMENTARY SUPERVISION OF DELEGATED LEGISLATION IN CANADA—APRIL, 1962—C. L. BROWN-JOHN.

Professor Brown-John answered questions.

The Chairman thanked the witness for his appearance before the Committee.

At 5:45 p.m., the Committee adjourned to the call of the Chair.

Fernand Despatie,
*Clerk of the Committee.*

## EVIDENCE

*(Recorded by electronic apparatus)*

**Tuesday, April 22, 1969**

• 0955

**The Chairman:** Gentlemen, I see an adequate quorum for the taking of evidence and so I propose that we begin at this point.

We do have some motions which perhaps could be put later when a fuller quorum is present.

May I first give you a very brief progress report. The work plan, as I believe you know, has been sent out to all the law schools and departments of political science across the country. We have also written to all the law societies in all of the provinces of Canada and to the Canadian Bar Association in each province, inviting all these groups to make submissions to us on our subject matter.

We have had replies from many of these bodies, most of them indicating that no submissions will be made. However there are indications that at least a number of these bodies will want to appear before us to make submissions.

We have of course completed the questionnaire and it is now in the hands of 120 government departments, agencies and corporations. I understand that returns have already begun to come in, although I expect that it will probably take us until about the middle of May before we have anything like full response to our questionnaire.

I had a letter from one minister saying that he thought it might take two months to answer the questionnaire. I hope that is not typical but I do believe it will certainly involve at least three or four weeks of considerable work by most of the government bodies. Therefore we will just have to wait until the departments are able to prepare the questionnaire in a satisfactory form for us. I think the answers are being collated by the Privy Council office and will be presented to us through their office.

Your steering committee has agreed on the calling of certain witnesses. We will have another witness this afternoon in addition to the one we have this morning. On Thursday, because of the air strike, our witness had to cancel out. Therefore our next meeting after today will be on Tuesday of next week. From that time on we will probably be meeting most Tuesdays and Thursdays at least until we have gone through our list of prospective witnesses.

Unless there are questions, I will proceed immediately to introduce our witness this morning and to allow him to make an opening statement, which will be followed by questions and discussions.

Are there any questions on the Committee's progress up to this point?

It is a great pleasure to have with us this morning Professor H. W. Arthurs, Associate Dean and a Professor of Law at Osgoode Hall Law School. His area of academic interest is administrative law and labour law, both of which richly qualify him to give us his assistance with respect to our subject matter. He is Vice-President of The Canadian Civil Liberties Association; he was previously special counsel to the Labour Safety Council of Ontario and also formerly chief adjudicator for the Public Service of Canada. He has experience in the preparation of draft legislation and regulations for both the Ontario and federal governments. I think it is quite safe to say that Professor Arthurs is one of the outstanding law teachers of this country and we are very pleased to have him with us this morning as the first witness before this committee.

**Professor Arthurs:** Thank you very much, Mr. Chairman.

I must say that despite the rather spurious list of qualifications I prefer to appear before this Committee, if you do not mind, as a consumer of regulations, as a member of the public rather than in the true sense of an expert witness because I stand in considerable awe of the experience represented on this Committee. I think amongst all the parties

there are gentlemen who know a good deal more about the system of government than I do and whose expertise I respect mightily. Of course I know that you have available to you the very great assistance of the public service, the Department of Justice and the various departments and agencies that you will be going into. So I would prefer in a sense to be on the outside looking in for purposes of my testimony and to indicate to you how perhaps someone who is slightly more than the average newspaper reader, but not very much more, sees the problem that I understand you are concerned with.

That problem of course is basically the problem of the degree to which Parliament itself must assume responsibility not only for articulating policy but for filling in the details of that policy in the manner of its implementation.

Now let me declare my position at the outset. It will be my respectful submission that there ought to be the broadest possible mandate for regulation-making, as we normally call it, and that Parliament ought to confine itself so far as possible to the announcement of broad policy lines within which that regulation-making shall operate and to scrutiny of the regulations once made, by means which I hope to suggest. Saying that, I realize that I fly in the teeth of a good deal of the current concern with bureaucracy, with hippie power in government, will all the other sinister influences which are thought to lie athwart the rights of the citizen. I want to suggest that while in strict theory all law of course must be made by the legislature, while in strict theory judicial and quasi-judicial bodies merely interpret and apply the law, while in strict theory Ministers and other lower-level administrators simply execute instructions given by Parliament, it is time to recognize that this theory does not, cannot, and indeed should not accord with actual practice.

There are many important reasons in my view why so-called subordinate legislation must be enacted and I propose now to canvas these reasons.

I suppose at the head of the list is the fact that Parliamentary time is at a premium and should therefore be reserved for doing what Parliament does best, namely to debate issues of great public importance at the level of principle and of policy rather than at the level of detail. It follows from the nature of the debate in Parliament, the kind of debate that informs the public, that attracts and engages the attention of the public...

**An hon. Member:** Have you ever been there?

**Professor Arthurs:** At least as reported in the newspapers. But let me respond to that. It seems to me that the amount of public interest is more or less in direct proportion to the degree to which the debate focuses on the kind of issues which are intelligible to the public and that the minutiae of administration are not such issues, with all due respect. The minutiae are not really the kinds of issues which are going to attract public attention. It seems to me therefore that legislation should be drafted broadly so as to highlight that kind of issue—the policy issue—and that questions of detail should be left to be filled in afterwards by those who are best technically equipped to do so.

Secondly, it seems to me that certain very significant legislation may come to be enacted without full knowledge of the social facts of the matter being legislated upon or of the full implications of legislation. Perhaps, for example, some harm to the public interest is sought to be eradicated, the harm may be obvious but not its causes, the causes may be obvious but not the cure, and yet the decision has to be taken to deal with the problem. Now three alternatives exist in that kind of a situation. Firstly, it is possible to assume that certain facts exist and then to go ahead and enact detailed legislation. Of course if it turns out that those factual assumptions were accurate no harm is done. If it turns out that they are inaccurate you are potentially into a very serious and dangerous situation in which the legislation might turn out to be entirely inappropriate and unworkable. So that one can go perhaps to the other extreme and say that the thing to do is simply to go ahead and in fact license decision-making by a Minister or by some administration tribunal on a *ad hoc* basis so that the decision can be made in context and as time goes on the Minister or the administrative tribunal presumably becomes better and better informed and the decisions that are made are more and more responsive to the particular problems as they come forward. However, here we encounter I think a very justifiable concern by those that have to comply with these decisions, that have to appear before the tribunal or make submissions to a Minister on a particular case —they have to know what the rules of the

game are so that they can govern their own conduct accordingly. Moreover, to deal with these important social problems on the basis of a series of *ad hoc* decisions inevitably leaves substantial areas about which no rule at all has been proclaimed because the problem has not yet come up for decision. So that I suggest really the third alternative, the alternative of subordinate legislation, which is in many ways the happiest one when we are confronted with a situation in which we do not know what all the facts are and cannot know what all the facts are until we swing into the whole process of regulation. It seems to me that licensing the making of subordinate legislation of regulations by some appropriate and knowledgeable person within the broad policy framework established by Parliament escapes the excessive rigidity of the first alternative I outlined and the excessive vagueness of the second. Yet it does enable the administrator or the Minister, whoever it is, to conduct serious research into altering the rules, with due advanced warning, as it appears that they ought to be altered on the basis of experience, as more and more facts come to the surface, as they begin more and more obviously to form a pattern. It seems to me that the real choice that confronts us is not between my first and third alternatives, not between detailed legislation and regulation-making but between ad hoc decision-making and regulation-making. It seems to me that no statute can be drafted so carefully and completely as to avoid the necessity for further elaboration either by process of *ad hoc* decisions—case by case decisions—or by a process of making regulations. That is the genuine choice that confronts us, given the realities of Parliamentary time, given the difficulty often of ascertaining the social facts of making an intelligent estimate of the kinds of solutions that are needed to problems which are only half perceived at the time the decision is made to begin to solve them.

Thirdly, and perhaps associated with this point, we often encounter a need to regulate fields of activity which are of a technical or scientific nature. So that while Parliament is able to specify the general objectives which are to be achieved it really cannot meaningfully discuss the substantive details of the regulation. These details must be worked out on the basis of technical and scientific advice after consultation with experts and must be stated in terms which are intelligible to experts, which use appropriate scientific or technical terminology, and by providing for the participation of experts in the scientific and technical sense in the announcement of rules. In this way it seems to me that the actual quality of rule is likely to be improved both from the public point of view and from the point of view of those who are being regulated.

Next we have those situations where the field of activity being regulated may be and perhaps must be of a particularly fluid nature so that the rules are able to shift in response to shifts in the economy, in technology or in the new scientific developments. Take certain regulations dealing, for example with the marketing of drugs. It would be impossible to continually amend legislation to specify all of the hitherto undreamed of drugs which might appear on the market. More and more developments take place not merely by reason of their scientific nature but by reason of the fact that there is a constantly changing situation. It must be possible to continually match the rule to meet the problem. Now this can only be done, it seems to me, if someone below the level of Parliament itself is able to announce the rule and to announce it with a fair degree of speed as well as technical competence.

Another significant point I think is that the content of a rule or a regulation may be predicated upon the views of those who are being regulated and it is therefore necessary to adopt a form of law-making which facilitates the expression of those views from time to time. Participatory democracy, if you like, at a fairly sophisticated level is something I think that everyone is concerned about—the necessity, for example if we were regulating broadcasting, of having the intelligent expression of views about desirable policy as well as, say, the technical problems to be encountered in order to formulate the rules, not simply so that the rules will be better but so that those people who are governed by the rules will come to feel that they have a stake in them, will come to feel that they are responsive to the actualities of the industry and of the social situation which is being regulated. Now, again, certain details of administrative schemes, particularly those which are of a procedural or a housekeeping nature, may be unworthy of the attention of parliament or sufficiently non-controversial to justify enactment without direct parliamentary intervention or supervision.

Finally, and as a broad point, it does seem to me that legislation should be reasonably simple, reasonably easy to read and of a long-lasting or permanent character. Each of these qualities is diminished to the extent that more ephemeral matters are dealt with by legislation or to the extent that legislation incorporates mere details without any great substantive significance.

For all of these reasons it is highly desirable that substantial opportunity be given to appropriate individuals and bodies to make regulations, to make rules, many of which will have significant impact on the procedural and substantive rights of citizens.

It seems to me that the problems confronting this honourable Committee are thus not to diminish the scope within which regulations or subordinate legislation are permitted to operate but rather to ensure that in the operation and in the processes of enactment there are adequate safeguards and opportunities for an ultimate debate about policy issues in the public forum and for full knowledge by those whose conduct is being regulated of the rules to which they are expected to conform.

My conclusion then, to restate it, is that we must give reasonable scope for the making of regulations, that we must give instructions to those responsible for making the regulations —which are as precise as circumstances permit but not so precise that unknown and unanticipated problems cannot be dealt with.

Let me turn now to the procedure by which regulations, in my view, ought to be made. I have already touched on the need that ought to be afforded for participation in the regulation-making process by those who are subjected to the cutting edge of the regulation. To the extent that a statutory order or instrument may be aimed specifically at a particular individual or a particular group, elementary principles of fairness seem to me to demand that an opportunity be given to that person or group to be heard. Now this opportunity may be afforded by informal consultation, by an invitation to submit a brief, or by a full-dress public hearing, but need not be in the form of a formal hearing. In some cases at least such participation must follow rather than precede the promulgation of an order or a regulation, because of the potential for great damage to the public interest which would occur if the regulation were withheld until all the consultative mechanism had been exhausted. On the other hand, as a general matter of principle, participation by the governed in the processes of government is likely to enhance the effectiveness of the regulatory scheme. And as a corollary, the sudden and unannounced emergence of a regulation affecting the lives or livelihood of individuals and groups is likely to produce in them a feeling of resentment and antagonism and an unwillingness to abide by the policies and practices proclaimed in the regulation. Now, obviously, we cannot universalize here because it really depends on the time, the people, the complexity and so on.

One further point deserves consideration. Both legislation and subordinate legislation or regulations are not in my view mere collections of words but are rather the embodiment of value judgments based upon experience and familiarity with the subject matter. I therefore have great reservations about the philosophy—which in my view occasionally appears in the Department of Justice—that draftsmanship is a pure science. While I immediately concede the need for participation by skilled draftsmen, both as to form and content, I am very anxious that statutory instruments should capture the flavour of the milieu in which they are intended to operate. Thus it follows that a predominant influence in the actual drafting of regulations ought to be the department or agency charged with the task of administration. I would add that where members of the public are involved closely and directly with the administration, as for example in the labour relations field and the immigration field, particular care should be taken to frame regulations in non-technical and easily understood language so that the citizen who is faced with the task of coping with that regulation can in fact do something intelligent to secure his own interests.

Let me pass on to the question of who should make regulations. Obviously the answer to some degree depends on the type of regulation. Rules relating to procedure or housekeeping, I think most people would agree, can and should be made directly by the department or agency involved. Where the regulation relates to substantive policies we look to a process of regulation-making at a fairly high level, perhaps by an independent regulatory agency such as the Canada Labour Relations Board or by Cabinet itself, depending on where in the particular case authority for formulating the policy resides. If the structure deemed appropriate is to

keep policy-making within the purview of Cabinet then obviously Cabinet must assume responsibility for making that policy by announcing it in the regulation. If on the other hand it is felt more appropriate, as indeed it is in some cases, perhaps broadcasting would be an example, to simply give a fairly broad mandate to and independent agency, an expert agency, then that of course is the appropriate location for the making of the regulation. But I do stress here that one should be careful not to thwart the implementation of important public regulatory schemes because of busy Cabinet agenda, especially where no policy issues are involved. And so I suppose my tendency would be to look with some degree of concern at too great a thrusting of the obligation of making regulations onto the Cabinet.

I come next to what I consider to be perhaps the most useful part of this exercise, the review of regulations. Obviously, review may be undertaken for different purposes and therefore requires different procedures. A review for example may have as its objective the simple purpose of collection. How can we make sure that we have all regulations relating to a particular subject matter in hand? Here I think someone who might be termed a registrar of regulations, someone whose function is essentially a clerical one but one requiring considerable care and sophistication can safely be given the job of review in the sense of ensuring the completeness of a code of regulations. If we are concerned about review for the purpose of ensuring intelligibility, internal consistency, linguistic sophistication of the regulation, then here again I think we can give the job either to someone we might call a registrar of regulations or even to some branch of the Department of Justice. And I do not think there are any great issues involved in these purely technical matters which ought to be done before the regulations take effect.

But if we are concerned about review for some such purpose as to see that the regulations do not offend the Bill of Rights or otherwise unduly infringe upon principles of fairness, this obviously requires a much higher level of review. I think we have in many countries some scheme for direct review by the legislators or by some committee of legislators. In my submission, simply to establish a routine procedure for the tabling of some or all regulations either before the House or before a committee of the House does not quite meet the problem.

First of all, if review is to be effective it seems to me there must be some professional staff placed at the disposal of those who are charged with the obligation to review—someone whose job it is to give very careful scrutiny to the regulations, someone who can make significant inquiries as to the actual operation of the regulations, someone who can record how those regulations do reflect in a technical way policies embodied in other statutes or in great constitutional principles.

Secondly, it is very important to see a problem in context. A great American administrative law scholar once said that one man's due process is another's red tape. I think what he intended to convey was that you cannot really evaluate even the degree to which a particular procedure adopted in a regulation infringes upon some such basic policy as due process, as fair procedure without seeing it in the life context, without knowing whether or not it is possible to give more or less opportunity to be heard—for example to someone who is appearing before an adjudicative body in a situation in which events move very rapidly, to take but one example. So whether process is due, even that central principle must reflect the social and economic and often psychological facts which are being dealt with by the regulatory procedures.

What if a reviewing committee, for example, should decide that the regulation violates one of these great Constitutional principles or in some other way is offensive to a large degree? It seems to me that if an appropriate committee does formulate the view that there is such a defect in the regulations, it ought to be permitted to table in the House a report indicating its objection to the regulation and the defence of the regulation advanced by those who have made it, and the matter ought to be brought as a special matter to the attention of the legislators and appropriate opportunity afforded for debate.

Of course, this is not likely to be effective very often because the real unfairness often does not appear unless you know something about the particular area of life which is being regulated. Indeed sometimes unfairness may falsely be made to appear if you consider a regulation in the abstract and not in context. So that, I would tend not to favour a so-called watch dog committee whose sole

function is to consider regulations, but so far as possible I would favour scrutiny of regulations by the various standing committees of the House which are concerned with different subject matter areas, such as transportation, or labour, or some of the other specialized committees of the House who could see the problem in context.

Again, because of the infrequency of sittings, it does seem to me that regulations ought to take effect when they are made, subject to impeachment, subject to attack by the procedure that I have indicated, because we really cannot have the whole regulatory scheme awaiting the perhaps distant date at which a committee can be assembled, especially if the House is not sitting, in order to bring in important public business. So far as possible I would favour the taking of effective regulations subject to their being scrutinized and, if seriously objected to, laid before the House and debated.

I may say in this connection that although scrutiny by the Minister of Justice, a learned gentleman with many other learned gentlemen at his disposal, is undoubtedly helpful, it is not, in my view, the answer to all of our problems. The Minister obviously has his own axe to grind in these matters. He is obviously concerned with many other matters including the reputation of the government, of which he is a member, and I do not view this as a significant contribution to ensuring the appropriateness and fairness of regulations.

It may be also very important to determine whether or not the regulation changes or initiates the policy in this particular field of activity—immigration or labour or whatever. You often cannot tell very much by reading the legislation as to what the policy is supposed to be, and you therefore have to look at really what are the operative policy rules expressed in the regulations. These can most appropriately be done again by standing committees of the House concerned with subject matter, concerned with this field of human activity or economic activity and by exposing what are really the effective policy decisions announced in regulations and not in the legislation, the scrutiny of the such committees, it seems to me the major objective will best be served.

Finally we come to court review. I do not think court review is a very practical consequence and, to the extent that it is, it is largely undesirable. Obviously we cannot prevent a court from finding that regulations do not fall within the scope of an act. That happens from time to time. It often, it seems to me, happens in situations where the court is not sensitive to the nuances of the regulatory scheme, indeed may be unsympathetic to the whole purpose of the scheme and may by a literal-minded process of interpretation seize the occasion to strike down some very valuable scheme.

Many times, if one wants to look at it from the other point of view, it is not a question of the court being too eager to intervene, but of there being no real way in which the court's attention can be attracted because no-one has standing to complain to the court that a particular regulation, a particular policy, is somewhat offensive, either procedurally or in substantive terms since no-one has a personal grievance or an injury which is different from that suffered by the public as a whole. In that sense, if one is intervention-minded, the court route does not seem to me terribly promising.

Let me come then in my final moment or two to the question of publication and consolidation. I put aside statutory instruments which bear narrowly on an individual or a small group. It ought to be possible to bring the regulation to the attention of that individual or group by serving it on him personally and, indeed, that is certainly a recognized principle in many statutes which govern the taking of effect of statutory instruments. A person who has personal notice that a regulation has been passed is bound by it. However, so far as statutory instruments having the effective of rules which govern the conduct of the public or a broad sector of the public is concerned, I think it is undisputable that these should be published; I think it is indisputable that they should be freely available for inspection, and I do underline this, at the time and place at which they are being applied. Here customs and immigration may be two notorious examples of the failure to make regulations freely available to those who are being subjected to them, limiting the appropriate time and place, unless there is some very special reason why they are not so made available.

Finally, I repeat a point that I have made: regulations should be intelligible to the person affected by them. The pure science of regulation drafting, so prized in certain circles on the Hill here, in my view ought to give

way to intelligibility. There is no more important principle than intelligibility when you are dealing particularly with laymen.

I think also there is no more important principle in aid of intelligibility, besides the actual selection of words, than the consolidation of words, the review of the random regulations made from time to time and pulling them together in some coherent and collected form. There are lots of solutions to this problem which have been adopted by private publishers, some of them occasionally resorted to by the government. There is the obvious expedient of periodic consolidation. How periodically things are consolidated or ought to be consolidated is perhaps a matter of debate. I, for example, do not consider consolidation of the *1948 Revised Statutes of Canada* at some date subsequent to 1969 as being quite periodic enough for my taste, but I can see that tastes may differ in this regard. That is the classic way of bringing together regulations and legislation. There are more up to date methods such as loose leaf services which are put out by many private law publishers and people in other lines of endeavour where there is a need to up-date and consolidate. I see no reason why that expedient could not be used.

There is, of course, the wave of the future: computerized retrieval. I could envisage ultimately a situation in which there are a number of local routes into a central computer bank which contains all of the regulations promulgated by the various departments and agencies of government, so that someone administering those rules in Toronto or Vancouver or Quebec City or Halifax could, by means of a fairly simple dialogue with this mechanical monster, obtain a definitive answer to the question, "What rules govern the situation?", and an answer, again, and I conclude on this note, which is equally accessible to the citizen.

I cannot think of anything more important and more likely to give rise to genuine concern about the process of regulation making within government than the denial to citizens of free and full access to the rules that are made. Thank you, Mr. Chairman.

**The Chairman:** Thank you very much, Professor Arthurs for a most intelligent and intelligible presentation.

Before we proceed to questions, now that we have a full quorum and in fear that some of you might have to leave for other committees at 11 o'clock, I want to suggest the consideration of two or three motions which are appropriate at this time and which the Clerk has prepared. The first of these is a motion with respect to printing the questionnaire which we circulated to the government departments. I suggest it be moved that the Committee's questionnaire pertaining to practices in the drafting of Statutory Instruments be printed as an appendix to this day's *Minutes of Proceedings and Evidence.*

**Mr. Marceau:** I so move.

Motion agreed to.

**The Chairman:** The next is a motion with respect to the printing of the second list of documents distributed to members of the Committee. This motion might be that the second list of documents distributed to members of the Committee be printed as an appendix to this day's *Minutes of Proceedings and Evidence.*

**Mr. Gibson:** I so move.

Motion agreed to.

**The Chairman:** The final motion is with respect to travelling and living expenses and per diem allowances for a number of the witnesses, including Professor Arthurs. Four witnesses that we have had, up to now, arranged to come before us. One of these, Professor Abel, was to appear on Thursday but he is unable to be with us now because of the air strike. However, we will make arrangements for him to appear before us again as soon as we can.

**Mr. Stafford:** Will that be at the rate of 7 cents a mile or 12 cents like the Deputy Minister?

**The Chairman:** Well, I do not know what the formula is for this, Mr. Stafford, but it is not spelled out in the resolutions.

**Mr. Baldwin:** Can you find that adjustment in the regulations, Mr. Chairman?

**The Chairman:** I hope there is a statute authorizing it somewhere; maybe we should investigate that, but we had better pay the witnesses first.

This motion is that reasonable travelling and living expenses and a per diem allowance of $50 be paid respectively to Professors H. W. Arthurs, C. L. Brown-John, J. R. Mallory

and A. S. Abel, who are to appear before the Special Committee on Statutory Instruments.

**Mr. McCleave:** I so move.

Motion agreed to.

**The Chairman:** Now the meeting is open to questions. I am sure that our counsel, Mr. Morden, who is here will have some questions, but I will hear first from any Committee members who might want to comment. Our other counsel, Dean Pepin, was not able to be with us today because of the press of university business. Mr. Brewin?

**Mr. Brewin:** Mr. Chairman, I found one thing in Professor Arthur's presentation that seemed to me particularly interesting and worthwhile. It was the suggestion that these statutory regulations be reviewed by the appropriate standing committees, rather than by some special group assigned to them. I was wondering whether Professor Arthurs had given any thought to the machinery of that. Would there be some sort of automatic reference to the appropriate committee? One of the troubles in the past, as I understand it, is that committees usually only function in respect to matters referred to them and a lot of things do not get referred to them. For instance, take the field of immigration; I think all immigration regulations passed by order-in-council should go before the Standing Committee on Manpower and Immigration which does exist. However, both the problem of getting it to them and then the later problem of their reports being debated and acted on seem to me to arise out of that. Have you any particular thoughts about how that would work out?

**Professor Arthurs:** Even from the distance of Toronto, Mr. Brewin, it is obvious there is some controversy about the role of committees under the new rules of the House and what their destiny ultimately is. I do not want to embroil myself in that particular controversy, but I see two particular ways in which these regulations might come under the scrutiny of such a committee.

I think even within the context of the present understandings of the functions of committees, it would be a very salutory principle that there ought to be periodic review of legislation and of regulations made under legislation, at least of the major statutes which govern the subject matter areas with which the committees are concerned. I am talking about every five years or seven years or some such reasonable period of time, so that it is possible to evaluate the working out of a policy and, necessarily, to scrutinize in policy terms now, the regulations that have been made since the last periodic review.

I visualize a full-scale look at what has happened, say, in the field of manpower policy; what has happened in the field of broadcasting policy; whatever it happens to be. As part of that necessarily a matter of bringing together the regulations and evaluating them in policy terms. However, that is, I think, a less frequent kind of review than what I was really putting my mind to.

What I had in view was this: I hope and I expect that the movement now is towards committees which acquire considerable familiarity with the subject matter to which they are assigned. I see this as moving toward a situation in which regulations are routinely circulated to those people assigned to that committee, if they effected its business; they would, as part of their on-going process of educating themselves, of keeping themselves au courant in relation to the matters with which they are dealing, scrutinize those as private members and as members who are concerned with that area of government. Then I hope that we would ultimately reach a stage in which a concerned member of the committee, or some appropriate number of concerned members of the committee could have a committee debate on a regulation deemed to be of importance. I do not envisage the committee sitting around engaging in a kind of public reading of all regulations. I do visualize all members of the committee as receiving these on a continuing basis and of being able to provoke a debate, shall I say, by some appropriate procedure.

**Mr. Brewin:** Also, would it not be possible, if the committees had charge of these regulations, to involve the process of what I think you call participatory democracy? I am thinking in terms of the immigration field; for example, at present the regulations are made by Cabinet on the recommendation, of course, of the Department, but the people who are affected, the would-be immigrants, have very little contact whatsoever with the process. If there were a committee in charge of this whole matter, people affected by the regulations could be informed through appropriate societies or representations of where the shoe pinched as far as these regulations were con-

cerned. It seems to me that aspect would be extremely valuable if it could be worked out.

**Professor Arthurs:** I certainly agree with that and it is exactly the kind of issue which, it seems to me, is most appropriate for public debate and participation. Indeed, in fairness, when new regulations were in prospect, if there were not debate through the vehicle of the committee, at least there was some degree of dialogue between various community groups and the minister and the government as a result, as I recall, of a white paper. I think to the degree that the committee can procedurally be brought into operation, can make itself available for purposes of participation as the forum, perhaps, for this dialogue, that would be a very healthy thing.

**Mr. Brewin:** Thank you.

**The Chairman:** Mr. Gibson.

**Mr. Gibson:** I was thinking of what you were saying and it occurs to me—supposing the Agriculture Committee had all their regulations piled up on the desk here, and in comes the Committee. How practically, do they get down to work and implement your suggestion? In other words, how are we going to do it? Here are the regulations on the deak and here is the Committee on Agriculture. How are they going to function once they are in the room?

**Professor Arthurs:** I would envisage, first of all, that someone would make some kind of analysis of those regulations. We are talking now about the first time they approach this Herculean task? Someone such as counsel to the Committee, its expert staff—and I underline again the need for that kind of staff—would make an analysis in terms of what policy judgments are embodied in these regulations in various fields—it may be sales; it may be standards; it may be a wide variety of licensing schemes, on whatever—and make some initial report to the Committee.

**Mr. Gilbson:** To narrow it down to two or three spheres? Is that the idea?

**Professor Arthurs:** I think you would have to develop some organizing principles; but I would hope that after this first very difficult task—the first, in effect, periodic overview of what is, after all, our agricultural policy and what are the procedures by which it is implemented—that aside from that, on an ongoing basis, there would not be quite such a pile. That is that the members of the committee would routinely receive the regulations as they come out, would be able to spot them by reason of having participated in the review, or of having had at least the transcript of the review, or the report of the reviewing committee made available to them, and they could then intelligently read what they receive from time to time and would not quite be into that situation on a regular basis.

**Mr. Gibson:** Thank you.

**Mr. Stafford:** From the point of view of the ordinary citizen, the one affected by our laws—and we speak of participatory democracy—looking at the legislatures of this country and the one in Ottawa, do you see an increasing or decreasing degree of participation?

**Professor Arthurs:** Let me put it this way, that I would like to see an increasing degree of participation by citizens. I can well appreciate the frustration on both sides—on the side of the citizen, who has no place to participate, and on the side of, I think, many well-intentioned legislatures who do not see all that many citizens coming forward to participate, although they are affording them the opportunity to do so.

I think this is partly because we are trying to move into a new technique—a new sphere—which has not been widely explored. There are deep traditions to this kind of activity. I think we have to be modest and realistic in our hopes for it, but I certainly see it coming; and I see lots of opportunities for this sort of thing to go on.

**Mr. Stafford:** Do you think it is going on at the present time? Or should there be more of it?

**Professor Arthurs:** I would say that it is going on now, particularly for well-organized and powerful pressure groups, whether they be farmers, or labour unions, or doctors, or what have you—people who are formally organized and who have some degree of resources that they can muster to participate in the fairly formal channels of communication now open.

But I could certainly visualize much more opportunity for participation, requiring some sacrifice of time, some degree of informality, which would make participation a little less forbidding to the people; and I think this is difficult.

**Mr. Stafford:** You mentioned that legislation should be drafted in broad general principles. Is that about what you said?

**Professor Arthurs:** I think so. It is impossible, you know, to pick up many statutes and say what is the policy of Canada. Let us take labour relations as an example. It happens to be one field that I am well familiar with. There is virtually no overt statement of policy in the Industrial Relations and Disputes Investigation Act. It reads like the Income Tax Act. People who are in the field of labour relations, unless they happen to be initiated into it—if they come as strangers to it—would be hard-pressed to tell you really what is the living spirit of that statute. I do not see why it should not appear on its face.

**Mr. Stafford:** Do you not think there is an inclination on the part of the drafters of such bills and legislation, because of long experience and the very nature of their work, to make them technical and complicated?

**Professor Arthurs:** I think that is one philosophy of drafting, but not necessarily the best, or the only, one.

**Mr. Stafford:** I did not say that it was the best one; but it is one?

**Professor Arthurs:** It is certainly a widely held philosophy.

**Mr. Stafford:** In view of what you have said—and I do not know whether or not you wish to consider examples—most of our rights are set out in the common law. You referred in part of your evidence to this being an era of constant change. Do you think that to draft a bill of rights setting out all our rights in this era of constant change would be an even greater impossibility than some of the examples you mentioned?

**Professor Arthurs:** Hearing no objection from the Chairman on the grounds of relevancy, I seize this opportunity to say that in my personal view, and as an officer of the Civil Liberties Association, I would very much favour a constitutional bill of rights stated at the level of broad principle. I certainly feel that, although it is not self-executing, it does offer the opportunity for creativity, for growth, for development, in relation to things that I am sure you and I are both concerned about.

Let me add one note of caution, in all candour. I think if we were to adopt such a bill we may go through a difficult transitional period in which the learned gentlemen who are charged with interpreting and applying the bill in concrete cases as they arise in the courts may not share my enthusiasm for it, nor may they be terribly sophisticated in its use and that we may encounter, as we have already encountered since 1960 with the existing bill, considerable frustration. Nonetheless, I think, as a general re-orientation of our constitutional tradition, in the long run we would be well-served by such a bill.

**Mr. Stafford:** But in the 1960 bill do you see anything that is not already covered by our common law rights—rights we have enjoyed in this country for years? Is there anything in it?

**The Chairman:** I think, Mr. Stafford...

Mr. **Stafford:** I think this is fairly relevant. I think that by considering some of these examples we are talking about legislation and making it more detailed. My point is this: Do you think we should pass new bills because they cover in a technical way something that is already covered in the very spirit of our law?

**Professor Arthurs:** Let me put this, if I may, in the context of our particular concern today about regulation-making. One of the concerns about regulations is, for example, that they may create procedures to be followed, say, before an administrative tribunal, which are unfair in some way in that they deprive people of what are thought to be their common law rights.

A sort of first principle of statutory interpretation is that if the legislature says explicitly that a certain procedure is to be followed, that is the procedure to be followed, regardless of whether it infringes on our common law rights or not. So that rights in that sense are infinitely contractable, to the vanishing point entirely. There is nothing to prevent legislation from explicitly diminishing what we had conceived to be our traditional rights and liberties.

If we transpose this into the area of regulations rather than parliamentary legislation, there is a principle of construction that says that unless the legislation explicitly authorizes departure from the common law principle, that there is the right to be heard and an adjudication of your right, then regulations which contravene that principle are not deemed to be authorized.

That, as you know is a kind of broad statement that the courts on some occasions resort to. On the other hand it is hard to say that on some occasions they should resort to it. They may not perceive, for example, that the principle is being defeated, or they may wrongfully perceive that it is being defeated. I have in mind a particular case which found its way to the Supreme Court of Canada. It involved the Ontario Labour Relations Board. The judge of first instance, who decided it, purported to rely upon principles enunciated in *Magna Carta* in striking down certain allegedly undesirable activity of the Ontario Labour Relations Board, which had denied someone an opportunity to be heard. To anyone with the slightest knowledge of labour relations it was evident that the choice to be made in that case was not between civil liberty and no civil liberty, not between due process and no due process, but between the effective working of a labour relations scheme and its destruction, and that it was necessary to overcome the result of that case by legislation.

This is the problem. The principles are there, whether in legislation, in the common law, on in the bill of rights. They must be applied in particular circumstances. There is a risk that often they may not be applied vigorously; that sometimes they are applied, unwittingly, too vigorously. So we cannot avoid ultimate human judgments by administrators, by courts and, indeed, by legislatures, about the competing interest, the degree to which other legitimate concerns warrant the expression of things like "due process" in a particular way, not necessarily emulating court due process but in a way that is appropriate to the life circumstance of the regulatory scheme.

I am not sure that I have quite answered your question, but I do not think these great principles are self-executing; one has to create an atmosphere in which people believe in them and generally try to make them work. In aid of that I think the constitutional Bill of Rights is most useful. Ultimately we come back to human judgment.

**The Chairman:** Would you care to put the name of that case on our record?

**Professor Arthurs:** The Globe printing case.

**Mr. Stafford:** The point I was getting at is that it is very difficult to set out principles, especially in this age where there is more change than at any other time in our history and if those changes are set out in words, they have to be interpreted by a court of law, and judges are very prone to rely not only on precedent but to stick to the very letter of the law. The point I wanted to hear your comments on was the fact that it was difficult to set out those principles today when you hardly realize what will happen 20 years from now.

**Professor Arthurs:** I think that is a fair comment.

**Mr. Stafford:** Possibly, rather than setting them out in general principles, maybe the best safeguard would be the 264 men in the House of Commons to change the law as they see fit from time to time. I think you will admit it is very difficult to change a Bill of Rights or a constitutional law once it is passed.

**Professor Arthurs:** It is. It is also difficult to change legislation once it is passed.

**Mr. McCleave:** Mr. Chairman, on my maiden voyage in the Committee may I question Professor Arthurs on two areas. First, with regard to the Registrar of Regulations, do you visualize this as comparable, say, to the Auditor General, a person who would be under the wing of Parliament rather than under the wing of government?

**Professor Arthurs:** I would visualize him preferably as being under the wing of Parliament but I want to stress that primarily he is performing, as I visualise him, a technical function, that is, he is not quite performing the ombudsman function that you might find in the Auditor General, but he is there as Parliament's servant to collect subordinate legislation to make it accessible and to make it, I would hope, intelligible.

**Mr. McCleave:** Could it not be carried one step further, Mr. Chairman? I ask Professor Arthurs this: that he have a staff and instead of having a lawyer with each committee dealing with regulations the Registrar General have that staff for study and to make available reports or comments or criticisms of the regulations to the various committees. Could it be done by having a central body on Parliament Hill available to all committees rather than have extra people hired for each committee?

**Professor Arthurs:** That would defeat one of the concerns that I have. It is certainly a

widely adopted expedient in many parliamentary systems and seems to work well sometimes, but I think it would defeat the advantage of having people who know something about the subject matter concerned with the regulations.

Let me give you an illustration. It is possible that a regulation comes out that looks perfectly innocuous, and let us say that something has to be done within 10 days in the field of regulating companies: you could sit at the centre of things in the Registrar of Regulations office, or some comparable official's office, and look at that regulation and it would look perfectly acceptable to you. On the other hand, 10 days, given the realities of the particular thing you are concerned about,

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may be as an instant or it may be an eternity; you do not know unless you know how rapidly the events move in that particular field. What can you really say about it without immersing yourself in it? That is one concern that I would have about the centralized review.

**Mr. McCleave:** Is that a practical objection to it, though? This officer would be powerless to take any steps, anyway. Presumably it would be the parliamentary committee that would have to take the steps, and the parliamentary committee might not be sitting at that particular time.

**Professor Arthurs:** You were confronting me with a choice. If we are talking about doing both of those things and I say "That is fine; let us do them both", then we have the advantage of the technical review, the competence at the centre, and also the subject matter competence at the committee level. I would not certainly see those as mutually exclusive. I think each of them have a contribution.

One other point I would just mention: I think it is somewhat reflected in the role of the Department of Justice, as I understand it, at least in the drafting stage, one acquires a certain vested interest in a way of doing things, and it may be right and it may be wrong in any given situation, but a degree of unwarranted uniformity may come to be reflected in the regulations. That is one concern that I have, particularly because I am concerned that they should be phrased in ways that are intelligible to the people who have to read them.

**Mr. McCleave:** Mr. Chairman, my other area of questions concerns the legislative technique of adding schedules at the end of statutes, some of which are passed by Parliament giving parliamentary approval to add categories. I think the Hazardous Products Act is an example and I wondered if Professor Arthurs would venture an opinion on the fitness or lack of fitness of this.

**Professor Arthurs:** If you are talking about hazardous products of which I know nothing whatsoever...

**Mr. McCleave:** This is a specific example where three or four products are mentioned, but there is the power to add.

**Professor Arthurs:** I would see something with that ominous title as the classic case for allowing a list of things to be expanded. You cannot wait until the Order Paper is cleared away before you can add to the list. Untold damage may be done to people if you wait. So that, I would think this is really the classic case for saying "Here is the general sort of thing we are heading at," or better still, "Here is the general sort of thing, plus some illustrations. You carry on, and as more hazardous products emerge, you continue to fill in the list".

**Mr. McCleave:** It strikes you as a good way for legislators like ourselves to come to grips with the speediness of the times, if nothing else?

**Professor Arthurs:** I would think so.

**Mr. McCleave:** Thank you very much.

**The Chairman:** Would you want to qualify that Professor Arthurs by your previous statement that perhaps regulations could be allowed to take effect and then be subject to impeachment if fault was subsequently found with them?

**Professor Arthurs:** As I understood the suggestion, it was that there was a provision in the statute which said "Here is what we are after. Here is Schedule A, some illustrations of what we are after, and regulations may be enacted by the Minister to add to the list".

**Mr. McCleave:** So it is legislation by regulation.

**Professor Arthurs:** Yes.

**Mr. McCleave:** It does become part of the statute.

**Professor Arthurs:** It does indeed.

**The Chairman:** In the analogy I was drawing I was asking whether you would suggest the statutory provision that there should be subsequent review of things which were added to the list by a parliamentary committee or by Parliament as a whole. Do you see that as being necessary or even as being possible?

**Professor Arthurs:** If one were to underline in the hazardous products situation the word "subsequent", I would certainly say that they should be subsequent, that the regulation should take effect immediately. Naturally, there may be controversy arise. For example, one can visualize certain circumstances in which a pressure group might say that a certain thing ought to be proscribed and, perhaps with undue haste the decision is made to proscribe it. Upon further consideration, particularly by a body of legislators, parliamentarians, it might be decided that it was inappropriate and ought to be taken off the list. So, I certainly see both of these things as operating: immediate taking of effect, and subsequent review.

**Mr. Baldwin:** Mr. Chairman, I wish to express my appreciation. I think we have had a very excellent learned and very helpful presentation. I would like to add to my knowledge a little.

The discussion that Professor Arthurs had with Mr. Stafford, concerning statutes which contain general statements of principles and then, I suppose, as a result, a lot of regulations would have to be passed. The two classic examples in my mind are the Transportation Act and the Broadcasting Act, each of which are centralized around a set of principles. As I understand you, Professor, you envisaged the likelihood of more of this type of statute and consequently more regulations being enacted from time to time and flowing out of that the need for some kind of control, observation or check; is that right?

**Professor Arthurs:** That would be a fair statement to make.

**Mr. Baldwin:** I thoroughly agree with you on that. Forgetting the question of publication, I think our discussion centered more on the question of remedy, of relief. I might be pardoned for saying that we are sort of grouping now with regard to these committees. When you go into the House of Commons you see 25 to 30 members and there are 10 committees sitting, which indicates that we have not yet found the ideal solution and probably never will. Is there a possibility, however, that we can make use of both types of committee; using the standing committees for a general surveillance from time to time of regulations or even the regulatory bodies which have been established by statute, because as you say the personnel of those committees presumably will have acquired a certain degree of expertise in this particular subject matter; having a special committee charged with the responsibility, even in conjunction with the Registrar General, as Mr. McCleave said, or independently with such assistance as it may have of inquiring into cases where there has been injustice, where there have been instances of effects of regulations which were never contemplated and so on. In other words, a committee which has an expertise on regulation. I put it to you because of the problems we are experiencing in committees, the time spent, the difficulty in ensuring adequate numbers to attend, is there a possible case to be made for leaving to the standing committee group the opportunity to survey, generally, policy terms, to see if there has been a tendency to conform to what the act required, and possibly individual instances, but also having a special committee about which I will say more later, which would have this other special knowledge.

**Professor Arthurs:** I have not put my mind to that possibility, but one difficulty I visualize is that you might have two committees reaching rather different conclusions because of their different points of view. Let us face it, one develops a psychological investment in one's function. You give a man a role to play and he plays that role. You say, "Your role is to ferret out injustice in regulations", and people ferret out injustice in regulations. You say to someone, "Your role is to develop a coherent and fair system of administering this particular subject matter", one tends to focus on that problem. I suppose in a sense that kind of conflict is bound to occur. Whether it is worth the inconvenience and possible resulting confusion to ensure that nothing slips by that really does warrant scrutiny, I think there is an argument to be made in that regard.

**Mr. Baldwin:** I could supplement that by saying I have experienced the same qualms as you. My feeling, however, has always been that any committee or any group of committees will only touch the very surface of these regulations and that the main function of one committee, or all the groups of committees for that matter, will be to put the fear of God into the people who draft the regulation, so there will always be this Sword of Damocles hanging over them. Consequently, if you had a committee with this expertise which in a few well-documented and well-publicized cases came up with some varying examples, as they undoubtedly will without looking too far, of the sort of injustices I mentioned, this would be the real gain that we would make in Parliament. I have all your fears about the variations and the flexibility of treatment which the standing committees might give.

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**Professor Arthurs:** Sir, may I just respond by saying a word about the "fear of God" theory of administrative law, because I think that is quite important. I quite concede that there are in any administration, whether of federal government, provincial government, or heaven help us even the university, people who are so rule-minded, so insensitive to human beings that they insist on going ahead and deliberately trampling over people, whether by making regulations or particular decisions; that obviously does happen. However, it seems to me that many more injustices are perpetrated by well-intentioned people who simply have not directed their mind to the problem, and that the solution for those people who encompass the great majority of cases is not to put the fear of God into them. They just have not directed their mind to the problem.

Rather, it is to create an atmosphere in which they see as part of their regular function the protection of the rights of the citizen that you and I, I am sure, are both concerned about; to create an atmosphere amongst administrators in which they see their objective not only as getting from point A to point B in terms of executing policy, but of going there by a route which is consistent with what we would want in a democratic society. How do we do this? Not by scrutiny, whether by court or by committee afterwards, I am sure we can avoid that, but we do it at the beginning of the process. We do it by holding, for example, seminars of administrators who are in a position to make this kind of decision; we do it through training, manuals, publications, statements, however binding they may be—I am not suggesting they necessarily have to have legal force—we do it by creating a consciousness in the minds of people who are taking decisions and making regulations, that they must be sensitive to these other values. With all due respect, although many of them are very fine people, they are very busy people and they have never been asked, except in a critical sense when they have offended, to put their minds to those values. Now I say, let us do something affirmative before the fact, rather than to punish them after the fact by embarrassment.

**Mr. Baldwin:** I probably should have indicated there are refinements of the fear of God. Fear of God into those administrators who deliberately set about to achieve the kinds of results which they must realize have unfair and improper results. Let us say a healthy anxiety about the Lord with respect to those people who simply do not let their mind wander through to the ultimate conclusions of the actions which they are setting in motion. I am only judging from my experiences in the Public Accounts Committee but I think when people realize they are going to be, or can be, subjected to this very keen, very searching scrutiny, they are going to take that extra step forward, or those extra series of steps to carry their mind through to the consequences of the actions they are about to launch the government or their department into; that was my intention. I fully realize that 95 per cent fall into the latter category. Let us consider this question of a special committee. If we did have such a committee, do you think it would be adequate if it were established under the Standing Orders, or do you think there is a necessity for a statute setting out its powers?

**Professor Arthurs:** I am not sure, again, that I have strong views, but I wonder if perhaps we might not go through a little period of experimentation. I do not know how readily that kind of statute can be changed in order to improve it with experience; whether the dignity you accomplish by having it in a statute outweighs, I would think, the relative sacrifice of flexibility in terms of responding to the problems as they emerge over the years. There is a saw-off to be made there.

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**Mr. Baldwin:** I have two more questions, Mr. Chairman. With all due respect to my friend Mr. Brewin, have you given any thought to the question that if there was a special committee, should the Senate be included in it, having in mind the question of continuity and so on? I think that in some jurisdictions there are committees which embrace both Houses. And assuming that the Senate is considered healthy and still living in Ottawa, would there be any benefit in having members of the Senate, who do represent a certain broad view, on the committee? I am not advocating this, but I am just asking for information. I was just thinking of your colleague, Mr. Knowles.

**Mr. Brewin:** I share his views.

**Professor Arthurs:** I would not want to enter into this debate, sir, but obviously the answer does flow out of your feelings about the future of the Senate. And if one is looking for more useful things for the Senate to do, this might well be one of them. If one comes to the conclusion that as an institution they are not to be rethought, then one comes to a different view. I really would not care to say that it grows out of this Committee so much as it is an inference to be drawn from one's general view of the function of the Senate.

**Mr. Baldwin:** Mr. McCleave raised an issue on which I would like to enlarge. Is there a case to be made for these two positions or functions? If we did have such a committee or a series of committees, what would be the capacity of such a committee to deal with the regulations enacted under a statute, which would expire after being laid before the House unless it has already been confirmed by Parliament? The other alternative is the one Mr. McCleave mentioned, namely a regulation that can be impeached. Have you any thoughts as to what procedure would be adopted for such impeachment? Of course, those are two different approaches to the same problem, the opportunity of a parliamentary committee to study and do something about a regulation, either to confirm it, or to kick it out of existence.

**Professor Arthurs:** I think my preference personally would be for the latter alternative, that is, the alternative in which the regulation takes effect subject to impeachment. As far as impeachment is concerned, I would visualize a procedure in which the committee made a report on the impugned regulation. That is, it simply did not lay it before the House, but it gave a statement in fairness to both the objections to the regulation and the response to those objections made by those responsible for its promulgation. And that report would be laid before the House, which could then proceed intelligently to debate it. I would envisage the possibility of a resolution of the House accomplishing the impeachment, if that were the will of the House. But I would hope that this would not be a regular procedure. I would expect it would not be. One reason I feel quite strongly that there ought to be a reasoned analysis of the regulation and its defects and its advantages, would be to ensure that that step was taken soberly and not casually.

**Mr. Baldwin:** Thank you.

**The Chairman:** Mr. Morden.

**Mr. Morden:** On the process of impeachment, should that be provided for? Do you see any injustice or practical difficulties in a regulation coming into force, and persons being prosecuted perhaps or rights being changed, and then the regulation subsequently being annulled by a resolution of the House? Is that a risk that you think has to be run? Or can you see any safeguard preventing that?

**Professor Arthurs:** Well, I can see immediately that it is a risk, and it is a risk that looks particularly gruesome when, as you pointed out, the regulation is ultimately repealed. To the extent possible, perhaps we might think of remitting the penalty in such a circumstances. That is one slight response to your question. But of course it does not meet the situation where there might be, say, a significant business loss or something of that sort occasioned by the regulation.

Yet I really do not see any alternative to the expedient transaction of public business which is after all not lightly done, not done entirely without guidelines laid down by Parliament and not, for better or for worse, immune from challenge in court on the grounds of *ultra vires*, on the grounds that the regulation is not authorized by the statute.

**Mr. Morden:** On the subject of judicial review, you indicated an opinion that in many cases courts are not too sympathetic to the regulation making the process and they perhaps interpret the enabling legislation literally to come to a particular result. Can you

envisage any circumstances or situations where it would be proper to insert in the statute a prohibitive clause preventing a court from passing on the validity of a regulation? Or would you think that that would be a part under any circumstances?

**Professor Arthurs:** I would not be terribly anxious to press for that. I know that prohibitive clauses are not much in favour these days, but I would like to see them reserved where they are used for adjudication rather than for regulation-making. It does not happen so very often that it is a significant problem.

**Mr. Morden:** Ultimately you would say there should not be any prohibitive clause preventing judicial review of regulations, as opposed to adjudication?

**Professor Arthurs:** I would prefer to put it in terms that I do not see this as a terribly pressing matter, and just to leave it at that. I know people feel strongly about it and this is one of those areas in which I see no important advantage to be gained from doing that, and I see some disadvantage. And I would be content just to leave that matter as it presently stands.

**Mr. Morden:** With regard to those regulations that you referred to that bear on only specified individuals or a very narrow group, is it your submission that the legislation conferring the power to make those regulations should have a requirement in it that the regulation cannot be made or come into force without prior opportunity to be heard for consultation, and that it is a condition precedent to the legal validity of the regulation?

**Professor Arthurs:** I think not, although I immediately concede that it is possible to disguise an adjudication as the making of a general rule, which in fact operates on a public of one. But I think we run into the same difficulty even in adjudications, if that is what this turns out to be. There are situations in which the harm done requires the making of an effective determination of rights first, and perhaps subject to subsequent hearing and repeal of the regulation or amendment of the regulation, subsequent to hearing. Take our dangerous substances situation again. It may well be that someone is greatly harmed in a business sense or reputation sense by the promulgation of such a regulation. And yet if there is a genuine fear of physical harm, or death coming to someone, I think most of us would say: "Pass the regulation rapidly, then hold your hearing. And if it turns out that the factual base of the regulation is incorrectly conceived, then one must amend or repeal."

**Mr. Morden:** Generally, do you feel familiar enough with dominion legislation to hazard an opinion as to whether or not, in your view, proper use has been made of the possibilities of conferring power to make regulations? I gather from what you say that perhaps not enough use to date has been made of that legislative device.

**Professor Arthurs:** I certainly am not intimately familiar with dominion legislation. I work more often than not in the provincial field. But I think what I was addressing myself to was more what I understand to be a widely held view that there is something intrinsically wrong with regulations. It was really to that view rather than to the actual body of law that I was addressing myself.

**Mr. Morden:** Well, perhaps for a moment we could get into the comparative approach. I understand you have some familiarity with American administrative law.

**Professor Arthurs:** That is right.

**Mr. Morden:** Some substantive American administrative law. Is more frequent resort made in congressional legislation to the power to pass regulations or rules than is made, say, by Parliament in Canada?

**Professor Arthurs:** I think so, from my fairly remote observation of it. My impression is that rule-making is a very important function of many administrative agencies. But here again I stress that often the choice is not between legislation and rule-making but between rule-making and decision-making, and that where we might tend to give the power to make decisions on an *ad hoc* basis to an administrator I think the Americans would tend to go the regulation-making route. But that varies of course from field to field. Certainly the public hearing device for example in connection with rule-making is much more widely resorted to in the States under the aegis of various administrative agencies. But I think that although it has its costs on occasion, although it often slows down the processes, it does often result in a more sophisticated and pointed operative rule.

**Mr. Morden:** I do not know how much longer I will be, Mr. Chairman. I had three rather detailed short questions.

**The Chairman:** I am quite prepared to entertain them, Mr. Morden.

**Mr. Morden:** You probably noticed that in Dominion legislation—certainly in provincial legislation—just about every statute confers the power to generally make regulations for carrying into effect the purposes and the provisions of this act. Now do you have any view one way or the other on such a wide power-conferring section?

**Professor Arthurs:** Although the power appears on the face of it to be wide, in a number of cases that I have read certainly it is not usually held to sustain anything more than fairly routine procedural regulations. In fact, it is quite the contrary and, on occasion, when there has been an attempt to sustain substance of regulations under that power it has failed. So, the way in which the courts have construed that typical provision has not in fact been wide.

**Mr. Morden:** What about the power to make regulations to confine the meaning of a word or a term in the act—in other words instead of putting it in the definition section of the statutes, leaving it to the regulation-making authority to define the act.

**Professor Arthurs:** Actually, that expedient is not designed simply to define words, it is really to define the operative scope of the act very often. And that sort of thing can only be done in many, many situations with experience. There is simply no point, for example, sweeping in everybody that might conceivably come within the broad definition of a word, nor is there any point in excluding some people until you have had some experience.

**Mr. Morden:** It can be a good thing in a proper context.

**Professor Arthurs:** I think it can be an extremely useful thing and I think the contrary could be very hurtful. You may find, for example—let us suppose that we are dealing in some area of employement—that major problems can be gotten at by dealing with certain industries or employers of a certain size and that over a certain size the problems for one reason or another take care of themselves, or in certain sectors of industry the problems take care of themselves. I view that as a very useful expedient.

**Mr. Morden:** What about the power to make regulations which would have the effect of amending provisions already enacted in a parent statute—or can you not answer that in the abstract?

**Professor Arthurs:** You cannot answer that in the abstract because first of all you do not know whether they are amending it. That may be a highly contentious issue and it may be denied by those who made the regulation that they have in fact amended. But I suppose the classic case is really the War Measures Act litigation.

**Mr. Morden:** The chemicals reference.

**Professor Arthurs:** Yes. In such cases, frankly, it is so libertarian, I would have to say, that I am really not in favor of overtly permitting amendment of the authorizing act by its regulations.

**The Chairman:** I would like to direct one question, Professor Arthurs.

With respect to the review body which you were suggesting, namely that it should be the standing committees—I suppose from our point of view this is the most pointed recommendation that you have made to us—we must recognize that unless there had been a fairly widespread feeling that there should be some review body this Committee would not have been set up, therefore we are operating within that general parliamentary context and so are obviously pretty interested in the question of what body should conduct that review if there is to be review.

Now it could be argued that even with the assistance of a technical staff it would be beyond the interest and even beyond competence of a particular parliamentary standing committee to deal with regulations in its subject matter area. But I suppose your answer to that would be to the effect that if the regulations were drafted in such a technical way that they had no reality for the people who were involved with this area then they were badly drafted and this alone would be reason enough to submit them to the scrutiny of that committee—to ensure that they were put in a form which was meaningful to the consumer. The agriculture committee, for example, usually has a fair number of farming representatives and I suppose they can, from one viewpoint, be considered to be consumers just as the justice committee, with its large number of lawyers, can also be said to represent the consumers in that area.

**Professor Arthurs:** I think the answer you attributed to me in your question is right but I would just add that there are in fact techni-

cal questions which are, for better or worse, beyond the capability of any of us who are not experts in the field and it then becomes a contest of experts—the departmental experts, the committee's experts, the experts brought forward by those being regulated. You know, the committee is in a better position to evaluate that contest if it has its own expert advisers than otherwise but at a certain point you must probably give deference to the people whose professional qualifications you most respect. That problem is encountered in terms of expert testimony in courts of law, I think probably it will be encountered here as well. But you cannot always draft regulations in laymen's language; in a given field of activity, say regulation of drugs or something like that, it might simply not be to the problem.

**The Chairman:** There is one other area that I would like to raise with you, the criteria that might be used by a review committee for reviewing regulations. I suppose this is one of the most subtle questions that will face us. Should the content of the regulations be excluded, in your opinion, from the review? If this review were to be conducted by a standing committee should the committee take the view that this is a matter of policy which has been established in the legislation, that no further discussion should be allowed on this from the policy viewpoint, and should their consideration be solely technical—it is intelligible and is it within the powers conferred by the statutes?

**Professor Arthurs:** Well it is certainly those two questions but I would think, particularly when we are talking about a periodic overview, that I would certainly favor a policy discussion. I think that there has to be some ventilation of those policy judgments which are made between the broad boundaries of the statutes and that a committee is an appropriate forum for that ventilation. So I would not want to draw the net too tight in terms of the kind of issues that can be raised. And, quite the contrary, I would think that many statutes are, to be frank about it, totally open-ended in terms of policy judgments. There is a concern, there is a social problem—we must do something about it. We do not know what to do about it. At the moment we have to somehow move, equip somebody with the power to feel his way through the situation. Fair enough that he should do that but fair enough equally that he should account, that he should report. Who better to report to than people who are charged with that area of concern.

**The Chairman:** You have the danger though, having fought a legislative battle perhaps on a strictly political basis in one session of parliament, that after the act is carried through by a government majority accepting the policy views in the bill regulations are made and then those regulations come back in the next session, perhaps to the same parliament or even a different one, and you fight the policy battle again in terms of the regulations—or has the policy been decided once and for all? Mr. Brewin?

**Mr. Brewin:** You still have your majority, do you not? I do not want to answer for Professor Arthurs but, to put it in the form of a supplementary question, you still have the same policy makers in control, do you not?

**Professor Arthurs:** You sometimes have a parliamentary majority, Mr. Brewin, but . . .

**Mr. McCleave:** It has not been representative of the last five years, then.

**Mr. Brewin:** I have been raped when there was a good parliamentary majority—not normally, but in fact.

**Mr. Stafford:** A good parliamentary majority.

**Mr. Brewin:** A working one, not a very good one.

**Mr. Stafford:** That is what you said.

**Mr. Brewin:** I meant from the standpoint of it being able to carry out what it wanted.

**Professor Arthurs:** Oftentimes the bill does not in fact contain a statement of policy. Frequently the bill simply says that the Minister may make such regulations as he may deem proper, or that the board may do something or other, which is described in equally vague terms, and although there may have been discussion about whether this is a problem and should we do some identified something about it, a policy judgment has not in fact been made. If it has been made, it has been made in *Hansard* and not in the drafting stage. I see no objection to the ventilation of that policy.

**The Chairman:** Even if it amounts to a rehash of what was gone through and, as you say, reported in *Hansard* the previous year.

**Professor Arthurs:** I am not so naive that I believe this is necessarily true, but I would hope that a responsible committee would accept its limits. But let us face it, a statute which was passed 10 or 20—or perhaps 40 or 50—years ago when that debate took place may have become obsolete. It is better that we should know about it.

**The Chairman:** Mr. Brewin.

**Mr. Brewin:** Would it not be asking the parliamentary committee that was set up to abrogate its appropriate functions if it did not consider questions of policy and merely considered questions of form? Personally I cannot imagine a parliamentary committee so self-denying that it refused to go into questions of policy and law.

**Professor Arthurs:** That fact of human nature may render the merits of our discussion more or less irrelevant. I suspect there might be a drive in that direction in any event.

**The Chairman:** I suppose that is more true if you follow the recommendation you have made to us, that regulations be referred to the standing committees. If you had a special standing committee which only dealt with regulations, and to which all regulations were referred, I think you might tend to get a purer consideration, if I may put it that way, of the regulations which were submitted to it. I think the very fact of your suggestion carries this implication of policy review.

**Professor Arthurs:** How can I go on record as being opposed to purity? You are putting me in an awkward position.

**The Chairman:** If there are no further comments, we will perhaps have to leave Professor Arthurs in that ambiguous position for the rest of time.

We will have another witness before us at 3.30 this afternoon. Before we adjourn this morning I would like to say how grateful we are to Professor Arthurs. I know that many members have had to leave this meeting before we completely finished to attend other committees, but the fact that the discussion has continued to this point indicates the degree of interest that we have had in Professor Arthurs and in his presentation. I think it was one which not only canvassed the field extensively but on very many points convassed it intensively as well. I think this has been an excellent introduction to the whole subject at our first public hearing. We are very grateful to Professor Arthurs for his presentation this morning and for the fact that he was able to get our hearings off to such a fine start. Thank you.

**Professor Arthurs:** Thank you.

**The Chairman:** Mr. Stafford, would you like to move adjournment?

**Mr. Stafford:** I so move.

Motion agreed to.

**The Chairman:** This meeting is adjourned.

## AFTERNOON SITTING

**Tuesday, April 22, 1969**

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**The Chairman:** Gentlemen, we are pleased to have as our witness this afternoon, Professor Lloyd Brown-John, Assistant Professor of Political Science at the University of Windsor. Professor Brown-John was educated at the University of British Columbia and the University of Toronto where he has substantially completed his doctoral work and he has also spent two years in this city with the Department of External Affairs where he worked with the drafting of orders in council and therefore has some practical familiarity with this field as well as a considerable theoretical influence in it. He is one of the few men who has actually worked in the area and perhaps I can almost say has lived to tell the tale; at least has lived to be able to appear before us in a capacity not related to government and we are very pleased to have him with us. Without any further fanfare I will call on Professor Brown-John.

If you have a prepared statement we will be pleased to receive that in the beginning, and afterwards we will have a dialogue between yourself and the Committee members.

**Professor C. Lloyd Brown-John (Assistant Professor, Department of Political Science, University of Windsor):** First let me say that I find it rather intriguing that the House of Commons at long last has found it possible to establish a committee to look into something I thought only a few "nuts" like myself could get involved in and get very excited about.

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I think the matter of what you call statutory instruments and what I call delegated

legislation, is something which affects people perhaps more than they think it does. Primarily I became interested in it because I am concerned about the individual and his relationship to his government.

First let me say that I am approaching this thing with a number of presumptions in mind. First, I presume that there is a requirement for statutory authority to create subordinate legislation, and thus I am not prepared to question the need for subordinate legislation. I may question, as anyone else would, the quantity of legislation which is produced, but there is no question in my mind that it should be employed.

Secondly, I feel that the House of Commons or Parliament—and I prefer to use the term "Parliament", I must admit—Parliament alone has a an authority and a responsibility to exercise in regard to delegated legislation. I feel that the responsibility has not been adequately exercised in the past years; in fact, as far back as you care to go in Canadian parliamentary history. If you stop and look at it for awhile you probably will agree with me. We are going through reforms now in procedure and I think this is simply a matter of procedural reform.

Third, I presume that it is within the Committee's terms of reference to consider the nature of the various forms of delegated authority. Here I am not talking exclusively about delegated legislation as such; I am talking also about the means by which it is created.

I follow on that to another presumption, and that is that it is clearly within your terms of reference to consider a means of reviewing how you can achieve greater precision in the legislation which is produced, in the statutory instruments themselves.

Also, I am working on a presumption, which I think the existence of this Committee vindicates, that there is some need for more adequate parliamentary supervision of the legislation which is produced.

Finally, of course, I believe that you are looking for suggestions as to how this might be better accomplished. I am simply going to outline one idea I have. It is one I have had for a number of years and have done a lot of research and work on, so I am prepared to launch it to you with that in mind.

I am sorry, there is one other presumption I did not mention. It is in the public interest that Parliament accept and maintain in fact its responsibility for legislation enacted pursuant to delegated authority. I should have mentioned that because it is in effect the crux of the question.

As I say, I do not deny the need for enabling legislation or for provision in statutes which will grant administrators, ministers the right to create this legislation. Nor am I impressed by charges which are made my members of Parliament that the country is becoming bureaucratically run, that it is a country of bureaucrats. I think I would hold Parliament primarily responsible for this. If Parliament feels that the civil service is usurping its role, then Parliament has the capacity and the duty to step in and take over. It is fully competent to do it and should in fact do so.

My own research in this field has suggested to me that all too frequently the production of subordinate legislation has suffered from an absence of precision and consistency and I will, I hope, given the opportunity, cite you some examples of this. I think examples can be multiplied indefinitely, but I will give you one particular case which exemplifies a number of crucial points, both concerning the delegation of authority and what I fear most, the subdelegation of authority; that is, the use of a regulation as a means for re-delegating. I think this is quite without the competence of any minister to do by statutory interpretation.

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I have gone through in my own studies some of the procedures which are currently available for parliamentary review of subordinate legislation: to wit, committees, questions, various forms of debate, I think the standard procedures which any text book would outline for you. I think that I can conclude, and if you have John Kersell in here at some later point he will agree with me on this, that the procedures presently available in the forms of debate and questions are not adequate, and they are not adequate primarily because the members themselves have no way of being informed of what is going on. In this sense I would say that the one weakness here stems from the Regulations Act itself. I believe the Regulations Act is badly in need of revision: it is imprecise; it is inadequate, and I think a lot has to be done in that respect.

I would like to make another comment on my own particular interest in this field. I

have become interested in a peculiar theory about what Parliament is doing and why it is doing it. The theory is what I call the theory of cocoon individualism, and that is that Parliament today is acting in a fashion of creating legislation to protect the citizen in spite of the citizen himself. In other words, it is protecting him from evils which he does not know. I think that this type of cocoon individualism is a recognition of the individual's rights; on the other hand, it has all the inherent dangers of a bureaucratic state or of a state which is overgoverned. I fear more than anything pleas which are made for more government action, for more government participation in other areas of individual endeavour. I fear this simply because the individual himself is demanding that government regulate his life. This is becoming overdone and I think that if it has to be done by statute then it is incumbent upon the parliamentarians to maintain a control to prevent the next logical step, which is down to a bureaucratic operation or bureaucratic control over the individual.

I want to mention just briefly some examples of the type of authority which Parliament delegates to various people. Here I will not even pin it down to ministers because in many cases it is not a minister; it may be an action exercised by right of minister—the minister may do something within a statute. But the type of authorities which are extensive, and I will give you an example from a series of regulations of the extent to which this can be pursued, and to the point where I consider it extremely dangerous.

For example, the delegation of authority, the Opium and Narcotic Drug Act, Section 3(a), permits the issuance of licences; this is strictly an authority delegated. The Canada Shipping Act, Section 413(e), permits the imposition of fines by the minister or by whomsoever acts under his authority; the revocation of licenses, the establishment of a time at which something will transpire, the provision for an inquiry to be conducted. To give you an example of what I consider to be the dangers to which this can be pursued, I would cite you a series of regulations made under authority of Section 7 of the Ferries Act. These are a series of three regulations taken at random, all of which provide that if the Minister is of the opinion that the operation of the ferry is no longer in the public interest he may revoke the license to operate that ferry. There are at least two points that disturb me about this delegation of authority.

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**An hon. Member:** Excuse me; do you have the numbers of those regulations?

**Professor Brown-John:** Yes. The numbers I have are SOR/60-6, SOR/59-49 and SOR/59-184, all of which relate to the same section, Section 15(f) of these regulations.

**Mr. Stafford:** What did you mean about revocation of licence? Were you talking about the Canada Shipping Act? Previously you mentioned revocation of licences and provision for inquiry...

**Professor Brown-John:** I was just talking in general. There is the Canada Shipping Act authority to impose fines; the Canada Shipping Act authority for inspections; Canada Grain Act, to conduct an inquiry. I can give you the section numbers if you wish.

**Mr. Stafford:** What about provision for inquiry? Was that related to the Inquiries Act?

**Professor Brown-John:** No; this is without reference to the Inquiries Act. That would presumably relate to the manner in which an inquiry would be conducted.

**Mr. Stafford:** Perhaps if you referred to the statutes we could use this for educational purposes, you see. If you would mention the Canada Shipping Act and then continued, we would take it for granted you were talking about the Canada Shipping Act.

**Professor Brown-John:** I am sorry; I forgot to mention that there are a whole series...

**Mr. Stafford:** If you will mention the authority it will be of more value to us when we read the proceedings later.

**Professor Brown-John:** Yes.

**Mr. Stafford:** Some of these statutes even a practising lawyer never sees.

**Professor Brown-John:** For example, there is an interesting provision in the Canada Dairy Products Act, Section 84. There are two of them, in fact.

Whenever the inspector believes—whatever it is—he may seize the dairy product. It seems to me the physical action of seizing is a delegated authority from which there appears from that Act to be no appeal.

That is why I went to the Ferries Act and these regulations made thereunder. It simply says that if the Minister is of the opinion that the operation of the ferry is not in the public interest he may revoke the licence.

First of all, there is no determination—and I know that certain people will differ with me here—of what is, and who is going to define, the public interest. The Glassco Commission had the unmitigated gall in Volume 4 to suggest that only the Cabinet is competent to determine public interest, or public opinion, on defence policy. It is the most astonishing affront to Parliament I have seen in years, but it is there in full print.

That aside, what really bothers me is a delegated authority to revoke a license to operate a ferry, from which there is no appeal whatsoever. That Parliament would permit itself to delegate such an authority, in spite of the fact that it may never be exercised, is, in my mind, extremely dangerous. This is only one. These same regulations also contain a phrase under SOR/59-184...

**Mr. Stafford:** You are talking of the Ferries Act?

**Professor Brown-John:** Yes, again; or the regulations made under the Ferries Act. There is a phrase that waiting rooms, or something, must be fitted out to the satisfaction of the Minister. God forbid that the Minister should wander down into somebody's ferry office to see that the waiting rooms are fit for accommodation. Presumably, and quite logically, he delegates this to an inspector. But it does not prescribe what constitutes his satisfaction. Does he want plush chairs?

I admit this is nit-picking, but the fact of the matter is that to the man operating the ferry his livelihood is at stake, and he could stand to lose it all with absolutely no appeal to anyone. This disturbs me.

I talked to a gentleman over here about a series of astonishing Orders in Council. I have copies of them, if you are interested.

**The Chairman:** Perhaps they could be passed around.

**Professor Brown-John:** Yes; actually there are a number of things here. The two very crude statistical tables on the top are designed only to show you that I actually did some work on this. They are also designed to disprove a theory I had, which was that when Parliament is not in session, civil servants busily run about producing Orders in Council and regulations, and so on. I correlated when Parliament was in session with the quantity of material that was turned out. These only include ones registered in the Privy Council Office. I found, much to my surprise, that I could find no correlation. My theory does not hold true. Therefore, civil servants, on the whole, are not trying to subvert Parliament by producing regulations when Parliament is not in session.

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Attached to this are a series of three Orders in Council numbered SOR/51-197, SOR/53-35 and SOR/53-111. To best indicate how one can be appalled by this I have to explain how I stumbled on them. I was hunting around for something relating to the size of lobster traps and I cam across this Order in Council SOR/53-111. You see that it says:

> Pursuant to the authority vested in me by section 7 of the Otter Trawl Fishing Regulations,

and so on—May 16, 1951. I went back to that Order in Council of May 16. You will note that there is no section 7. One can only presume that somewhere along the way, between June 13, 1951 and March, 1953, the original Order in Council was amended; and you will find that it was amended, in fact, in February of 1953 and a section 7 added.

That was the first problem. First of all, I discovered that there was a tremendous lack of precision in these things. They were badly drafted.

The second thing, which disturbs me even more, is that the third one, SOR/53-111, says, "Pursuant to the authority vested in me by section 7." In other words, an Order in Council has been used to sub-delegate the original statute which provided that the Minister might make regulations relating to various things. They then used a regulation to sub-delegate to a minister an additional power. I think this particular case, to me, is one of the more glaring examples of badly written, badly drafted regulations, regulations which might—and here I certainly stand to be corrected—be of questionable legality. I am not a lawyer and do not wish to stake my claim in that area, but I do think that the third regulation, the SOR/53-111, is a tremendous excess of authority. It is excess of authority of the statute and certainly in my mind there is no reason for a regulation being permitted

to sub-delegate an authority to a minister. I think this is one classic example of the sort of situation you can get into.

Another type of regulation which I consider to be somewhat strange and imposing an unjust hardship—but be that as it may—is one made under authority of the National Parks Act. This is SOR/60-71, wherein section 8(1) requires a permit to erect a television antenna on a building in a national park. Subsection (2), in fact, requires the submission of plans and specifications for a permit to erect a television aerial; and, in addition to that, it requires a fee of $2.00. My point here is simply that on those people who may, through some circumstances, dwell in a national park and may wish to put a television aerial on their building this, in many instances, is an unjust imposition. Nowhere else in Canada that I know of is there a requirement for the submission of plans for television aerials or for the paying of a $2.00 fee for a permit. It is creating a category of second-rate citizens, if you like, for what it is worth. It is not terribly important, but it seems to me to be an unjust imposition by virtue of regulations.

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Another interesting type of situation is found in regulations made under authority of the Canada Student Loans Act. SOR/66-380 section 26 provides:

> Whenever, under the Act or these regulations
> (a) Any matter or thing comes within the discretion of a bank such discretion may be exercised by a responsible officer of the bank.

Perhaps it is an oversight on my part but I do not understand how Parliament can possibly delegate authority to a person who is neither a public servant nor a parliamentarian, and this is what they are doing. If it were a medical association or a bar association which was set up to regulate its members by statute I could understand it, but because banks are chartered, private enterprises, officers of the banks are given authority to exercise a statutory discretion. I might add that this same section also contains a reference to "under the Act". It seems to me that this does...

**The Chairman:** In the one you read?

**Professor Brown-John:** It refers to "Whenever, under the Act or these regulations". I would like to raise this simple question. Is it possible that Parliament has delegated, through this authority to make these regulations—and the regulations thereby created—a power or a right to amend the statute? Again I stand to be corrected on this but it seems to me, at least superficially, that because it refers to "under this Act" in this regulation that one could have the right to amend or alter the interpretation or the meaning of the statute.

Those are examples of some of the things I have come across, and they were taken at random. Another thing I should like to draw to your attention—and to me this is equally important—is the matter of definitions. If you look at the Regulations Act you will see that a regulation is defined under Section 2(a) as:

> ...a rule, order, regulation, by-law or proclamation.

To my mind this is the most imprecise form of statutory definition one could imagine because a rule, a regulation, an order, a by-law, a decree and a minute are completely different things. However, for some strange reason people use them and for some strange reason Parliament has not seen fit to define these things precisely.

In searching through the limited literature that is available on this subject—writings by men such as E. A. Driedger and A. D. P. Heeney, who have written bits and pieces on these things—one finds that they all provide limited definitions. Driedger distinguishes between a rule and a regulation and also tells us what a by-law might be interpreted as. Heeney simply devotes his study to defining an order and a minute. I think the Glassco Commission refers to orders in council as being all-inclusive. I have yet to pin this down. You will find this in volume 5, page 35, of the Glassco Commission report, where they are extremely critical of the overuse of orders in council. I am very much inclined to agree with them in this respect because I think orders in council might be interpreted as prerogative orders, which they have not been in practice. There is a tremendous—and I do not understand it—fetish among the public servants in Ottawa to produce orders in council. When in doubt write an order in council. This means that it has to be thrown through Cabinet. It acquires a degree of formality which I think probably far exceeds the content of the order in council. I very strongly believe that the Regulations Act must be revised. There is absolutely no question about this. Such terms

as orders, rules, regulations, minutes, by-laws and decrees must be more precisely defined. There is no question in my mind about this. I defy you to find a definition for "decree" in any of the published literature. Most authorities agree that by-laws have something to do with public corporations, Crown corporations. Nobody is sure what it is but they have something to do with corporations. Minutes, aside from Treasury Board minutes, have something to do with approval of ministerial

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action. Then there are regulations and rules. It becomes a great hodge-podge of words. The report on the Committee on Ministers' Powers, which was a British Committee in 1932 on the same subject, came to the same conclusion. They said in their report:

> The commonest words in statutory use to describe delegated legislation are "regulations," "rules," and "order." But considerable confusion is caused by their indiscriminate use. No attempt seems to have been made at any definition and delimitation of the words.

I wholeheartedly agree with this. I defy you to find anything which reasonably purports to define what all these things are, and yet they are used with great abandon. As I said, as a prerogative order I think the order in council is far overworked—in fact, it is insanely overworked. If you look at the statistics I think you will find in the right-hand column the extent to which it is used, which I think is far too great a use.

I do not know whether you wish me to make suggestions at this point or whether you would like me to...

**The Chairman:** If you have specific recommendations to make, Professor Brown-John, I think it might be appropriate if you made them before we have any discussion.

**Professor Brown-John:** Yes. I have been playing around for some time with what to do about subordinate legislation or statutory instruments, whatever you want to call it—which, by the way, is indicative of the situation itself. I prefer to call it delegated legislation because to my mind that is more precise. Your Committee is called the Special Committee on Statutory Instruments. There are those who call it subordinate legislation. You can pretty well take your choice, but I think it is indicative of the degree of confusion that is prevalent in the use of these terms. However, I have bantered this subject about for many years in an attempt to figure out the most appropriate, the most feasible means of handling it and based on, as I said earlier, the presumption that Parliament must—and I repeat *must*—assert some responsibility, it must acquire the responsibility for this type of legislation which it appears to have lost. It appears to have lost it, I think, basically because the members cannot keep themselves informed. What I hope to propose to you, in however naive and peculiar a fashion it may be, is a means whereby Parliament may once again acquire a respectable responsibility for the actions of its public servants. I might say that I do not attribute to the public servants, and I think I am repeating a bit, any ulterior motives. I think they are above and beyond reproach in this respect and, in fact, I have tangled with one of your colleagues publicly over this very point.

In any event, I suggest—and I know I am getting on to touchy ground here, but I do not think there is a senator in the room—there should be a joint House-Senate committee. I do not mean a special variety of committee, a standing committee, a select committee or anything of this nature, I mean a continuing committee which can operate twelve months of the year. I think that perhaps—and I might just take another little shot at you here—the biggest weakness which faces parliamentarians today is the weakness of committees. On the whole the committees, until the last few months when the Public Accounts Committee has become operative, have been disastrous. I think the individual committees, the procedure and the attitude of the members on the committees require a considerable amount of modification. I might generalize here and say that I think many Canadians would strongly object to the political playing around that goes on in committees. To my mind committees are not second debating chambers; they are not houses of commons in miniature; they are working bodies that are here to do something irrespective of the party lines of the people involved. I think the Public Accounts Committee, with an opposition member as the chairman, may in effect be proving that it can do this work if it can keep its sticky fingers out of political overtones. I know this hits at members of Parliament but I am really sincere about this. This is not a game, it is the place where people are supposed to be doing the nitty-gritty work of legislation.

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In any event, I think the type of committee I have in mind would be a committee of approximately 15 members. Do not ask me why I chose 15, other than I think that the functions of government departments can be neatly broken down into four categories. I will not outline them, but I think they can be subdivided so that subcommittees of this main committee of, say, three or four people at a time could work as a review committee.

This committee, in my mind, would be chaired by a senator. Again, I know this does not go down too well with members of the House of Commons, but I think the nature of the work—keeping in mind that subordinate legislation is perhaps the dullest and drabbest form of legislation imaginable and keeping in mind, too, that there is not a lot of political hay to be gathered in the subordinate legislation field—would be such that the senate is eminently qualified to do this task. I think it is very well qualified and it has some capable people. If you wish, I can document the last 100 years of the work of senate committees as I have this available. Besides, it has little else to do and I think it would be most attractive to them. I think, too—I am not trying to be facetious, Mr. Chairman—there is an underlying presumption that if the senate should be abolished, why the hell not abolish it, but I do not think it should be abolished.

**Professor Brown-John:** I proposed a senator as chairman of this committee because I think the senators are in a position to maintain a continuing review of subordinate legislation. What I am launching here is a formal procedure involving this joint committee on a continuing basis, that is when the House is in session or not in session, with the Privy Council as a form of registrar's office, in much the same form as they are today.

**The Chairman:** Professor Brown-John, perhaps it might be helpful if you were to read this document to us, of which you have given me a copy. I will have it circulated to the other members subsequently, but it is an outline of your proposed committee and perhaps if you were to go through this and read it to us step by step it might clarify the situation.

**Professor Brown-John:** I will apologize for its bad writing. As you know, I am not a lawyer and cannot afford to be one. When I said I have actually written Orders in Council one can somewhat shudder at the result because I think this is a fine example of how badly a layman can write a proposal of this sort.

**Mr. Stafford:** You do much better than a lawyer, what are you?

**Professor Brown-John:** I am a public administrator—a retired public servant. This committee, I propose, would consist of 15 members drawn from both Houses of Parliament—8 members from the Senate and 7 members from the Commons—the chairman to be a senator and a quorum to consist of three members. I say this simply because I know that come mid-August members of Parliament on the whole just are not here and I suspect there would be some senators over in the Chateau who could be dredge out to a meeting.

The Terms of Reference of this committee with one or two exceptions—one addition and two omissions—are identical to the United Kingdom Committee on Statutory Instruments.

> 3. (1) The Committee shall review all proposed subordinate legislation and certify to their correctness and authenticity before any proposed subordinate legislation may be promulgated as law.
>
> (2) The Committee shall ascertain whether:
>
> (a) The legislation was properly enacted within the terms of the enabling statute;
>
> (b) The legislation imposes a charge on the public revenues;
>
> (c) The legislation excludes challenge in the courts;
>
> (d) The legislation makes an unusual use of the powers conferred;

I am not prepared to define that either.

> (e) The legislation purports to act retroactively (*ex post facto*)
>
> (f) The legislation appears to exceed the constitutional prerogatives of the federal government.

I have added this here because I think it is a touchy subject, particularly on matters relating to the Department of National Health and Welfare.

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> (g) Such other reasons as the committee might consider appropriate.

I have added here a section on Definitions and I define subordinate legislation as meaning:

4. (1) "Subordinate Legislation" means any order, regulation, rule, by-law, minute or decree, issued under authority of an enabling statute.

This excludes prerogative Orders in Council—prerogative writs.

(a) This shall not apply to orders issued by the Governor in Council.

(b) These provisions will not apply to regulations, orders, by-laws, minutes, issued by a Crown agency listed in Schedule D of the Financial Administration Act.

I believe the propriety corporations of Canada still are—the one that is on strike—Air Canada, Polymer and Canadian National Railways.

(2) For purposes of this section,

I have not defined them because I have some partial definitions of what an order, a regulation, a rule, a by-law, a minute and a decree are, but I hesitate to get too immersed in that.

Next, I have labelled these by sections—not that it will help you at all but—

5. No subordinate legislation may be promulgated until it obtains certification by the committee. But the committee must indicate its approval or rejection of the proposed legislation within 15 days of receipt of the proposed legislation when Parliament is in session and 30 days if Parliament is not then in session.

(a) Legislation when certified by the committee must then be published in the next most immediate issue of the *Canada Gazette*

I have added this phrase "most immediate issue" to make it absolutely precise, I hope.

(b) Legislation shall be laid before Parliament within 15 days after publication, or if Parliament is not then in session, within 15 days of the next ensuing session.

Here I come to the next thing which is a recommendation from the Committee on Ministers Powers—the United Kingdeom Committee on Ministers Powers—and a modification of Section 7 of the Regulations Act.

6. If within 30 days after laying before Parliament a resolution is passed by either House for annulling or modifying the subordinate legislation it shall be annulled or modified as the case may be, by Order in Council.

And that, I would think, would be a mandatory requirement.

7. The Clerk of the Privy Council shall act as registrar for the committee.

(a) He shall maintain a record of all proposed subordinate legislation including orders issued by the Governor in Council.

(b) Every proposed act of subordinate legislation shall bear a number assigned to it by the Clerk of the Privy Council.

These are fairly similar to the Regulations Act.

(c) All proposed subordinate legislation must be so registered before submission to the committee and copies must be registered in French and English.

(d) Any purported subordinate legislation not so registered and certified by this procedure is invalid.

This is somewhat of a change because the Regulations Act, I believe, says that if it is not published it does not invalidate the regulation.

8. On an order of the Governor in Council the requirement of certification may be waived.

(a) The order waiving the requirement and the subordinate legislation shall be published in English and French in the *Canada Gazette* in the next most immediate issue and shall be laid before Parliament within 15 days after publication, or if Parliament is not then in session, within 15 days after the commencement of the next ensuing session.

9. *Judicial Notice*

I simply would subscribe to the provisions of Section 8 of the Regulations Act and I will have to leave that up to your imagination. I have the Act here somewhere, but I do not know where it is.

POWER OF THE JOINT-COMMITTEE

To me this is crucial because we are talking about this in what is referred to as an "antenatal" period, that is, before the regulations and rules can become law—before in fact they are published. It is referred to in the Committee on Ministers Powers as "antenatal" supervision as opposed to "postnatal" supervision, which is the standard. It is a very maternalistic approach.

10. (1) The Committee may when it is in doubt about the provisions of any proposed subordinate legislation:

(a) Call for a verbal explanation by a representative of the legislative making authority;

(b) Require an explanatory memorandum;

(c) Require technical or legal re-drafting;

(d) Refuse to certify the proposed subordinate legislation for any of the reasons cited Section 3.

That is, in excess of jurisdiction and so on.

(2) Any decision made by the committee under Part I (d)...

That is, refuse to certify for any of the reasons in *ex post facto* operation or imposing charges and so on. Any of these reasons

... shall be reported to Parliament within 15 days or if Parliament is not then in session, within 15 days of the commencement of the next ensuing session.

(3) If within 30 days, a resolution is passed by either House rejecting the committee's decision the proposed subordinate legislation will be deemed to have been certified and shall be recorded and published as such.

(4) The committee shall report annually to Parliament within 15 days after the commencement of the first session of Parliament after the first day of January in any year.

That is a bit clumsy and I apologize for that.

(5) The report of the committee shall contain such statistical and explanatory information as is considered necessary to depict the Committee's work during the previous calendar year.

(6) The report shall also contain notations of all orders made by the Governor in Council and all orders issued under Section 8.

This is the provision for waiving the requirement of certification by the committee.

That is all I am proposing. I think my key points—it does not matter whether it is a House of Commons committee, a Senate committee or however you want to look at it—the two key points are: firstly, that I think all subordinate legislation should be reviewed by representatives of Parliament—be they House of Commons members or senators—before these regulations become law and, in fact, when they are published they would, as of the date of publication, become law. Secondly, my suggestion is perhaps a bit different in that I think the Senate should be involved in this. As I said, I know that members of the House are not always enthusiastic about this, but I think the senators have the time; I think they certainly have the ability and they have, I might add, the desire. I canvassed a good many senators some years back with this specific subject in mind and I received some very favorable replies. I received, in fact, some very interesting material—views and opinions on this whole subject—prepared by members of the Senate. I think it is the sort of subject that will gain neither votes nor political hay, as I said earlier, and senators are in a much better position to appreciate this, I think, than members of the House.

Mr. Chairman, that is all I think I can say about this at the moment.

**The Chairman:** Thank you, Professor Brown-John. I will make sure that all members of the Committee are sent copies of your proposal, but we have just the one copy at the moment. I might also ask you, since I have been able to obtain copies of an earlier writing of yours—I take it that it is not published, but it is in the form of chapters. I have Chapter 8 and, I think, several following chapters here—if you would be agreeable to having this distributed to the Committee members as well.

**Professor Brown-John:** That is just the end of the major work and relates primarily to the Senate.

**The Chairman:** The rest of the work is on the Senate?

**Professor Brown-John:** No, the rest of the work is much larger than that.

**The Chairman:** Is it on this same subject?

**Professor Brown-John:** It is on the same subject. It relates to the whole operation in review.

**The Chairman:** If you would like to make the whole thing available to us we would be prepared to circulate it to the members of the Committee.

**Professor Brown-John:** Certainly.

**The Chairman:** All right.

**Professor Brown-John:** It is in the form of a B.A. thesis, as a matter of fact, with all the deficiencies of such a piece.

**Mr. Gibson:** Is it on the Senate and committees as well?

**Professor Brown-John:** No, this is...

**The Chairman:** I think we should have it.

**Professor Brown-John:** It is rather lengthy. In fact, there is one chapter missing. You see, I was in the process of preparing a book on this subject and the publishers with whom I was dealing felt that the subject was too academic for their market, so I took it back. I now feel my production is not academic enough for other reputable publishers, so I am stuck in the middle.

**The Chairman:** You can give that to us either in its revised or unrevised state—whichever you like—and we will circulate it to the members of the Committee.

I now will allow members of the Committee to ask questions. Mr. Stafford.

**Mr. Stafford:** You were talking about delegated authority. Do you think it would be better to delegate authority to a parliamentarian then to a public servant? You said it should be delegated to either one.

• 1655

**Professor Brown-John:** Let me put it this way. As it presently stands, the authority is delegated to public servants in practice and I see nothing wrong with this. One thing I did not mention in my submission is the matter of reviewing the enabling statutes themselves. This is something which, I think, John Kersell is much more qualified to go into, but I think Parliament is fully capable in committees if the committees were improved, were given more staff and much more freedom to act. I think that at the committee stage, if the statute with an enabling section in is at issue, the delegation of it to a public servant becomes somewhat immaterial because the parliamentarians are doing the delegating and they know full well what the section means and if they have given any thought to it at all, they will know what it will mean in practice. When a statute says the minister may revoke a licence they know that somewhere down in the department a public servant is going to do the work.

**Mr. Stafford:** I notice in some of these photostatic volumes that the Chairman has given us a Sheppard's chapter on subordinate legislation. Apparently in the B and B Commission report it says this at the beginning:

> Subordinate legislation, or delegated legislation, or administrative law, as it is also called ...

Do you think they all mean the same thing?

**Professor Brown-John:** No, I certainly do not think administrative law means the same thing. One talks about administrative law and I agree it is related, but administrative law, to me, is the judicial interpretation or quasi-judicial interpretation of regulations.

**Mr. Stafford:** Right on the same page, in speaking of subordinate legislation, it goes on to say:

> For instance, in Canada, there has not been one single satisfactory text book published on the subject.

Is that correct?

**Professor Brown-John:** There is Kersell's book and I might add he will admit and agree with me on this—the book is called *Parliamentary Supervision of Delegated Legislation.* I think it is a Cambridge book published about 1962.

**The Chairman:** We circulated a copy of the book to members of the Committee.

**Professor Brown-John:** That is right. Kersell will admit that his book is incorrectly titled.

**Mr. Stafford:** Apparently there has been a lot of work done according to what it says here and I will just read you the four lines.

> Yet, despite its great importance, subordinate legislation has not yet received from political scientists and jurists the attention it deserves. For instance, in Canada, there has not been one single satisfactory text book published on the subject.

I want to know if you agree with that.

**Professor Brown-John:** Yes, I agree with that.

**Mr. Stafford:** There has not been published a single satisfactory text book on subordinate legislation?

**Professor Brown-John:** As I started to say, for some strange reason the publishers changed the title of Kersell's book. His book deals primarily with parliamentary supervision of the delegating of legislation the delegating authority. I was more concerned with the delegated authority and hence I have the same title, but a somewhat different subject.

**Mr. Stafford:** I have only a couple more questions. Are you giving us the list of the

statutes that you looked into together with the sections?

**Professor Brown-John:** I have a copy of it somewhere, but that is just a general outline.

**Mr. Stafford:** Are these the ones you looked at?

**Professor Brown-John:** Yes, I looked through quite a quantity. I will admit I have never read all the statutory orders and regulations or all the statutes, but I have wandered through a lot of them. I read them like James Bond novels, looking for things like this.

**Mr. Stafford:** I have one final question. How long did it take you to document the work of the Senate in the last 100 years?

**Professor Brown-John:** It took about a year. As a matter of fact, if you are interested, it is at the back of this thing; it is hidden away here. What I was concerned with were the types of committees which the Senate had appointed. I was thinking at this point more in terms of an exclusively senate committee, but it contradicts my own theory in which I said that Parliament, as a whole, must accept responsibility. I believe the Senate has a role in our constitutional political system. I object very strongly to members of Parliament who will not, at least, grant them the existence which, in fact, the constitution provides. The BNA Act gives more provision for the Senate than it does for the House of Commons.

• 1700

**The Chairman:** I think perhaps that is a different subject and one that we do not want to get into today.

**Professor Brown-John:** Oh, indeed, but I simply am saying that in looking back over what the Senate has done—I notice I only have the ones from 1911—it has undertaken a lot of major studies on a whole variety of subjects throughout the years. None of these to my knowledge are very often given any publicity at all and it is a bit of a pity because I think there is a tremendous potential there. Therefore, let us make us of some of the resources we have got for an otherwise uninspiring, unattractive task.

**Mr. Stafford:** I think you have heard from the few that criticize the Senate, and there are some of them close at hand to you. All of us have not got that idea.

**The Chairman:** Mr. Baldwin.



**Mr. Baldwin:** Have you given any thought, having in mind the terms of reference which you have envisaged for this Committee, without going into the type of committee right now—have you given any thought to the number of regulations—I will call them regulations for the time being for the sake of argument—which you envisage would be considered and reported upon within the term of a year?

**Professor Brown-John:** I suppose a rough outline is contained here of the number that would be reported upon. I might say that this statistical summary, however haphazard it is, does not contain a complete summary of everything that is in the *Canada Gazette* in terms of minutes; these are only regulations, rules and orders in council. But let us put it this way: there would be a tremendous quantity of material. I do not deny this at all. I think the very existence of the Committee would prompt public servants to draft their legislation with greater degrees of precision. If I may just comment from my own experience, I really knew nothing about drafting orders in council. I was asked to draft an order in council, drafted an order in council and immediately upon its completion qualified as a departmental expert in orders in council. The committee on minister's power pointed this out too. They were very strongly critical of the fact that just about anybody under the sun down to the janitor could draft an order in council.

To my mind the existence of the committee would tighten up the regulations themselves and they would not be so poorly written. As to the number that might be subject to question, the British Committee on Statutory Instruments I think in one year reported on only 21 regulations out of some multithousands that went through their purview. So the number being drawn to the attention of Parliament would, I think, be very, very few.

**Mr. Baldwin:** Your view of the salutary effect something like this would have on those engaged in drafting and the resulting product would agree with—Professor Arthurs and I had a little discussion on that this morning. Would you exclude from consideration those regulations for which provision is made in the parent statute for review and appeal either by a court or by some other quasi judicial body? In other words—I suppose I have made myself clear—if the statute establishing the right to set up the regulation and what effect it might have also provides that any person

who is affected by this would have a right of appeal either to a judge, which is becoming increasingly rare, to a court or to some statutory appointed board of review, would you exclude from consideration that type of regulation?

**Professor Brown-John:** No. I might just add a point—and here we are on the subject of administrative law. The types of appeals which are open from a decision made by virtue of a regulation are I think fairly limited and I really think it is not a subject for the committee, at least as far as I can gather. But I do think that this is another subject that warrants some considerable thought.

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I think that the prerogative writs under which one might appeal a decision made by virtue of regulations are not nearly adequate, but if regulations did provide for an appeal as a routine matter, a routine form of appeal or standardized and assured form of appeal, then invariably the committee would still be going to review this, subject to the requirement that all regulations must go through this committee in any event. But I do not think they would get terribly concerned because the fact that the appeal procedure exists in the regulations would be more than adequate.

**Mr. Baldwin:** I also had some discussion with Professor Arthurs about the means that would be used in establishing such a committee, whether by additions or changes in the standing orders of either the Senate and/or the House of Commons, or whether there should not be a statute establishing the committee. The reason I propose this—and possibly I should have enlarged on it to Professor Arthurs—is that I can envisage the possibility that some governments—and I use this with a small "g" as I think all of these have the same characteristics—might be inclined to provide an exception; in other words, the very same willingness which the House of Commons and which Parliament now display in passing and accepting statutes which have these regulatory powers in them. It might also permit the same Parliament to say that we will accept the statute which exempts from the operation of this committee the right to consider this particular regulation.

The statute which we say will be passed later on which will set up the regulatory power, give this power to enact regulations, might still provide that this statute would override the provisions of any other statute setting up a committee—I hope I am not getting too complicated here—but it would be less likely because it would be a statute to which both the Senate and the House of Commons have given assent, and part of the law. While it is not part of a bill of rights written into the Constitution, nevertheless there would be less likelihood that any government would attempt to get around the obstacle which this committee could provide, by having this committee created by and existing under the terms of a statute of Parliament.

**Professor Brown-John:** In fact I had written up my recommendations, as you will perhaps see when this is circulated, in a quasi statutory form because besides suggesting that the regulations actually be revamped, I think this committee should be created by statute for that very reason. I think any exceptions to the purview of the committee, as I set out here, should be undertaken on an individual regulatory basis. In other words, I would strongly object to any statute which said simply that any regulations made by the minister under this act are exempt from purview by the committee. I would reject that wholeheartedly.

I know this is a bit different and creates a bit of a curve for the present means of establishing committees, but I think that it should be done on a statutory basis because I think you also have to get around the little problem of—when the House is not in session, what do you do? In my mind this committee has to sit and to be able to sit 12 months of the year, and it seems to me that only a statute can do this. The same statute could be used to bring in the whole business of definiting all these terms and the publication and the laying before Parliament and so on.

**Mr. Baldwin:** The Australian public accounts committee is set up under a statute and both the Senate and the House of Representatives participate in it pursuant to that statute. That is the sort of thing you have in mind.

**Professor Brown-John:** Yes, that is correct.

**Mr. Baldwin:** The only other question I have you may not be able to answer—may not like to. At the present time do you see any tendency on the part of the Executive or those who are part of the Executive to enact regulations to submit to the sort of restraint which this would impose upon them?

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**Professor Brown-John:** I suppose any minister of the Crown at any time is going to

be somewhat reluctant to have his free wheel hindered in any way, shape or form by such a body, but I think that in the long run ministers themselves, as I think public servants, will come to appreciate the value of the committee's existence because, it seems to me, you not only are trying to protect the average citizen from any legislative statutory abuse, but you are implicitly protecting public servants from charges of bureaucratic takeover—Judy LaMarsh you know, made a comment about Mr. Pearson turning to the public servants and hence we are now run by the bureaucracy.

I think if you analyse Mr. Pearson's background you can understand why this was done. Who else can you trust when you are under pressure, but public servants and, I think, ministers are in the same category. They trust the people who are working for them and turn to their departments, but I think the ministers will appreciate this because they will be protected against charges of arbitrary action, against regulations which are illegal, public servants will be protected from abuse for which they do not have a defence, quite clearly the public will be protected and Parliament, in my mind, will have achieved its goal, which is to cover all legislation.

**Mr. Baldwin:** I simply conclude by saying that you are making a very good case for frequent changes of government so that the ministers then may become watchdogs. Thank you.

**Mr. Murphy:** Earlier, before this session started, I heard some comment that instead of having the type of committee you have recommended—rather than go into that—we should expand the role of standing committees so that regulations passed under acts which are dealt with by the standing committees would be reviewed by those standing committees rather than by one central committee as you have suggested. I take it that one of the reasons you do not approve of that method is because of the fact that the standing committees do not sit 12 months a year or are there other reasons?

**Professor Brown-John:** That is one reason. The other reason, I think, again coming back to my criticism of committees in general, is that the standing committees, in my opinion, have tended frequently—I think this is one of their biggest weaknesses—to revert to political recriminations. As you can see from my proposed terms of reference, no one at any point could question the policy of the regulations unless they were blatantly in excess of the statute. This would be simply a technical committee designed to exercise the technical competence.

The standing committees, I think, do serve as forums for political hay-making and, you know, with all due respect to members of Parliament—I have a tremendous respect for them—it seems to me that this is abusing the role of committees. Committees, in my mind, should do the technical work, should tighten legislation and in this case should tighten subordinate legislation. I think there could be arguments made for the standing committees looking at each of the regulations in that field, but I think the same thing could be done with a greater degree of precision by this committee.

**Mr. Murphy:** The one thing that bothers me when looking at the statistical summary which you have left with us, is that under the heading Orders and Regulations, it would appear that in the number of orders alone which you have totalled over these years, the committee would have to look at roughly 3,000 regulations a year which might be an impossible task.

**Professor Brown-John:** I think this is certainly a point, but in looking through regulations and various types of whatever you want to call them—subordinate or statutory instruments—that exist one can come to the conclusion that they basically follow patterns. I quoted you, for example, regulations made under the Ferries Act where there were three different sets of regulations, all with the identical section and all referring to the same

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thing. Once you work within a government department and once you find a pattern which works, you will write every other regulation in this identical pattern...

**Mr. Murphy:** I agree with you.

**Professor Brown-John:** ...so the actual volume is deceptive, I think, because the amount of work involved in reading is not that great. You can pick up one of those Orders in Council—take the one attached to the back of the last one, in fact—it is only one giant sentence long.

**Mr. Murphy:** I agree with you, but others are pages long. Do you not agree that the

committee members would be expected to read and study each one of these? Even looking for the pattern and knowing that patterns exist, the study still will have to take place, do you not agree?

**Professor Brown-John:** This is entirely possible and here I make no apologies. The members would have to devote a fair period of time to it. There is no question about it. I think, increasingly, members are going to find themselves working on one committee if they are not already doing so and that would be their one, in the popular jargon, "bag" so to speak. I think it is true that they will have to devote a considerable period of time to it and I think that the nature of the subject warrants that period of time because I am prepared to suggest, in an off-handed gesture, that all of the legislation which affects Canadians is subordinate legislation.

**Mr. Murphy:** I agree with you.

**Professor Brown-John:** Therefore, if anything, Parliament should spend more time on it than it does on statute. This is a bit absurd, but I think it is true. It is a serious business. When an individual citizen writes to you, as a member of Parliament, and says, "Look, I went into the Post Office and they said I cannot ship an elephant through the mail because the regulations say I cannot. What kind of regulations are those?", those are the regulations he comes in touch with. The ad men—the Madison Avenue boys—would call it the point of contact. His point of contact is a little public servant at the immigration desk or the customs or the post office and that public servant only has those great massive volumes of regulations. He does not know a thing about the statute and the citizen does not know anything about the statute. I think this is why more time should be given to it because it is a serious business.

To come back to something that was raised a while ago about political scientists not getting involved in it, they have not become involved in it because it is a hideous mire—a quagmire—to get wrapped up in. As I said, I have been playing around with this for years and I cannot even purport to know that much about it. It is extremely difficult and it is a beast which, until somebody does something to put a rein on it, is just going to keep getting bigger and bigger and bigger.

**Mr. Murphy:** I have one final question which, I guess, does not apply strictly to the question of statutory instruments. Earlier in your discussion or in your statement you commented about the danger of over-government, over-governing and how people wanted the state to become involved. If we, as Parliamentarians, represent the people, do you not think we should pay any attention to their desires? I would like to hear your thoughts on that. There is a little conflict in my own mind now and I want to take this advantage of picking yours.

**Professor Brown-John:** I must admit I also am very confused about this. As a political scientist—one with a primary interest in politics—all things political are fair game, but even I am beginning to have doubts. I am beginning to get a little bit concerned about over-government and it is not over-government because government wants to over-govern. I think it is because of the complexity of the situations which face us.

I am not an automobile mechanic. I can take my automobile into a shop and the guy will charge me $200 for a distributor cap or something and because I know nothing about it, I will accept that, but there is a law and there is a regulation regulating what he can charge me, so I am protected. Because I know nothing about it, I am protected. I am protected against drug manufacturers selling me bad drugs, food manufacturers, et cetera, and this is what I call the cocoon individualist. I am just concerned that people—there is no ready solution for it—get frustrated with the situation.

We have a marvellous situation of pollution in Windsor—air pollution. To me it defies individual action. Am I going to go across the river and blow up the Great Lakes Pressed Steel Corporation because I object to the smoke they are pouring out? I cannot do that. If I go to the city council they cannot do anything about it. If I go to the Province of Ontario they can do nothing about it, so I turn to the federal government and they may or may not be able to do something about it.

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The fact of the matter is, I look at a situation. I am living in a very complex world, a world which befuddles me at every turn. I am confused constantly and I consider myself to be at least a little more aware of what is going on in the world than most of my fellow citizens for whom I get terribly concerned when they turn around and say, "Let the

government do it. It is time the federal government stepped in to do this". Good Lord, I have a tenant's association going, and whom am I screaming to? The provincial government. We need more control over landlords. Fine and dandy, if I am prepared to pay the price which such control means, and such control is going to mean perhaps less capital invested in apartment buildings, or a detraction from free enterprise, which, I presume, is the governing ethic.

I am as confused as my fellow citizen; I do not quite know where to turn. However, I suggest that our parliamentarians of all levels should be receptive to the opinions, demands or requests, however they may be phrased, of their constituents. I would object strongly to their inspiring me to put pressure on the government to take more action on that particular problem.

It is becoming a serious matter. Every time I turn around there is another regulation, another law or another rule and I get a little bit worried about it and from an old socialist of the British Columbia variety, this is a pretty hard admission. I do not have a palliative for it, I assure you. I have been proclaiming this for a full year at courses in public administration and I get pinned down on the same point every time. I do not have an answer.

**Mr. Murphy:** That is fine.

**Mr. Baldwin:** That was a very good point brought up by Mr. Murphy. I would like to pursue this question of how we tackle the problem. Here you have on one side St. George, our vague, formless committee which is going to be set up some time, whether it will be Senate or House of Commons or both, what the mix will be, we will leave for the time being, and over there is the dragon, all of this great, huge mass of regulations. Do you think the answer probably is to cut the dragon down to size so St. George can slay him, by having an intervening group attached to the committee responsible to parliament as was suggested today?

This could be either a regulations commissioner or a registrar general of regulations whose competent staff would examine in some more detail, even as the Auditor General examines all of the $11 billion worth of expenditures and then reduces to manageable form, in his Auditor General's Report, the areas which he thinks are within the realm of competence for the committee to discuss in a year.

These people would be attached in some form to the committee and would winnow down to a manageable portion the areas of discussion by the committee. This is what I understand is done in the United Kingdom. One of the legislative counsel to Mr. Speaker there has performed a very valiant task with a committee there and has succeeded in doing this. Do you think this might be feasible as one way of meeting the problem here?

**Professor Brown-John:** I have heard this suggestion before as the form of legislative ombudsman, or something. I would certainly think this is a very logical suggestion. As these statistics seem to indicate, quantity is a serious problem. If the matter of quantity is an issue, then I would think, yes, certainly, provided the commissioner of sorts were responsible to Parliament in exactly the same form as the Auditor General and not to any Minister or anything else.

If I may say so, of all offices that I look up to in government, I look up to the Auditor General. He keeps them honest one way or another and the fact is that he is responsible to Parliament. I would think, yes, this would probably be very true—with a legal staff of some sort.

• 1725

**Mr. Stafford:** Would you cut down on the amount of subordinate legislation, or would you not cut down on the amount that advocates some method of appeal in the event of an abitrary decision?

**Professor Brown-John:** There are a number of points there. I think it is very difficult to cut down, to say, we are going to cut down the amount of legislation by 20 per cent this year. I think what really has to be imposed is that Parliament has to be more careful in creating the enabling provisions within a statute; in other words, it has to define them rather precisely. There should be some sort of appeal if necessary wherever such a situation as revoking licences is at stake, quasi-judicial action, because I am concerned with the livelihood of the man who operates the ferry, or who operates whatever he might be operating. He should have some appeal but this is, of course, getting into the administrative law area. It is a logical corollary. I think it is something that is the next logical step in the work of this particular committee.

**Mr. Stafford:** As you said, a prerogative which cannot apply too well there, because if the abitration board or whatever it is had any reason whatsoever under the statute to do it, even though they picked the worst of the different reasons you cannot do anything about it.

**Mr. Morden:** Did I understand correctly that your first proposition was that no regulation could be promulgated until it had been certified by the committee? Its main function would be to assess the regulations coming to it from the point of view of form and draftsmanship.

**Professor Brown-John:** Among other things.

**Mr. Morden:** You gave the list.

**Professor Brown-John:** Yes, the terms of reference. For example, does it impose a charge on public revenues?

**Mr. Morden:** The same sort of list that the British Scrutiny Committee has.

**Professor Brown-John:** Precisely; I have added the one provision about federal constitutional provisions because this seems to me to be appropriate here. I have deleted the two provisions which were in the Statutory Instruments Committee concerning notification of the Speaker, publication and so on, because they would be unnecessary if you had it certified before it is published.

**Mr. Morden:** You mean, "shall not become promulgated" means shall not become law until it has crossed this hurdle?

**Professor Brown-John:** Yes.

**Mr. Morden:** I am just thinking of a situation where Cabinet might pass a regulation in an emergency within the scope of the enabling legislation but which may leave something to be desired from the point of view of draftmanship. Do you think it is appropriate for a committee to hold that up?

**Professor Brown-John:** No, as a matter of fact I had provided under my section (e) that the provision can be waived, and it was for this very reason.

**Mr. Morden:** Where can it be waived, in the enabling statute or in the regulation?

**Professor Brown-John:** By an Order of the Governor in Council. In other words, it is Paul saying to Paul, I do not owe you any money any more. In other words, on an Order of the Governor General in Council the requirement of certification can be waived. This, of course, could be tightened up. That would provide for emergency matters which, I think, one always has to provide for, but this order waiving it must be published within the same period of time. The War Measures Act, I believe, has provision for this in it.

**Mr. Morden:** As I understand your recommendation and submission it inserts the joint committee at the very outset of a regulations history. It will not become a regulation until it has crossed that. I understand in England and in other places where they have scrutiny committees, the regulation is made and is then subjected to scrutiny and can be annulled or whatever they provide.

**Professor Brown-John:** I think if you look at the operation of the Statutory Instruments Committee in Britain, while it has proven itself useful I think what happens is that you revert over time to what you already have. The point is, I have set a maximum of 15 days in any event during which the Committee may hold up a regulation and it must justify any holding beyond that period. The procedure would be simply that the Department or the Minister would submit it to the Privy Council and the Clerk of the Privy Council would register it and that would be the first day of the 15.

It would then go to the committee and they would have to discuss it within those 15 days. Once that was done it would be published, and that is why I used the phrase "in the next most immediate issue of the *Canada Gazette*". Once it is published it is law, but with the other proviso that it could be amended on 30 days if a resolution is passed by the House.

**The Chairman:** This is in Parliament itself at that point.

**Professor Brown-John:** Yes; once it is published it is effectively laid before Parliament.

**The Chairman:** So you have two safeguards in your proposal, one in a committee before the regulation becomes law and second in Parliament itself after the regulation has become law.

**Professor Brown-John:** Here is another suggestion which has been included in a number of places. I did not include it, but it is certainly a valid one. Within these 15 days

the committee might have the power to consult interested parties. It is perfectly logical. Some have suggested in fact, that interested parties could serve the role of the Committee. I would reject this very strongly because they, again, are not Parliament. I am putting a lot of emphasis on Parliament's role here, but there is no reason why if you are making tariff regulations regarding cotton goods or something that people who—whatever they do with cotton—should not be consulted. It is perfectly normal.

**Mr. Morden:** I gather you are opposed to the sub-delegation of legislative powers?

**Professor Brown-John:** Most certainly I am.

**Mr. Morden:** You are familiar with the Chemicals Reference Judgment 1943.

**Professor Brown-John:** I am afraid I am not.

**Mr. Morden:** I thought you had taken Albert Abel's course in administrative law.

**Professor Brown-John:** Oh, good grief, that probably was one of 500.

**Mr. Morden:** The only reason I mentioned it was that I understood it was a case involving sub-delegaton of legislative powers which was upheld by the Supreme Court. I thought it was common knowledge that if it had not been upheld the war effort would have ground to a halt. It was necessary for flexible and adequate administration in a time of crisis.

**Professor Brown-John:** This is an interesting point. I think one can look at administrative law from two points of view. Administrative law under the War Measures Act is considerably different. If you look at the bulk of Albert Abel's cases they have been taken from regulations under the War Measures Act or the Immigration Act, the next most serious offender. That was a peculiar circumstances and I would agree with the Supreme Court, perhaps that whatever is necessary to win the war is necessary.

**Mr. Morden:** They surely proceeded on that basis.

**Professor Brown-John:** If it is sub-delegation I could reject sub-delegation theoretically simply because Parliament does not or should not permit sub-delegation of its authority. What you are doing effectively with an enabling statute is that you are saying we will take one finger out of the body politic of Parliament and we will give it to this minister so that he can make it work; he can attach it to his finger. However, Parliament always reserve the right to bring it back bacause if he takes that finger and chops it up and gives a piece of it to somebody else you have no control over it. This is something that was discussed in the Committee on Ministers Powers, the extent to which power was delegated, sub-delegated, sub-sub-delegated and on down the line and nobody knew who was responsible for some regulations.

**An hon. Member:** This was at local government level which was particularly bad.

**Mr. Morden:** Is it your position that Parliament has more control over the first tier of sub-delegated or delegated legislation, but it has no control over what goes beyond?

**Professor Brown-John:** Indeed, I would say that, certainly in theory. In theory they should, in practice they do not.

**Mr. Morden:** Is your complaint about the section of the Ferries Act that you referred to which gives the power to revoke a licence if, in the opinion of the minister, it is not in the public interest to retain a licence, the scope of the adjudicatory power there?

**Professor Brown-John:** This is primarily the reason. It is a decision made by a minister. I have no objections to the decision being made by a minister—that is perfectly logical—but I object to the fact that the person against whom the decision is made has no means of appealing the decision because to whom would he appeal without going to court. He would appeal to the minister.

**Mr. Morden:** Is the power to make that decision based on public interest concurred in the enabling statute or is it concurred in regulations made under the statute?

**Professor Brown-John:** That particular phrase is in the regulation.

**Mr. Morden:** Is there any authority for it in the statute?

**Professor Brown-John:** That I cannot say. I did not check that out.

**Mr. Morden:** I gather from what you said you would complain about that type of language even if it were in the statute.

**Professor Brown-John:** That is a touchy point. Presumably whenever Parliament

would say that the minister may in the public interest do something, I am enough of a political scientist, I believe, to query what constitutes public interest because I defy you to find any two people who would agree on how you figure it out. Therefore, I would be hesitant. I would not say that Parliament should not use the phrase "public interest" in he form of delegation, but I would be hesitant to overuse it. In other words, I would use it as an absolute last resort, if necessary.

• 1735

If it is in the public interest to get rid of a bubonic plague epidemic, then I think we would all agree it is in the public interest, but whether it is in the public interest to close off a man's livelihood and business through closing a ferry and revoking his licence, that, to me, is a completely different matter. For one thing, as a member of the public I can hardly relate to it, but I can relate to the bubonic plague.

**Mr. Morden:** I gather you object to the conferring of a power to make decisions on a basis of the standard of the public interest in a wide term?

**Professor Brown-John:** In the broad sense.

**Mr. Morden:** Whether it be in a regulation or in a statute?

**Professor Brown-John:** Yes, I think it is an over-used term and one which should be delegated with considerable hesitation by Parliament.

**Mr. Morden:** Finally, in your submissions respecting the definition of regulation in Section 2 of the Regulations Act which refers to rule, order, regulation, bylaw or proclamation made in the exercise of a legislative power, do you think that could be improved upon? Do you find "exercise of a legislative power" insufficient to carry the meaning intended?

**Professor Brown-John:** I had not looked at that particular phrase, but off-hand I would say it is pretty broad. I think one can be fairly precise and can say, "made in exercise of a delegated authority" or "delegated power".

**Mr. Morden:** That could cover not only legislative power, but adjudicatory power, executive power and investigatory power. It is delegated and it could be of any type, whereas the Regulations Act is solely for legislative power.

**Professor Brown-John:** Yes, that is true. We have two subjects at issue. We have the issue of delegated authority to conduct investigations, inquiries, et cetera, and we have the other delegated authority to make regulations. I think this points up the confusion of the situation, but they are both delegated authority and I would be prepared to suggest that where an act says that the minister may conduct an inquiry, presumably he conducts the inquiry under a particular act, either under the Inquiries Act or under a particular set of regulations or if it says that he may seize the dairy products, presumably he may seize them under a set of circumstances. Good gosh, he does not go in and just seize the dairy products. He has to have some format so the person whose dairy products could be seized knows under what circumstances they could be seized. In other words, the delegated authority contains within it implicitly a power to make delegated legislation simply when he sets up the conditions under which the authority will be exercised.

**Mr. Morden:** In other words, the man making the decision to investigate or to seize is formulating a policy which is a form of adjudicating and you could say he is making law in those circumstances.

**Professor Brown-John:** Practically, unless he has specific guidelines. If there are some guidelines—following are the circumstances under which dairy products might be seized or a departmental memorandum—first, the guy whose dairy products could be seized should know about it and, secondly, that is a form of delegated legislation. You see, this is when you get down to the question of rules such as the rules of a quasi-judicial tribunal of the Labour Relations Board under which it operates. The act usually says the Board may make rules for its methods of procedure and it makes rules which say there will be no more than two witnesses testifying at the same time. That is a form of legislation, but the act does not say it must make rules, it simply says the Board may decide and use whatever procedure it wants. The definition relating to rules most commonly encountered is that relating to rules of procedure and that is why I used that as an example.

• 1740

**Mr. Stafford:** I just have one more point. When a minister does make a decision say, under the Ferries Act, the member of Parliament and the constituency in which the ferry

is situated certainly has some influence on seeing that justice is done, possibly in a better way than maybe an appeal board would—on a late show, in the question period, in estimates or any forum of the House of Commons. So in a way a minister does have to answer on many occasions to a member especially one like Eugene Whelan or many of the others who would not see an injustice like that done.

**Professor Brown-John:** Yes, this is true. You know, the standard rule among public servants is that you do not fear the question asked, you fear the question that might be asked.

**Mr. Stafford:** I am talking about ministers. There is one advantage in giving the minister the right to make a decision rather than a public servant who sticks rigidly to this big book of regulations you use sometimes.

**Professor Brown-John:** Because of the fact that he is a Member of Parliament he can do this, and in these particular circumstances perhaps it would be brought to his attention. In effect I think you have to qualify the emphasis and the great flap about subordinate legislation to this point; many people cannot get excited because very few people are affected. I mean, how many people are going to lose their licences for operating ferries this year in Canada? Not very many.

**Mr. Stafford:** The person affected contacts the M.P. far more often than you think.

**Professor Brown-John:** Oh, indeed?

**Mr. Stafford:** In some cases I just want to point out, it seems a better method of appeal sometimes, provided it is the Minister that makes the decision. If a civil servant makes the decision the answer is a little harder to get, because they say "well, what has Stafford got to do with that? That is my job".

**Professor Brown-John:** I might just qualify your assertion here because you are presuming when the Minister makes a decision that he, good old so and so the Minister, is making that decision. I have been at the other end of enough Member of Parliament letters to the Minister to know that the letters that members of Parliament often get back saying "Dear Joe" and signed "Bob" are prepared by public servants.

**Mr. Stafford:** Well, that is right.

**Professor Brown-John:** I mean, you are presuming because the Minister has signed it that is, in fact, his decision.

**Mr. Stafford:** Oh no, I know that.

**Professor Brown-John:** You know, this has to be put into a context, I think.

**The Chairman:** Mr. Murphy?

**Mr. Murphy:** The witness mentioned the pollution problem and you may use this as an example on other occasions when you are discussing this. The power of the provincial minister in the field responsible for pollution is delegated and has been subdelegated to the point where a civil servant can go into a large company and say, "You put this apparatus in, or that apparatus in to cut down pollution within the next year or you stop."

To this extent that little man controls the jobs of maybe 2,000, 3,000 or 10,000 people so it is not entirely true that the public at large is not affected by a lot of these decisions. In the very near future there is going to be a lot more of it, if it is not watched.

**The Chairman:** If there are no further questions I think a motion for adjournment would be in order.

**Mr. Gibson:** I would like to thank the speaker very much.

**The Chairman:** Thank you, Mr. Gibson. On behalf of all of you I would like to thank Professor Brown-John who, in the absence of air service, has had to drive all the way from Windsor. We are grateful to him for the assistance he has given to this Committee.

The meeting is adjourned.

## APPENDIX "C"

### QUESTIONNAIRE FOR SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

1. With reference to the different types of subordinate legislation which come under the Administration of your Department or Agency

(a) Does your Department issue regulations, as defined by the *Regulations Act* R.S.C. 1952 c. 235, which are approved by the Governor in Council on the recommendations of your Minister? If so, about how many, including amendments, were issued during 1968?

(b) Does your Department issue regulations, as defined by the *Regulations Act* R.S.C. 1952 c. 235, which are made on the direct authority of your Minister? If so, about how many, including amendments, were issued during 1968?

(c) Does your Department issue regulations which are exempted from publication in the *Canada Gazette* by the *Regulations under Section 9 of the Act* SOR-54-569? If so, about how many, including amendments, were issued during 1968?

(d) Does your Department issue other rules, orders, instructions, not included within the terms of the *Regulations Act*— which affect the public? If so, about how many, including amendments, were issued during 1968?

(e) Does your Department issue other rules, orders or instructions, not included within the terms of the *Regulations Act*, which affect only your own Department? If so, about how many, including amendments, were issued during 1968?

In each case please list the statutory provisions (by title of statute, citation and section number) which confer power to make such subordinate legislation.

2. To what extent has the statutory power to make regulations conferred by legislation administered by your Department or Agency actually been used? Specifically, are there any such powers which have not been used or implemented? If so, please specify.

3. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until:

(a) published in the Canada Gazette; or

(b) thirty days after publication in the Canada Gazette.

4. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until approved by an affirmative resolution of the House of Commons within thirty days of being laid before the House—assuming, for the purpose of your answer, that the regulation is laid within fifteen days of being published?

5. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would become law when made but would be subject to being annulled by a resolution of the House of Commons within forty days of being laid before the House—assuming them to be laid within fifteen days of being made?

6. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned)

of a statutory requirement that regulations made under legislation administered by your Department or Agency would be subject to scrutiny by a parliamentary committee which did not have the power to amend them?
NOTE: It is appreciated that all regulations do not stand on the same footing as far as answering questions 3, 4, 5 and 6 are concerned. Therefore, it is expected that the answer will refer to particular enabling sections and actual regulations.

7. Are there any regulations made under legislation administered by your Department or Agency which are of such a long-standing or durable nature that their terms could be inserted into the enabling statute? Are there any such regulations which, for any reason, in your view, should have been enacted as part of the statute?

8. Are there any provisions in legislation administered by your Department or Agency enabling regulations to be made which, in your view, are too broad, in the sense that the nature and scope of your authority to make regulations thereunder is ill-defined or uncertain or that insufficient standards or guide-lines are set forth therein? If so, please specify.

9. Are there any provisions in statutes administered by your Department or Agency enabling regulations to be made which, in your view, are too narrow, in the sense that they do not provide enough scope to make regulations to deal effectively with the problems in the areas affected? If so, please specify.

10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify. If so, what steps are taken to bring such documents to the attention of interested or affected persons?

11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.

12. Are parliamentary committee ever consulted in the formulation of your regulations?

13. Who specifically within your Department or Agency formulates the policies found in your regulations?

14. Who drafts your regulations—a departmental solicitor, a Department of Justice solicitor, a departmental officer who is not legally trained, or some other person? If there are variations in the practice in this respect under different statutes, please specify.

15. Are your regulations drafted initially in French or in English—or simultaneously in both languages? If they are drafted first in one language at what point in the drafting process is the translation made to put them into the other language? How much delay results from the necessity of translation?

16. What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the Regulations Act, R.S.C. 1952, c. 235?

17. Is there any reason why regulations could not be published within fifteen days of being made?

18. What circumstances would, in your view, justify the exemption from publication of a regulation?

19. Please list the titles, indicating briefly the subject matter thereof, of all regulations made under legislation administered by your Department or Agency which have not been transmitted to the Clerk of the Privy Council, recorded by him, published in the Canada Gazette or laid before the House in accordance with Regulations Act, Supra,—or have not been subjected to any one of these four processes?

20. Have any steps been taken to index or tabulate the regulations referred to in question 19, to publish them in some place other than the Canada Gazette, or to advise interested or affected persons, or the public, of their existence? If so, please specify the steps taken with respect to each such regulation.

21. How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the Regulations Act, *supra*?

22. How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

23. Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

## APPENDIX "D"

### SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

Documents distributed to members of the Committee

(SECOND LIST)

Interpretation Act (Assented to 7th July, 1967)—together with Broadcasting Act (Assented to 7th March, 1968)

Regulations Act. 1950, c. 50, s. 1.

The Enactment and Publication of Canadian Administrative Regulations—Elmer A. Driedger.

Committee on Ministers' Powers—Report. Presented by the Lord High Chancellor to Parliament by Command of His Majesty, April, 1932.

Parliamentary Supervision of Delegated Legislation—The United Kingdom, Australia, New Zealand and Canada. By John E. Kersell.

Questionnaire pertaining to practices in the drafting of statutory instruments—Special Committee on Statutory Instruments.

Answers to Questionnaire on the Reform of Parliamentary Procedure through the System of Committees—Association of Secretaries General of Parliaments.

Submission: The Legality of Taxation by the Federal Government on Aviation Fuel and Oil—G. F. Maclaren, Q. C.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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# SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 8

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TUESDAY, APRIL 29, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS

(*See Minutes of Proceedings*)

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 3

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TUESDAY, APRIL 29, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS:

(*See Minutes of Proceedings*)

29817—1

SPECIAL COMMITTEE

ON

STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

(Quorum 7)

Fernand Despatie,
*Clerk of the Committee.*

[*Text*]

# MINUTES OF PROCEEDINGS

TUESDAY, April 29, 1969.
(5)

The Special Committee on Statutory Instruments met this day at 9.40 a.m. The Chairman, Mr. MacGuigan, presided.

*Members present:* Messrs. Baldwin, Gibson, MacGuigan, McCleave, Murphy, Stafford—(6).

*Also present:* Mr. Gilles Pepin, Counsel to the Committee; Mr. John Morden, Assistant Counsel to the Committee; Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness:* Professor J. R. Mallory, Chairman, Department of Economics and Political Science, McGill University, Montreal.

The Chairman introduced Professor Mallory and invited him to make an opening statement.

The witness spoke on the problems created by the existence of delegated legislation. He expressed his views regarding parliamentary scrutiny of subordinate legislation.

Following his statement, Professor Mallory answered questions.

The Chairman thanked the witness for his appearance before the Committee.

At 11.00 a.m., the Committee adjourned to the call of the Chair.

Fernand Despatie,
*Clerk of the Committee.*



29817—1½

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Tuesday, Avril 29, 1969.**

• 0939

**The Chairman:** I now will call the meeting to order since a quorum is present.

We are very pleased to have as our witness this morning, Professor J. R. Mallory, Chairman of the Department of Economics and Political Science at McGill University, who is a recognized expert not only in the general field of political science, but also in this particular field of statutory instruments which is our concern. Professor Mallory was perhaps the first person in Canada to publish in this area and since that time he has been continuing his research into matters of government administration. Without any further introduction I will call now on Professor Mallory to make a prepared statement which will be followed then by a period of dialogue with us. Professor Mallory.

**Professor J. R. Mallory (Chairman, Department of Economics and Political Science, McGill University, Montreal):** Thank you, Mr. Chairman. I was glad to discover that the Committee is not only going to listen to me but also to my friend and colleague at Waterloo, Professor Kersell, because while I was, I think, the first in the field to write something about this problem of subordinate legislation in the country, Professor Kersell is the only one who has written a book on it, and it is a very useful book indeed.

What I have to say today, partly because this is the time of year when I am pretty busy with examinations and have not much time to devote to serious and sustained work outside of that, is an elaboration of what I think first appeared as an article in Canadian Public Administration when I was asked to read a paper on the uses of parliamentary committees and I dealt among other things with the need for parliamentary scrutiny of subordinate legislation. I am very glad that the Committee has finally come into being. It has been a long time in this country before the House of Commons has really addressed itself to this question which is, I think, one that is a direct and important responsibility of the House.

The development of delegated legislation is one of the things that is necessary in the kind of modern urban and highly technological society in which we live. But necessary Parliament itself does not have the time or the capacity to produce all of the regulations which are necessary for the regulation of living in modern conditions. It is more important that Parliament should devote itself to the big questions and keep a constant and wary eye on major questions of policy.

This, of course, was not in the beginning. At the time of Confederation we lived in what is commonly called the night-watchman state. Nobody thought in those days that much regulation was necessary to protect the essential interests of the citizen. But now so much needs to be regulated to protect our health and welfare and safety because of the complexities of travel by air and sea and land, because of the need to develop provisions for the health and welfare of people under modern urban conditions. Also this kind of regulation by its nature requires very often rapid adjustment. We cannot live forever with a set of regulations about aircraft safety which were designed in 1918. We may have to change them with some rapidity. So that Parliament simply has to delegate the power to make many regulations to subordinate bodies in the executive: ministers, government departments, the Governor in Council or some other kinds of Crown agencies.

• 0945

These regulations differ from the kind of law which Parliament itself makes, because when Parliament addresses itself to the law there is full and lengthy public discussion, people who are affected by it have an opportunity to make representations about it, and we are then in a position where we have no reason to complain that we are being subject-

ed to laws that we have not had a chance to know about in advance and to discuss. But with subordinate legislation this is not so. This is not to say that subornidate legislation emerges somewhere out of the dark without careful consideration, because, in the nature of things, if a government department or the administraton itself is preparing the draft regulation it is likely to be given pretty careful consideration by committees of officials, or even sometimes committees of ministers. But these discussions take place without the advantage of being exposed to public view. They become part of the law without discussion and debate. Very often they are the kind of thing where public discussion and debate really does not help very much. It is not likely that the average members of the House are likely to possess the specialized knowledge which would improve a regulation which is intended to protect us against the use of dangerous drugs, for example. Nevertheless, there are questions about this. An executive agency is not always engaged in this relatively harmless activity because they may well frame a regulation which either goes beyond what the original statute intended or in some cases makes an unexpected, unusual use of power which had been given to the minister or to the Governor in Council, and nobody is in the position to ask the right questions. Do these regulations, for example, unduly restrict the liberty or property of the subject? Do they interfere with the remedies which the courts normally provide? There is, of course, some scrutiny of these things in Privy Council Office and in the Department of Justice. The Bill of Rights, if I remember correctly, has a provision which requires the Minister of Justice to scrutinize regulations to see whether they are in conformity with it. But we really do not know how serious this scrutiny is and it certainly is not public. While the officials who draft and supervise these regulations are persons of high competence and professional responsibility, they still are not operating under public scrutiny, and I think no body of persons exercising power should ever be put in the position where they are making major decisions that affect other people without the possibility of public scrutiny and discussion.

Let me briefly summarize what has happened in this country regarding this problem of subordinate legislation We, as usual, came a little late to an awareness of this problem. There is about a generation lag which is not due, I think, to our lack of sophistication, because I think in many ways we are a very sophisticated people, but because our own acquaintance with the problems of urban complexity came about a generation later than they did in Britain. We often arrive at an awareness of these problems about a generation later and then we have the advantage of considering British experience and other people's experience in deciding what to do about them.

In Britain this problem has been exercising the attention of one House or the other of Parliament since at least 1925. There has been a Special Orders Committee of the House of Lords which, it is true, confines itself to a relatively small number and class of subordinate legislation, those which—and they are much more common in Britain that they are here—only become effective if they have an affirmative resolution from either the Lords or the Commons or both in order to become finally effective. But it does look at these and it looks at them primarily from the point of view of their technical merit; that is to say,

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are they within the powers conferred by the statute and do they make use of these powers in a way that is not unusual, unexpected or undesirable.

The Committee on Ministers' Powers, commonly referred to as the Donoughmore Committee, or the Donoughmore Scott Committee, which this Committee is aware of and has I think had an opportunity to look at, is the classic discussion of this problem because it sought to lay down the guidelines for the exercise of delegated legislative power so that subordinate legislation would not do things that subordinate legislation was not supposed to do, such as usurp the function of Parliament by altering taxation, or legislating in principle rather than in detail, or, as subordinate legislation sometimes did, even amending statute law. Even in Britain, while the Donoughmore Report was submitted in 1932, no effective follow-up took place for many years. It was not, indeed, until 1944 that the House of Commons set up a scrutiny committee to deal with delegated legislation. The mandate of that committee has been essential-

ly the same since its beginning; it is only a select committee and it is renewed from session to session. However, it has acquired a permanent niche in the institutions and it can be regarded as a permanent body.

This committee generally takes a look at Statutory Instruments from the point of view of the criteria laid down in the Donoughmore Report and as long as they operate within that framework then the Committee has no quarrel with them. If you look back over its works it has, perhaps, found it necessary to report on and draw the attention of the House to one in a thousand of these things, which seems like a dreary and unrewarding job, but even one in a thousand is important.

About this committee I will only say two things. One, it is severely restricted from discussing or drawing the attention of the House to the policy implications of Statutory Instruments; it cannot criticize them because it dislikes the policy, but only because of the form. It is true that it has been possible to extend this notion of form a little bit to merit and sometimes to draw attention to orders which are objectionable on more than mere drafting terms, but that is a serious limitation.

The second thing is that the Committee itself works because it has an expert staff. It has the expert services of the Parliamentary Counsel to the Speaker and it is he and the specially trained experts, legal personnel in his department, who carefully assemble and peruse all these orders and draw them to the attention of the Committee.

The work of the Committee, as I think is well known, is, in fact, very largely the work of its permanent officials rather than the members themselves. Any attempt to set up a machinery that did this effectively would require the same kind of attention to the need for supporting staff.

At about the same time as the British House of Commons set up the Statutory Instruments Committee, a suggestion was made that a somewhat similar thing should be done in this country. The suggestion was made by a man who is responsible for a number of important innovations in both public policy and procedure and who will, I think, long be remembered for this. He was the late Brooke Claxton. In the Throne Speech Debate of 1943 he drew attention to the fact that while Orders in Council were tabled in the House this was an insult, and not much use. It was, as he said, an empty form. That they were tabled at all was, in fact, a relative innovation at that time. There was no systematic provision for tabling them before the war; it was decided during the war that all orders relating to war which had particular legislative import would be tabled. This was a wartime decision made necessary by the fact that so much of the ordinary lawmaking in the country was done under the War Measures Act by the Governor in Council and there had to be some way for the House to know about it. Mr. Claxton said:

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> I suggest that orders in council be referred to a committee for consideration—not all the orders but orders having the effect of legislation of a general nature. Even when they get to the committee, all the orders of that kind would not be discussed; but if the committee felt that one particular matter should be discussed it could take up that order, have the departmental officials there to explain it, and make its report to the House. This could be done exceedingly quickly. In this way there would be an opportunity of improving the drafting of the orders, which sometimes leaves a great deal to be desired; there would be exercise of control over the executive, opportunity for ventilating grievances, and also observance of the important principle of the supremacy of Parliament.

At a later date, this was raised again in the House on a number of occasions, not the least by Mr. Diefenbaker himself when in opposition. He did secure an undertaking at that time that the government would think about it and report in due course to the House. It did when it brought down the Regulations Act in 1950.

The Regulations Act was an important and useful advance in a number of respects. It provided that all orders which had legislative effect would be tabled whether they were made by the Governor in Council, ministers or other Crown agencies, and that they would be published, not only in Part II of the *Canada Gazette* but that they would be compiled systematically in an intermittent publication called *Statutory Orders and Regulations*, which is the responsibility of the Clerk of the Privy Council to produce. Also, that this would be available in both languages.

It also provided, and the consequence of this on the whole has been good, that draft Orders at least, Orders in Council, would get a much more careful scrutiny before they were promulgated, both in the Privy Council Office and in the Department of Justice. The form of Orders has, I think, very greatly improved since that time. However the government at that time was not prepared to go the rest of the way and suggest to the House that there ought to be a committee to scrutinize these things. Mr. St. Laurent said in the Debates at that time:

> We do not believe we should recommend at this time that sort of committee because most of the statutory regulations have to be made by the Governor in Council, and that gives considerable time for checking, whilst in the United Kingdom most of these things are done by boards or other agencies of the Crown. No one who is responsible to Parliament or to the public hears of these regulations until they have become law. This United Kingdom Committee has strictly limited terms of reference that probably would not fit our situation. They have to report on whether or not the order infringes seven stated principles. If it does not, the committee has nothing to do with it. If it does, they call attention to that fact. We do not believe that would be a remedy that would fit our situation.

I think the most charitable thing to say about that was that St. Laurent was badly advised in being told what to say about this particular request because it is a gross misdescription of what happens in Britain. There is a much more careful official scrutiny of departmental orders than he implied.

One thing he did say, which was important, was that the British Scrutiny Committee with its severely non political concentration on matters of form and not policy probably would not suit the Canadian situation. There are, I think, many people in Britain who would agree that the British Committee would be a better one if its scope were widened. I think when consideration is given to what should be done in this country, it would be a mistake to simply adopt, without criticism or modification, the procedure of the British Statutory Instruments Committee.

What ought to be done? It would be presumptuous of me, as an academic critic, to tell experienced parliamentarians how their business ought to be done, because I think only experienced parliamentarians know how parliamentary institutions work, and can devise effective ways of modifying them. All I can do is make some general statement on the nature of the problem as I see it.

First of all, let me say a word about the question of limiting the scrutiny of subordinate legislation to form alone. This is important and necessary. The procedures that now exist to ensure that orders are properly based on statutory authority and properly drafted are certainly better since the Regulations Act, but I think it would be better still if there were an independent examination by an outside body of the merits of order. Particularly whether they are a proper and expected use of power or an unusual and unexpected use of statutory authority.

A committee that did this, of course, any committee dealing with subordinate legislation, would need the resources of expert officials. Just as the Public Accounts Committee is effective because its knowledge of what it is doing is largely guided by the Auditor General and his staff, a committee of

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this kind would need similar and expert guidance from some such officer of the House as the Parliamentary Counsel. This would be a useful and a necessary and a very unglamorous job. Only a very conscientious member of the House would regard it as rewarding because members of Parliament have other calls on their time and other duties both to their constituents and to their parties. I am not suggesting that because of this it would not be done or it would be done badly. It would not likely enlist the hearts and minds of the Members as much as it might. This is one objection to confining scrutiny to form alone.

I would go further, it is hard to distinguish form and policy. Sometimes a policy decision is inherent in the way in which an order is drafted. Also, there is a second reason, which is relatively new. It used to be possible to bring before the House important questions arising out of departmental legislation. It was a limited opportunity and not, perhaps, the best, but it was better than nothing. It was an opportunity to raise them on the estimates, in the Committee of Supply. It would have been

better if there had been some regular provision in Standing Orders that it would be possible for a Member to debate these on some such provision as now exists under Standing Orders for members to bring up grievances arising out of Parliamentary questions at the end of the day on certain days of the week. This is, in fact, one of the ways in which Standing Orders in the British House enable a member to raise the question of an order and to move a prayer for its being rescinded. Some such procedure as that might well be useful.

This point was acutely and almost agonizingly brought up in the House in the debate on the Emergency Powers Bill in 1951, when the Opposition, which was much troubled by that Bill, said that they really felt there should be an opportunity in the House to debate the exercise of the powers under the Bill by the Minister. The only answer they got from the Hon. Mr. Garson, who was then the Minister of Justice, was that he had discussed this matter with the Prime Minister—he implied that they were both magnanimous men, which was true—and that the Prime Minister had told him that he could assure the House if anybody wanted to raise these matters the government would find time for it. That is a government that is no longer with us, neither is the Emergency Powers Act. The point is the only provision that seemed to exist in the minds of the government of the day, at that time, was that any government would be broadminded enough to facilitate discussion if members of the Opposition wanted to do it. However, that is not quite the same thing as having Standing Orders provide an opportunity.

After all, the important thing here, it seems to me, is to provide for systematic scrutiny because scrutiny to be effective has got to be systematic and not intermittent or sporadic depending on the time when a government does something which is totally outrageous, which is rare but happens, and hope that somebody will spot it and try to raise it. A much more effective way of exercising the authority and responsibility of Parliament is to have somebody grinding away day-by-day looking these things over and, as a matter of routine, drawing them to the attention of the right people. So a committee could draw the attention of the House not only to questions of form; an order that is drafted in a way that is unusual and unfortunate that may offend, for example, against the apparent provisions of the Bill of Rights, but also to raise questions where an order seems to raise a matter of policy that ought to be discussed.

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The fact that no longer are the main estimates considered in the Committee of Supply but have gone to Standing Committees has raised a number of questions in my mind to which I do not have satisfactory answers. It looks as if, from what we know about the way in which Standing Committees have worked, that the consideration of the estimates is more effective now than it used to be through the use of Standing Committees. It may also be—I suggest this with some hesitation, being an outsider—that something has been lost by this procedure also because some of the opportunities to raise debate on important policy questions in the Committee of Supply is now gone and nothing replaces it. I think it is important that the House address itself to the problem of providing a way in which this scrutiny can be replaced. That is why I think when this Committee has studied the question and deliberated it would do well to go back to the proposal Brooke Claxton made 25 years ago that a properly constituted committee of this kind should be in a position to draw the attention of the House, in a way that the House can discuss it, to questions, not only of form, but of policy, which arise out of subordinate legislation. Thank you, Mr. Chairman.

**The Chairman:** Thank you very much Professor Mallory for this helpful statement. I would just like to put several other facts about Professor Mallory on the record before we begin to question him on the matters which he has suggested to us this morning. He was educated at the universities of New Brunswick, Edinburgh and Dalhousie. I have no doubt that one of the reasons, at least, why he has been able to make such a distinguished contribution to political science in Canada is the fact that he has the advantage of an LL.D. degree which is not one possessed by most political scientists in the country.

He has taught at the universities of Saskatchewan, Toronto and at Brandon College, in addition to teaching at McGill University. He is the author of *Social Credit and the Federal Power in Canada* and, of course, very many articles including the article "Dele-

gated Legislation in Canada" published in the *Canadian Journal of Economics and Political Science* in November, 1953, and another article "The Uses of Parliamentary Committees", *Canadian Public Adminisration,* March, 1963.

I think Professor Mallory has made suggestions which are very relevant, indeed, to our task. He has disclaimed the intention of making them concrete, but I think that certainly they are sufficiently concrete as to be highly useful for us as indications of where we might go by way of solution to this problem. Mr. McCleave?

**Mr. McCleave:** Professor Mallory, could I suggest a three-part formula which may be the gist of your excellent address this morning? First, we have the Committee on a permanent basis, I think you agree with that. This takes the best idea of the late Mr. Claxton. Second, last week we explored the idea of perhaps a parliamentary registrar general, but you might wish to confine that more simply to expert advice on a permanent basis available to the Committee. Third, to get this point across, that it can be used, as in the Parliament of the United Kingdom, as some method of bringing a report before the House to suggest that an Order in Council, or the like, be rescinded. These are the three components of your recommendation, am I correct in that?

**Professor Mallory:** That is correct.

**Mr. McCleave:** I do not suppose there could be any quarrel about the fact that at least everybody here this morning is very conscientious, hard-working and would make the excellent substance for a continuing committee.

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Let us get to the second part of the formula then. Would you go for some office comparable to that of the Auditor General of Parliament or, say, a registrar general or would you restrict it more to highly professional help on a permanent basis for the Committee?

**Professor Mallory:** I think in this one has to distinguish possible remedies for a variety of problems. What the Committee really needs is a permanent staff of persons who are familiar with what a departmental order or Order in Council looks like; who have the requisite legal training and who have training in statutory draftsmanship in order to read them intelligently. This is something that laymen very often cannot do, so that the first thing that the Committee should have at its disposal is some body of person or persons who systematically reviewed these things with intelligence and experience and drew the Committee's attention to them. It is no secret that the importance and effectiveness of the British committee was due very largely to the vast knowledge and experience of Sir Cecil Carr.

**Mr. McCleave:** May I ask what position or title he was given?

**Professor Mallory:** Parliamentary Counsel to the Speaker.

One always has to adopt titles to one's own convenience or one's own institutions. I am not sure that this is necessarily the right or the best form but it is the kind of thing that I have in mind. It is an office which clearly is dissociated—the govrnment is related to the House and it is threfore by definition independent—and whose energies are very largely devoted to this kind of scrutiny work of Parliament. I do not think it is necessary that he should have quite all the trappings of independence of the Auditor General, who can only be removed by the awesome process of the Joint Address, but he nevertheless needs to be identified with the House rather than identified with the government.

I also think, though this is part of a wider problem about committees of the House, that the time mut be coming soon when those committees with permanent responsibilities will need research staffs of their own. If these committees are to raise not only questions of form but, to some extent, of policy, they will need the assistance of research staffs who can compare the experience of other countries and can do things that members' offices cannot do for them, so that it might well be that in Canadian conditions an office of this kind which would be primarily based on a legal officer of the House might nevertheless have a research staff which would be available to the committee, which could deal with questions not only of form but also of policy.

**Mr. McCleave:** How did the Parliamentary Counsel in the United Kingdom make known his reservations or doubts about certain of the Orders in Council? Did he do it by means of an annual report or simply by submitting

reports from time to time to the members on this committee?

**Professor Mallory:** When a committee met, as I understand it, it was the duty of the Parliamentary Counsel to review for them the orders which had passed across his desk and specifically draw their attention to those that he thought merited consideration by the committee. This did not prevent the committee from bringing up points of its own, but most of the systematic work of perusal of orders which had emanated from 50 or 60 departments, which had to be collected somewhere and scrutinized, was done in the office of the Parliamentary Counsel to the Speaker.

**Mr. McCleave:** It strikes me that perhaps my comparison would not be workable in Canada in the sense that you might not want the formal approach of an Auditor General in his report when you are in a field that may be largely one of opinion. Lawyers may differ, of course, on whether there is technical merit in an Order in Council and whether it should be attacked, and I suppose many times the Parliamentary Counsel in the United Kingdom presented something that aroused his curiosity or wrath and found that the committee itself did not go along with it.

**Professor Mallory:** I think this may well be the case but it is surely far better for a committee of the House which has developed its own *esprit de corps* to have its own legal advice than to be left with only the opinion already previously developed by the legal advisers in the Privy Council office or the Department of Justice.

**Mr. McCleave:** I was not suggesting that. I think the person advising the committee should be independent and a servant of the House and of the committee. I was just wondering how far the powers of such a gentleman should go. This is really where I was trying to get your opinion.

**Professor Mallory:** My opinion of this is that his effectiveness is going to be a question of authority and not of power. After all he is

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only a servant of the committee. The willingness of the committee to accept what his office has laid before them is what is going to matter. This is always true. The committee, in the end, is the master of what happens, and if it is fortunate in having an energetic and conscientious official who guides the members in their work, then he will very rapidly acquire an authority of his own which the committee and the House will come to respect. But in the formative stages it is the committee which is going to have to develop its own mind in these matters.

**Mr. McCleave:** Now to the final part of the three-part formula about recommendations so that the House itself can decide whether an Order in Council should be rescinded or not. Can you be more specific about what you would suggest by way of a formula? Should it be the majority recommendation of the committee or should it perhaps be done in some other way?

**Professor Mallory:** I would be inclined to think that if the committee's recommendations went to matters of policy, then the committee might be driven to majority reports; but one has to look at this as part of a political process. If the committee itself is divided on a question as to how it should report to the House and it makes a majority decision, the minority members of the committee are bound to feed this information back into their own caucuses. Parties will have their own study groups of these matters and if they feel that they have got their teeth into an important question that ought to be raised in the House, then whether the committee itself has made a recommendation or not, the fact that the committee had an appropriate discussion will be a foundation which then can be laid.

Well, then, the next question is, how? I do not know whether it is possible under the present Standing Orders for this to be done. I am wondering whether perhaps a modification of the present rule by which a member can ask Mr. Speaker for permission to raise a question on adjournment on certain days of the week would not be a procedure that would provide sufficient opportunity for those occasions when members of the House would want, from their knowledge of what happened in the committee, to raise a short discussion on this, much in the form, I think, of the present one; that is, a motion or a statement of the problem by the member and a reply by the minister or his parliamentary secretary. The publicity attendant upon this is usually sufficient. In the British committee,

while there have been countless prayers moved against Orders, I think only one or two have ever been carried.

However, the fact that this happens and the attendant publicity is often enough to have the Order rescinded or modified. Departments are very sensitive about public criticism, and the fact that the thing was discussed in the House and everybody knows that officials read *Hansard* is usually sufficient for them to think again and to try to disarm criticism either by modifying that particular Order or certainly not trying this whole thing again. This is the importance, I think of parliamentary scrutiny.

**Mr. McCleave:** And my final question, Mr. Chairman. What about the relationship of the statutory instruments committee? Supposing that we do all those things and have this help available, what about the relationship of the committee with other committees? Suppose, for example, that we took high exception to a regulation under the Fisheries Act but that the fisheries committee, untutored souls, without lawyers there, absolutely disagreed with us. Where would we fit then? Do we have a cross-breeding of committees or just what?

**Professor Mallory:** There are two possibilities here. One is that the committee did, in fact, take a dim view of the fisheries Order, and that the estimates of the Department of Fisheries were still before the appropriate committee of the House and someone raised it there and got nowhere with it. It is then open to the Opposition, as I understand the operation of the new rules, to ask to discuss this particular problem on an Opposition day. This would also be possible, I suppose, even though it is far enough along in the parliamentary cycle so that the Fisheries estimates are long since passed and approved, but there are lots of times when it is not a question that needs a full day's debate It may be, in which case it is up to the responsible party leaders to see whether they can use an Opposition day for this. It is a question of the best use of scarce resources.

**Mr. McCleave:** I do not think you are addressing yourself to my question. Suppose this Committee felt that a regulation was wrong, but a standing committee, dealing with that act and with that subject, felt that it, perhaps, was right; where do we go from there?

**Professor Mallory:** In the end, I think, the House would have to settle this. After all a government will have its way, particularly in a committee that is dealing with legislation or with the estimates. All that will have happened is there may have been a disagreement with this Committee which may not be so policy oriented. I think it depends a little on how the committee develops. It may become a relatively non-political committee as, to a large extent, the Public Accounts Committee is becoming. Its best hope, I think, is to ventilate these things and not expect with any certainty that committees dealing with legislation or the estimates will respond right away to what it says, but it does mean that it is on the record; it is on *Hansard;* it is a focus for fighting the battle another day.

**The Chairman:** I have Mr. Gibson and Mr. Baldwin on my list.

**Mr. Gibson:** Professor Mallory, have any of the legislatures of the provinces any statutory instruments committees or processes of review from which we can gain experience?

**Professor Mallory:** As far as I know, Mr. Chairman, they do not, but I have not made any serious examination of what is happening in the provinces for some time. It is not an area in which there has been a great deal of scholarly interest. I have not had an opportunity, for example, to look at a new book on legislative procedure in Ontario which is the most likely place to expect this. As far as I know, no province has a statutory instruments committee.

**The Chairman:** I might just interject here that I believe both Manitoba and Saskatchewan now have some form of a scrutiny and Ontario has just in the last two weeks announced its intention to create a scrutiny committee.

**Mr. Gibson:** Also, although it may not be strictly relevant, I was wondering if any of the cities in reviewing bylaws have come across any techniques that might be of any use?

**Professor Mallory:** I am sorry, could you repeat the question?

**Mr. Gibson:** I was wondering if any of the cities in reviewing some of the voluminous bylaws that go back ages and ages, like Toronto, Montreal or Vancouver, have come

up with a review system, in attempting to untangle their outdated bylaws; if there is any network in any of these cities?

**Professor Mallory:** As far as I know, there is not.

**Mr. Baldwin:** I do not know how the other members of the Committee feel, Mr. Chairman, but it has always been my view, in the time I have spent looking at this, that it is physically impossible, of course, and intellectually impossible as well, for Parliament or any legislative body to give the full type of detailed scrutiny to all the outpourings from the departments and the tribunals and the Crown corporations. We have to have machinery so we can look at them to try to make some examples. I think Professor Mallory put his finger on it there; he suggested making examples in certain cases in the hope that this will tell the people who are responsible for drafting to take a look at it.

With this in mind, I think we have to see what we can do to fill up our gap. First, I think Mr. McCleave brought up the question that the type of person who would be associated with the committee would be tremendously important. I suppose it should be somebody with legal training plus some experience with government.

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I always think, Mr. Chairman, that I practised law in a frontier area when there were a number of bootleggers up there. The best policeman we ever had was a former bootlegger himself. He cleaned up the country very quickly and very well. Would you regard a man with some experience, and even some one who has been identified with the processes, of the Privy Council office or elsewhere, of drawing these or having some relation with them, as being, I will not say a condition precedent, but tremendously important, Professor, to have such a person identified with a committee, assuming that we are going to have, I think we will have, I hope we will have, a scrutiny committee?

**Professor Mallory:** Mr. Chairman, I certainly agree with what Mr. Baldwin said. I think other things being equal that the best thing the House could do would be to extract from the Department of Justice somebody who had had some experience in this and who was an eminent, or already a promising and accomplished, public servant. I look forward to the day, as a matter of fact, when there is more mobility between the public service and the part of the public service which is at the disposal of the House. I think this has been suggested on other occasions. If the House is to function effectively, as a sort of counter-government, it must have to some extent the accomplished expert resources, and one of the best ways would be to have greater mobility in the public service between those who work in departments and those who may for a time, or from time to time, be available to the House in expert capacities. This is one case where I think this might well be.

**Mr. Baldwin:** I accept your views. I think we have already indicated as to the scrutiny committee that it is just a matter of later making a little less nebulous the form it will take. It becomes then a question of how we can ventilate in the House and/or in public the matters that the committee deals with. Do you think one means would be through a committee report presented to the House with a motion to concur?

This is one of the problems of the Public Accounts Committee at the present time. There is no motion to concur, there is no over-all debate, but if a motion to concur were made, there would have to be, probably, some understanding between the party leaders and the House Leaders as to the limits of such a debate, but to permit a debate in the House on an issue. The government does not have to accept the committee recommendations. I think the government of the day would have to take a stand on it; they would be compelled to organize, to bring their troops in, and if they did not like the recommendations vote them down. At least the matter would then get a certain amount of publicity and would be debated, the House would come to a decision. Do you think this would be one of a number of ways this might be tackled?

**Professor Mallory:** I think this is a rather promising way actually, and it might be the usual way. It has one disadvantage, it seems to me, and that is, the committee would only report from time to time. It is quite possible standing orders or the arrangements through the usual channels might mean that this debate on the motion to concur in the report of a committee might occur at only very relatively rare and fixed times in the session, and this might not be very timely. If the commit-

tee's attention was attracted by a particularly dubious and offensive order, and it was desired to bring this to the attention of the House, then other means, which I have suggested, since we cannot expect it to be done any more on the estimates, might be explored.

**Mr. Baldwin:** I think you are quite right; you have put your finger on it. The mechanism of the adjournment motion could be used through the medium, even if a member wants, of asking a question which he knows is going to be ruled out of order; he then says "Ten o'clock", and he has a ten minute period. This is one way and a very good way.

Then, of course, as you pointed out, we have the opposition days. The trouble is those are very precious and rare and sometimes we are not inclined to use a full day. We have so many opportunities from time to time we hate to use one full day.

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I would like to go back to the final thing, which is the first one we touched upon, the question of prayers. It would be a completely novel experience in this House. I think in all the times I have been here I have only seen three petitions brought in the House and they were in no way related to the question of regulation of statutory instruments.

Could you extend your remarks a little on that? To what extent do you think we might follow the English practice, and the length of time which might be used? Would it be time that would be taken after the normal hours of debates so the government would not be compelled to give up some of its own government time for debating. Would you think in terms of half an hour or what procedure would you suggest? I am thinking of some way by which an individual member of the House, as opposed to the committee, can by means of a prayer initiate a discussion and debate for a limited time on what might be a particularly obnoxious Order in Council.

**Professor Mallory:** My own feeling is that perhaps the best way would be to have some elaboration on the extension of the present procedure of raising matters on the adjournment and this is actually a very short period and it might perhaps be lengthened. But I also have the impression from my somewhat sporadic reading of Hansard that that opportunity is, at least at certain times during the session, not fully used and it might be an opportunity that could be further exploited. If members had in their boxes reports from the committee, and there are members of parties who are specifically responsible for watching this problem, then they could, as Mr. Baldwin suggested, ask a question on the Orders of the Day and hope for the indulgence of Mr. Speaker in rising at ten o'clock. It may be that that rule would have to be somewhat re-worded and the time altered to take account of this, but it seems to me this is already an existing procedure and one that would probably meet the point.

**The Chairman:** Mr. Murphy.

**Mr. Murphy:** Professor Mallory, I was interested in a point brought up by Mr. McCleave that it might well be that a scrutiny committee such as you, and which would be made up primarily probably of lawyers or legalistic type minds, might on occasion come to a different conclusion from members of the standing committee, such as the Standing Committee on Fisheries where there are people who are probably more expertise in the matter of fisheries. Do you think there is any merit in combining your idea of having a prominent professional man with staff who would be scrutinizing these Orders in Council and regulations on a continuing basis, available to each of the present standing committees, and then when he came up with a particular regulation say under the Fisheries Act, which he found to be offensive for one reason or another, it would be brought to the attention of the Chairman of that committee or to the committee itself and that committee made up of Members of Parliament, who would be more or less expertise in the field of fisheries, would consider the recommendations and be given the power to report to the House.

**Professor Mallory:** Here I think there is both a procedural problem and one of effectively doing business. It is too soon to say how much time pressure there is on standing committees in dealing with the estimates. I suspect it is very great. To have the possibility their consideration of very complex questions of policy subject to an official inruption of this kind, might in fact not make as effective, given the present time limits, the consideration of the estimates.

This I suppose, though I have not looked at the Hansards of standing committees dealing with the estimates lately, would not prevent a member of the committee raising this kind of point under an appropriate clause which was before the committee. I would think that it is better to have these things focused in the right place. I think the experience of the House before of having to raise these generalized and rather sometimes remote problems on the estimates has not been terribly successful. It is hard to get a satisfactory

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answer: the wrong official is there, the committee's business is delayed while the Minister arranges for somebody to turn up and give the answers, and so on. It is far better to have the thing dealt with in a committee, which is curious about an order passed by a department, which arranges with the department to have the appropriate Minister or official there and which presses into the matter and tries to find out what it can. There may be division on the scrutiny committee about this: the majority of the scrutiny committee may be good government men who do not think that there is anything in this except the opposition trying to make political capital. I would not like to see this happen in committee and it does not happen very much in the Public Accounts Committee, but the committee might, in general, be averse to this particular point which would not prevent the minority members of the committee from raising it in other ways and the other ways, it seems to me, and the most productive ones, are those which Mr. Baldwin suggested: one, the possibility of raising them on a motion concurred in the report of the committee, if the committee itself has dealt with the matter in its report, or failing that, to bring it up by some modification of the present ten o'clock procedure.

**Mr. Stafford:** Mr. Mallory, I have often concluded that the drafters of our legislation use language which is much more technical and sophisticated than necessary. Languages are difficult to interpret, even for our judges. Sometimes the more experienced such drafters are the more they tend to follow these principles. In other words, our statutes should be written in a much more ordinary and meaningful language. Sometimes as the bills pass through the House, members, as you say, having so many things to do, such as running after passports for people and things like that, do not have time to scrutinize all the words. You know how difficult it is sometimes even for our courts to understand just what a section means: what could be done about this?

**Professor Mallory:** I am not sure there is any easy answer. I think the experience of most lawyers who deal with legislation is that very often it is very much easier for the courts to interpret the law when it is drafted with great skill and complexity so that no layman can understand it, whereas nothing is less likely to guide the courts to a clear decision than a statute written in plain language. The Bill of Rights, I think, is a case in point. The Bill of Rights is written, as far as legislative prose can be written, in words that would appeal to everybody, but the courts have made very little of it.

This is why, as I said earlier, it is important that a committee of this kind be guided by persons experienced in statutory draftsmanship who can really read between the lines and understand what is afoot. Plain language, in the sense in which we are using it here, is not the answer because the law is a complicated technique which has developed its own very specialized methods of interpreting what language means. If we are going to have laws that the lawyers can interpret, then they have to be written in lawyer's language.

**The Chairman:** I will now ask our counsel if they have any questions to direct to Mr. Mallory. Mr. Morden.

**Mr. J. W. Morden (Assistant Counsel to the Committee):** Mr. Mallory, I have a very general question. Is your general survey or understanding of Dominion legislation such as you think too much or not enough use has been made of the device of subordinate legislation. Perhaps I should develop now the question of last week when it was suggested to this committee that there are, even in questions of important policy formulation, great possibilities in the use of subordinate legislation where there is a problem but no one at the outset knows, or has any confidence in, the solution to the problem; let it be worked out by an agency of government through the use of subordinate legislation.

What is your view on that general approach?

**Professor Mallory:** I would be inclined to think that this is a defensible proposition. After all, if Parliament wishes to frame legislation to regulate some noble human activity,

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which may have a high technical content, one cannot guess what the law is going to do. One may find that no matter how carefully drafted is the first act, it does not cover the obvious circumstances and, therefore, an enabling act, with orders to fill it in, is the best way to do it, emergency apart. Some of us will remember, as far back as during the war, the attempt of the Wartime Prices and Trade Board to regulate consumption and prices. I do not think Parliament could ever have drafted a law that would have worked. The Board had to go along almost from day to day through trial and error changing regulations until they had a set of regulations that would stick. The difficulty about that is—and I think we are going to have more of this—the time of Parliament is limited and Parliament must devote itself to the major questions. If the major questions concern foreign policy and private behaviour, then there is not much time left for other things. A decade may elapse before an important bill gets on the legislative time table for revision. So enabling legislation with plenty of opportunity for regulation by subordinate bodies is the only way to go about it. It then becomes very important that there is adequate political parliamentary scrutiny, so there is opportunity for public debate that you do not get ordinarily with subordinate legislation. The Department makes an order and it is communicated to the people who are affected by it. The Department of Transport makes an order that affects the air lines, but nobody ever publicly discusses it in the way that a bill gets discussed before a Parliamentary Committee, so affected people can argue against it and the full weight of public information and public opinion be brought to bear. This is why parliamentary scrutiny of both form and policy provides a chance to focus within the limited resources of Parliament on a public issue without the full dress procedure of having to debate the bill every time.

**Mr. Morden:** On that point of debating policy before it becomes law, do you think there should be some formalized procedure, such as there is in the United States, for those affected by a regulation, to be heard one way or the other before a Committee, or some other government agency?

**Professor Mallory:** It depends I think, on the kind of regulation you are talking about. If it is a highly technical one, they probably already have effective lines of communication with the regulating body. If it is a regulation that affects the public generally, say, a regulation that affects one's eligibility for unemployment insurance where there may be important interests at stake which affect a great many people, it might be better if the regulating body had some means of formally considering these kinds of representations. I think, given the possibility that Parliament can deal with the question and given the possibility which is outside the terms of reference of this Committee, that one may develop some kind of institution like an ombudsman. The problem can be dealt with in other ways.

**Mr. Morden:** A suggestion or submission was made last week that the scrutiny be both of a formal and of a policy nature, but that it not be entrusted to one body, a scrutiny committee, rather to the Standing Committees of the House dealing with the subject matter of the regulation, agriculture or whatever the case may be. It was suggested only in that way could it be fairly determined whether or not a regulation unduly infringed private rights. Then the point was further developed that one scrutiny committee does not have (a), the technical expertise; or (b), the time to cover the great volume of regulations that are made. What do you think of having, more or less, 12 or 15 scrutiny committees?

**Professor Mallory:** The number of members in the House is small; the number of committees the House has is now large. There is already, I guess, pretty well a problem of overload of committee responsibilities both dealing with the estimates and with legislation. I am not sure that this might make

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matters a good deal worse. As I see it, there are two things you need to do. One is that you should look at every regulation that has legislative import. This is a matter that can be done by the Committee staff in the first instance. In Britain, the parties have working groups that also perform a little watchdog role on their own so that the parties know

what to bring up in Committee. The number of objectionable ones that you flush in this way is manageably small, or should be. A committee that is familiar with raising them on this ground is a better body, it seems to me than a committee whose primary interest is in policy and legislation.

**The Chairman:** May I just interject here Professor Mallory? If what you want is a Committee which really scrutinizes substance, the content of regulations, I think that at least this job, whatever other deficiencies there may be, would be better done by a Standing Committee. For example, take broadcasting regulations; if you want to have a real scrutiny of the regulations which are made in the area of broadcasting, whether they are established by the government or by the CRTC, you are going to have a much more thorough study and a more thorough criticism, if it is done by the House Committee, which has expertise in that matter, than if it is done by a single scrutiny Committee which is bound, I think, to give a more formal than a substantive criticism.

**Professor Mallory:** Mr. Chairman, I think this point has substance. The fact that a scrutiny Committee existed, which was dealing with regulations in the large, would not prevent another Committee, particularly one whose responsibilities for policy are pretty wide ranging, but which, perhaps, is not often burdened with heavy legislative responsibilities such as broadcasting, from a serious consideration of the broadcasting regulations, particularly in the formative stages of the regulatory authority. I think the two things are complementary.

**The Chairman:** Mr. Murphy.

**Mr. Murphy:** It may sound like I am pushing this point, but we had a little scare here last week when a witness—I have forgotten his name—a chap from the University of Windsor...

**The Chairman:** It was Professor Brown-John.

**Mr. Murphy:** Yes. He had done a job counting the number of regulations and so forth, Orders in Council and regulations—he confined himself to those two fields—that had been passed in the last five or six years and they were averaging something over 3,000 per year. This is why, I think, we are a little concerned about one committee handling that volume of work and doing an effective job.

I suggested before the idea of having each of the Standing Committees concern itself in this field and I think you have valid objections to that. Do you think there would be any merit in giving each of the Standing Committees the power to set up a scrutiny subcommittee which would not necessarily be made up of all the members of the Committee, but it might even be an added job for the steering committee of the Standing Committee. In this way it would give them the responsibility for scrutiny in their fields?

**Professor Mallory:** I do not think so. All of the Committee may not remember this, but when Arnold Heeney was Clerk of the Privy Council he wrote an article on the work of the Cabinet secretariat in which he discussed, in part, the whole problem of subordinate legislation, because he was talking about Orders in Council and so on. During the war the flow of Orders in Council were running at about 10,000 per year and, as I remember, Mr. Heeney's estimate was that not more than 5 per cent of these—taking into account both Orders in Council and Treasury Board minutes which dealt with major policy questions—in fact, had any significant legislative effect. Therefore, a mere count of Orders without attempting to say what is in them—they may just be Orders which just change a phrase or a comma in Orders that already exist. It gives a distorted view of the size of

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the problem. I think that in general one Committee could handle it.

After all, in Britain where you have a country of 40 million people, a Committee of this size has, indeed, been able to deal with these questions without difficulty over the years. It is true that they back away from policy questions, but not entirely. Government is less complex in this country in the sense that there are large areas of administration which are under provincial jurisdiction. I think it would be a manageable problem for a Committee of the House of this size.

**Mr. Baldwin:** I suppose this is as much a statement as a question. The terms of reference of Standing Committees now, when they are dealing with estimates, would probably be wide enough, at least there would be an

implication they could deal with the same matters really as the Public Accounts Committee do. In other words, looking at estimates for the current year one would be entitled to say, "Here is an item, and relating this to the same item last year there has been an example of extravagance or over-expenditure or duplication or waste". Therefore, one could deal with this, I think, in the estimates committee, in the Standing Committee. If you did not have the Auditor General combined with the Public Accounts Committee, the careful, detailed scrutiny which is now being given and has been for seven, eight or nine years—the post mortem examination—would never take place. While I agree there is certainly a place for standing committees to have some over-all scrutiny of regulations and to assist in other duties, without specialists on the committee and without a specialist staff with the committee, I think you would be in trouble. Would you not agree that this is a likelihood?

**Professor Mallory:** Yes, I think Mr. Baldwin's answer is really the one that, had I really understood the subject as well as any experienced parliamentarian, I would have given myself. And it shows, among other things, that the people who can best address themselves to this problem are the knowledgeable members of the House. I think it is perfectly true that the fact that the Public Accounts Committee deals only with the public accounts but does not deal with them *in vacuo* does mean that this is available to committees dealing with the estimates in subsequent years. Similarly if a scrutiny committee were dealing with subordinate legislation, it would still throw useful light on questions that members could raise on the estimates in that year or subsequent ones.

**The Chairman:** Our time is running short. I want to give both Mr. Beaudoin, the Parliamentary Counsel, and Dean Pepin the opportunity to ask questions. Mr. Beaudoin.

**Mr. G. A. Beaudoin (Assistant Parliamentary Counsel):** I would like to hear a little more about the role of the legal staff in committees. We have here in the House a legal staff that is not very big while, for example, the one in the Department of Justice is very large. Would you suggest the mobility of the legal staff from the Department of Justice to the House, as far as committee work is concerned, or would you favour the enlargement of the specialized legal staff here in the House? The reason I ask you this is that if we are going to have, one day, a committee on subordinate legislation, of course somebody would have to scrutinize the legislation. If I follow your idea, I understand you would favour in such a case the mobility of the legal staff.

**Professor Mallory:** Mobility in a particular sense. I think it is clear from the growing effectiveness of the work of the House under the changes in the rules that have taken place in recent years that it is going to be necessary to persuade the Commissioners of Internal Economy that the House now needs a very much larger expert staff to service committees. And the obvious pool from which such staff might come is existing departments. But I think the staff of House committees will have to be part of the public service pool. The man who goes into the service of a committee of the House or Senate at comparable rank and status as he had in a department—an ex poacher makes a good gamekeeper—may be the best person to do this. It is still part of the normal career development in the public service so that he might, if this was not the thing that he wanted to do the rest of his life, move back into the public service. But I would not think that the House ought to be in a position where it has to depend on the services of officials who still exist in other departments. I would not like to think that you would be borrowing people from the Department of Justice to deal with this kind of job. You want to have them on your establishment. And this is something that has really got to happen—the House has to spend a great deal more on building up a competent, expert staff to service its committees.

**The Chairman:** Dr. Pepin, do you have a question? Could you speak into the microphone, please?

**Mr. Gilles Pepin (Legal Adviser):** To me it is a very important and practical matter. You seem to assume from you brief and your testimony that a statutory instrument is necessarily the result of delegated legislative power. Am I right in that assumption?

**Professor Mallory:** If it is a statutory instrument, yes, because it is by definition founded on some authority conferred by statute.

**Mr. Pepin:** But it could be a judicial act, too, or an administrative one.

**Professor Mallory:** You could have the exercise of administrative or judicial power, but it seems to me that the concern of this Committee should be with subordinate statutory instruments that are of a legislative character. This is what this is all about. The way in which you can effectively exercise control over the exercise of statutory powers of a judicial or executive charcter, it seems to me, lies in a different direction; perhaps through the use of a parliamentary commissioner or ombudsman or judicial review or whatever.

**Mr. Pepin:** Yes, but would you say that the result of the exercise of judicial power would also be a statutory instrument?

**Professor Mallory:** Yes. The term statutory instrument as it is dealt with by Parliament is usually by definition a legislative one because that is the business of Parliament.

**The Chairman:** I think we can take one minute more. Mr. Murphy, you wanted to get back into something else, did you not?

**Mr. Murphy:** I just wanted to clarify the record. In my earlier question with respect to sub-committees I presumed at all times the existence, for lack of a better name, of a supervisor general or a scrutineer general with a trained staff working with these sub-committees and standing committees.

**The Chairman:** I am sorry we have been a little rushed for time, but with the shortage of rooms and the number of committees to meet we were pressured to be finished by 11 o'clock. I know there are other questions that you would like to ask Professor Mallory but there is another committee now waiting to get into this room. I think we must regrettably call the meeting to a close. I would like to express our appreciation to Professor Mallory for appearing before this Committee this morning.

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The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 4

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THURSDAY, MAY 1, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS:

(*See Minutes of Proceedings*)

20198—1

SPECIAL COMMITTEE

ON

STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

(Quorum 7)

Fernand Despatie,
*Clerk of the Committee.*

[*Text*]

# MINUTES OF PROCEEDINGS

THURSDAY, May 1, 1969.
(6)

The Special Committee on Statutory Instruments met this day at 9.38 a.m. The Chairman, Mr. MacGuigan, presided.

*Members present:* Messrs. Forest, Hogarth, MacGuigan, Marceau, McCleave, Stafford—(6).

*Also present:* Mr. Gilles Pepin, Counsel to the Committee; Mr. John Morden, Assistant Counsel to the Committee; Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness:* Professor A. S. Abel, Faculty of Law, University of Toronto.

The Chairman introduced Professor Abel and invited him to make an opening statement.

The witness spoke on the subject of formulation of regulations. He expressed his views on the British and American systems and made suggestions on methods that could be applied in Canada.

Following his statement, Professor Abel answered questions.

It was suggested that the witness supply the Committee with his recommendations pertaining to changes in the Regulations Act. Professor Abel will endeavour to do so at a later date.

The Chairman thanked the witness for his appearance before the Committee.

At 11.00 a.m., the Committee adjourned to the call of the Chair.

Fernand Despatie,
*Clerk of the Committee.*



20198—1½

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Thursday, May 1, 1969**

• 0937

**The Chairman:** Since a quorum is now present I will call the meeting to order.

I am very pleased to have with us this morning as our witness, Professor Albert Abel, Professor of Law at the University of Toronto, where he taught administrative law since joining that law school in 1955, after many years of experience in the field of administrative law in American law schools. He taught administrative law in West Virginia, Iowa and Harvard from 1940 through until 1955.

Professor Abel began at the University of Iowa in his own studies, obtaining a Bachelor of Arts degree and a J. D. degree, and went on to Harvard where he obtained the doctor's degree in law, the S. J. D. He was called to the bars of Iowa and to that of the U.S. Supreme Court, and in 1942 became the senior attorney in the U.S. Office of Price Administration assigned to the preparation of regulations of meat and fish prices.

He has subsequently been Chairman of the Committee on Uniform Rules of Agency Practice and of the American Bar Association Section on Administration Law.

He is the editor of Cases and Materials on Canadian Administrative Law and the journal of the Institute of Public Administration of Canada, Canadian Public Administration: Administration Publique du Canada.

He is, of course, the author of numerous periodical articles on aspects of administrative law. It is a special pleasure for me to welcome Professor Abel this morning because he is a former colleague of mine at the University of Toronto Law School, and it is indeed an honour to have him with us today because of his great reputation in both Canada and the United States in this field. Professor Abel will make a preliminary statement to us and after that, we will go on to a period of dialogue with him.

We are not confined by the clock this morning as much as we were on Tuesday. We have the time at 11 o'clock, too. Therefore we do not have to finish before 11, and this gives us a bit more leisure in the asking of our questions. Now without further comment I would like to call on Professor Abel.

• 0940

**Professor A. S. Abel (Faculty of Law, University of Toronto):** I believe that a copy of my submission has been circulated, but not all of you may have had the time to read it. If those who have will pardon me, I will commence by reading it for the benefit of the group.

In by judgment, the one gravest structural defect in the administrative process in Canada which, on balance, is among the best in the world is the lack of any general system in the formulation of regulations.

The United States and the United Kingdom have both undertaken to deal with the problem. They have proceeded in a different manner and on different premises. The former has addressed itself mainly to procedures before the regulation is drafted, the latter to procedures after that but before it becomes operative. Neither approach has been fully successful. Canada should not look to either for a solution but guidance in seeking a solution may be found in both if appropriately modified.

The British seek to check whether the regulation is abnormal in certain specified ways and, if so, whether it should be disallowed on that account, a method useful for guarding against accidental deviations of the types specified but against nothing else. The Americans are concerned with the more basic problem of the substance of the regulation but the way they go about it is formal, cumbersome and does not differentiate enough between the types of regulatory situations.

As much as and perhaps more than the things checked by the British, the trouble is the gap in communication which leaves it uncertain how well adapted the regulation is to the variety of situations in which it will fall to be applied. The policy it embodies is and must remain that of the Minister for

which he will take responsibility and no one would suggest that the choice of a policy be diverted elsewhere. But whether in operation the regulation will be too sweeping, or conversely not inclusive enough to achieve that policy without unintended side effects, is a matter where some systematic involvement of persons potentially affected could be most useful. There are a number of ways of doing this, no one of them ideal for every case. Indeed in many cases there is no call for using any of them. What is needed is to sort them out, establish a classification of cases where none is needed and where one is needed, and if so what one, and to set up some organism for seeing they are dealt with accordingly. Nobody has done that yet, may be we could."

Now it will be apparent, I think, that it is a matter of the advance consideration of regulations where I feel there is a particular gap. To that particularly I want to address myself. I am, of course, prepared on any of the other issues that are raised in the work paper and suggestions, to express my views to the committee to the extent it is felt they would be helpful. But as a primary matter, I shall speak to the point I have mentioned.

Commencing by exclusion, the British method has been already explained in some detail, or will be explained. It is the one, essentially, which is dealt with at length by Professor Kersell in his book on Parliamentary Supervision of Delegated Legislation. It is really a definitive work in that area.

As you may recall, that legislation specifies certain types of objections which are to be looked for by the scrutiny committees, matters such as whether the regulation imposes a charge, whether it withdraws jurisdiction from courts, whether it purports to be retroactive, and the like; a handful, half a dozen or so of matter to which the committee is to address its attention and comment on them if it finds them, but with a specific directive, that is to say, nothing of the content of the legislation.

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This has proved to involve a great deal of effort for a relatively meager result which is to be expected in the course of examining hundreds, and indeed thousands, of instruments during the year. The committees will come up with 12 or 15 on which they feel that the attention of the Houses need to be called on the matter, and normally of those, perhaps only one or two where they feel there is any objection to be made. This is useful, but it seems to me that its usefulness is one which is rather readily attained and somewhat mechanical in nature. I do not propose to dwell on that feature of it which is cared for elsewhere.

Another matter which is sometimes spoken of, and to which the working paper addresses some attention, is the matter of the drafting, as a matter of linguistic formulation, of the regulations, which is ordinarily handled by appropriate legal staffs charged with the drafting of legislation or other matters as well as set-up, in connection with the Department of Justice, or in their case, the Lord Chancellor's office, or internal legal staffs in the various departments as the case may be. That again is a matter which, while not unimportant, is of a somewhat technical character, and can be accomplished without going to the root of what seems to be the difficulty in the formulation of regulations now. My feeling is that what is needed in order to adapt the system of delegated legislation to a proper functioning, is a more regularized way of advance consultation on the terms and substance of the regulation.

Here again I want to make it clear that I am not proposing in any respect the responsibility for, or the direction of, policy be withdrawn from the appropriate source, the Minister. After all, it will be his to lay down what policy is to be followed. But the difficulty is that the detail of expression, the detail of content of regulations, even intended to achieve a particular policy, will sometimes involve, or often involve unconscious omissions, unconscious additions, where because of the lack of familiarity with the particular problems that are to be met, the regulation is not well adapted to achieve the policy that is in mind. My submission is that some kind of systematic advance involvement on these matters is very often the only way in which an appropriate regulation can be devised.

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The British select committee on delegated legislation, in their report in 1963, did not address themselves really to this problem at all. They were so preoccupied with matters of drafting and with the matters of laying before which were their concerns at the time, that one does not find much help in their observations. The two most useful discusions that I know of on the matter are to be found in a law review article by Professor Fuchs, Proce-

dure in Administrative Rule Making 52 Harvard Law Review 259 (1938), and in the report of the Attorney General's Committee on Administrative Procedure in the United States in 1941, where chapter 7 devotes itself to the problem.

The combined effect of this fusing together, the teachings they make, is to recognize the possibility of advanced participation in a number of modes Professor Fuchs devides them, and it is followed by the report, into four types. I do not think that categories or concepts can be rigidly adhered to in this connection, but he indicates four general types: one, investigative, two, consultative, three, conferences, and four, adversary.

The first one, investigative, is the sort of correspondence inquiries that are addressed, when a regulation is intended, to persons who might be thought to be interested. The initiation by the department for requests for information to such other government departments or officials as it thinks can usefully supply information.

The consultative one stresses actually the existence of advisory committees, which undoubtedly are useful devices that can be employed. If there is not an official advisory committee constituted, the trade associations, unions, and other regularly operating groups in the area—who might have sentiments on the matter—are solicited and their opinions are utilized advance at the preparation of the regulation.

The conference method contemplates the assembly of a group of people at a designated time and place, or designated times and places, where they meet to discuss the possible content of regulations in a certain area.

The adversary one, as its name implies, suggests something in the nature of a formal trial or hearing with the presentation of witnesses and the evidences of records. They are in a somewhat ascending order of formality and formalism.

It is suggested—and I think that the suggestion is undoubtedly true—that the propriety of employing one or the other of these methods or, perhaps, some variant, is dependent upon a number of factors. You cannot have appropriately the same kind of operation incident to the formulation of every kind of regulation. Such matters as the character of the parties aflected, the nature of the regulations, the nature of the agency or department itself, and its personnel, in similar matters will govern, from time to time, the choice of one or the other of the methods.

So much of the general propositions that have been advanced in the field. Let me add, then, some reflections of my own on the subject with illustrations. There are undoubtedly types of regulations where nothing in the way of advance consultation, or formal activity outside of the department itself, is required or would be appropriate. I have in mind, for instance, such matters as one sees gazetted year after year, and quite properly, prescribing the open seasons and the game limits for fishing in the various waters of Canada. This is something that must be handled that way, but where the matter is repetitive, and where there would seem to be no recessity for going outside for any information.

Take another kind of situation perhaps of somewhat the same order. I know it is the policy of the Government of Ontario now—and I should think, perhaps, it is that of the Government of Canada, judging from a casual survey of the legislation—no longer to attempt to fix in statutes a prescribed scale of fees or money levels from time to time but to allow these to be fixed by Order in Council. This takes into account the varying values of money and the circumstances that there have been over the course of years which indicate

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something of an inflationary tendency. There is certainly no point where we are trying to do something like adjust a scale of fees from time to time to hold hearings on that matter. This is the kind of thing that does not adapt itself well to that.

There are other kinds of matters that one can recognize—although they would certainly be exceptional—where a sudden and grave emergency arises and here there would hardly be time to have any sort of a preliminary consultation. This, again, must be taken into account. With those situations recognized, there are other cases where something of a varying attempt at advanced consultation can be useful. I will illustrate some varieties of use from my own experience if I may. I was —as my curriculum vitae here indicates—at one time associated in a regulatory capacity. In the early years with the U.S. Office of Price Administration, I remember one instance in which it fell to my lot to attempt to prescribe pricing regulations for sponges. There was some initial uncertainty as to whether sponges fell under the jurisdiction of the drug

department or of the meat and fish department. They were ultimately assigned to the fish department because the drug people felt completely at a loss about them—as I nearly was too. But the technique we followed on that occasion—it happened that the sponge industry in the United States was located and centered entirely on the west coast of Florida—was that we actually went down to the tampa area and had a large-scale conference with everybody interested in the sponge industry—the testimony being taken in Greek and interpreted for me.

This was one way in which—under the circumstances of that kind of a situation, with a relatively centralized and focused group—you were able to handle it by the conference procedure.

Another quite different method of proceeding was in connection with the fixing of prices for certain types of pork cuts where we had adopted a general regulation on pork prices in substance like those that the Wartime Prices and Trade Board enacted attempting to freeze them at a certain date, and providing for the filing of petitions for exemptions and exceptions. We received a great many petitions from South Carolina and Georgia pointing out a circumstance that we had not been aware of, and to which the pricing period certainly did not apply since it froze them as of a date in the fall. In the summer months, there was a production and a coming on to the market of local peanut-fed hogs. This was the great source of supply in

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those areas at that time, a source of supply which would be distorted by having a price-fix for a period which was totally out of line with the situation, the result being that in place of granting exemptions and exceptions, we notified various people that we were withholding action until we obtained a representative group of quite a number of people stating the facts when they were before us, enough so that we had a representative sampling and expression of opinion.

We then drafted an amendment to the regulation to take care of the situation of types of pork which were only regionally and seasonally available. That was the way we put it, but it was intended to deal with this special situation in which there was no way anyone in a government agency, or no one not personally familiar with the details of that line of trade in that locality, could possibly have anticipated. This suggests, really, an additional device for the consultation of the public. It is the device of using a suspended effectiveness device, where you have put out a regulation which is announced in advance in general terms, but being only a tentative regulation subject to applications or representations being made, before it is finalized and issued as a regulation.

There was another type of activity which I engaged in a little later, after I had left the office of private administration and had joined the Navy. One of my early responsibilities was to draw up a new system of station regulations for one of the large naval stations in the United States. They had only a very antiquated one which had digressed itself to the case of a rather small peacetime operation, and the circumstances were wholly different now. In that event, what I really made was a kind of a one-man royal commission, if you will, to find out what the situation was. I went around inquiring from the head of each department on the station, and each affected activity or division, as to what actually were the usages carried on in that department, in what way they were impeded by existing regulations, or whether there were matters that had to be circumvented or disregarded. On the basis of finding a descriptive pattern of their existing practices and needs, I drafted the proposal of a regulation, from that information, for submission to the commanding officer of the station. There were certain matters where Navy Department policy compelled a disregard of present practices or a lack of attention to existing needs and, of course, on matters of policy, the decisions were governed by responsible authorities. However, they were made in the light of the information as to the existing situation.

I do not want to prolong this matter any further because I do want to open myself to questioning, but I merely suggest this as a variance of ways in which the practice of advice and advance information, useful in the elaboration and detail of making up a regulation, can be brought about. With that, I am at your service.

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**The Chairman:** Thank you very much, Professor Abel. You have certainly given us a helpful categorization, if I may so call it, of methods of rule making, and when one method may be advisable and when another method may be advisable. I wonder if there are questions which the members of the Commit-

tee would like to raise or which our counsel would like to put. Perhaps, Mr. Morden, we will begin with you.

**Mr. Morden:** Can you conceive now of what sort of statutory provision, perhaps, should be inserted in the Regulations Act to provide for these diverse ways of obtaining advance information and consultation?

**Professor Abel:** It is a little difficult, of course, because I do not have the text of any such provision before me. I do admit that what is involved is a revision of the Regulations Act in certain significant respects. I would think, if I may more or less speak off the top of my head, that perhaps the thing needed is to have a provision for the Governor General by order-in-council to prescribe a kind of a law cadre for specified situations as to types of regulatory activity, then calling on the departments to propose how each of the regulatory authorities granted them fits into which one of the categories it is to fit, and requiring the approval of the governor in council to the plan proposed by the department for the elaboration of its regulations under each of its granted authorities.

**Mr. Morden:** It would be a sort of a case, by case type of regulation, in the regulation making process.

**Professor Abel:** It would be, perhaps, intermittently. What I suppose would happen would be that the council would lay down certain categories or certain situations in which it deemed types of regulations, types of consultation, to be advisable, depending on the number of parties, the interest affected, and so on. It would then call on each of these departments to review what in actual practice had been the description of the settings, or situations, in which its regulatory power applied and say, "Now, you tell us which of your exercises of regulatory power come under our category A, category B, category C and so on, and you have to follow on that method". I do not think, at the moment, that anybody outside the department is sufficiently aware of the complexities involved in each of the types of cases they are dealing with. The department itself is going to have to make a study in advance and say, "This seems to us like it fits under description of category B". This is the kind of thing. Then the department would have to propose to the Governor General, what methods of regulation it planned to bring under what part of his scheme.

**Mr. Morden:** If I may just interject here, I suppose this goes back to your basic principle that at present we lack any general system in the formulation of regulations. Would you care to compare, briefly, our lack of system with the present American system in the same type of job?

**Professor Abel:** The Americans, it seems to me, have gone too far in the other direction. The Administrative Procedure Act, as it was finally enacted and which applies of course only to federal operations—the states go on a

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different basis—provides in Section 4 that after notice required by this Section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, with or without opportunity to present the same orally, and after consideration of all relevant matter presented the agency, shall incorporate in any rules adopted, a concise general statement of their basic purpose. Where rules are required by statute to be made on the record after ample opportunity for an agency hearing, the requirements of Section 7 and 8 shall apply. They are really trial type rules.

The American act does not absolutely require that there be a formal adversary type of hearing in either situation, but the tendency of the agencies and departments in the United States—very strong tendency—has been to use the more formalized structure rather than the less formalized with the result that any important regulation covering a considerable scope of activity, and many of those which do not cover a considerable scope of activity, are dealt with by this adversary procedure whereby you handle it by means of a formal trial type of introduction of evidence and testimony making up of a record, and so on. This is not required but it is the procedure the agencies have tended to follow on a natural impulse of protecting themselves.

The result has been an immense amount of expense, particularly for smaller business men and the private citizens of the community who cannot really afford the time and cost involved in appearing at formal hearings and in being represented. It has meant a tremendous delay in making regulations about anything. For instance there are matters such as the arrangement of relationships between pipelines and gas distributers, where the for-

mulation of regulations has already been in operation for eight or ten years in the holding of hearings, and there is no end of it in sight yet.

This over-structuring can be attributed in part to something in the American temperament, and in part, perhaps, to something in the civil service temperament. Allowing for an appropriate discounting of both of those, I think that one must preserve flexibility in the process to take account of differences. If the need for flexibility and adjustment to differences in circumstances is perhaps not quite as great as the need for full information and communication. It is certainly almost as great. I think this is where the Americans have fallen short.

**Mr. Hogarth:** Dr. Abel, it occurs to me that what you have outlined for us would bring about a situation in which the minister involved would want to make particular regulations, but might become very gravely hampered. He might well know exactly what kind of regulation he wants. It might be as a result

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of informal consultations. If we were to formulize a procedure which he had to follow before regulations could become effective, do you not think, in a practical sense, this would become very difficult, or as you mentioned, over-structured?

**Professor Abel:** I do not think it would need to be. The policy judgement would, of course, have to remain his at all times. I think that it would call for a rather careful definition of the circumstances to make sure that it would not become over-formalized.

Allow me to refer to a couple of instances that have occurred relatively recently in the Ontario Department of Education that I think illustrate what should be avoided and where there is still a discretion that has to be left to the Minister. These are matters that have to do with the formulas that the Department of Education has recently evolved concerning bursaries to university students.

One thing they have done where they did consult the universities, was to adopt a policy which, in effect, disregards any consideration of the merit or ability of the student and makes the bursaries available on equal terms even to students who have no competence to pursue university studies. They are available simply on a basis of general availability.

The universities made representations to them saying that they were not in favour of this. The department did consult with them and the universities had a chance to state their case. The department nevertheless adhered to its position, which, I think, was quite appropriate for the department to do. It was its decision once it knew the facts.

In contrast, the department was involved in another situation a year or two ago concerning the information that students have required to give in connection with applications for assistance. This requirement called for revelations of parental ability to help. It was a type of a second hand means test arrangement. It turned out that they met with a great deal of difficulty in the application of this. Some parents were reluctant to make disclosures because of disagreements between themselves and their children about whether or not the child should have gone to university at all.

Eventually, the department modified its procedures in that respect, and instead of calling for statements, made an attributed award of a certain amount of deemed parental help to each student who was living as a member of a family.

I am quite sure that if the department had consulted anyone in advance to discover the defects in the application of the original scheme, they would never have put in into effect. So it seems to me that one does not have to interfere with the department's ultimate responsibility for its regulations, and yet one should see that it gets the information in advance concerning the workability of the regulations.

**Mr. Hogarth:** Even if we had some law whereby a minister was obliged to consult, you are not putting forward the suggestion that he is obliged to accept the consultation?

**Professor Abel:** No, by no means.

**Mr. Hogarth:** I was wondering, sir, if you would reflect on something that has been crossing my mind concerning this subject. Perhaps if we had an apparent statute, a specific clause, which entitled the minister to make regulations as drafted by the regulations department of the Department of Justice, it would be one type of regulation, or one type of delegation of authority.

However, we could have another concerning specific areas in which it would be obviously impossible for him to have them drafted by a department. For instance, this might

concern the situations in which the Department of Transport installs No Parking Signs at airports, etc.

Would this not be one way to control this problem of having every regulation perused by a department of government, Parliament, or a committee, as the case may be?

**Professor Abel:** I suppose it would be. If I perceive correctly the tenor of your suggestions, it would make a department of government, in this case I guess the Department of Justice, the scrutinizing authority in effect for all except a certain named kind of regulation.

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**Mr. Hogarth:** That is right, and they would be the trivial ones that we could never scrutinize because there would be so many of them. Take for instance the Department of Fisheries. In the Fisheries Act the Minister is empowered to make regulations pertaining to the licensing of fishermen or fishing boats in the industry. He is also empowered to make regulations as to what particular creeks shall be fished and what time of year they shall be fished, and so on. It is obvious that in the second type of regulation, they must be made more or less on the spot. For example, the Coquitlam River is closed from September 1 to October 15. To have the Department of Justice concerned with the making of such a regulation would be rather absurd because there must be thousands of them, and I do not think the Minister himself knows where they are. They are just done by delegated authority from him. In the first instance, where you have a very powerful regulation producing a very deep effect on an industry, perhaps there it would be best to specify in the authority given to him that these must be drafted by a certain department of the government.

**Professor Abel:** It was that kind of situation that I was trying to get at by my suggestion that each one of the departments be called on to review the exercises of regulatory power that it presently has and to submit to council a suggestion stating: "This is the way we think this kind of regulation ought to be dealt with". The one like the particular creeks, they would say. "We do not think any advance consultation is needed at all". In the one involving licensing, they might say. "We think that we need to have advisory groups set up and to have regular reference to them or whatever the methods might be". By sorting out the kinds of things as to which they regulate and the types of consultation available for making regulations and saying. "We think this kind of regulation appropriately fits this method of dealing", would mean that it would be up to council to make an initial review of all the departments' submissions as to whether they agreed or not with what the department was suggesting. After that, it would be expected that the department would just go ahead operating under the approved plan—except for new statutory powers that were given or modifications that were made when they would have to make some new submission on that.

**Mr. Hogarth:** In your mind, what agency should do this review and advise the minister? Should there be an independent outside agency, using as an example, the Department of Fisheries? Should there be acentralized agency of government which organizes all these regulations, reviews all regulations that might be made by any minister and advises him on the policy that they are trying to adopt with consistency throughout all departments of government?

**Professor Abel:** No. Of course, my proposals do not really point so much to the matter of the subsequent scrutiny as to the matter of the initial formulation, or how you go about formulating. So far as the matter of subsequent scrutiny is concerned, if appropriate steps had been used for the formulation—

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appropriate as defined in advance along the sense it is indicated—then I would say that the regulation that issued, so far as its policy and content was concerned, was one from which the minister was going to have to answer. There would not be any scrutiny of policy other than in the question period, or otherwise than in bringing the minister to look for it. The only scrutiny that might be involved is the kind of thing that the British have for these specified abnormalities, like imposing a charge or operating retroactively.

So far as its content is concerned, once the department has availed itself of the appropriate sources of information preliminary to arriving at the structuring of the regulation, I would say that it is for the department to decide what regulation it wants to issue now.

**The Chairman:** Mr. Pepin.

**Mr. Gilles Pepin (Counsel to the Committee):** You are not in favour of the systematic parliamentary supervision of the merits of

regulations? Somebody has made this suggestion to this Committee.

**Professor Abel:** I am not, and it seems to me that to expect that is to impose on Parliament a task which, added to everything else it has to do, is just impossible. It is crushing. I think that the whole necessity for delegating the power of subordinate legislaton renders it impossible for Parliament to scrutinize in detail the content of each regulation.

**The Chairman:** If I may interject there. I thought, Professor Abel, that you distinction in the beginning which I jotted down as a policy content distinction might go so far as to suggest that there should be a scrutiny of the content. I thought perhaps that one of the implications of your words was that while policy should not be scrutinized by a scrutiny committee, yet its content should be. The McRuer Commission in Ontario, as I recall, did not make a distinction between the two since they thought that all matters of content apparently were matters of policy. They took the view that only a very procedural kind of test ought to be applied to regulations by a scrutiny committee. I thought that perhaps you were suggesting something more than that.

**Professor Abel:** No, not other than the extent to which the British have done it. If you want to specify certain items of content as they have and then say that there must be a scrutiny committee as to these matters, well and good, but not for the general structure and operation.

The same lack of familiarity with the details of operation in particular situations plagues the department in drafting the regulation in the first place. If it does, it is solely on the basis of its own information, and would be unavoidably present I think as far as Parliament is concerned. The important thing, it seems to me, is to get access to as genuine and as valid sources as you can and to make sure of your access to the valid sources of information, and then letting the content be formed on the basis of them.

I see a place for Parliament in connection with the members of Parliament rather than Parliament itself in connection with the operation of some of these devices. For instance, one of the really serious questions you would have to confront—if you were to attempt to use something in the way of a conference or a consultative system—would be to make sure that you were reaching the people who had the information and who were interested in bringing it forward.

We all know that a mere public announcement or pronouncement in the press—that there is going to be a hearing on such and such a thing—does not necessarily stimulate all of the interested people to come forward.

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The departments could notify members on matters about which they wished to be informed when prospective regulations were in order. The members could communicate to their constituents the fact that such regulations were in prospect and they would pretty well know who would be interested in it, and thus bring forward a possibility of representations being made. Or, the members could get lists of people, from among their voters, who wished to be automatically put on the mailing list whenever a regulation of a particular kind was in order so that the member could serve then as a channel between his constituents and the departments for establishing the contact in this consultative arrangement. To that extent, I think that there certainly ought to be at all times, a pretty clear liaison between the department and each member to the extent that the member wanted it.

**The Chairman:** But you take the view that if the making of regulations was done in the most appropriate ways, the need for subsequent scrutiny would not be very great.

**Professor Abel:** I think that is right.

**Mr. McCleave:** Mr. Chairman, could I raise a point here? I have just looked at their terms of reference and they are: "to report on procedures for the review by this House of Instruments" which I suppose leaves us in a bit of a bind because the good Doctor has come in with suggestions about amending the Regulations Act, and the like, and yet we are pretty limited in what we can make in any constitutional report back to the House of Commons. Perhaps you could take that up with the House Leader. I gather there is no objection if we pursue Doctor Abel's suggestion for remedies in this field. Doctor, would you like to try your hand at drafting and sending the Committee what you think should be done about the Regulations Act?

**Professor Abel:** Well...

**Mr. McCleave:** Then maybe we will find out if we can get it before the House of Commons.

**Professor Abel:** I do not know that I could do that tomorrow.

**Mr. McCleave:** I do not think we will get an answer back from them by tomorrow either so this is not a time problem.

**Professor Abel:** But at a later time, in the summer after I get my examination papers graded, I would be willing to take a whack at it.

**The Chairman:** Mr. Morden?

**Mr. J. W. Morden (Assistant Counsel to the Committee):** Would you, in making some provision for advanced consultation attach any consequence of invalidity to regulations that for one reason or another were made not in compliance with those requirements? Would you make it mandatory to follow the procedure?

**Professor Abel:** That might be handled by requiring a statement to be made preliminary to, and as a condition of, the gazetting as to whether the agreed on procedures had been followed, the agreed on procedures for this particular type of regulation. If the Department did not give an affirmative answer, then simply refuse to gazette it, which would of course seriously impede its having any operating character.

**Mr. Morden:** Perhaps if there was such a certificate or statement that the act had been complied with in the making of the regulations, it could be treated as conclusive evidence that it was complied with so that, say, six months later when their regulation is operating, it would prevent attack. If there are legal requirements regarding procedure prior to the making of a regulation, I can see the possibility after the regulation has been made that someone affected by it, say, being prosecuted under it, or being obliged to comply

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with it, saying "They did not follow Clause 7 (b) of the Regulations Act in making it", therefore it is invalid. I can see a great deal of mischief arising from that in some cases.

**Professor Abel:** I hesitate to open up a new ground of collateral attack on regulations. I would think that the situation would be very rare—I would hope non-existent, but certainly very rare—where a department would certify compliance when in fact it had not complied.

**Mr. Morden:** It would be reasonable legislation to provide for, say, a statement made by the Department being conclusive as to compliance?

**Professor Abel:** I think so, yes.

**Mr. Morden:** Are you aware of any cases in the United States where there was failure to comply with the APA requirement of "right to appear" invalidating a regulation?

**Professor Abel:** I think there are some cases—I do not have them at hand—where the regulation has been one under Section 7 or 8, the ones that require a hearing with a record made up, rather than the general Section 4 one, where there has been invalidation of regulations. Indeed there are instances in Canadian jurisprudence of situations where a statute has particularly specified some particular step or consultation where the regulation has been set aside for failure to have that specified preliminary step taken.

**Mr. Hogarth:** There is a policy there which exists for by-laws that have to be on the vote of the electorate.

**Professor Abel:** That is the kind of thing, yes.

**Mr. Morden:** A witness last week made a submission to the effect that in his view, a subdelegation of delegated power to make regulations was improper for several reasons which he assigned. What are your views on that?

**Professor Abel:** I see no impropriety about it at all. It seems to me that the same considerations, in a more modified form, that have compelled Parliament to delegate it all, operate under certain conditions to compel the primary delegate to do some subdelegating. It all depends on the scope of the primary delegation, and in part on the character of the primary delegate, and of the subdelegates. I do, of course, recognize that there are certain situations where you have imposed a special confidence in the particular person to whom you have made the primary delegation. There are, as it were, nondelegable duties in a limited range of cases. In so far as the matter of principle is concerned, I would say there is no valid principle against subdelegation. It is a matter of what is a reasonable way of thinking Parliament has contemplated that the scheme is going to be put into operation. Some times Parliament will have recognized that this is much too broad a scheme. Take the situation, for instance, happily in the past

and I hope never to occur in the future, where we had to have recourse to the War Measures Act. It certainly was not contemplated that every detail of what happened under the War Measures Act had to be the personal responsibility of the Governor in Council. It had to be subdelegated at various levels down the line.

**Mr. Hogarth:** Pardon me for going all the way back to law school because I forget most of what I learned there, but was there not a Latin maxim: *"delegatus non potest delegare"*?

**Professor Abel:** Yes there was.

**Mr. Hogarth:** Is that not the line of reasoning that you are submitting to us? That you could not delegate that which had been delegated to you unless you had certain specific powers to do so?

**Professor Abel:** This is a maxim which, I think it is now generally agreed, was devised wholly in line with the private law agency. It is one of those frequent maxims which seems to have been fathered by Lord Coke on a misreading of earlier cases because that is the

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result he wanted to arrive at, and I think so far as the operations of government have been concerned, it has been pretty well accepted that it does not apply.

**Mr. Hogarth:** It does not apply to delegated authority. Thank you.

**Mr. G. A. Beaudoin (Assistant Parliamentary Counsel):** Would you restrict the subdelegation to time of war or other emergencies, or would you allow such subdelegations in time of peace, depending on the criterion of the legislation?

**Professor Abel:** I would allow it in time of peace. I would not restrict it to time of war. I would make it depend rather, on how large a body of responsibility had been delegated, and who it was that it was being delegated to. If you delegate a power to somebody like a Minister, it is expected that it is going to be operated departmentally. That is the purpose of providing him with departmental structure so that the functions can be taken care of at different levels. If you delegate it to a body such as the Canadian Transport Commission, the Canadian Transport Commission is not provided with a departmental structure in the same way.

I would say that if we give a regulatory power as we have to the Canadian Transport Commission or the Canadian Radio-Television Commission, we expect that that body shall exercise it. However, if we give it to a minister we expect that it will be exercised at a level within the department.

**Mr. Beaudoin:** It is not in any case a case of emergency or...

**Professor Abel:** No.

**Mr. Gilles Pepin (Counsel to the Committee):** As you know Professor Abel, the Parliament of Canada can delegate to a provincial administrative authority the power to adopt regulations in federal matters. Do you think that it would be possible for the scrutiny committee that could be established by the House of Commons to exercise its power of supervision on those regulations?

**Professor Abel:** Yes, I think that might be an advisable thing to do. For the interim, I think that might be an extremely advisable thing to consider, depending of course, on what, if any, new shape the Constitution will take in the future that might affect this particular situation and this whole matter of interdelegation. For that matter, it might affect the question of which one of the houses should do any supervision that was necessay.

I can well imagine this gets a little collateral to what I am talking to but it is raised in the working paper. I can well imagine alterations in the composition and function of the Senate which would lead to a different answer to the question of which one of the Houses should do this supervision. For the time being, in the situation you suppose, I think this might well be added to the British list as a thing that a scrutiny committee should consider.

**Mr. Hogarth:** Doctor, I would like to see your suggestion operate in the light of our new Omnibus Bill that is going through the House now, in which the federal government gives the power to the Lieutenant Governor in Council to set up a lottery system. It would be extremely interesting to see how the federal government would review a lottery scheme of the Province of Quebec, and at the same time, review one of the Province of Manitoba. There certainly might be some conflicting political interests involved.

**Professor Abel:** This, of course, begins to range a field. Whatever the matter of delegation, I would like to reserve for interest the

study of the question about delegation of-powers to the Lieutenant Governor in Council, and how far the federal government can impose new responsibilities on him. However, that is another matters.

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**Mr. Morden:** Professor Abel, I certainly appreciate the thrust of your remarks in their placing the emphasis on the actual formulation and making of regulations in the first place, and the processes intended the guarantee good regulations. Would you think it unnecessary to formalize any new procedures for Parliamentary review after they have been made?

**Professor Abel:** No, I do not know that I would. I can see advantages in the kind of system that the British have. I think the advantages are relatively minor and take care of a less important class of considerations than those to which I have addressed myself. However, I do not think they are negligible. I think that there is some value to be gained from that kind of a proceeding.

**Mr. Morden:** In line with that, an earlier witnesses has submitted that Parliamentary review of regulations should be conducted not through one scrutiny committee as in the British House of Commons, but through the various Standing Committees of the present House who are familiar, or would be familiar with the subject matter of the regulation in question. In other words, they would avowedly interest themselves in matters of policy and, unlike the British Scrutiny Committee, could be reasonably expected to be more familiar with the content policy of regulations than one scrutiny committee for the whole House which would have to review all regulations. What do you think of that submission?

**Professor Abel:** I think it is an unhealthy proposal. It seems to me that it negates the responsibility of the minister and it dissipates the notion of ministerial responsibility. Aside from the scheme of reviewing for the elimination of specified flaws, such as the British have, any sort of a review which addressed itself to the substance of the regulation was improper.

**Mr. Morden:** I understand, and I think it is clear from the British system, that the work of the Scrutiny Committee is to submit, in some cases, reports which would a foundation for debate in the House on whether or not a regulation should be annulled. This is to assist the House, and to isolate problems for the benefit of the House. That is followed with a procedure whereby the House can annul the regulation. Putting the scrutiny aspect to one side, do you think that the House should have the power to annul all regulations, or some regulations?

**Professor Abel:** Yes, I think it should have. In fact, it does have this power, since anytime they disagree strongly with the tenor of a regulation, legislation could be introduced specifically providing to the contrary of what the legislation provided. Therefore, there is always, theoretically, the power to overrule the terms of any regulation.

As I understand the British annulling procedure, the matters which the Scrutiny Committee calls to the attention of the House are accompanied with a comment that it does not believe, in spite of this, that anything should be done other than accepting the regulation. On occasion it calls matters to the attention of the House with a reasoned suggestion that the regulation be annulled.

However, it is only annulment on these specified grounds that are laid out. Thus, if we have a regulation which has retroactive effect, the Committee may call this to the attention of the House, with a recommendation that the regulation go into operation, nevertheless. Or, it may call it to the attention of the House with a recommendation that this regulation be disallowed because it is felt that the retroactive operation, in this case, is so gravely injurious that it ought not go ahead.

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The annulment is always an annulment on one of the grounds specified in the terms of reference of the Committee. It is not a general annulment because of policy. The only grounds on which, conceivably, one could say that the substance matter comes before Parliament is that the statute has been put to an unexpected purpose. Here, I suppose, if the Committee puts forth a reasoned justification showing how, in its judgment, the tenor of the regulation is completely out of line with what the statute was intended to achieve, this does raise issues of substance of a sort, but it is on a rather limited basis.

**Mr. Morden:** I understand the procedure. I think it is in three Canadian statutes, but in roughly half the British Statutes providing for laying before Parliament annulment, say,

during a period of 40 days of laying. It is an easier procedure for getting rid of a regulation than putting a bill through the House.

Do you think it is a good thing—I know you cannot answer this except very generally—to increase that type of legislation?

**Professor Abel:** Would you re-state the question, Mr. Morden?

**Mr. Morden:** Do you think it would be a good thing generally, if more statutes contained provisions for annulling regulations made under them by means of the passage of a resolution?

**Professor Abel:** If you could imagine a Parliament with an infinite amount of spare time on its hands, yes. My impression has been that Parliament has quite a lot to do anyway so the question is really: What is the most effective way of allocating the use of parliamentary time? I think that there are more pressing matters for Parliament to concern itself with, so I do not think I would like to see this added morsel put on its plate.

**Mr. Morden:** When you were preparing regulations for the OPA was there very much congressional supervision or second guessing of your work?

**Professor Abel:** Not much, no. The main way by which that appeared was due to members who would bring to our attention the interests of their constituents in certain matters which we knew were under consideration. They would then try to get us in touch with a constituent. Once in a while, a member himself would actually appear to make a statement of the situation in his district. We would have that before us. It was a very infrequent event in which Congress disapproved of any detailed regulation that had gone into operation.

**Mr. McCleave:** May I ask a supplementary? You mentioned a very interesting case about the Tampa sponge fishermen. This brings a breakdown into one area where they would have a congressman, and of course, senators from the State of Florida. Did any of these gentlemen contact you when you got into sponge price field?

**Professor Abel:** I think the only communication we had as I remember—and my memory goes a little faint over the years—was a letter from one of the Florida senators urging us initially to proceed with promptness and to take care of the situation, if a matter had arisen here. This, perhaps, gave it a little higher place on the list of priorities of hearing in conference, but I think that was the extent of it.

• 1055

**The Chairman:** We have had an hour of battle with Professor Abel on this since his statement, so perhaps if the members have no further points that they would like to pursue, this would be a good time for us to adjourn. We are able to go on in terms of our own timetable, but I suspect we all have other committee meetings at eleven o'clock which the Whip would greatly appreciate our attending.

**Mr. McCleave:** I have delegated my duties to another member.

**The Chairman:** Are there any other further points that you would like to raise while Professor Abel is with us? I would like to extend our thanks to Professor Abel, for a very able presentation.

Our next witness will be Professor Kersell on May 13. There will be no meeting next week.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 5

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TUESDAY, MAY 13, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS:

(*See Minutes of Proceedings*)

20200—1

SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

Timothy D. Ray,
*Clerk of the Committee.*

[*Text*]

# MINUTES OF PROCEEDINGS

TUESDAY, May 13, 1969
(7)

The Special Committee on Statutory Instruments met this day at 9:40 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present:* Messrs. Brewin, Forest, Gibson, MacGuigan, Marceau, Muir (*Cape Breton-The Sydneys*), Murphy, Stafford (8).

*Also present:* Mr. John Morden, Assistant Counsel to the Committee; and Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness:* Dr. J. E. Kersell, Associate Professor of Political Science, University of Waterloo.

On motion of Mr. Marceau, it was

*Resolved,*—That reasonable travelling and living expenses, as well as a per diem allowance of $50, be paid respectively to Dr. John E. Kersell, Mr. G. S. Rutherford, Mr. C. B. Koester, and Professor Daniel Baun, who are to appear before this Committee.

The Chairman introduced Dr. Kersell, and invited him to make his submission.

Dr. Kersell proceeded to elaborate on a six-point outline: (a) the drafting of enabling legislation; (b) notification rather than publication of regulations as the time for giving effect thereto; (c) provision in Statutes for Parliamentary affirmation by resolution of regulations; (d) debate on the adjournment re regulations tabled in the House; (e) proposal for a Scrutiny Committee to report to the House on Statutory instruments; (f) appointment of a Parliamentary official analogous to the Auditor General to consider grievances arising out of the operation of delegated legislation.

He was questioned by the Committee and Mr. Morden on each point.

At 12:40 p.m., the Chairman thanked Dr. Kersell, and adjourned the meeting to the call of the Chair.

Timothy D. Ray,
*Clerk of the Committee.*



20200—1½

[Text]

## EVIDENCE

*(Recorded by electronic apparatus)*

**Tuesday, May 13, 1969**

**The Chairman:** The meeting will now come to order. Since we have a full quorum, I would like to request at this time—in case some of you have to leave for other meetings—that we have several motions while we have an adequate quorum as opposed to our quorum for the hearing of witnesses. Perhaps we could take care of the witness today and the three other witnesses that we have arranged. On Thursday we will be having Mr. G. S. Rutherford from Manitoba, who works with the Scrutiny Committee there, and in the afternoon, Mr. C. B. Koester from Saskatchewan, who works with the Scrutiny Committee there. These are the two provinces in Canada which utilize the scrutiny procedures. We are very pleased that both of them will be able to appear before us.

In June we will have Professor Daniel Baum from Osgoode Hall Law School who is going to speak to us on the American situation. He is the editor of the *"American Administrative Law Review"*; he is going to spend a full day with us, discussing the U.S. situation.

We can have a single motion for all of these men; one mover will do for the whole group. I would suggest that someone move that reasonable travelling and living expenses, as well as a per diem allowance of $50 be paid respectively to Doctor Johne E. Kersell, Mr. G. S. Rutherford, Mr. C. Koester, and Professor Daniel Baum, who are to appear before the special committee on Statutory Instruments.

• 0945

**Mr. Marceau:** I so move.

Motion agreed to.

**The Chairman:** Our next order of business is to hear Doctor Johne E. Kersell. Before calling on Doctor Kersell, I would like to say this about our schedule of hearings for the day. We are scheduled to sit now, at 11.00 a.m. and again at 3.30. Since there are many other committees meeting at 11.00, perhaps we could try to finish the morning session at about 11.15 or 11.30, to enable those of you who wish to attend both this hearing and others, to do so. If it appears, however that we were unable to finish this morning by 11.30 or 11.45 perhaps the Committee would then feel that it would rather press ahead and thus dispense with the afternoon session. We will make that decision when the time arrives.

Doctor Johne E. Kersell obtained his Bachelor and Master degrees at Queens University; there he worked with Dr. Corry. He then went on to the London School of Economics and Political Science where he obtained his Ph. D. working on the subject of Parliamentary Supervision of Delegated Legislation. He has taught at the Universities of Western Ontario, McMaster, and is presently Associate Professor of Political Science at the University of Waterloo.

His subjects are Commonwealth Political Systems, Comparative Politics and Comparative Administration. He is the author as we all know—because we have distributed his work—of the leading text in this field, *Parliamentary Supervision of Delegated Legislation* which in its original form was his Ph. D. thesis at the London School of Economics; it has since turned into the fine book with which we are familar and which was of so much assistance to us as we prepared to acquaint ourselves with the mysteries of Statutory Instruments.

Therefore, we are naturally very pleased that Doctor Kersell has been able to be with us this morning. We are very much looking forward to the comments which he will make and to the period of exchange which we will subsequently have with him. Professor Kersell.

**Dr. John E. Kersell, Associate Professor, Faculty of Arts, Department of Political Science, University of Waterloo, Waterloo, Ontario:** I am very pleased to be with you this morning. I told your chairman that I have not been able to study the subject of Parliament Supervision of Delegated Legislation for some years. My book is up to date as of 1959 or 1960. Since then I have maintained a general

interest in the field but have been unable to do substantial research because of other interests and responsibilities. I did, however, have an opportunity to meet members of the Committee and members of the staff of the Australian Regulation Committee which is a Senate Committee. In my discussions in Canberra with these people, I became increasingly convinced of the advantages of having a scrutiny committee in the Upper Chamber, if it is impractical to have one in the popular chamber.

In the Canadian context it may be more practical to propose a speaking committee for the Senate rather than for the House of Commons. I am not convineed that the reverse would be such a bad proposal either.

• 0950

I was also impressed by the obvious importance of having adequate staff for any scrutiny committee. Generally speaking, instruments of delegated legislation are quite technical; it is not at all clear that without a staff, the members of a committee—unless they happen to be specialized in this area of law—would be able to operate effectively. Further more even a specialist in this area of law may find that there are certain implications on the administrative side that are missed on regulations and orders. Long experience would make up for this initial lack of familiarity with the administrative aspect. One could say the same thing about a specialist in administration. He might well pick-up the legal technicalities with long experience.

So it is possible that some members of a scrutiny committee would in time gain the confidence if they brought background either from law or from administration. And yet I think it would be infinitively better from the point of view of the members of the committee in particular to have adequate staff.

In the British case, at one point the chairman of the scrutiny committee of the House of Commons in giving evidence to the 1953 committee on delegated legislation said in the presence of the council to Mr. Speaker who was their technical adviser, to Cecil Carr, "You are the committee". I think that was very true. The effectiveness of the British Committee depended very much upon this dedicated specialist in the field. When I was talking to Senator Wood in Canberra he emphasized the importance of the staff, the three or four they have serving their committee.

If a committee were to be established, I think it would be highly desirable to provide it with at least one specialist who would be familiar both with the legal side and with the administrative side. Where you would recruit that person I am not at all sure, but it would seem it might best be from the one of the departments that has within it specialists who combine these particular competences.

I did submit to the secretary of the Committee some notes that I want to have in your hands. I assume they were distributed, were they?

**The Chairman:** Yes, Dr. Kersell, all the members of the Committee have copies of these notes.

**Dr. Kersell:** I do not know, Mr. Chairman, whether or not you like to go through each of these.

**The Chairman:** I think, perhaps, you might proceed through each of these elaborating on them a bit, and then we will come back and pinpoint certain areas.

**Dr. Kersell:** Perhaps, if we could take time with each note to have questions it would be a little more helpful?

**The Chairman:** Is that agreeable to the Committee? Some of these of course may blend together but we can always come back and ask questions on an earlier one. You may proceed then Professor Kersell.

**Dr. Kersell:** I think probably in the Canadian instance there is even more cause for concern about the breadth of enabling clauses and the lack of definitive precision in the nature of enabling clauses. I am not a specialist in law. I am sure that you will have witnesses who can review much more insight

• 0955

in this. However, in my study which is some years old now I had to look at this aspect at least in a preliminary way of backgrounds for the problems of controlling delegated legislation. Nowhere did I find, except in the war years in Australia, the unlimited scope of delegating clauses of bills and sections of acts. I found no explanation for this almost unlimited delegation in the Canadian context.

I do not think our problems are that unique. We have not got as fully developed a welfare system as either Britain or New Zealand or, indeed, Australia. We have a federal system that takes much of the load off the

public services in Canada as they do in Australia. The sharpest contrast, I think, is with Britain where they have a highly developed welfare state and no federal system. It is a system in which there would be many more excuses for broad delegations, and yet you do not find them. There is much more precision.

Another not quite comparable system where there are very few broad delegations, and you will have a witness who can tell you more about this in detail, is the American. Their Congress is most jealous of its legislative authority and simply refuses to delegate in an unlimited fashion.

I have a few examples of the situation in Canada, and again they are a bit dated. This is a paper that two colleagues, Professor Kenneth Kernahan and Professor William Hull, and I turned up in a preliminary search of literature with regard to a study that we are just beginning on responsibility in the public service. It is a paper by Eric Hehner, which he delivered here in Ottawa in November, 1965, and he has a number of examples of delegating clauses of bills that were introduced in the Third Session of the 26th Parliament, 1965.

Perhaps I just could just seize on some of the more startling examples. He picked out Bill-131, proposed Appropriation Act No. 6 of 1965. It listed a variety of estimates specifying in detail what each sum was to be spent for and providing that the respective amounts could be paid or applied only for the purposes and were subject to any terms and conditions specified in the particular item. And further, there had to be complete certification from the comptroller of the treasury for each of these specified appropriations.

Then the act provided, after all this specification and details American style or British style, that $750 million be raised "for public works and general purposes" which were unspecified except by orders-in-council still to be issued. In other words, here was a delegating clause dealing with $750 million and the only restriction on what could be done by order-in-council was that it should specify such rates of interest and other terms and conditions as the governor-in-council may approve.

• 1000

One of the things that Mr. Hehner in this paper objected to in particular was the general pattern of using "may", a permissive term rather than "shall" a specific term. Another feature that is, I think, rather typical of Canadian delegated legislation and which is guarded against very carefully in other Commonwealth systems and to my knowledge the American system, is the habit of giving authority to the delegatee to delegate further.

Mr. Hehner found another example in 1965 of this practice. He looked at a randomly selected number of regulations found in this in the Veteran's Land Act Regulations published in June, 1965:

> Authority to exercise judgments and make determinations is delegated not only to "The Director, the Veterans' Land Act" but to "District Superintendents" and to "any person authorized to act on behalf of" such superintendents.

That is almost, unlimited delegation of already delegated authority. And note, again:

> Authority to exercise judgments and make determinations

He found in these regulations repetitive references to "in the opinion of" and, again, the use of the permissive word "may". His comment on this was that it leaves civil servants in the position of autocrats whether or not they wish to be such. These are not necessarily senior civil servants. They may, as the regulations state, be

> "any person authorized to act on behalf of"

district superintendents under the Veteran's Land Act.

There was one other that I thought I might draw your attention to before asking if there are any questions or comments. This reference is to the Old Age Security Regulations published on July 14, 1965. The Director of Family Allowances and Old Age Security Division

> may "delegate to Regional Directors any duty, power or discretion conferred on him by these regulations". The Director is then given almost absolute powers over the essentials of qualifying for assistance. He is not bound to accept any evidence respecting such a factual matter as proof of age. He may

...again a permissive...

> (but does not have to) submit a disputed case to an appeal tribunal. The applicant is not provided with a right of appeal.

Mr. Hehner's comment on this was that:

> The Director is made the judge of what is in the best interest of the pensioner.

All of this is sub-delegated authority. As I mentioned previously, this broad delegating pattern is quite unusual at least in other Commonwealth systems and, as far as I know, it would be considered quite excep-

• 1005

tional in the American instance, too. I could imagine there would be fights in committee, and perhaps floor fights, even in the House of Representatives, if it were proposed that Congress delegate authority to any department or agency of the administration in the United States.

In summary, it seems to me that there should be much more precision in the drafting of enabling legislation. I do not see this as impractical. It certainly has not proved impractical in Britain. Though I am not specialized in the American system, I understand that it is not impractical there for Congress to guard its legislative authority; and in Australia and New Zealand, again, much more precision is used in the drafting of enabling legislation. You do not have to give blank authority. You can require legislative drafting to set out the limit so that not only can Parliament maintain some meaningful control over how the delegated authority is used, but if a person has a case in law the courts can say, "Yes, there are limits".

It is not unusual to find in Canadian legislation such terminology as "the Minister or the Governor General in Council has authority to make regulations or Orders in Council—"—as the case might be—"—necessary to carry out the intent and purpose of this Act". That is not an unusual formula to find.

**The Chairman:** Are there any questions? Mr. Brewin.

**Mr. Brewin:** Before asking my main question I would like to call your attention, and that of the Committee, to a rather flagrant example of what you have been speaking about. It is in the field of immigration, where we now have regulations which are themselves subordinate to, or are delegated under, I think it is, section 63 of the Immigration Act—very broad powers of delegation. Under the regulations they delegate to immigration officers the right to disregard the standards that the regulations themselves set up; and perhaps as an instance of that you have directives issued to interpret the regulations, which have no status whatever in law, but no doubt are taken very seriously by the officers who are making the decisions.

Is this an illustration of what you have been talking about?

**Dr. Kersell:** I would think so, although I am not familiar with the details of the legislation in question. But from what you say it clearly is an example. The status of directives is almost anomalous in parliamentary tradition, as I understand it, in Britain, Australia, New Zealand and Canada. If these have legislative effect they themselves should certainly be in the form of orders or regulations or, if they are important enough—and this is one thing that a scrutiny committee should always have control over—and they in fact deal in a legislative way with matters that should be in the control of Parliament, they should be in the form of legislation—an act of Parliament.

**Mr. Brewin:** The main question I wanted to ask you is by what process in Britain, and perhaps in other Commonwealth countries, or in the United States, if you are aware of it, there arose a tendency to become more precise and to get away from this general legislation? Is this just an imposed self-restraint?

Speaking as an opposition member of Parliament, I think, on occasions, when we have seen legislation that we thought was very broad, or over-broad, in its terms the tendency has been for the Opposition to criticize and to talk about the rights of Parliament, and for the government to say, "Well, that is a con-

• 1010

venient way to do it, and that is how we are going to continue to do it." By what process was this habit of a very wide delegation of legislation changed? I think most of us agree it is not a good habit.

**Dr. Kersell:** The older style of delegating authority was to have precision, even in the Canadian context. Therefore it is Canada that has departed from it; it is not the other systems. Certainly in Britain and, as I understand it, in the United States as well, there were very bitter floor fights, particularly in the war years, about clauses that seemed to be very generous in the delegation of legislative authority. As I read British *Hansard*, the restrictions were put on largely by backbenchers of the government's own party.

As you know, in Britain during the war they had a coalition of the Conservative Party and the Labour Party which formed the government and yet there grew up within the Conservative Party, which was the senior member of the coalition, a group of what you

might say were unofficial opposition members. They called themselves "the active backbenchers." One of the things they were quite concerned about was the delegation of authority and how this authority was used. These active backbenchers were, in the British context, the guardians of Parliament's authority to make laws. When the government felt it necessary to insist on broad delegations, the active backbenchers only acquiesced when they got an assurance from the government that this was only for purposes of the war and once the war was over there would be amendments to the legislation that would again restrict the delegations. Those commitments were honoured. It was a matter of a moral commitment, a political commitment perhaps to Parliament itself that these delegations would not remain in their wartime breadth after the war. Again the active backbenchers policed this. They were of course officially in opposition in the postwar period, 1945 to 1951, but they watched very carefully to see that these broad delegating clauses were given some precision once the wartime emergency was over.

I think in very brief summary of my answer to the question, it was largely the activities of backbenchers of the government's own party that brought about some restraint in these matters.

**Mr. Gibson:** Professor, with respect to the Order in Council raising this $750,000 for public works . . .

**Dr. Kersell:** That is millions—three-quarters of a billion.

**Mr. Gibson:** Is this completely wide open as far as regulation goes?

**Dr. Kersell:** Yes. As far as one could tell from reading the Bill, the purpose was for public works and general purposes. With just public works, you know, you would have a hand full, but when they append the words "general purposes" you wipe out the limits. Then the Order in Council had to be issued—"at such rates of interest and upon such other terms and conditions as the Governor in Council may approve." It is hard to see, although I am not a lawyer, what limits could be put on there. I do not know how a Parliamentary Committee could insist on limits, if I could not, and it would be very difficult I think for a lawyer to make much of a case either before an administrative tribunal or an ordinary court if there were limits on what the Cabinet could do when it had such authority.

• 1015

**Mr. Gibson:** Our problem sir, I think, to a large degree is that we agree with your conclusions but the practical mechanism to check these and to reform them is not easy to find. What specific steps do you suggest should be taken to cut out or curb this type of regulation through backbencher action?

**Dr. Kersell:** Now this is a delegating clause, in the first instance, delegating authority to spend $375 million and it might be sufficient simply to say for "public works" and leave out the "general purposes." Now if there were in fact other things that Parliament wanted this money available for in addition to public works, all right, specify them. "Public works and housing"—if they wanted housing; and if they wanted money available for land reclamation, all right.

**Mr. Gibson:** I agree with that sir. What I am getting at is that there may one passed today. We are in here and the mechanism of Parliament does not seem to be set up so that you can get at these things speedily.

**The Chairman:** Mr. Gibson, I think probably that will be answered in one of the later points which Professor Kersell will discuss with us. Perhaps I could put the question this way, if you would permit me to do so.

Assuming that we have a scrutiny committee, whether it be of the House or the Senate or some other scrutiny mechanism, what could such a committee do? It would be dealing with the consequences rather than with the basic problem perhaps—that is, the legislation would already be there giving these very broad powers to the executive and to administrators and the House committee or other mechanism would be confronted only with the fruits of that.

**Mr. Gibson:** That is right.

**The Chairman:** And even if it were established, is there anything that could be done?

**Dr. Kersell:** Not with regard to enabling legislation, unless the scrutiny committee were given authority to look at enabling legislation or the clauses that delegate it within enabling legislation. That of course is feasible: a scrutiny committee could be given authority to look at enabling clauses.

**The Chairman:** Has that been done anywhere?

**Dr. Kersell:** It has been done in the British case, in the House of Commons scrutiny committee.

**The Chairman:** It has the power to look at enabling legislation?

**Dr. Kersell:** Yes.

**The Chairman:** And what type of recommendation does it make with regard to enabling legislation?

**Dr. Kersell:** It of course, as a committee, cannot move amendments but any member of the committee, as a member of the House, can move amendments. In the British case, by tradition and not by requirement, the chairman of the scrutiny committee is a member of the opposition.

That obviously has its advantages, but there are also advantages to having, as the Australian committee has, a senior member of the government's own party as chairman of the scrutiny committee. Senator Wood is on first name terms with most if not all members of the cabinet. When he says that there is a bit of difficulty with something under the authority of the regulations committee, it car-

• 1020

ries some weight. Indeed ministers have told him, he reports, that they are very glad that he and his committee are there, because they do not have to watch the products of their departments when it comes to delegating legislation this closely—they can just wait until his committee takes it up and, if it gets through his committee, it must be all right. If he objects or if his committee, through him, objects then they take another hard look. In many, many cases there is no squabble at all. The committee does not report; he just goes as a friend of theirs and says: "This regulation looks a little bad. We are just starting our investigation. What do you think?" If that committee like the British committee had authority to look at delegating clauses, they could do the same.

**Mr. Gibson:** We say that, but I see the practical strength against us doing it. I can see mountains of regulations up to the ceiling and only two hours a day. This is the feeling that I have about it.

**Dr. Kersell:** That is why it is so important to have a staff.

**Mr. Gibson:** If a board was set up there would be some way of having some officials go over them and then bring to the attention of the committee the two or three most significant ones. Is that the idea?

**Dr. Kersell:** Yes. I asked Professor Carr if it was a very time-consuming and energy-consuming task to go through these statutory instruments and he said no, that he can do this in a very few hours a week. Most of them are all right. You see, he was counsel to Mr. Speaker, a lawyer by training, and he had all kinds of administrative experience. He was like the Deputy Minister of the civil service that served Parliament. He could tell after a rapid reading of an instrument whether there was anything there to draw the Committee's attention to, and if there was he did so. If there was not, the whole list would go through. Some meetings of the British committee lasted 10 minutes, and rarely did they last over an hour.

**Mr. Gibson:** It shows that it can be done practically then.

**Dr. Kersell:** Oh yes.

**Mr. Gibson:** Is the staff very large, sir, with which he operates?

**Dr. Kersell:** Professor Carr did it all himself. The Senate Committee in Australia, which really does not have as thick a load of work as the British committee, has a staff of two or three. They do other things. They are specialists in different aspects of delegated legislation.

**Mr. Gibson:** Professor Carr did the thinking along the lines of complete work. If you had a bad appointment in that function you would be in trouble.

**Dr. Kersell:** Yes, and therefore it may be a somewhat larger staff. It is unlikely that you would have three weak staff persons at one time. I met two of the three and I know the other by correspondence and by reputation, and they are all competent.

**The Chairman:** Perhaps we are running just a little bit ahead. We are getting into what, of course, is a very interesting part of what a committee would be like. However, I think there is at least one more thing that should be asked at this point. Does the English scrutiny committee have enabling legislation referred to it? Or does it, when it is confronted with regulations, go back and look at the enabling legislation?

**Dr. Kersell:** It can go back and look at enabling legislation, and it does. This is not in

its formal terms of reference. It just started to do this, and it is allowed to continue doing it. It is not in the formal terms of reference that it has this authority. It has taken it, and has been allowed to keep it.

**The Chairman:** By what time or what date would you say that this was established?

**Dr. Kersell:** I am a little weak in the details here, so I better just take a minute and see if I can find the exact reference.

**The Chairman:** In the meantime, let me see who else may want to ask questions.

• 1025

**Dr. Kersell:** I think it was in the session of 1963-64. I have not found the exact reference, but it was some years after it was established, and there was felt to be no need to actually amend the terms of reference of the Committee. I am sorry, I have not found the exact reference.

**The Chairman:** That is fine. Does the committee go back to the enabling legislation through the regulations? Is that how it gets to it?

**Dr. Kersell:** It usually does that, but in his role as counsel to Mr. Speaker, if the adviser finds enabling legislation that looks to be questionable, he might raise the question before the legislation goes into operation.

**The Chairman:** And the Committee might make a report on it at that point to the House and say that this enabling legislation is too broad even though no regulations have yet been made under it?

**Dr. Kersell:** It does not have the terms of reference to do that, but any member of the Committee could raise the question, presumably when reports are made. Or he might be assigned to the Committee or arrange to be assigned to the Committee that looks at the legislation in detail.

**The Chairman:** I guess that gets us a little bit farther ahead too, so I will forego any further questions along this line.

**Mr. Murphy:** I was wondering about your comments which indicated that the Canadian system has gone a lot further than the other Commonwealth systems and the system in the United States in delegating and redelegating authority. Did your studies indicate at all that as a result of this delegation and re-delegation, the numbers of persons employed in the civil service in Canada comparatively speaking is less than the numbers of Civil Servants employed in the other jurisdictions?

**Dr. Kersell:** It is lower in Canada than in Britain where they have a unitary system and a much more fully developed welfare scheme. It is lower than in Australia. But employees of public corporations and school teachers in Australia are included as civil service people.

**Mr. Murphy:** Maybe I should be more specific. Was there any relationship, did you think, between developments of the civil service in Canada as opposed to the size of the civil service in the other jurisdictions?

**Dr. Kersell:** I do not think so. In the British case where you have a higher proportion of civil servants doing more things, you still have many more precise limits on the authority that they have been delegated.

**Mr. Murphy:** So in effect Canadians cannot even relax in the knowledge that although we may be delegating more than the others, we have cut down the bureaucratic overload, so to speak.

**Dr. Kersell:** No, I do not think so.

**Mr. J. W. Morden (Assistant Counsel to the Committee):** Professor, you have pointed out that it is common to find in many Canadian statutes the general enabling provision to make regulations generally for carrying into effect the purposes and provisions of the act. You point that out in your book, I think with respect to the Estate Tax Act. Is it your view that under no circumstances should such a enabling provision be enacted?

**Dr. Kersell:** You can find examples in other jurisdictions where such broad delegations are made. I suppose one could argue that in certain instances, for certain programs of a highly technical nature it would be impossible for Parliament to be more precise. And cer-

• 1030

tainly in the initial stages of developing something new and untried it might be wiser to have the increased flexibility and avoid the necessity of returning to Parliament for amendments to the parent act, and so on. It is possible to argue this way, but I do not think it is possible to argue this way for all the legislation that has such broad delegations as is the case in Canada. I do not think these arguments would hold for revisions of acts that have been administered for years and a lot is known about how they operate.

**Mr. Morden:** Is it your view that, if used, this type of provision should be used very sparingly?

**Dr. Kersell:** Yes, it should be exceptional rather than the rule and it is the rule in the case you are talking about.

**Mr. Morden:** Yes, I think you are right. I think it is also the rule in provincial legislation, too.

**Dr. Kersell:** Yes, it is.

**Mr. Morden:** Dealing with the problem respecting the power to subdelegate, do you feel that in no circumstances should the delegates have authority, have power to redelegate?

**Dr. Kersell:** I think there should be power to delegate administrative authority, certainly that is indispensable, but to delegate and then redelegate law-making authority and broad discretions to apply judgments is dubious.

**Mr. Morden:** On that point you very helpfully referred to regulations made under the Veterans' Land Act, which you say redelegate power to certain officers to exercise judgments and make determinations. Now on the face of it that would appear to be a redelegation or a delegation of the power not to make law but to make judgments and decisions?

**Dr. Kersell:** Yes. My objection there was that this might be justifiable to delegate from the director to the district superintendent but my objection was to the redelegation to any person authorized to act on behalf of district superintendents. These people are nameless faces as far as the regulations are concerned. Who knows who is going to act on behalf of a district superintendent; it is up to him to decide presumably, and if he does not decide in an appropriate way, or does not choose appropriate subdelegates...

**Mr. Morden:** You would like to see the person who is going to make these decisions defined either in enabling legislation or at least in the first tier of subordinate legislation?

**Dr. Kersell:** As I say, we found this paper in a survey of literature for the study of responsibility. How are you going to hold a district superintendent responsible. How is his director to hold him responsible if there are such broad decisions with regard to the director delegating down the chain of command.

**Mr. Morden:** Thank you, sir.

**The Chairman:** I wonder, Dr. Kersell, if I could summarize in this way the considerations which it seemed to me that you are advancing with respect to enagling legislation. First of all, that it should be drafted precisely so precision would be the first requirement. Second, and here I might be overextending what you say, that there should be no subdelegation of legislative authority.

**Dr. Kersell:** Yes, of legislative authority, I think.

**The Chairman:** It was not clear in your dialogue with Mr. Morden whether you would say there should be no delegated legislative authority or if there is that the person to whom it is delegated should be defined.

**Dr. Kersell:** I think as a rule, maybe, legislative authority, rule-making power should not be ordinarily delegated a second time. It seems to me that is removing the potential for Parliamentary control a bit too far. There might be cases where it could be justified, in which case if Parliament is notified and agrees, accepts the arguments for redelegation, as long as it is aware of what is happening and does not object, maybe that would be fair enough.

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**The Chairman:** I will come back to that in a moment. The third would be that the standards for discretion even by the executive should be as far as possible objective standards.

**Dr. Kersell:** As far as possible.

**The Chairman:** That is phrases such as we sometimes find in Canadian Statutes "the Governor in Council may make such regulations as he deems fit", with no other qualification not even to carry out the purposes of the act, but just as "he deems fit". This is a totally subjective kind of discretion that you would object to. Perhaps I am right in extracting from what you have said those three requirements of precision, no subdelegation and objective standard. Would you add any others to that?

**Dr. Kersell:** No, I do not think I would. If you could achieve that much it would be a great gain.

**The Chairman:** Coming back to the question of subdelegation which has concerned us with a number of the witnesses who have appeared before us and concerned the witnesses, of course, too, is there any case for subdelegation to be made in terms of administrative necessity? Or, putting it this way, what is the situation in other countries? Do they find that they can absolutely exclude subdelegation and carry on without any loss of administrative efficiency? What about the U.K., for example?

**Dr. Kersell:** Well, of law making authority, this is distinct from merely the procedures of an administrative nature.

**The Chairman:** You must have that.

**Dr. Kersell:** Yes, in Britain they seem to be pretty successful in at least maintaining control over subdelegation. They are pretty jealous of this. As I understand it, in the United States it is very rare indeed. It is quite exceptional that the delegate has the power to subdelegate by act of Congress. Congress is exceptionally touchy about delegated legislation never mind about subdelegation.

**The Chairman:** Yes, so at least on the basis of the experience of other countries you think we could do without subdelegation. Do you think there is any case to be made in theory for subdelegation?

**Dr. Kersell:** No, I am more a theorist than a student of practical politics. Empirical theory, I would like to think. I can see no justification for a delegate having the power to redelegate in theory. This is enlightened by some knowledge of what is done in Britain, Australia and New Zealand.

**The Chairman:** Thank you. I am sorry, Mr. Muir.

**Mr. Muir (Cape Breton-The Sydneys):** From your knowledge, and as you have already indicated, this does not take place in the United States.

**Dr. Kersell:** As far as I know, it would very difficult to get through Congress an enabling clause that gives the delegate power to redelegate. Congress is very jealous of its legislative authority, and it is very specific in delegating at all. There are real restrictions on every enabling clause, real limits, made effective so that the courts can police without anything further. There is no scrutiny committee in Congress. The courts are given enough in the legislation itself to rule on validity. I know of no particular example of Congress delegating authority.

**Mr. Muir (Cape Breton-The Sydneys):** Therefore, with regard to the illustrations that you mentioned to us regarding the 750 million and so forth, you do not feel this sort of thing occurs in the United States?

**Dr. Kersell:** That was just one delegation. It was the Governor General in Council who had that authority; that is just one delegation. It is of money and there are no limitations on it, but as far as one could read it would have to be done by Order in Council; it could not be done by a delegate of the Cabinet. The expenditures would have to be authorized by the Cabinet.

**The Chairman:** Your objection to that was on the grounds of lack of decision rather than...

**Dr. Kersell:** That is right.

**The Chairman:** ...subdelegation. On the question of precision, Mr. Muir could ask the same question, I suppose, is it likely that the U.S. Congress would pass a bill that gave that kind of authority?

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**Dr. Kersell:** There is no way.

**Mr. Muir (Cape Breton-The Sydneys):** I have just one other question. In your opening remarks, Professor, you mentioned that you preferred, or you were in favour of, a committee from the Senate. Would you elaborate on why you feel that way about it?

**Dr. Kersell:** Perhaps we could discuss that...

**The Chairman:** Perhaps, Mr. Muir, we could leave that because he comes to that more directly in one of the later points.

**Mr. Muir (Cape Breton-The Sydneys):** Yes, fine.

**The Chairman:** Perhaps we could proceed then to Dr. Kersell's second point, of publication, I believe.

**Dr. Kersell:** Yes. In Canada if the defence can prove that an order or regulation had not been published in the *Canada Gazette*, Part II, prior to an infraction of that order or regulation, I think this is meritorious, but it has the effect, does it not, of saying "Well, if

people get notification and comply before it is published then we might as well have that advantage." There is an extensive practice, in the Canadian context, of notification going out to those most likely to be affected by orders or regulations beofre they are published in the *Canada Gazette*. This is meritorious too, so that the principle that if you want compliance to law those who are expected to obey it should know about its existence and its terms, is carried out in an informal way at the very least in Canada. However, it raises the question: why could not the effect of orders and regulations be delayed at least until they are published? Indeed with this extensive experience we have in Canada of extending notice even before publication perhaps, though this is not done in any jurisdiction of which I am aware, perhaps it could be statutorially required that until notification has been given an instrument is to have no effect; and that could well precede publication in the *Canada Gazette*—and it does in the case of a number of regulations. The Department of Transport particularly has an excellent record in this regard.

So it seems to me that it would not be all that administratively inconvenient to require notification before operation of instrument delegated legislation. Again that could be precisely defined. This could be confined to instruments that have a legislative effect; that require people to do things or not to do things—rules of behaviour. It would not have to deal with administrative *minutiae*, procedures and so on, confined to legislative instruments that were intended to have general or specific effect; and particularly in Canada I think it would not be impractical to conceive of such a provision.

In Australia, for 50 years they have required that every instrument be published before it goes into effect, which is more restrictive, really, than requiring notification. Again we come back to the principle that if compliance with the law is the purpose of law, why not have such a provision?

**Mr. Forest:** As it is now, they are going to be given only to the people affected. Is that what you mean?

**Dr. Kersell:** Yes. Departments know their clients fairly well and if a regulation with regard, say, to the operation of a ship or aircraft is to be effective, it only makes sense that the operators of these ships or aircraft or whatever be told that these regulations will be put into effect as of such and such a date, and that date might well be prior to the publication of the next *Canada Gazette*, Part II, which is published only bi-monthly—about the middle of the month and about the end of the month.

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**Mr. Forest:** Would you recommend publication in the *Gazette* prior to the regulations being put into effect?

**Dr. Kersell:** That would be even more restrictive than requiring notification because notification could be immediate. You could say the day after *Canada Gazette*, Part II, is published, and I suppose there is one due any time now, this being the thirteenth. Let us say it is published on Thursday, which would be normal, and on Friday it is decided by the Civil Aviation Branch of the Department of Transport to impose new requirements with regard to instrument landing systems. By Monday all aircraft operators could have notification of this—or by the following Wednesday anyway—and the legislation could go into effect by the twenty-first of the month, long before another issue of the *Canada Gazette*, Part II. This is done now. Notification is sent out prior to publication in the *Canada Gazette*.

Looking at it from administrative convenience, the way the law now reads, if there is an infraction between the dates that the instrument goes into effect, after it has been publicized and before *Canada Gazette*, Part II, comes out again, the person violating the regulation can say, "Well, it has not been published in the *Canada Gazette*; therefore you cannot prosecute." That is the law as it now is. If you changed the law and required not publication but publicity or notification, there would be more teeth in regulations prior to the issuance of the next *Canada Gazette*, Part II.

**Mr. Forest:** Are you satisfied with the way subordinate legislation is published—after it has been passed?

**Dr. Kersell:** I do not think it is as good as in Australia. It would, I think, if it had been practical to require notification by statute. It would be second best, I think, to do as they do in Australia and say that no instrument can go into effect until it is in fact published.

**Mr. Forest:** It seems from the evidence that it is very hard to find anything in the *Canada Gazette*.

**Dr. Kersell:** Yes. It is very hard to find your way through the *Canada Gazette.*

**Mr. Forest:** Yes, I think one witness was promoting a computer bank or something to try to find exactly where the regulations are for some time after they have been passed.

**Dr. Kersell:** That is why I am more in favour of publicity. Publication does not mean much, although *Canada Gazette*, Part II, is infinitely better than Part I. It is easier to find things in Part II. But if you have this requirement of publication which is informally lived up to now, departments and agencies do know who are likely to be affected. Indeed they draft regulations and orders in Council very much with these people in mind and they or their representatives may well be consulted in the drafting not only of subordinate legislation but of the legislation itself. They know their clients and others who are likely to be affected, and I do not think it would be unrealistic to require notification of those most likely to be affected before instruments are put into effect.

**Mr. Forest:** Thank you.

**The Chairman:** I am not sure I understand this myself yet. It seems to me that in practical outcome the Canadian situation and the Australian situation are the same although, as you say, there is not in Canada an absolute requirement of publication before the notice becomes effective. Still, it is an adequate defence for any prosecution to say that it has not yet been published. So in practice the situation is the same in both Australia and Canada. Is that right?

**Dr. Kersell:** I would think that in the Canadian context it is a bit better than the Australian in that it is a defence that though you may have notice of a regulation, you cannot be prosecuted because it has not been published. However, in many cases public

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safety is at issue, and it is not the interest of, say, the operator of a ferry service that we should be concerned with, but rather the safety of the passengers on those vessels. If you could give more effectiveness to regulations that affected the general public, I do not think any operator would willfully say, "We do not have to obey this regulation until it is published in the *Canada Gazette*", but it is possible that there could be delays in implementing a regulation because there is not the urgency. I think that if there were a requirement of notification preceding operation, it would be an improvement even over the Australians.

**The Chairman:** Notification rather than publication.

**Dr. Kersell:** Yes, notification before operation. Everyone who is expected to change their behaviour or their operation would have an additional spur to amend their procedures and operations.

**The Chairman:** This might be an area in which the safeguards which are provided in Canada are now too great. In other words, the safeguards against government action. In most other areas that we see there may not be enough safeguards, however, here there may be too many.

**Dr. Kersell:** Yes, because it is a defence to prove that they have not been published. Publication may not be nearly as meaningful as notification.

**The Chairman:** Mr. Morden.

**Mr. Morden:** Dr. Kersell, I can see that in some areas notification would be practical, and could be achieved if provided for. In the example which you give in the case of airline companies you could have a list and notify them easily. Perhaps this could be provided for in the legislation. I can see other areas of business or human activity where those likely to be effected are such an amorphous group that it would be difficult to frame legislation. To gain benefit from it they would have to be notified before the regulation becomes effective.

**Dr. Kersell:** They could be notified through the media, legal notification. These are changes in the law.

**Mr. Morden:** Perhaps what you are saying then is that the legislation should require the authorities to take reasonable steps to notify those likely to be effected.

**Dr. Kersell:** Yes.

**Mr. Morden:** In actual fact, it may very well be that in some cases, even though they have taken reasonable steps, there are some people who for one reason or another have not been notified.

**Dr. Kersell:** You are right. That is a good point. Instead of thinking in terms of notification, you should think in terms of publicity, and then you are covered. This publicity, is

better than publishing in *Canada Gazette* Part II, because not everyone subscribes to *Canada Gazette* Part II.

**Mr. Morden:** You are quite right. What type of publicity do you have in mind?

**Dr. Kersell:** In the case of a very specified clientele such as the operators of aircraft or pilots on the St. Lawrence Seaway or at the major ports in the country, you have their names and addresses, and it just depends on the post office, literally, to send notification to them. If you have wholesale distributors, then you might not have a comprehensive list of these people. If you have a requirement for publicity as opposed to publication, they are more likely to read the business or legal notices in the *Financial Post* or the *Globe and Mail* and/or other newspapers than they are to read *Canada Gazette* Part II. Yet, if it is published in *Canada Gazette* Part II, that is all that is now required and they can be prosecuted. Referring to the principle that compliance is the purpose of law, then publication is perhaps not as good as publicity.

**Mr. Morden:** I do not think that you are suggesting that we use more widely read methods of communication, such as the *Financial Post,* or leading daily newspapers or the text in which the regulations are published but just the fact and the general description of the context.

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**Dr. Kersell:** That is right.

**Mr. Morden:** An explanatory note perhaps such as accompanies all instruments in Britain with each instrument in Britain as an explanatory note.

**Dr. Kersell:** Something of that nature.

**Mr. Morden:** We must go on to say, "See *Canada Gazette* Part II".

**Dr. Kersell:** Or ask your lawyer to see it because often it does not benefit the layman very greatly to look at these regulations.

**The Chairman:** Perhaps we can move on to the third point in Dr. Kersell's outline.

**Dr. Kersell:** This is with regard to requiring a resolution affirming that the instrument is acceptable to parliament. As far as I know, there is still only one act on the Canadian Statute books which requires that there must be a positive resolution affirming instruments before they can go into effect. In Britain, this is a much more generally used procedure, and Britain has 55 odd millions of people whereas we have 21 odd millions; therefore, they are twice our size. They have a unitary system whereas we have a federal. They have a much more fully developed scheme of welfare services than ourselves. Their problems are far more complicated than ours.

For all these reasons parliament in Britain is far busier than our parliament. If they can extend the use of this affirmative procedure, which gives parliament an opportunity not only to see the regulation which is just a laying procedure in final form using the Canadian context, but actually an opportunity to raise questions or even have a debate, why cannot we in Canada? I do not believe that it is impractical to give these opportunities. Often they are not taken up except by the scrutiny committees of the House of Lords and the House of Commons. They do not take time, of any significant proportion, in parliament itself.

The total of parliament's time in Britain which is devoted to all aspects of delegated legislation, is about 4 per cent, four hours in every hundred. This includes the discussion of enabling legislation, and motions to annul. In recent years, I have a feeling, although I have not actually looked at the facts here, that there is a declining proportion of parliament's time devoted to the discussion of delegating and delegated legislation. One reason for this is that departments are behaving better as there was a declining pattern through the years 1940-1960 with which I was concerned in my study.

Once the public services are on notice that what they are doing is being watched, they naturally, like all of us, tread more carefully. They are more responsible in the broad sense of that term, not that they are irresponsible otherwise, but they know that they can bring their minister under fire, and as we all know that is a major concern of any public servant. If he is doing anything—it may have nothing to do with exercising delegated authority—but in the back of his mind is always the thought, "What effect will my actions, future plans or activities have on my minister". If he thinks that they will be adverse, he is a little more cautious. They do not mind, as they must have plenty of trepidations about some of the things which they are required to do by law. I do not think this is an insidious remark but I have never heard a public servant say, "I wish parliament was not there".

**The Chairman:** Mr. Brewin.

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**Mr. Brewin:** Mr. Chairman, does Dr. Kersell not possibly suggest that the British system is not really performing the function that we want to see performed, which is that of only spending four per cent of their time in a general investigation? I am afraid that I am getting on to five but as I have to go in a minute I think I will bring this in here. It relates to three as well. But where a House committee probably would not raise questions of policy in the light of British experience, it would seem to me that any single reviewing committee or any single method of having the House look at it which in effect did not bring in a review of policy was only doing a fraction of the job, perhaps only attending to the formalities—that the thing was not obviously bad. For this reason, when we got to five—unfortunately I have another committee—I was going to suggest, as has been suggested by other witnesses, delegation to larger groups of functioning committees made up of members of Parliament. I would think elected members of Parliament would perform the function of a more efficient and thorough review, if the committees lived up to their responsibilties, than the British system seems to be doing, if it does not really go into the question of policies.

**Professor Kersell:** It does go into questions of policy but it does not report on them. This is "unusual and unexpected use of powers" and if they report that there has been unusual or unexpected use of power MPs know that there is a policy question at issue and it is the role of Parliament to take that up, in the British view. I am not apologizing for this, I am just explaining. I think that maybe a committee should itself be able to raise policy questions and to make policy recommendations to Parliament and then this all should be discussed in the House. It seems to me any policy questions should be discussed in the House. But the theory of the British and the Australian practice is: all right, we have identified a policy question, we will draw this to Parliament's attention and then let them carry the ball. I tend to agree that it would be better if they could go into some serious study of the policy alternatives and say: this seems to be the government policy in making this Order in Council or the minister's policy in making this regulation; we think that these policy alternatives should be considered. I think this would be highly useful. That is one reason that I am more in favour of a Senate committee. It could do that sort of thing without threatening the government and if there was a serious question that was reported on in these terms by a Senate committee, surely it would not be long before members of the House would take up the question, particularly if there were affirmative procedures that had to be followed or if there were procedures whereby an instrument could be annulled and those procedures could be set in motion in the House. I do not think it matters who looks at these questions so much, as long as they are looked at. I think it is better to look at them in some detail, in some depth, as you suggest—but if you cannot get that at least have the question raised: yes, there is a policy question here that somebody should look at; this Committee does not have the authority but maybe some member of Parliament or a group of members of Parliament or the opposition or one of the opposition parties should take it up.

**Mr. Brewin:** I am sorry but I have to leave. I would tend to take issue with you on the matter of the Senate being the best instrument to do this job.

**Dr. Kersell:** I do not think it is the best instrument but it might be the only one though on which you could get agreement from a Canadian Government.

**The Chairman:** Mr. Muir wanted to raise a question on this earlier and perhaps I should allow him to do that now.

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**Mr. Muir (Cape Breton):** The Professor mentions the advantages of a relative non-partisan committee. What makes you think that a committee, certainly a committee from the Senate, would be non-partisan.

**Dr. Kersell:** I think any specific Committee would be. The House Committee in Britain is established on party lines but it does not operate on party lines, and I think that if the government is concerned with this it is wrongly concerned. I just do not think there is that much of party political significance to come out of scrutiny committees. This has not been the case with a House Committee in Britain, it has not been the case in Australia with the Senate Committee, where party lines are much harder drawn than is generally believed. The Australian Senate is pretty partisan.

I say in these notes that some of the things that I think most desirable are not likely to be adopted in Canada because of the reservations held by the government. And we have had this all along. The governments of Canada, governments of both parties have made all kinds of arguments against having a scrutiny committee either in the House or in the Senate. I think their reservations and fears are unfounded. If they would just look at how the scrutiny committees of the House of Lords, House of Commons in Britain and Australian Senate work they would find out that they are ill-founded. But how can you convince them? If you can convince them, I would certainly go all the way. If you can convince them that there should be a House committee composed of a majority of members from the Opposition parties, chaired by a senior member of the government's own party, with authority to look into policy questions as well as all others and with authority to look at delegating provisions of enabling legislation—fine, that is the ideal. But I am enough of a student of practical politics to strongly suspect that the present or any government in the foreseeable future, in the Canadian context, will say "no" to such a comprehensive system of scrutiny. I just do not think it is "on". But it is better to have some scrutiny than no scrutiny.

**Mr. Muir (Cape Breton):** You would agree that a committee from the Commons could do this though just as well as any others that could be sold to any government.

**Dr. Kersell:** I really do not think there is anything to this partisan fear—especially if it were a small committee. Small committees generally work more effectively than large committees. I cannot see any partisanship of a serious nature developing. If it were a big committee, like the old style committees with 50 or 60 members, maybe, but it is not likely even with that number. It is the subject matter that militates against partisanship. I think any scrutiny committee has a better chance of being more like a parliamentary committee in the literal sense than most other committees, more likely to be than the Public Accounts Committee, the Miscellaneous Estimates Committees or specialist committees—those charged with responsibilities for certain departments or agencies. The subject matter is such that it just does not arouse partisan spirit.

**Mr. Muir (Cape Breton):** Would you go into this type of committee a little further than you have in your notes and give us all the thoughts you have in mind.

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**Dr. Kersell:** I have done that in general, in answer to your questions. But to take it a bit further, I think the advantages of having a majority of Opposition members would be that you would generate more confidence in the Committee and such a committee could not be accused of playing the government's game. Now this is all premised on my feelings that it would not be a partisan committee, it would be much more a parliamentary committee. If it were composed of a majority of Opposition members it would not only be a committee not controlled by the government but it would have that appearance and there would be more public confidence in what it was or was not doing. I do not think it would do that much. I do not think it would report that often.

After a brief period of operation I think you would see instruments drafted much better, clearer in their meaning; if there were requirements for publicity, there would be improvements in that area, and the committee would not do that much. As I suggested, sometimes the British committee meets only for ten or fifteen minutes every two weeks and rarely does it go longer than an hour. Of course, this is premised on having an adequate staff to do the preliminary leg work.

The advantage of having a majority of opposition members would largely be that it would give the person subject to orders and regulations much more confidence that they were in no way prejudicial, or likely to be prejudicial, to them as individuals or corporations or whatever.

The advantage of having a senior member of the government's own party as chairman, I think, would be in the same terms as Senator Wood told me, that he would have much readier access to any minister or to the minister chiefly responsible for an Order in Council in the Cabinet. If there was something that needed tightening up in an instrument, it would be more easily possible for him to get this done informally. I am convinced that it is better to do things informally, if at all possible, than to have a "knock 'em down, drag 'em out" fight in public. I think to have a senior member of the government's own party in the chairs would be a trade off for having a majority of the opposition. The government might well say that if they could have their own man in the Chair they would

go along with having the majority of the opposition. You get the best of both worlds then.

Because the committee would be, I am confident, nonpartisan in the way it operates, the chairman himself would lose any tendency to be partisan. He would see that the members of his committee were behaving in a parliamentary fashion, if you like, and he himself would say that this is the way we have to operate.

Senator Wood is certainly not the handmaiden of the government of Australia. I do not know whether he is still sitting; I do not know whether he is still alive but anyway I will use the past tense. He certainly was not in the years when I knew of him, up until 1965, a handmaiden for the government, but he certainly got some very constructive changes in particular regulations that were in effect in Australia.

**Mr. Muir (Cape Breton-The Sydneys):** With regard to a member of the opposition as chairman of the committee, this has worked out well in the previous government and in this government in the Chairman of the Public Accounts Committee.

**Dr. Kersell:** It works well with the British scrutiny committee in the House of Commons. That committee is chaired by a member of the opposition. Again, this would not be far behind as a second best, and if it were impossible to have a majority of opposition members on the committee, as I suspect it would be in the Canadian context, then it would certainly be highly desirable to seek agreement to having the committee chaired by a member of the opposition.

It would then also leave an impression with the public in general, or at least the public that is more frequently and more importantly affected by subordinate legislation, with a greater feeling of confidence.

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**Mr. Muir (Cape Breton-The Sydneys):** In making your case for a Senate scrutiny committee you mentioned, first, nonpartisanship, which we have dealt with and, second, adequate time. A few moments ago you said that the committee in the U.K. only meet for a few minutes once it was organized and once it had the proper staff. So time would not be a factor if it were set up in the same manner here with regard to a committee of the Commons.



**Dr. Kersell:** I do not think it would be, but I think you would get an argument not only from the government but probably from members of the House that there are too many committees now meeting too frequently, too long—

**Mr. Muir (Cape Breton-The Sydneys):** We hear this at the moment.

**Dr. Kersell:** —and we do not need another committee. I think the argument can be attacked in terms that you have suggested, that this committee would not be meeting all day once a week. It would meet perhaps every couple of weeks for an hour at most. That is the British experience. That depends on having staff, though. That depends very much on having a competent staff and maybe you cannot get that. To get good people requires money and is the government prepared to provide this staff? I think it is indispensible that there be really competent staff for any committee but particularly that one because of the technical nature of the problems with which it has to deal.

**Mr. Muir (Cape Breton-The Sydneys):** In your case again for the Senate scrutiny committee you mentioned experienced membership. Would you not find experienced membership in the Commons? There are some who stay here for a period of time—

**Dr. Kersell:** That is right.

**Mr. Muir (Cape Breton-The Sydneys):** —although some of us do not.

**Dr. Kersell:** That is right. When I said experienced in this context I was thinking of more experienced than just being a member of Parliament or a Senator. I think if there were a scrutiny committee in the Senate and it was seen by the government to be doing a good job, a worthwhile job and doing it well, there might well be appointed to the Senate, men who brought this unique combination of public administrative experience and legal experience. These people are very hard to find and I think it is desirable to have this sort of background to deal with this sort of thing, especially if there was not to be adequate staff. I think it would be very important to have maybe, as they do in Britain, former civil servants appointed life peers. That is an increasingly general practice in Britain. Permanent undersecretaries appear in the House of Lords as life peers from time to time, increasingly now. I think it is desirable to have persons of this kind, former man-

darins, if you like, in the Senate. Why should it be a preserve for essentially party politicians?

**Mr. Muir (Cape Breton-The Sydneys):** Careful now.

I have just one final question, Mr. Chairman. Professor, have you given any thought to a joint committee comprised of members of the Senate and the Commons?

**Dr. Kersell:** If it proved practical, I think it would be a very useful sort of committee. You could combine the best of both worlds there. If you needed a lever you would have it in the persons of members of the Commons and you would have hopefully some of this experience of a broader nature being infused into the committee from the Senate, or it could be infused.

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**The Chairman:** We have with us, at our invitation, at all of these meetings the Assistant Counsel of the House of Commons with the thought in the backs of our minds that at some point this may become an important matter for him.

**Mr. G. A. Beaudoin (Assistant Counsel to the House of Commons, Canada):** Dr. Kersell, you said that you were in favour of a Senate committee and I understand that you are impressed by the Australian experience. However, in Australia I understand, the Senate is an elective body. Does this have any influence on your decision, because the Commons—

**Dr. Kersell:** The election is almost indirect. It is a matter of the parties putting up lists of candidates and they are elected on a statewide basis. It is proportional representation as well; both parties are almost assured of getting roughly half of their candidates elected in every state.

It is true that a party could well try to displace a Senator. They tried to displace Senator Wood at one stage and he fought it and got the nomination despite his state party's antagonism towards him, and because he was on the list and in a fairly high position he was elected. It is possible to try to displace a Senator but in many circumstances it does not prove to be practical. They have this on the same terms as a party appointive position, which is similar to the Canadian context.

**The Chairman:** Mr. Beaudoin.

**Mr. Beaudoin:** I asked that question because some people may feel that the committee should be part of the elective body. In Australia, of course, there is no problem because both bodies are elective.

**Dr. Kersell:** The senators there feel the same distance between themselves and public opinion as they do here—perhaps not as intensely, although they do not recognize that. They say they are divorced from the public, they do not have the feel, they do not have a well-defined constituency, it is a whole state and—they are one of 10 from that state. They just do not feel their relation with public opinion.

I think there is probably a substantive difference between the confidence that senators have in Australia and the confidence they have in Canada when they speak for the public, but it is pretty hard to pin down. If you talk to Australian senators they say, "No, we are not really a popular body. We do not have the people behind us. At least, we do not feel we do." You hear this from senators in Canada as well. While there is probably a difference of degree it is perhaps not a difference of kind.

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**Mr. Beaudoin:** So on the whole they would favour a Senate committee for that?

**Dr. Kersell:** As I suggest in the notes, I think a House committee would be preferable, but I am perhaps not as well qualified to judge these matters as members of the Committee.

Let me put it this way. I think it would be too bad if there were not the alternatives proposed at the Senate committee. If it were an "all or nothing" effort to get a House committee and it came to nothing, then there would continue to be no scrutiny. As I have suggested, we do have loose regulations and, as we all know, we do have enabling clauses, and if we had an ombudsman I am sure we would soon find there are people who are desperately dissatisfied. Indeed, I am sure that if we did a survey of members of Parliament we would turn up particular cases of persons who are affected by immigration regulations and by income tax regulations who feel they have a grievance, right or wrong, against the operation of delegated legislation in this country. Such surveys have been done. One was done a few years ago by a graduate student at Carleton University and it was reported on in Professor Rowat's book

of readings on the ombudsman. So, we know there are these grievances and nothing is being done about them now and people therefore must be alienated and frustrated by the system as it now works.

Perhaps this Committee should recommend that there should be a scrutiny committee in the House and the government against—this is not a very good term but I do not think it is inappropriate to use it—stonewalled recommendations. On my reading of *Hansard* over the years, and as others read it too, the proposals for scrutiny committees which have been made by very responsible members of the House have in fact been stonewalled by members of both parties. I think if that were to happen again and no scrutiny were to be effected, then these grievances and these alienations would continue to persist, and I think that would be too bad. It seems to me that we are now coming to a time when the young in particular feel an alienation from the system that this sort of scrutiny might not do anything to alleviate, but to again have a lack of sensitivity and responsiveness on the part of the government, a total lack, would seem to me to be quite unfortunate.

**The Chairman:** Mr. Forest.

**Mr. Forest:** Provided they have adequate staff could the scrutiny be made by the different standing committees of the House, where the members have specific knowledge of the legislation which comes before them?

**Dr. Kersell:** Again, because of the technical, detailed nature of orders and regulations and also the nonpartisan nature of these things, I do not think a standing committee would devote much time to the exercise of delegated authority by the departments and agencies under their jurisdiction. I am pretty sure that is right. There would be other things which they would view—and properly so—as more important in each particular standing committee. They would say, "We have to look at other things; the departments' legislation, estimates, appropriations, their public accounts perhaps, and so on", and this would be especially so if the Auditor General reported on these things in his annual report and they were following along. Further, there

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are boards and commissions that exercise discretionary powers of a legislative sort as well and I think these would be missed, there would be big gaps.

To summarize, perhaps I could suggest that in particular cases the importance of delegated legislation does not loom all that large, but if you collect it all together, as in the *Canada Gazette* Part II, every couple of weeks or so, then you have something of importance. To select the instruments of the Departments of Agriculture, Energy, Mines and Resources, and Transport does not look so important as it is when collected all together. There are general patterns too, particularly with such questions as notification: clear, precise drafting, such as the drafting or explanatory notes that they have in Britain that really give the sum and substance of the effect of a regulation in laymen's terms. It would be highly useful to have explanatory notes that are meaningful to the lay reader. That should be so in the case of all subordinate legislation, all instruments of a delegated nature, whether they have legislative effect or otherwise.

**The Chairman:** You spoke earlier about the size of the committee, Dr. Kersell. Our normal standing committees now have 20 members: would you consider this to be too large? This Committee which is a special committee has 12 members.

**Dr. Kersell:** I do not think that there would need to be 20 members. I do not think that would be too large, but I suggest a smaller committee of 10 or 12. Parkinson says the smaller the committee, the more effective it is likely to be—especially, though, on this sort of technical subject matter.

**The Chairman:** On this I would like to ask you about the size of the committees in the other jurisdictions, and to give us a summary of the constitution of those committees. As I understand, in England for example it is a government majority and an opposition chairman?

**Dr. Kersell:** Yes.

**The Chairman:** Whereas in Australia it is government majority and government chairman. Could you just give us a summary of those two things?

**Dr. Kersell:** I am sorry, I would have to look up the size of the committees. They are small, but to give you the exact numbers, I would have to check.

**The Chairman:** I think we could find that out from your book, but is your recollection

that they are as small as 12, or smaller than that?

**Dr. Kersell:** Yes, they would be of the order of a dozen in the Australian and British instances. The House of Lords committee, I think is larger, but then it has a small quorum and it is the more actively interested lords who participate on a regular basis. So, I think a small committee would be quite acceptable.

**The Chairman:** Do you think a committee of six would be too small?

**Dr. Kersell:** I think it probably would be.

**The Chairman:** What about the constitution of these committees in the other places? Could you just briefly refresh our minds on that?

**Dr. Kersell:** In every case it is a government majority and only in the British House committee is there an opposition chairman. So, the general pattern is government chairman and government majority.

**The Chairman:** Mr. Morden.

**Mr. Morden:** Mr. Chairman, are we dealing with both topics 3 and 5 now?

**The Chairman:** Because of Mr. Brewin's desire to speak on this before he left, I thought that we should move on to 5 and I have been allowing questions and discussion on 5, so if you want to direct any comments to that point we might as well have it at this time.

**Mr. Morden:** Then you will be going back to 3?

**The Chairman:** We will go back to 3, yes, and 4.

**Mr. Morden:** You stressed, Dr. Kersell, the importance of the permanent staff of this committee. I think you quoted the statement, "Sir Cecil Carr, you are the committee", which would appear to be so if one of the purposes of the permanent staff is to save the committee time. It would seem to me that the

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most important function it would serve would be to decide on those regulations which it would not put before the committee and that type of decision would be the most crucial, and if there were any errors made in that type of decision, in other words, if controversial regulations were not shown to the committee because the staff erred, then—

**Dr. Kersell:** The British House committee and the Australian senate committee are the two most effective ones. The House of Lords committee deals only with instruments that require affirmative resolution. That is because at the time it was established all instruments of importance required affirmative resolution. That is the explanation why the House of Lords committee has such restricted scope.

Each member of the two effective scrutiny committees with which I am familiar has a copy of each order or regulation that is going to be dealt with at a particular meeting. Therefore, if the staff missed something that any one member of the committee thought ought to be raised it could be raised.

**Mr. Morden:** But that list would not include regulations that the staff—

**Dr. Kersell:** Oh, yes, it would. It includes all.

**Mr. Morden:** Every regulation made since the last meeting of the committee?

**Dr. Kersell:** That is right.

**Mr. Morden:** Oh, I see. Then there is some sort of a possibility of the staff being overruled by the members of the committee?

**Dr. Kersell:** Yes, quite. Of course, in the Australian instance the staff is more than one person.

**Mr. Morden:** You say in the British House of Commons Scrutiny Committee they have adopted the practice of looking at enabling legislation even though it is not one of their seven terms of reference?

**Dr. Kersell:** Yes.

**Mr. Morden:** What is the significance of that? They can look at it: it is legislation that has been passed sometime previously.

**Dr. Kersell:** It might not be. It could still be a draft, enabling legislation in some current bill.

**Mr. Morden:** And no regulations of course yet made under it?

**Dr. Kersell:** Yes. But then, of course, even enacted legislation could be amended. Hypothesizing the idea of having an opposition majority and senior government member as chairman, if the chairman of a committee

composed like that brought in an amending bill (because the committee cannot, of course, do anything on its own) it could hardly be ignored.

**Mr. Morden:** Your point is, as you pointed out earlier, any member can put before the House an amending bill, but if that member were the chairman of the scrutiny committee, then there would be much more chance of that bill receiving serious consideration.

**Dr. Kersell:** Yes. If he was a back bencher it would have to be brought in, of course, as a private member's bill. But then, if he is the type of chairman that I had hypothesized, a senior member of the government's own party and was on a first-name basis with many ministers, probably he could get the minister to sponsor it and it would come in as a government bill.

**Mr. Morden:** That might be a further reason why the chairman should be a member of the government party.

**Dr. Kersell:** Yes. Senator Wood's experience has been that the ministers are very responsive indeed to any representations he makes, more responsive to his informal representations than when, in fact, he has tried it the informal way and then has to get up on the floor of the Senate. Then of course the guards are up and there is much less evidence of allowing us to respond. As I reported, they had real battle back in 1955 I think it was, and they made the concessions—of course, the committee made some concessions too—but even when it got out in public the press was full of it for days and it was pretty adverse publicity for the government too. So, things can be done by a scrutiny committee.

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**The Chairman:** Perhaps we will return to the order of the points in your notes, Dr. Kersell, and return to section 3 on which we have had some discussion. As I recall you were in favour of having the requirement of an affirmative procedure.

**Dr. Kersell:** Yes.

**The Chairman:** How general would you make this?

**Dr. Kersell:** I think that any instrument which either imposes a charge or provides for an expenditure, or any instrument that has an important legislative effect—that is when you have as we do in Canada, so many acts of Parliament that merely provide a framework, and the real rule-making is done afterwards by Order in Council or by regulation—when we have instruments that are made under authority of such skeletal legislation, the rule-making instruments should be subject to affirmative resolution, because otherwise Parliament has no control over the laws that people will have to obey. For example, the Income Tax Act is a skeletal framework; the real laws that the ordinary taxpayer must obey are all in the form of subordinate legislation.

**The Chairman:** If you were to require an affirmative procedure for rule-making, there would not be any advantage to a government in not putting this in the actual legislation itself.

**Dr. Kersell:** Yes, because a permanent resolution requires only one stage. The government would avoid the necessity of a second reading debate and the committee stage report; these are time consuming.

**The Chairman:** Yes. It is a simpler procedure from the government's viewpoint and more expeditious; however, it still has the advantage of putting before the Parliament the substance of the rules that are made.

**Dr. Kersell:** Yes.

**Mr. Morden:** Dr. Kersell, you have indicated the desirability in some circumstances of the affirmative resolution procedure; you have developed the point in your book. I am referring to page 95, at about one-quarter of the way down the page; on the fourth line of the first full paragraph you say:

> ...Except in the admittedly significant minority of cases where it is necessary to bring an instrument into effect immediately upon publication, there might be considerable advantage in Ministers laying their statutory instruments in draft rather than in final form.

Then you go on to state that a substantial objection would be the time factor. I now direct your attention to the final two sentences in that paragraph where you say:

> . .From the administrative point of view, therefore, it would be desirable to include an "escape clause in the enabling statutes providing for laying in draft. Parliament would have to see that such escape clauses were not invoked without good reason, and could probably be relied upon to do so.

You deal with the "escape clause" later on in your book. By "escape clause" do you mean a provision in the enabling legislation where in some cases the government department would be responsible for the regulation, or do you mean that it would be laid down before the House as law and not in draft form in the case of an emergency?

**Dr. Kersell:** Yes, for instance, taxing regulations or regulations that impose a charge, would have to go into effect immediately in most cases. You would not lay that in draft. Other important safety regulations are also included in this category.

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**Mr. Morden:** Then your general recommendation is that where possible, enabling legislation should require the laying of the regulation before the House in draft; it would be effective upon affirmative resolution.

**Dr. Kersell:** Any regulation that made financial provision for the legislative substance of skeletal legislation or any which prejudiced persons or classes of persons should be placed before the House in draft. However, it may be fair to lay other instruments in draft too, for a specified period, perhaps for 10 sitting days; then it would be effective automatically, even without affirmative resolution. It would not be necessary to have an affirmative procedure for all instruments that would lay in draft.

**Mr. Morden:** It would only be necessary to bring to the attention of the House the ones that were considered to be of sufficient importance.

**Dr. Kersell:** Yes. For example, if you had an escape clause—and I am not a lawyer, so I could not draft such a clause—you could say that all instruments that are now presented to Parliament should lay in draft for 10 or 15 sitting days. The escape clause would relieve you of much responsibility when it was necessary for the instrument to be immediately effective.

**Mr. Morden:** Do you think that it would be better in each individual statute that provides for the making of regulations, to enact that type of confirming procedure in the statute rather than to provide for it in a regulation statute?

**Dr. Kersell:** No, it should be done by the statute that delegates the powers. It would specify the procedure and some instruments under an act would lay in draft subject to affirmative resolution. Others would perhaps simply lay in draft for a specified period and that would vary from statute to statute.

**Mr. Morden:** Would you recommend that a regulation or an Order in Council passed by the Cabinet be subject to annulment by resolution of the Senate?

**Dr. Kersell:** I am not in favour of the annulling procedure at all. I think it would be more meaningful and more realistic to have a procedure whereby instruments would be referred to the government for consideration, as is the term in New Zealand. You are not telling the government that it cannot have this regulation. It is going to put the whips on it and acquire it in any case. That is referring to experience.

**Mr. Morden:** I was getting ahead of myself. We are dealing with the affirmative resolution procedure. The question perhaps should have been: should a regulation depend upon an affirmative resolution of the Senate before it becomes law? I think you have answered that by saying you would like to see all resolutions specify that they be reconsidered by the government, and that that would focus...

**Dr. Kersell:** I think that the Senate has a role to play in this as in many other aspects of our parliamentary system. Particularly if the House does not have a scrutiny committee, then everyone is responsible and yet no one feels very responsible. I guess the same would apply to the Senate, but I do think that the Senators have some spare time at their disposal. Their life is not quite as hectic as the life of a typical M.P. Any of the procedures that I suggest for Parliament, should be for the Senate as well as for the House. Affirmative procedure, procedure for reconsideration or referring back to the government for reconsideration.

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If the issue is not controversial the Senate will not delay long. If it is controversial then even though it has not been controversial in the House or perhaps has not even been taken up in the House, I can think of some examples of the Senate doing a better job than the House, with all deference to the House.

**Mr. Morden:** You have referred in your book, I am not sure I can turn up the exact page now, to four examples in England where regulations were either annulled or failed to

receive the affirmative resolution necessary and the government the very next day turned around and passed identical regulations.

**Dr. Kersell:** Yes. That is why I am in favour of the reconsideration in proposal.

**Mr. Morden:** It is more practical.

**Dr. Kersell:** These were all on snap votes. The whips are on particularly for negative motions and it was just on snap votes that they succeeded.

**Mr. Morden:** It was a sort of fluke?

**Dr. Kersell:** Yes.

**Mr. Morden:** You have also referred on page 106 of your book to the Australian statute which provides that where a regulation is disallowed no regulation similar in substance may be made for six months. What do you think of that type of legislative procedure?

**Dr. Kersell:** If you are going to have annulling procedure I would be in favour of the Australian, but I still think that if you have a serious point and simply refer it to the government for reconsideration the civil service will take it up, and if the point has substance and merit they will bring in the amending regulations or orders or recommend them to the Minister and he will see that they are put into effect.

**Mr. Morden:** I suppose the benefit that you see in that is that it does focus some publicity on a regulation and exposes it to some debate that it otherwise would not have?

**Dr. Kersell:** Yes.

**The Chairman:** May I ask what you would do when the House is not in session with regard to either an affirmative resolution or an annulling procedure?

**Dr. Kersell:** I would expect that these procedures would not be invoked that often if there were a scrutiny committee chaired by a senior member of the government party who could use informal lines of communication to the minister in his department. One of the major advantages of delegated legislation is that it is flexible and changes can be made within hours, literally, and the notification procedures go into effect even now in the Canadian context. In due course the amended instruments appear in the *Canada Gazette*.

Therefore, if there were a scrutiny committee of an appropriate nature, I would think that there would be very little necessity for public differences to be aired either by affirmative procedure, or annulling procedure, or reference procedure.

**The Chairman:** One problem might be that of time. If the government wanted a certain regulation and it was subject to the necessity of obtaining an affirmative regulation when the House is not in session this would be a difficult problem.

**Dr. Kersell:** Yes, and that is where your escape clause would come in.

**The Chairman:** You make it to include time as well as content?

**Dr. Kersell:** Presumably, the content provision would exclude from affirmative procedure instruments that might have to be brought into effect when Parliament was not in session.

**Mr. Forest:** Do I understand correctly that in all these cases, and they seem to cover quite a few, you will need an affirmative resolution as a requirement before they come into effect? That would mean possibly a debate in both houses and a vote and so on.

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**Dr. Kersell:** There might well be on occasion a debate and a vote. Generally, they pass on the nod in Britain. It is very rare that there is a debate on these resolutions.

**Mr. Forest:** As the Chairman said it could very well become a question of time.

**Dr. Kersell:** The British experience is that very rarely do they have a meaningful debate because the instruments are in an acceptable form and the substance is acceptable too. I am not so sure that most of the good of a set of procedures such as I have advocated here and in summary form in the notes would do anything more than tighten up the rule-making procedures that are now widely used in Canada.

**Mr. Forest:** The British experience might not be too good here because we find out in a procedure committee there are a lot of things which they do not debate over there but which we are still debating here.

**Dr. Kersell:** Yes, but the fact that you can introduce procedures that would allow debate would bring into operation that psychological effect to which I referred earlier: The civil servant in the department would say, "All right, now, if I do it this way it is going to be

convenient for me in the short run perhaps and if nothing happens in the House everything will be fine, but can I take the chance on drafting this rule this way?" He might say, "No, I cannot. I will not. It might have an adverse effect on my minister. It might, in fact, put the whole order, or regulation, or whatever in jeopardy for a period of weeks or months. So I will not recommend, for example, that my minister be able to delegate."

That is one of the abuses that has been pretty well minimized in Britain; the re-delegation of delegated authority. "We will just keep control of this at the top," he might say to himself, "because it is going to be less dangerous for my minister in the House." Once that sort of thinking becomes general, then there are very few debates in the House, they are very short if any occur, and things go through on the nod. At least, that is the British experience.

Professor Corry had a very picturesque metaphor in another context. He said, "The effect of, in this case, the Opposition is largely the same effect as a fence around a pasture. The horse knows that fence is there. So all you are doing is erecting fences and the horses will know the fences are there.

**The Chairman:** The horses in this case being the civil servants?

**Dr. Kersell:** Right.

**The Chairman:** Perhaps we could move on then to four.

**Dr. Kersell:** We have touched on this in the course of our discussion so far and I do not know that I have anything to add at this point. I do not think negative motions are all that effective. The whips are generally on. They have fallen into disuse in Britain. The New Zealand procedure of simply referring questionable instruments for reconsideration seems to me to be quite adequate and more realistic.

Then there is this additional advantage, I think, that there would not have to be any changes in statutes or in standing orders. Any member who simply picks up an instrument that is laying on the table can say that he thinks there are certain features of this

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instrument, perhaps in the way it is operating if it is no longer on the table, that require a debate. If he makes a substantive case for taking some of the House's time to discuss a draft table or an instrument on the table, or the operation of an Order in Council. I think Mr. Speaker might very well say, "Yes, we can have a debate" maybe on adjournment.

**Mr. Forest:** I suppose the Standing Orders would have to be modified to provide time at the end of they day for 15 minutes or half an hour so that a member could move a motion to have certain regulations reconsidered.

**Dr. Kersell:** But this could be done on the daily adjournment, could it not? Even now you can take that time on the adjournment for an instrument.

**Mr. Forest:** Yes.

**Dr. Kersell:** The reason it does not happen now is simply that nobody looks at these things. Again I think the last sentence is the important one; that the chances of an instrument's coming to the attention of any member of the House would be greatly increased if there were a scrutiny committee. Literally, the situation now is that everyone is responsible—every member of Parliament is responsible—for looking at the *Canada Gazette*, Part II, and I suggest that very few look at instruments on the table. When they do they probably miss a good deal because they do not have this administrative cum legal background.

**Mr. Forest:** As it is now, I suppose a motion could be made by a member, but it might never come up.

**Dr. Kersell:** Oh yes, It could be made on the daily adjournment, but it is not made because no one, or few members are responsible for looking at Orders in Council and regulations that are tabled; they just are tabled and ignored because there are other things which individually are more important than any individual instrument. I think this is a fair judgment. In this problem of delegated powers being redelegated, if you look at one instrument or a few or a random sample you may not see them in their true proportion as you would collectively. I understand your Committee is looking at this sort of general pattern and I think you will turn up evidence to the effect that this is a major phenomenon. Collectively it is important, but it is not seen by individual members. I think this is the main justification for considering the establishment of a scrutiny committee; that they look at a phenomenon that is quite general and not unimportant collectively.

**The Chairman:** This discussion raises several questions in my mind about the operation of scrutiny committees in other jurisdictions which perhaps I might pose to you now. The principal one is as to how they make themselves effective. I have understood from your comments that the committee does not, as such, make a report, but that if any individual members of the committee wants to bring the matter up in the House, it is done in that form. Is there any jurisdiction with the committee member to report and raise something as a matter that must be discussed by the House?

**Dr. Kersell:** No, they always make reports but the committees do not have the power to move amendments or to move resolutions for annulment. They do make reports, though, regular reports, and these can be, and often are, debated.

**The Chairman:** Is there a special provision that they should be debated, or do they have to be raised in some other way? Can the debate take place when the report is made to the House?

**Dr. Kersell:** Yes, and quite often there is no debate, but if there is something important in the report then there often is debate. There is one example I vaguely recall reporting on in

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the book of a steering committee having arranged informally for amendments to a trade regulation—if I recall correctly. The minister himself brought in the amending instrument prior to the committee's report. So there was no need, once the report was brought in, to debate it, but a member of senators and the minister himself felt that the committee had done such a good job in drawing to the department's attention the weakness in this particular regulation that the committee and its chairman should be commended. Quite a debate developed; it took half an hour or so and it was very laudatory of the committee and its activities. But other reports are simply tabled and there is no debate, and no motions arise out of the report.

**Mr. J. W. Morden (Assistant Counsel to the Committee):** On that point, I think your book points out that the British House of Commons Scrutiny Committee does not have the power to release minority reports.

**Dr. Kersell:** No.

**Mr. Morden:** What is your view of that? Do you think that if there is a minority, it should have the power to also report to the House?

**Dr. Kersell:** Well, the British experience is that the committee rarely divides, and never on party lines. It is a consensus committee. I think the same would probably occur in Canada; that the committee would not divide; it would not divide on party lines and there would not be minorities wanting to make reports. But I think there should be provision made for minority reports. I do not think there would be any danger in this of a partisan nature, in any event. But, yes, I do think that ideally, whether or not it is likely to be acceptable to the government is a different question; but if this Committee could recommend that a scrutiny committee be established with provision for the minority to make reports it would be a good thing.

**The Chairman:** May I ask if the scrutiny committees would print their proceedings? Or would these all be in camera meetings which would not be reported? If the proceedings were printed, then of course the minority views would be contained therein.

**Dr. Kersell:** Yes. I am in favour of in camera...

**The Chairman:** I was asking how they proceed in other countries.

**Dr. Kersell:** In camera, very informally, behind closed doors, and the only public manifestation of its activity is in its reports. This enables the committee to operate on an informal line outside the committee, too, you see. They can then go informally to the minister or his departmental officials and explore the thing. They can, and do, invite departmental officials to come and explain the regulations.

**The Chairman:** In camera?

**Dr. Kersell:** Yes. There are very frank and forthright explanations given, particularly in Britain, and this is an improvement—so not only Sir Cecil Carr but members of the committee told me—over having the minister there. The minister really does not know all that much about why a particular civil servant drafted an instrument in such and such terms. The man who did the drafting knows better than the minister.

**The Chairman:** Yes.

**Dr. Kersell:** You might as well get the story right from the original source.

**The Chairman:** How do the scrutiny committees in other jurisdictions operate during the vacations of their respective houses or when they are not in session?

**Dr. Kersell:** An Australian committee can

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sit at any time; in Britain, only when Parliament is in session. The Senate Regulations Committee in Australia has power to sit not only at any time but in any place. It does not use this very often.

**The Chairman:** Which one does it not use?

**Dr. Kersell:** Either. It usually sits in camera and when Parliament is in session; but it has the power to sit elsewhere and to sit when Parliament is not in session. There are, of course, in Australia, large chunks of time when Parliament is not in session. Generally it sits only six months and then every other week during that six months. So that there is a peculiar need in Australia to have this procedure whereby it can meet when Parliament is not sitting. I suppose that is a good thing too with delegated legislation, because much of it has to go into effect rather quickly.

**Mr. Forest:** Policy considerations are excluded, I believe, in the United Kingdom so it makes for...

**Dr. Kersell:** They get around that: they cannot go into depth but they can report on instruments that make unusual or unexpected use of the authority delegated. Most Members of Parliament who are at all interested in delegated legislation know when an instrument is reported under that term of reference, they should look for a policy issue, and they do. The active backbenchers were notorious for this. It took only a very few years of this sort of activity before very few instruments were being reported under this head. I think there is an appendix in my book that deals with this but it is not broken down by year; this is on page 170. I do have a very clear recollection though: "Unusual or unexpected use of powers", 47 were reported in the period from 1944 to 1959. My recollection is that, if there were broken down by years, that the bulk of these were in the earlier years, immediately after the war. There was a slight increase in the session of 1950 and the session of 1950-51. In the session of 1950-51 alone, there were 17 instruments reported, whereas generally there was a falling off after 1948.

That was a period in which there were abuses of the annulling procedure. Members of Parliament can get at the scrutiny committee there too and, through members of that committee, raise questions about instruments. So, it is only the staff that stimulates the activity of the committee. In 1951-52, when these 17 were reported, it seems to me there was an increase in unusual and unexpected use of powers on instruments reported under that head but generally there was a falling off of reports under this head after 1947-48. So that again the horse and fence metaphor applied. For instance, when the civil servants knew that they could not make substantive policy effective by way of delegated legislation, they stopped doing it.

**The Chairman:** Perhaps we could proceed to your fifth point which has to do with the establishment of a scrutiny committee in Canada's Parliament. I think there we could follow up the consideration that Mr. Forest has just raised with regard to the terms of reference of a scrutiny committee and your views on whether or not it should include policy and so on. I think we have discussed most of the other aspects of this, but we have not yet come to that aspect.

• 1215

**Dr. Kersell:** Again I would think that the typical Canadian government, and I might include the present one, would be very hesitant to have a House committee with power to raise policy questions. As I mentioned, in the period 1950-51 there were abuses of procedures, particularly the annulling procedure in Britain. Governments are properly concerned with making trouble for themselves, or giving others the opportunity to make trouble for them. If you have a House committee with power to raise questions of policy, I think you are going to have a number of Ministers saying, "No, not at all, if I can help it".

I think policy questions should be looked at in detail, so that when a report comes in it is not subterfuge as in the British case where you have something like unusual or unexpected use of powers.

Let us take Mr. Brewin's example of excluding those who are trying to avoid the American draft, or who were unsuccessful and subsequently left the service without permission, if it is government policy to exclude these immigrants, then Parliament should know about it. It seems to me that is a policy

question. There are ends involved and purposes, as well as what is being done, at issue, and I think that Parliament should judge these policy questions. They should not only be told that there is a policy question involved, but that there are certain implications and certain alternatives. I think it is fair enough for a parliamentary committee to explore these and report to Parliament: that is what committees are about—to advise Parliament. They cannot take action. I would not suggest that a scrutiny committee should be able to vote on policy questions and make policy determinations thereby. That is the role of the House itself. If it has to make these judgments *in vacuo*—although I do not think that is a very big improvement—the committee that knows most about these things should take these issues up. In the case of subordinate legislation, if, for instance, there were to be recommendations from this committee that there would be in the case of every instrument an explanatory note, that is almost a policy question, is it not? If it is not, what are the reasons for making this recommendation? That should be in the committee's report, then Parliament has something on which to base its judgment.

If I am right in suggesting the possibility of the government refusing to let a House committee have this power, perhaps it would let a Senate committee have it. The life of the government is not at issue in the Senate: if there is an adverse vote as a result of an adverse committee report, the government is not threatened. The effect might be, though, to have the government pay some attention to the issues in question. The real purpose, it seems to me, is to protect the citizens of the country from arbitrary, unfair, unjust decisions taken by the government or departments or agencies of government.

• 1220

**The Chairman:** One of our witnesses earlier took a position against having a special scrutiny committee and was in favour of having all regulations referred for consideration to the relevant Standing Committee.

**Dr. Kersell:** Yes.

**The Chairman:** I believe another witness suggested that there might be a possibility of combining both of those methods. Where there would be a general and more procedural type of scrutiny performed by a scrutiny committee but that then the matter might be taken up by the Standing Committee more from the viewpoint of content. Would you have any comment to make on that?

**Dr. Kersell:** Yes, I would think that much would be missed by simply giving the Standing Committees responsibility for looking at subordinate legislation. I do not think one looks that carefully, or even that often at subordinate legislation as being made by the Department or agencies under their jurisdiction, because seemingly more important, and I think factually more important, things would preoccupy their attention.

Secondly, there are many agencies, boards and commissions that do not fall within the terms of reference of Standing Committees and they make important use of powers delegated to them. Therefore, I think there is an important need for a comprehensive scrutiny committee.

Your second witness proposed if there were a scrutiny committee it should report to the Standing Committees and not to the House?

**The Chairman:** No, I would not put it that strongly. I must admit I have forgotten whether this suggestion was made by a witness, or by one of our own members. It was made in the dialogue with the last witness we had, I believe. I think the suggestion was that it would report to the House, but that Standing Committees ought to take up questions which were raised in their area by the scrutiny committee, and if any change in the rules was necessary to make this possible that this change should be made.

**Dr. Kersell:** Yes, I think that would be quite a good idea. That would save the time of the House perhaps. If there were—and I suspect there would not be very often—a controversial instrument or set of instruments brought in and particularly the government felt that there was precious little time in the House to debate this, it could simply move that the questions be referred to the relevant standing committee. If it could deal with the matter effectively, fine. If it felt that it had to report to the House again, then you would have a more substantive report, presumably, for the House to debate and again that could be a saving of time in the House itself.

**Mr. Forest:** It would be very useful for the education of the respective members.

**Dr. Kersell:** I would think so, yes.

**The Chairman:** I think that completes most of the aspects of 5. Let us move on to 6,

which deals with an effective procedure for the ventilation of grievances.

• 1225

**Dr. Kersell:** Yes, I think there has been, as I have suggested in these notes, a very strong case made for a grievance procedure that would be readily accessible and inexpensively accessible to the public. As I point out here, there was a petition procedure, and there still is a petition procedure, in New Zealand, and there was a fair amount of acitivity dealing with grievances by these two committees. Even so, New Zealand has introduced an ombudsman system that has proved even more satisfactory to the public there. In Britain of course, they now have an ombudsman whose title is Parliamentary Commissioner for Grievances. Certainly there has been a good deal of use made of his services by the public. I have not made a survey of how many issues arise out of delegated legislation or the operation of it in either New Zealand or Britain, but when Sir Guy Powles was here I did talk to him and learned that there has been a number—though not a very significant number—of grievances arising out of the operation of delegated legislation.

I think the case is a general one that does not relate all that particularly to the operation of delegated legislation. Many other kinds of grievances are going to eclipse the few that might arise out of delegated legislation.

The man in Canada who has made this case most impressively is Professor Rowat, whom I have named in the notes, and he of course has appeared before Parliamentary Committees, both of the Parliament of Canada and of various provinces. We do have ombudsmen in several provinces: these are in Alberta, Nova Scotia and there are proposals for an ombudsman in Ontario.

**Mr. Forest:** Quebec has one.

**Dr. Kersell:** That is right, recently introduced. Perhaps there could be a case made for having Professor Rowat appear before this Committee; I would leave that up to you. Clearly, because procedures with regard to delegated legislation are much looser here than in Britain or New Zealand, I would think that even more grievances might exist in the body politique of this country than Sir Guy told me had at least surfaced since 1962 in New Zealand.

**The Chairman:** If we were to do the other things that you are suggesting, I suppose that the case for an obudsman in this realm, at least, would diminish. I suspect that the case for an ombudsman then is largely focused on injustices, or seeming injustices, in administration?

**Dr. Kersell:** Yes.

**The Chairman:** Rather than in regulation making?

**Dr. Kersell:** I think that may well be the case. I would like to think, at any rate, that the other procedures would minimize the potential for grievances. However, I think there would be enough justification for attempting to get an ombudsman at the federal level in Canada that some efforts might be made to further this. I have suggested that if a proposal were made in terms of—not necessarily an ombudsman—I do not think it is necessary to have the name as long as you can have the gain—but a parliamentary official such as the Auditor General reporting to a Committee of the House, and perhaps it could be required as it is in Britain to have any grievances coming to the official transmitted by members of Parliament—there could be a screening mechanism—that this might make it more practical in the Canadian context. I really think it is important to do whatever is possible to have some meaningful and effective grievance procedure. Indeed, if I were to put a priority on, I would say it would be more important to have the ombudsman than even a scrutiny committee.

• 1230

**The Chairman:** Thank you. One other question that occurs to me is, have you seen these scrutiny committees in actual operation in England or Australia?

**Dr. Kersell:** No, because outsiders are not welcome.

**The Chairman:** I believe the English Committee in the House extended an invitation to us.

**Dr. Kersell:** I am sure that could be arranged. Yes, but I was a graduate student at the time I was there.

**Mr. Chairman:** Of course, one of our questions is whether there is any gain from that or not; whether or not we can understand sufficiently what they are doing without actually seeing them. I think you have given us a fairly lucid account of what actually occurs in a general way.

**Dr. Kersell:** I think you would find that it is a pretty informal meeting. As I understand it, and I did talk to Cecil Carr about this, there would not be anything very impressive about it. Their procedures are adjusted from time to time, so on the day you were there you might see them follow a pattern that they would not follow a year hence. There is nothing very systematic about the way they operate, as I understand it.

**Mr. Forest:** What are your ideas concerning review by the courts? Would it be desirable or not?

**Dr. Kersell:** I think this relates to the first point. The way things are now in the Canadian context it is very difficult for a lawyer to make a case that a particular regulation is *ultra vires* because the delegations are made in such broad terms that there are no limits. If not only enabling clauses were more precisely drafted, but the regulations themselves were more precisely drafted, then I think that people who could then have a case would from time to time appeal to the courts, and they might well be able to get a measure of justice from the courts. If Parliament does not intend to have such broad delegations and the authority is exceeded, the courts properly should be able to say so and declare the subordinate legislation *ultra vires* of the authority making it. That would ease the burden on Parliament or its committees.

**Mr. Forest:** It has not been done extensively in the past.

**Dr. Kersell:** It has in Britain.

**Mr. Forest:** It has in Britain.

**Dr. Kersell:** There are no limits in Canada. Almost anything that a department wants to do can be done under the appearance of making legislation that is common here. There was a case in war-time, I recall: the Wartime Prices and Trade Board was the authority involved and it had to do with the packaging of butter, I think.

**The Chairman:** This was in Canada?

**Dr. Kersell:** In Canada. It concerned the packaging of margarine, I think. The rule was challenged and it was found by the courts that such detailed regulations with regard to the packaging of margarine could not be made under the authority of the legislation; or maybe it was an Order in Council that had passed on the rule-making authority.

**The Chairman:** Mr. Forest, do you have any more questions?

**Mr. Forest:** No.

**The Chairman:** Mr. Morden.

**Mr. Morden:** I gather that you did not discuss the position of the ombudsman in your book because at that point it was not popularly considered.

**Dr. Kersell:** There was not a serious proposal for one in any of the four countries.

**Mr. Morden:** It followed two years later in one of the four countries.

• 1235

**Dr. Kersell:** That is right.

**Mr. Morden:** What can an ombudsman—and I suppose we can only refer to the New Zealand one at this time—do with respect to delegated legislation beyond focusing attention on injustices that take place? Does he have any authority to refer their content back to Parliament?

**Dr. Kersell:** He has no authority at all. As in the case of the Scandinavian ombudsman, all he can do is make a report, which is then subject to parliamentary debate, and which is also, of course, available to the press. He has found that the press has taken his reports much more seriously than Parliament. Some of his reports are debated in Parliament, but he does not have a committee to report to. Again, all members of Parliament are responsible for reading the report and raising any issues that it implies. Very few do it. I was going to say none of them do it, but very few do it and on many occasions no-one does it. That is why I suggest that there be a committee to whom the ombudsman, or parliamentary counsel, or whatever you want to call him—parliamentary commissioner is perhaps as good a name as any—reports, and then there is someone with a vote in the House to take up the report, someone with a particular responsibility. But in New Zealand they do not have such a committee, so it is the press that publishes. As the *Globe and Mail* has done more with the Auditor General's reports, in the past anyway, than the Public Accounts Committee on occasion, so too in New Zealand with the ombudsman's reports.

**Mr. Morden:** You see as one of the functions of an ombudsman, should one be provided for, and if he investigated a particular grievance and saw that perhaps the actual

decision made was in conformity with the regulation but that the regulation was operating unjustly, that he could report back to the committee from this actual case, or cases like it, that this is an unfair regulation?

**Dr. Kersell:** Yes, that it is a bad regulation; it is legal, but it is politically questionable. If he had a committee to report to of course the committee would not be able to make motions but any member of it would be able to introduce a resolution asking the government to reconsider. That would be the procedure I would favour.

**Mr. Morden:** Would you consider this ombudsman reporting to a parliamentary commission or reporting to a committee who would deal with it from there to be a superior way of dealing with grievances to any of the ones discussed in your book?

**Dr. Kersell:** Yes.

**The Chairman:** Gentlemen, we have had Dr. Kersell before us for three hours and the usual length of an academic appearance is only an hour, so while Dr. Kersell appears to be very fresh—perhaps fresher than we are—we have undoubtedly been keeping him longer than is his custom.

We are very grateful for the detailed account which he has been able to give us of the practices in other countries, especially in Britain and Australia, and I have no doubt that things which he has told us here this morning, and others which we will learn and have learned to some extent already from reading his book, will be of very great assistance to us in formulting our recommendations. Thank you very much, Dr. Kersell.

**Dr. Kersell:** You are very welcome.

**The Chairman:** The meeting is adjourned.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 6

THURSDAY, MAY 15, 1969

*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

WITNESS:

(*See Minutes of Proceedings*)

20202—1

SPECIAL COMMITTEE
ON
STATUTORY INSTRUMENTS

*Chairman*: Mr. Mark MacGuigan
*Vice-Chairman*: Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

(Quorum 7)

Timothy D. Ray,
*Clerk of the Committee.*

# MINUTES OF PROCEEDINGS

Thursday, May 15, 1969
(8)

The Special Committee on Statutory Instruments met this day at 9:50 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present*: Messrs. Gibson, MacGuigan, Marceau, McCleave, Stafford (5).

*Also present*: Mr. John Morden, Assistant Counsel to the Committee; and Mr. G. Beaudoin, Assistant Parliamentary Counsel.

*Witness*: Mr. G. S. Rutherford, Revising Officer, Department of the Attorney-General, Province of Manitoba.

The Chairman introduced Mr. Rutherford who made a brief statement, outlining the scrutiny committee procedure in the legislative assembly of Manitoba. Mr. Rutherford tabled the following documents:

(a) *The Control of Delegated Legislative Powers* – a general paper outlining the history of controlling procedures in various jurisdictions,

(b) *Memorandum to the (Manitoba) Standing Committee on Statutory Regulations and Orders respecting regulations passed during 1966-67 session,*

(c) *The Orders of Reference of the Standing Committee on Delegated Legislation of the Manitoba Assembly*–which was read into the record.

(d) Chapter 224, R.S.M. – *An Act for Central Filing and Publication of Regulations.*

At 12:40 p.m., following questioning of Mr. Rutherford by the Committee, the Committee was adjourned to 3:30 in the afternoon.

AFTERNOON MEETING
(9)

The Special Committee on Statutory Instruments met this day at 3:45 p.m., the Chairman, Mr. MacGuigan, presiding.

*Members present*: Messrs. Forest, MacGuigan, McCleave, Stafford (4).

*Also present*: (same as at morning sitting).



20202–1½

*Witnesses*: Mr. C. B. Koester, Clerk of the Legislative Assembly of Saskatchewan, and Mr. G. S. Rutherford, Revising Officer, Department of the Attorney-General, Province of Manitoba.

The Chairman introduced Mr. C. B. Koester who read a prepared statement, during which he tabled the following documents:

(a) *Orders of Reference of the (Saskatchewan) Special Committee on Regulations* – which was read into the record,

(b) Chapter 420 of the R.S.S. 1965 – *An Act to provide for Central Filing and Publication of Regulations* and Chapter 91 of the Statutes of Saskatchewan 1967 – *An Act to Amend the Regulations Act.*

The Committee questioned Mr. Koester and Mr. Rutherford.

At 5:00 p.m., the Chairman thanked Messrs. Koester and Rutherford, and adjourned the Committee to the call of the Chair.

Timothy D. Ray,
*Clerk of the Committee.*

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Thursday, May 15, 1969.**

• 0949

**The Chairman:** The meeting will come to order.

We are very pleased to have with us this morning as our witness, Mr. G. S. Rutherford, Q.C., the Revising Officer for the revision of the statutes in the Province of Manitoba and in that capacity he is working with the Department of the Attorney General in Manitoba.

Mr. Rutherford was educated in Winnipeg and received his Bachelor of Arts Degree from the University of Manitoba in 1911. He was called to the Bar of that province in 1914. He served overseas with the 52nd Battalion, Canadian Army from 1915 to 1919 retiring with the rank of Captain.

He practised law in Winnipeg from 1919 to 1930. In 1930 he became Chairman of the Manitoba Death

• 0950

Adjustment Board in which position he served until 1940. In 1940-41 he was counsel to Comptrollers of the Department of Munitions and Supply in Ottawa and in 1941 he became Legislative Counsel and Insurance Counsel to the Government of Manitoba, a position which he held until 1963.

He became a Queen's Counsel in 1947. On retirement as Legislative Counsel in 1963, he assumed the responsibility as Revising Officer for the Government of Manitoba of a complete revision of the Statutes of that province which I understand he has almost completed.

Mr. Rutherford was, I am sure it is no exaggeration to say, the guiding spirit behind the introduction in Manitoba of a control of delegated legislative powers similar to those which we are exploring as possibilities for the Parliament of Canada. It is because of his role in that respect and because of his position as legislative counsel for so many years in Manitoba that we are pleased to have him this morning as our witness. After Mr. Rutherford makes a statement, we will then have an opportunity to discuss with him in more detail practices which are presently in vogue in the Province of Manitoba.

**Mr. G. S. Rutherford (Revising Officer, Department of Attorney General, Manitoba):** During and prior to the year 1958, while Legislative Counsel of the Province of Manitoba, I became interested in the subject of control of delegated legislative powers.

I should interject here that although I have not put it in this written statement, I had become acquainted through correspondance with Sir Cecil Carr of the United Kingdom, who was then counsel to the Speaker of the House of Commons, and we got on to this subject and he had written a good deal on it and that was the origin of my interest.

With the approval of the government then in office, I began a more detailed study of the matter, and ultimately prepared an article on the subject, some copies of which I submit herewith as the article includes some historical matter, and references to action taken in other countries, notably the United Kingdom, Australia, Union of South Africa, and India, which is of interest when a study of the subject is undertaken.

I should interject again, Mr. Chairman, I just brought that memorandum with me; I did not know whether the Committee would really be interested or not but some copies are available if you are interested.

**Mr. McCleave:** Could I suggest, Mr. Chairman, just from scanning through it I think this is a very helpful document and should be printed as part of our proceedings.

**The Chairman:** I agree with your suggestion, Mr. McCleave. I think this would certainly be the wish of Committee members. We can have a formal motion on that later but we will definitely include this with the Minutes.

**Mr. Rutherford:** When the article was completed, there had been a change of government; but the new government was also interested in the subject, and soon thereafter took action in the matter as I shall now mention.

I should first mention that in 1945 the Legislature of Manitoba enacted The Regulations Act, which

required the registration and with minor exceptions the publication of all regulations made under statutory authority. This Act, in large measure, followed the draft prepared and recommended by the Conference of Commissioners on Uniformity of Legislation in Canada. In 1960, The Regulations Act was amended by adding three sections. The first provided that all regulations stand permanently referred to the Standing Committee on Statutory Regulations and Orders of the Legislative Assembly to be dealt with as provided in the rules of the Assembly.

Again, if I may interject, Mr. Chairman, I would emphasize "permanently referred" which simply means that the committee and subsequent committees can call them back again at any time they want, even several years later.

• 0955

The next section requires that at each session of the Legislature, the Attorney-General shall lay before the Assembly a copy of each regulation registered since the filing of the latest regulation previously laid before the Assembly.

Finally, the amendments provided that when the assembly passes a resolution ordering that a regulation be repealed or amended, the Clerk of the House shall send a copy of the resolution to the authority that made the regulation and that authority shall repeal or amend the regulation as required by the resolution.

If I may interject again, the authority is very, very frequently the Lieutenant Governor in Council, but not always, there are certain boards and commissions such as the Milk Board, for instance, that have power to make regulations.

At the time this amending Act was passed, the rules of the Legislative Assembly were amended as required by establishing a Standing Committee on Statutory Regulations and Orders and providing that it shall examine all regulations that stand permanently referred to it.

At the first meeting of the first Standing Committee on Statutory Regulations and Orders, the committee recommended the adoption of certain general principles by which it would be guided in examining regulations. These principles followed in large measure the principles by which the similar committee of the House of Commons of the United Kingdom is guided.

The Committee also recommended that it have leave to sit during the recess after prorogation and to report at the next following Session. It recommended that the Law Officer should examine the regulations laid before the Committee and report thereon to the Committee respecting any regulation offending against the principles adopted or which, in his opinion, is otherwise objectionable.

The Committee, of course, is not restricted to examining only those regulations respecting which the Law Officer has reported.

The recommendations of this first Committee were approved by the Legislative Assembly and have since been followed by succeeding Committees. I am attaching hereto copies of the principles and other recommendations above mentioned.

**The Chairman:** Mr. Rutherford, it might be helpful here if you were to read those into the record since this document is not being put into the record itself but only orally.

**Mr. Rutherford:** Yes.

**The Chairman:** It might be helpful if at this point you would read those recommendations.

**Mr. Rutherford:** I sent copies to the Clerk.

**The Chairman:** Yes. We all do have copies but for purposes of the record we would like to get it in the Minutes.

**Mr. Rutherford:** Yes. The principles then are as follows:

1. That it and, until otherwise directed by the House, future Standing Committees on Statutory Regulations and Orders should, in examining regulations and orders submitted to it, be governed by the following general principles:

(a) The Regulations should not contain substantive legislation that should be enacted by the Legislature, but should be confined to administrative matters.

(b) The regulations should be in strict accord with the statute conferring the power, and, unless so authorized by the statute, should not have any retroactive effect.

(c) The regulations should not exclude the jurisdiction of the courts.

(d) The regulations should not impose a fine, imprisonment, or other penalty or shift the onus of proof of innocence onto a person accused on an offence.

(e) A regulation in respect of personal liberties should be strictly confined to things authorized by statute.

(f) The regulations should not impose anything in the way of a tax (as distinct from the fixing of the amount of a licence fee or the like).

(g) The regulations should not make any unusual or unexpected use of the delegated power.

(h) The regulations should be precise and unambiguous in all parts.

2. That the Standing Committee on Regulations and Orders appointed at each Session of the Legislature, since a considerable part of its work may often be done between Sessions, should always be authorized to sit during the recess after prorogation and to report to the House at the next following Session on the matters referred to it, and that the Provincial Treasurer should always be authorized to pay to members of the Committee the amount of the expenses necessarily incurred by them in attending meetings of the Committee during the recess after prorogation up to such amount as is approved by the Comptroller-General.

3. (1) That, until otherwise directed by the House, an examining officer, who shall be the Law Officer or, failing him, the Deputy Legislative Counsel or, failing him, such other counsel as Mr. Speaker may designate for the purpose, shall, prior to the beginning of each Session of the Legislature, unless otherwise directed by the House, examine each regulation that, under The Regulations Act, stands permanently referred to the Committee and that has been filed under The Regulations Act between the filing of the latest regulation previously laid before the House pursuant to section 11 of that Act and the beginning of that Session.

• 1000

(2) That the examining officer shall scrutinize the regulations in the light of the general principles set out in Recommendation 1 of this Report, and shall report to the Committee respecting any regulation or part of a regulation that, in his opinion, may offend against those principles or that, on any other grounds, he believes to the objectionable or should be brought to the attention of the Committee.

Shall I go on?

**The Chairman:** Yes.

**Mr. Rutherford:** I think it is fair to say that the system has worked very well. The Law Officer who, in Manitoba, is also the Legislative Counsel, about the beginning of each Session of the Legislature, examines all regulations registered since the registration of the last previous regulation examined by the Committee. He comments on any that he thinks offend against the principles adopted or that are on any other ground objectionable. The Committee then reports to the House and, in the report, states what it recommends should be done by way of the repeal or amendment of any regulations. If the House adopts the report (which, so far I believe it has always done) the Clerk then, as required by The Regulations Act, sends a copy of the resolution adopting the report to the authority that made the regulation. This authority, as before mentioned, is required by the statute to act as set out in the report so adopted.

To the best of my belief, the Committee has always gone about its work in a non-partisan manner, and its decisions have, I think, always been unanimous.

A somewhat hurried examination of the journals of the Legislative Assembly and reports of the Committee shows that, since its establishment, the Committee has recommended, and the House has approved the amendment of approximately forty-three regulations and the outright repeal of thirteen. In many cases, the amendment approved required the repeal of some objectionable section or provision of a regulation. In some cases, the Committee found that a provision of a regulation was, perhaps, not objectionable in principle but that there was no, or doubtful, statutory authority for it. Accordingly, the Committee recommended that the authority concerned should seek the enactment of the required legislation.

**The Chairman:** Thank you, Mr. Rutherford. I think that undoubtedly the Committee members will have some questions for you. Perhaps I might suggest by way of beginning that you might describe to us in more detail and more informally just how the Committee operates in practice, how often it meets, how many members it has, how often it meets between sessions, and so on.

**Mr. Rutherford:** I must apologize, Mr. Chairman, if I am a little indefinite. Since I have ceased to be legislative counsel I have lost touch with this.

The Committee has, as I recall, about 10 members, and all parties are represented. As far as I recall, they have not yet taken advantage of the provision authorizing it to meet during the recess. If it has done so it has been very occasional. It has met, I think, only once or perhaps twice during the session.

• 1005

**The Chairman:** Therefore, one, two, or three meetings a year would normally be adequate for it to deal with the number of regulations presented?

**Mr. Rutherford:** Yes. In most years there is somewhere in the neighbourhood of 100 regulations. The

legislative counsel or law officer of the House makes this examination before the session. He usually begins some time in the month or two ahead and goes through them. While the Committee is not restricted in any way from examining the regulations to which he has referred, I think pretty well it has confined its attention mainly to those.

We have a possible weakness here in that when the regulations are presented for registration it was intended that the registrar should examine them then and note whether there was anything that he thought was objectionable. Unfortunately, we have never had a full-time registrar. Perhaps I should not say this, but I think it has been a mistake that we have had the legislative counsel or deputy legislative counsel as also registrar of regulations.

For at least eight months of the year they are so very, very busy with their other work that they have no time to look through the regulations when they are first drawn and presented. I spoke to our present legislative counsel the other day and he confirmed that. He said that he simply does not have the time, and not until he happens to look at them before they are presented to the House does he get time to do it.

We would be better off if we had a man who was either full-time or most of whose time would be devoted to examining the regulations when they are first presented for registration.

**The Chairman:** What would the name of the present registrar be?

**Mr. Rutherford:** The present registrar is the legislative counsel, Mr. R. H. Tallin.

**The Chairman:** Mr. R. H. Tallin. What would be the name of the examining officer?

**Mr. Rutherford:** The trouble is that he also is the examining officer.

**The Chairman:** Therefore, it is also Mr. R. H. Tallin.

**Mr. Rutherford:** At the present time, yes. When I was legislative counsel there was a different registrar fortunately for me.

**The Chairman:** Is there a government majority on the Committee?

**Mr. Rutherford:** Yes. I think there is government majority, but proceedings have been quite non-partisan and there has never been a vote taken as far as I know.

**The Chairman:** I see. Is the chairman also from the government party? We have had suggestions from some witnesses, for example, that either there should be an opposition majority on the Committee or that the Chairman should be a member of the opposition.

**Mr. Rutherford:** The chairman has been a member of the government party. I think that I suggested in that longer memorandum that they might follow the United Kingdom practice and appoint a member of the opposition. However, that has not been done.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** What about the volume of regulations that are so examined, Mr. Rutherford? Can you give any idea in approximate numbers?

**Mr. Rutherford:** There has been somewhere, I think, in the neighbourhood of 100 regulations a year, but of course, it must be remembered that a good many of them are simply amending previous regulations. They may be very brief, just amending one paragraph of a previous regulation.

**Mr. McCleave:** For the, say, 100 regulations, what is the time taken up by the law officer? You have given us some idea of the problems that he encounters, but does he study these 100 regulations over a month or two months?

**Mr. Rutherford:** When I was legislative counsel, yes. I took them as I could get time. I started well before the session in going through them. You might spend one hour one day and four hours another day. It is a little difficult to say, but they are spread over a month or six weeks. I devoted a good deal of time to it.

**Mr. McCleave:** There were then and are now no assistants for the law officer who makes the examination?

**Mr. Rutherford:** No. There was just one man, and it was myself.

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**Mr. McCleave:** Has there been any occasion to your knowledge whether the members of the Committee have initiated themselves, say, an attack on regulations or caused them to be studied in the Committee, Mr. Rutherford?

**Mr. Rutherford:** During the three or four years that I was still legislative counsel, I know of no such case. Whether there has been anything in the last year I am not able to say.

**Mr. McCleave:** My final question concerns the eight general principles that have been set out in the first report of the Committee. I take it that these have been invariably followed and have not been added to. Is this correct?

**Mr. Rutherford:** There has been no change. They have not been added to, and I think they have been followed pretty closely.

**Mr. McCleave:** The law officer and the members have found them quite workmanlike?

**Mr. Rutherford:** I believe so, yes. I have not heard of any objection from anybody.

**Mr. McCleave:** Have there been cases to your knowledge where regulations have offended any one or more of these eight guidelines?

**Mr. Rutherford:** Oh, yes, and in this . . .

**Mr. McCleave:** I am sorry, perhaps I should add to the question because you have given us examples where regulations were amended or repealed. Have there been cases where no action was taken, notwithstanding the fact that the regulations did not live within the guidelines?

**Mr. Rutherford:** I am sorry, I did not quite . . .

**Mr. McCleave:** Have there been cases where the guidelines have been breached in regulation and yet no action is taken to amend or repeal?

**Mr. Rutherford:** Not that I know of while I was there. I believe the Committee has pretty well followed the report of the present examining officer, Mr. Tallin, and has accepted his suggestions. I do not recall any instances where they have not.

**Mr. McCleave:** This is the final question, Mr. Chairman.

Could you say whether you spent one-thirtieth of your time in any year when you were examining the regulations dealing with this particular work?

**Mr. Rutherford:** I am afraid I could not say, sir. I can hardly remember just how much it would total up to in hours spent on it.

**Mr. McCleave:** Would it be the equivalent of 10 working days?

**Mr. Rutherford:** I would think so, Yes.

**Mr. McCleave:** More than 10 working days?

**Mr. Rutherford:** No, 10 working days. I do not think I would have spent any more than that on it.

**Mr. McCleave:** The reason I ask, so there is no mystery, is that I gather that our volume here is about 30 times the amount that it would be in Manitoba.

**Mr. Rutherford:** I expect so.

**Mr. McCleave:** I want to get some idea of what we are up against. I think it is a very meaty and excellent presentation and very practical. Thank you.

**The Chairman:** Mr. Gibson.

**Mr. Gibson:** One of our previous witnesses suggested that with the mass of regulations that are passed in a session it might be more practical to have a scrutiny committee examine on a sort of a spot-check basis various departments of government regulations. Do you think that might be more appropriate in the federal area than trying to do every single regulation?

**Mr. Rutherford:** I do not think I am competent to express an opinion on that because I do not know the volume of the federal regulations.

**Mr. Gibson:** Apparently the British House of Lords Scrutiny Committee, from what I have gathered from the evidence, is an extraordinarily efficient but very small committee. Apparently it is made up of one or two men who just simply concentrate on short, sharp bursts of activity on the regulations and they seem to deal with a large number of them. However, I had the feeling that there was a tremendous pressure and haste in the way that was set up. As the British seem to be great improvisers I am hesitant to be critical of anything they do in that line.

**Mr. Rutherford:** They have, of course, that Scrutiny Committee of the Lords and another committee, whose name that I have forgotten at the moment, of the Commons. I understand from what Sir Cecil Carr has written that those committees existed before they went into the present system of

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examining. The present system was added to the other committees. I am not very clear about whether they still carry on as before. However, some of their checks are affirmative and some are negative, are they not? That is, some regulations are not enforced until approved by the House and some are enforced until they are disapproved.

**Mr. Gibson:** Sir, the question of vacation, that is, when the House is not sitting, did this work out in Manitoba, or did you have that system working there?

**Mr. Rutherford:** The committees always have powers, as I mentioned, to sit during the recess. They may have done it on one occasion, but usually they manage to get rid of their business during the session.

**Mr. Gibson:** There is provision, we believe, for not terminating this session at the end of June but to keep the facilities of the House of Commons open in some avenues. Would you be in favour of having this Committee available to do some work over the summer? Do you think it would be a helpful start?

**Mr. Rutherford:** When the matter was considered in Manitoba it was generally agreed that this would be useful in Manitoba, but as I say I do not think they have had to do that very often at all. It is so much larger a field in Ottawa that it is difficult to compare them.

**Mr. Gibson:** Do you not think that Parliament to a large degree is woefully out of date in the emphasis given to facilities for committees of this very type as compared to big business?

**Mr. Rutherford:** I would not like to comment on that, sir.

**Mr. Gibson:** I wish you would.

**Mr. Rutherford:** I do not think I am competent.

**Mr. McCleave:** Maybe you will, Mr. Gibson.

**Mr. Gibson:** There seems to be a terrible reluctance and a fear of spending money in an area where tremendous benefits might come back to the country in the investigation of these committees. The feeling I have is that we are penny pinching to a great extent on whether we will have one more secretary, or whether we will have translation services. This is an area, it seems to me, that requires a great deal more spending of money in getting equipment to operate. Have you found that in your past experience?

**Mr. Rutherford:** All I would like to say is I think this is a very important committee in Manitoba. Regulations can and used to be so drab that on some occasions they did seriously affect the rights of the Queen's subjects. In some cases they purported to create offenses and impose penalties which should only be done by the legislature in my judgment. Therefore, I think regulations which may affect the rights of the citizens are so important that it follows that the committee is a very important part of the legislative machinery. That is not a direct answer, I know.

**Mr. Gibson:** It is an encouraging answer and it is the kind of answer that spurs us to really try to do a job here and get this thing on the right track. There seems to be thousands of regulations passed and virtually ignored after being put on the books. It is only through the efforts of pioneers like yourself who have led the field off on the right track that we are being guided in the right direction.

**The Chairman:** Mr. Rutherford, what status do these rules that you gave us have? Are they standing rules of the legislature, or are they just internal rules of guidance for the committee itself?

**Mr. Rutherford:** Actually, the situation is somewhat ambiguous. I personally thought they should be made part of the standing rules of the House, but they were adopted by the first committee. I have said since that technically at least it is doubtful to me whether they are really bounds exceeding committees.

However, the recommendation of the first committee which was concurred in by that House did state that they should be observed by succeeding committees. How far that binds the succeeding committees I do not know, but in actual fact the succeeding committees have considered themselves

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bound by it. Personally, I would have preferred to see them embodied in the rules.

**The Chairman:** The House itself is not bound by them, although the House has established this committee as a standing committee?

**Mr. Rutherford:** There was an adjustment. When the first report was made it was agreed that they should bind succeeding committees. How far that binds any future House I do not know. I suppose it does not really technically bind it at all, but they have considered themselves bound.

**The Chairman:** That was made in a report to the House and it was concurred in by the House at that time?

**Mr. Rutherford:** At that time.

**The Chairman:** And not just by the committee, so it at least has the status of approval by the whole Manitoba legislature?

**Mr. Rutherford:** That is right.

**The Chairman:** What procedure is followed for reporting by this committee to the legislature in the cases that you have mentioned where, for example, the committee has found that certain regulations went farther than they would like? What does the committee do?

**Mr. Rutherford:** The committee makes a formal report and . . .

**The Chairman:** To the legislature?

**Mr. Rutherford:** To the legislature, yes. I thought I had one of them here, but I do have one copy of the memorandum by the examining officer to the Committee in which he goes through the business. The Committee then makes a formal report to the House recommending that such and such be done, and that regulations be amended or in some cases repealed.

**The Chairman:** Would it be agreeable to you if this memorandum were also put into our minutes?

**Mr. Rutherford:** Yes, there is nothing confidential about it. This was just one particular case where a present examing officer made a report. The report of the Committee is based on that largely, but it is also his report.

**The Chairman:** Do you have any copies of committee reports?

**Mr. Rutherford:** I am sorry, Mr. Chairman, I intended to send Mr. Ray a copy of the Reports of the Committee to the House, but I am afraid I overlooked it.

**The Chairman:** If you are able to send us a copy, we can still attach it to our study.

**Mr. Rutherford:** Yes, I would be glad to do that.

**The Chairman:** Does the Committee recommend to the House that some action be taken with respect to a particular regulation, or is the effect achieved by giving publicity to it?

**Mr. Rutherford:** No, it makes definite recommendations. It must under this system because when the House concurs, then it is concurring in a definite recommendation and on the regulation-making authority receiving "that concurred in report", it must act as set out in the report. It must be definite and state that it should be amended in such and such a way, or repealed.

**The Chairman:** In order to do that it is not made in the form of a motion, is it? It is in the form of a report which the House concurs in.

**Mr. Rutherford:** Yes, it is a report and then it is moved that the House concur in the report.

**The Chairman:** Yes, but there is no need for individual members of the Committee to bring this to the attention of the House as seems to be the case in some jurisdictions if the Committee itself takes the lead presenting it to the House to consider the problem.

**Mr. Rutherford:** That is right; it is not left up to the individual member.

**Mr. Morden (Assistant Legal Counsel):** Is there any provision in the standing orders of the legislative assembly which specifically provides for a debate on a report received from your scrutiny committee?

**Mr. Rutherford:** No, Mr. Morden. In the rules of the House there is only the provision, for setting up the committee, and then a very short one that the committee shall examine and report on all regulations laid before the House.

**Mr. Morden:** In Mr. Kersell's book, he points out that in some parliaments there is difficulty finding provision for debate on these things, and that the opportunity to object to regulations can just go by. However, there has never been any difficulty, according to your knowledge, of a report of your scrutiny committee being debated, and either approved or otherwise.

**Mr. Rutherford:** I am sorry, I do not recall whether or not there has been a debate, Mr. Morden. I could not imagine that there would be any difficulty if anybody wanted to raise it under the general rules of the House. A motion to concur would be open question. Am I right?

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**Mr. Morden:** Is it considered that there may be difficulty when an important regulation which is passed by the Lieutenant Governor in Council is subject to attack and a recommendation is made that it be repealed? What I have in mind there relates also to what is in some of the writing—that this could be regarded by some as tantamount to the government's losing a vote in the House.

**Mr. Rutherford:** Theoretically that may be so, but we have never regarded it as that with us. I think everybody is cognizant of the fact that even a regulation made by the Lieutenant Governor in Council has probably not been discussed in great deal by the Cabinet and that it really comes from departments of government where, some person in the department has overlooked, or gone too far in some respect. It has not been regarded, in any way, as a vote of nonconfidence in the government when such a regulation has been criticized.

**Mr. Morden:** The record speaks for itself. When you refer to 43 regulations being amended, and 13

being repealed, I dare say a large proportion of those were regulations made by the Lieutenant General in Council.

**Mr. Rutherford:** Yes, undoubtedly. Some regulations purport to extend or alter the impacts of a statute. One type of this involves a fundamental definition in the statutes, around which the whole statute turns–For instance, in our Mines Act, the definition of what is a mineral. Under the general provision for making regulations, it has been attempted to alter that. This alters the whole impact of a statute and I would say it is legislation not regulation. There have been some cases of that kind, and they have been subsequently corrected.

If the present examining officer and I found some departmental regulation after it was passed which I thought was out of line and I was pretty sure the committee would disapprove, I would contact the Deputy Minister or the Minister concerned and tell him what I thought of it and in a great many cases they have said, "That is right, we will take measures to repeal or amend that regulation". When it went to the committee without having been repealed or amended, the committees commented that they were informed this was underway and that the offending regulation was being altered, and no further action was taken.

**Mr. Morden:** So you save a lot of time that way.

**Mr. Rutherford:** Yes. This is an informal way; there is no rule laid down. I used to do this and the present examining officer does it still. It would be just a matter of common sense, rather than take up the time of the House or of the committee, if we could get the Department to act in the matter by pointing out what was wrong with it. They are nearly always agreeable to do so.

**Mr. Morden:** Are the committee meetings held in private?

**Mr. Rutherford:** All our committees of the House are almost always open to the public, but I do not think any of the public come.

**Mr. Morden:** Regarding a record kept of their proceedings, were the Minutes or the actual verbatim transcript published in any way?

**Mr. Rutherford:** No, not of these committees.

**Mr. McCleave:** Could I ask whether there might be virtue in having the guidelines set forth in the legislation itself? I will check the Regulations Act, but I do not believe anything like that exists in it. It is sort of a general over-all statement of principle.

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**Mr. Rutherford:** As I said, I thought it would have been better if they had been embodied in the rules of the House and perhaps better still if they were embodied in the statute.

**The Chairman:** Do you mean, Mr. McCleave, that the guidelines which the committee has for itself would also be appropriate ones for those who are drawing up the regulations, to have before them in statutory form?

**Mr. McCleave:** Yes, in statutory form rather than an Order of the House. I do not know how workable that would be, but I suppose if it were even to be seriously considered the government's view would be required.

**Mr. Rutherford:** Would you like a copy of the Regulations Act?

**The Chairman:** Yes, we would be pleased to have that. While the Regulations Act is coming to Mr. McCleave, there are several other point which I might raise. You have spoken about 43 regulations which were amended and 13 which were appealed as a result of action of the Committee. Would that number be in addition to the type of informal changes which you were able to bring about?

**Mr. Rutherford:** Yes, this was a case where specific action was taken.

**The Chairman:** Would that be because the departments in those cases had not acted on your informal suggestions or did you not always make informal suggestions?

**Mr. Rutherford:** No, it would be mostly because I had not acted on it. Usually when the *Gazette* came in, I had the habit of scanning through the regulations very hurriedly and if I noticed something which I thought was really wrong, this might be in July, I would get in touch with the appropriate department. I did this on a number of occasions, but it was certainly not done thouroughly. When I later examined it in detail, before making a report to the Committee, I discovered others which I had not mentioned. There were the ones with which the House dealt.

**The Chairman:** Yes. Looking at the Committee's criteria you have given us which of these would you say are the ones that have been invoked, in most cases, by the Committee where they found the regulations wanting?

**Mr. Rutherford:** I would say (a), (b), and occasionally (d). I do not remember many of (e) or (f).

**Mr. McCleave:** Which part, Mr. Rutherford? The first part, the "fine, imprisonment or other penalty" or the second part "the onus . . .".

**Mr. Rutherford:** The first part. I was thinking that this has seldom occcurred in recent years, but there was a time when the regulations did purport to create an offence and impose a fine. I think they know the departments concerns better now.

**Mr. McCleave:** You have learned them, as we say.

**Mr. Rutherford:** I noticed that Sir Cecil Carr, who is from the Old Country, puts considerable emphasis on what you have here as (g), "not make any unusual or unexpected use of the delegated power". He suggests this gives the Committee quite a leeway and that this is a good thing. This is in an article that he wrote and of which I have a copy. Occasionally, of course, the (h) is put into two words, and in some cases this amounts to bad drafting.

**The Chairman:** 1 and 2 or (a) and (b) would be the ones that received the greatest abuse.

**Mr. Rutherford:** Yes, but occasionally in the past (d) about fines and imprisonment was in this situation but not so much now because they know better. Of course, that was extremely important when it did happen.

**The Chairman:** Yes; (a) is a rather broad provision. Did you find this in the criteria which were used in the United Kingdom or in Australia, or is this a distinctive contribution which the legislature of Manitoba has made to this area of the law?

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**Mr. Rutherford:** I am pretty sure that this was in the United Kingdom ones, Mr. Chairman. I would have to check that out again but I agree that there is a borderline and that it is sometimes difficult to say what is regulation and what is legislation. On the other hand, there are a great many cases where there is very little doubt. Personally, as far as the provincial legislature is concerned, I think when you get into what is actually legislation, it is ultra vires but I know there are some who disagree with that.

I once had the temerity to write an article in the Canadian Bar Review arguing this point, and it goes back to the fact that in the British North America Act the state of the provincial legislature cannot affect the office of Lieutenant Governor. In the old case of initiative and referendum decided by the Privy Council, they said that an attempt to enact legislation by way of a referendum, without the attempt of the Lieutenant Governor sitting in the legislature, was ultra vires. When bodies other than the legislature attempt to enact what is clearly legislation, I think that, as far as the province is concerned, this is ultra vires.

As I say, many would disagree with that and it certainly does not affect the Parliament of Canada, but only the provincial legislature. You have mentioned this, and I agree that there may be borderline cases which are hard to distinguish and sometimes it is quite clear. The regulations of the kind I mentioned purport to alter the impact of the legislation in some way. In my mind, it is legislation not regulation or extending the operation of the act or restricting it.

**The Chairman:** Yes. Mr. Morden, do you have a further question?

**Mr. Morden:** Yes, this relates to your list of criteria again. You have referred to (d) regulations imposing fines, and so forth. I take it that means unless authorized by statute.

**Mr. Rutherford:** Yes. If the statute purported to authorize it I suppose the regulation could do that; this would be ultra vires but that is just my opinion.

**Mr. Morden:** Except that there are quite a few Dominion statutory provisions enabling regulations to be made and imposing fines or imprisonment. The legislation imposes the maximum fine or period of imprisonment and then the regulation-making body can provide for fine or imprisonment below that figure.

**Mr. Rutherford:** Yes.

**Mr. Morden:** It is quite common.

**Mr. Rutherford:** I presume there is no question. It is within the power of Parliament to do that.

**Mr. Morden:** Yes, the reason I asked the question is because another criterion used the expression "unless so authorized by the statute" but you do not use it in this one.

**Mr. Rutherford:** Quite apart from the question of power, I think the idea was that the legislature should not authorize this. If the Queen's subjects are to be fined or sent to jail, the legislature should create the offence and prescribe the penalty.

**Mr. Morden:** As a matter of basic policy.

**Mr. Rutherford:** Yes.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** I have looked at it and there is nothing as such here. It is rather interesting and perhaps Mr. Rutherford would want to comment on this. A part of the Regulations Act says:

> 2. In this Act
>
> (a) "regulation" means a rule, order, regulation, by-law or proclamation
>
> (ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament.

From reading that I presume that the Act itself must prescribe the fine or penalty rather than the possibility of a regulation being able to do it. However, that is just a very off-hand reading.

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**Mr. Rutherford:** Yes. We certainly have legislation. I think it is in our summary convictions act that any violation of a regulation, if no other penalty is provided, is subject to a penalty of so much. It is a catch-all.

**Mr. McCleave:** Yes.

**The Chairman:** Did you have any further questions, Mr. Morden?

**Mr. Morden:** Referring to the Scrutiny Committee, Mr. Rutherford, is a new committee appointed at the beginning of each session?

**Mr. Rutherford:** Yes.

**Mr. Morden:** Has the membership been pretty constant throughout one Parliament?

**Mr. Rutherford:** Yes, that is true.

**The Chairman:** I suppose there have been a number of different chairmen since this has been introduced.

**Mr. Rutherford:** Yes, Mr. Chairman; there have been. Off-hand I cannot remember how many but I will check on the figure.

**Mr. Morden:** Has any injustice ever flowed out of a regulation being in force for some time and then, pursuant to your procedure being repealed, the subjects are fined or their rights in some other way affected by it?

**Mr. Rutherford:** I have not heard of any such case.

**Mr. Morden:** Have you given any thought to what could be provided for such a contingency?

**Mr. Rutherford:** Frankly, no; I have not.

**The Chairman:** Gentlemen, we have had an exchange now for about an hour. Mr. Rutherford has agreed to return this afternoon during the testimony of Mr. Koester from Saskatchewan. If we have any further questions that occur to us in the meantime, we can put them to him then. Perhaps there will even be some possibility of a dialogue between them as to the relative merits of the systems which are used in Manitoba and Saskatchewan.

I would like to express our thanks to Mr. Rutherford. He is in his 79th year, but judging from the vigor with which he has answered our questions and the sharpness of his answers, I think we can safely assume that we have not imposed any undue burden on him in requesting him to appear before us. We are very grateful, sir.

**Mr. Rutherford:** Thank you, Mr. Chairman.

## AFTERNOON SITTING

Thursday, May 15, 1969.

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**The Chairman:** Gentlemen, the meeting will come to order.

**Mr. McCleave:** Mr. Chairman, with your indulgence, I would like to ask a question that occurred to me over the noon period. I have discussed it briefly with Mr. Rutherford and it concerns looking at regulations that have been in existence in Manitoba before the screening body was set up. I wondered if there had been any policy or any attempt to go back over those to find out if they offended in any way against the principles being followed by the Committee, and if this was not being done, why it was not being done?

**Mr. Rutherford:** No, it has not been done, Mr. Chairman. The regulations were registered in 1945 and we did not establish this new procedure until 1960, it was 15 years, and I imagine the real reason was because of the amount of labour and effort involved just nothing was done. As against that, I think the government has in contemplation in the reasonably near future a complete revision and consolidation of all the existing regulations. Undoubtedly at that time, the revision people will take these principles into account, I should think.

**Mr. McCleave:** The other part of the question is that you mentioned some regulations sought to amend or alter regulations in existence. When such things did come before you. Did you then examine the whole original regulation?

**Mr. Rutherford:** No, Mr. Chairman, we did not. When I said that I was thinking mostly that regulations made in 1965 might be amending ones made in 1960. Undoubtedly, there were some that amended the earlier ones but I am afraid we did not go back and examine the old regulation but just the amendment.

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**Mr. McCleave:** What happens to old regulations? Are they like old soldiers, they just fade away?

**Mr. Rutherford:** In a great many cases they have been repealed, and new ones substituted or appealed altogether. Some of them still go on being amended, and amended and amended, and frankly they are in bad need of revision at the moment.

**Mr. McCleave:** Thank you very much.

**The Chairman:** It might just be a good idea if we read into the record several of the rules, orders and forms of proceeding of the Manitoba Legislative Assembly as of March 26, 1960. I would propose just to read the rules which refer in a particular way to the Standing Committee on Statutory Regulations.

> 68. All regulations that, under The Regulations Act, stand permanently referred to the Standing Committee on Statutory Regulations and Orders shall be examined by that committee.

I guess before that I should have referred to the fact that in Section 67 (1) one of the standing committees which is established is the Standing Committee on Statutory Regulations and orders.

> 69. Of the number of members appointed to compose a committee a majority of them are a quorum, unless the House otherwise orders.
>
> 70. A member who is not a member of a committee may attend for the purpose of addressing the committee, or of putting questions to witnesses, but he shall not be permitted to vote.
>
> 71. (1) A report for a standing committee or a special committee shall be presented by a member standing in his place, and shall be read by the Clerk at the table.
>
> (2) The member presenting the report, after it has been read by the Clerk, shall move that the report be received.
>
> (3) Concurrence in the report of a committee may be moved subsequently after the usual notice has been given.

I think having these rules on record for us may help us to understand the context within which Mr. Rutherford's presentation took place.

Our witness this afternoon is Mr. C. B. Koester, Clerk of the Legislative Assembly from Regina, Saskatchewan. Mr. Koester was born in Regina and was educated at the Regina Central Collegiate Institute, the Royal Canadian Naval College, the University of Saskatchewan and the University of Alberta. He holds a bachelor's degree in education from the University of Saskatchewan which he obtained in 1952 and an honour's B.A. from the same university which he received in 1956 and a master's degree from the University of Saskatchewan which he obtained in 1964. In 1966, he was admitted to candidacy for the Ph.D. degree at the University of Alberta. In 1960 he was appointed Clerk of the Legislative Assembly of Saskatchewan and since 1963 he has, as well, been Clerk of the Special Committee on Regulations. He was appointed Temporary Senior Clerk in the House of Commons in Westminster for three months, from May to July of 1967, and I have no doubt that this experience in the United Kingdom has given added perspective to his views on our subject. In addition, he has contributed articles on parliamentary procedure to *The Table, Saskatchewan History* and *The Parliamentarian.* It is a pleasure for us to have you with us this afternoon, Mr. Koester, and we would ask you to make an introductory statement followed by a period of dialogue with the Committee.

**Mr. C. B. Koester (Clerk of the Legislative Assembly of Saskatchewan):** Thank you, Mr. Chairman. My introductory statement I believe has been distributed to the members of the Committee.

The Legislative Assembly of Saskatchewan has undertaken a systematic review of delegated legislation since 1963. The foundation for this review is twofold: it is dependent on the one hand on an Act providing for the central filing and publication of regulations, and on the other hand on the report of

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a committee which recommended procedures for the review of regulations filed in accordance with the Act.

The Regulations Act covers three critical areas. In the first place, it defines a "regulation" and provides a procedure to be followed in doubtful cases. In the second place it establishes procedures for the filing and publication of regulations. Finally, it establishes a procedure by which, in effect, regulations are tabled in the Assembly for review by a committee of the Assembly, including a procedure for the revocation or amendment of a regulation of which the Assembly, by resolution, has expressed its disapproval.

The Regulations Act does not prescribe the procedures by which the Assembly is to conduct its

review of regulations. These procedures were evolved by a Standing Committee of the Assembly to which the matter was referred during the 1963 session, and by the resultant Special Committee on Regulations itself. Consequently, the Assembly now appoints at each session a Special Committee on Regulations consisting of nine members empowered to appoint legal counsel and to sit after prorogation. The Committee is required to consider every regulation filed with the Clerk in accordance with the Act with a view to determining whether the attention of the Assembly should be drawn to any regulation on any of the following grounds: that it imposes a charge on the people or the public revenue without statutory authority; that it is excluded from challenge in the courts; that it makes unusual or unexpected use of statutory powers; that it has retrospective effect without statutory authority; that it has been insufficiently promulgated; or that it is unclear. The Committee may invite regulation-making authorities to submit explanatory memoranda, or to appear as witnesses, but before reporting any regulation to the Assembly on any of the above grounds, the Committee must advise the regulation-making authority of its intention so to do.

Certain observations should be made with respect to this Order of Reference. First, it is essential that the Committee have legal advice. Members should not be required to undergo the tedious process of reviewing each regulation word by word, nor can they be expected to have developed the professional skills and techniques of the lawyer. The member's role is to exercise his judgment on matters brought to his attention by counsel. Second, the type of report required by the Order of Reference is of extreme significance: the Committee is required to report only its opinion; it is not required to make a recommendation. Consequently, the report need not be concurred in by the Assembly. Any further action with respect to a regulation must be taken on motion in the Assembly. The initiative to have any regulation annulled or amended therefore rests not with the Committee, but with any member of the Assembly who may exercise this initiative with respect to any regulation on any grounds whether the Committee has drawn the attention of the Assembly to that regulation or not. Finally, it should also be noted that, while the Order of Reference is silent on the matter, the convention has developed of appointing a member of the Opposition as chairman. The device is effective in this type of committee since it produces a healthy tension which tends to assure both sides that the proceedings of the Committee will be fair and just.

While the regulations are formally before the Committee, it is the report from counsel with which the Committee primarily concerns itself. Counsel will draw to the attention of the Committee any matter, within the Order of Reference, to which he feels the Committee should give further consideration. On some such matters the Committee will decide that no further action is necessary; on other matters, the Clerk might be instructed to seek explanations from the authorities concerned, and the departmental replies are considered at a further meeting. In conducting this correspondence the Committee carefully avoids becoming involved in a dispute with a department; it "invites" rather than "demands" an explanation. This exchange of correspondence is usually all that is required to clear up a difficulty; to date, the Committee has not felt it necessary to draw any regulation to the attention of the Assembly.

It is scarcely within my competence to comment on the efficacy of The Regulations Act itself or the executive procedures involved in its administration. It is obvious, however, that the definition clause is of primary importance, and the Saskatchewan experience suggests that a certain flexibility in determining the application of the Act is desirable from both an executive and legislative point of view. Moreover, it should also be obvious that the central filing and publication of regulations will impose requirements for additional staff, particularly if the Act requires the filing and publication of regulations already in force.

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I am on more familiar ground when dealing with the legislative procedures established in Saskatchewan for the review of delegated legislation. I have confidence in the procedures; the necessity for providing legal counsel to the Committee; the desirability of appointing an Opposition chairman; and the wisdom of establishing contact between the Committee and the departments. Above all, I am convinced that the factual report, which contains no recommendations and which leaves any member free to initiate further proceedings with respect to a regulation, is a condition precedent to the effective operation of the committee.

The shortcomings of the review as conducted in Saskatchewan arise not from procedural inadequacies, but from external factors. The review of regulations is a dull process at the best of times; when the Committee meets only three or four times a year the lack of immediacy makes the process even duller. Furthermore, the short session makes it impossible to employ the affirmative and negative procedures with respect to statutory instruments which have been developed at Westminster. The availability of these procedures would considerably strengthen parliamentary control over the exercise of legislative power by the executive.

Nevertheless, the Saskatchewan practice shows three obvious and important results: regulations are systematically published each week as an appendix to the *Gazette*; bound and indexed volumes of the regulations are available annually; the legislature is assured that the regulations conform to certain basic parliamentary conventions.

Mr. Chairman, would you like me to read for the record the Appendix as well which is the Order of Reference of our Committee?

**The Chairman:** I would indeed, Mr. Koester.

**Mr. Koester:**

Ordered, That Messrs. Cameron, Weatherald, Mitchell, Guy, Gardner, Blakeney, Wood, Dewhurst and Meakes be constituted a Special Committee to consider every regulation filed with the Clerk of the Legislative Assembly pursuant to the provisions of *The Regulations Act*, with a view to determining whether the special attention of the Assembly should be drawn to any of the said Regulations on any of the following grounds:

(a) That it imposes a charge on the public revenues or prescribes a payment to be made to any public authority not specifically provided for by statute;

(b) That it is excluded from challenge in the courts;

(c) That it makes unusual or unexpected use of powers conferred by statute;

(d) That it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(e) That it has been insufficiently promulgated;

(f) That it is not clear in meaning;

and if they so determine, to report to that effect;

That the Committee have the assistance of legal counsel in reviewing the said regulations; that it be given the power to sit after prorogation of the Assembly; and that it be required prior to reporting that the special attention of the Assembly be drawn to any regulation, to inform the Government department or authority concerned of its intention so to report; and

That the Committee be empowered to invite any regulation-making authority to submit a memorandum explaining any regulation which may be under consideration by the Committee or to invite any regulation-making authority to appear before the Committee as a witness for the prupose of explaining any such regulation.

**The Chairman:** Thank you very much, Mr. Koester. Do you have any additional comment that you want to make before I ask the members for questions?

**Mr. Koester:** Nothing in particular, sir. We can proceed with questions and answers.

**The Chairman:** The Saskatchewan system does provide some interesting contrasts with that in Manitoba. We would be interested in having some comparison of these perhaps at a later stage. Are there any questions at the moment more directly on the Saskatchewan experience? Mr. McCleave.

**Mr. McCleave:** When was the Committee established?

**Mr. Koester:** The Act was passed in 1963. The Committee first met in 1964.

**Mr. McCleave:** It has found nothing objectionable to report that to the legislature?

**Mr. Koester:** I would not say that it has found nothing objectionable, but what it has found to be objectionable has been communicated to the departments concerned which have either put up a very good case for their own point of view which the Committee has been prepared to accept, or have indicated their intention to amend in line with the Committee's views.

**Mr. McCleave:** How many instances of this, say, per year would take place?

**Mr. Koester:** I think the counsel's report deals with 50 to 75 instances for each year's worth of regula-

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tions. The regulations vary, of course. The number of regulations vary from year to year but it would be 300 or 400 I would think. Of these 50, 25 or so are reported to the departments and correspondence conducted on them.

**Mr. McCleave:** Is this then primarily by the counsel, say, in the off season while the legislature is not sitting.

**Mr. Koester:** No. The correspondence is conducted by the clerk.

**Mr. McCleave:** Of the Committee?

**Mr. Koester:** Counsel to the Committee is not a government employee. He is a practising lawyer who obviously has many other things to do.

**Mr. McCleave:** Does the clerk take this initiative himself or is this the suggestion of the Committee—a

decision reached by the Committee that such and such a minister or department be contacted and the fight then goes from there?

**Mr. Koester:** The Committee takes the decision on motion in the Committee that the clerk be instructed to invite the Department to submit an explanation of a particular matter.

**Mr. McCleave:** In comparing what you have here with your sister province of Manitoba, as far as I can see the major difference is that in Manitoba following, as I understand it, British practice, one of the general principles to be followed is listed by Mr. Rutherford as point (d):

> (d) The regulations should not impose a fine, imprisonment, or other penalty or shift the onus of proof of innocence onto a person accused of an offence.

It seemed to me from looking at the six guidelines set out in the Saskatchewan resolution that this one did not seem to be covered, or perhaps covered very slightly.

**Mr. Koester:** I would have no particular comment on that. It certainly is not covered specifically, but I am not aware that this particular provision had been left out of our Committee's Order of Reference for any particular reason.

**Mr. McCleave:** You did not intend to debate when the Committee was established then, or have no recollection?

**Mr. Koester:** I did, but this was not a factor which the Committee considered.

**Mr. McCleave:** Was it a resolution drawn up by members of all parties or was it presented to the legislature by the government of Saskatchewan?

**Mr. Koester:** The bill was presented as a government bill. It was referred after second reading to the select Standing Committee on Statutory Regulations and Orders which was also instructed to recommend to the Assembly certain procedures to be followed for the review of regulations. The recommendation did not contain specific items such as those you mentioned.

**The Chairman:** Are you finished, Mr. McCleave? I would just like to ask several other questions along the same line, Mr. Koester. First, could you tell us something about the background of the development of this new procedure in Saskatchewan, and especially whether there was any particular political happening or legislative incident that set the thing off. I believe it would be fair to say that in Manitoba it was the memorandum from Mr. Rutherford which brought about the setting up of the Committee. Could you tell us something about the background in Saskatchewan?

**Mr. Koester:** Yes. I had been interested in this general area and made some inquiries about the procedures followed in the House of Commons at Westminster and wrote a memo to the government suggesting that they might like to look at the area. It so happened that the government at that time, apparently, was thinking in these terms, particularly with respect to an ombudsman to protect individual rights in the province. My memo moved through various channels and ended up in a government committee which pursued the matter and legislation was eventually introduced along these lines.

**The Chairman:** Then we are very fortunate in having a Saskatchewan innovator as well as the Manitoba innovator here with us.

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**Mr. Koester:** I think it was a matter of coincidence. The government had been thinking in those terms about the same time.

**Mr. Chairman:** It often helps if someone gets these things started. Did you look at the Manitoba or the British experience—you have already mentioned you did look at the British experience—for a guideline about how the Committee should be set up and what its terms of reference should be?

**Mr. Koester:** I have always found it very helpful in procedural questions to refer initially to the practice of Westminster, not that this is the practice which we will ultimately adopt. However, it seems to me that they have met almost every parliamentary problem there is at one time or another, and they have usually found a way out of it. If their solution is useful we will certainly use it. Therefore, as I say, one of the first things I did was to approach the House of Commons for information about how their committee worked.

I also approached the Clerk of the House in Manitoba, knowing that they had had a committee of review for some sessions, and their standing orders, their order of reference, and a sample of their committee report was used in Saskatchewan to a certain extent.

There is one particular difference which you may have noticed. Mr. Rutherford and I discussed it and, indeed, debated it on the train as we came down, which presents two rather interesting points of view, I think. The Manitoba legislature, as Mr. Rutherford has undoubtedly explained to you, receives a report from their committee on statutory regulations and

the reception of this report is followed by a motion for concurrence.

The Saskatchewan practice is quite different in this respect, in that the committee does not make a recommendation to the assembly and, therefore, the report of the regulations committee to the Saskatchewan assembly does not require a motion for concurrence by the House. The committee simply reports its opinion. It has examined these regulations, and it wishes to draw the attention of the assembly to a particular regulation on some particular grounds, leaving the initiative for proceeding farther entirely in the hands of any member of the assembly who may proceed by putting down a resolution requiring the amendment or the annulment of a regulation.

**The Chairman:** I notice that you mention in your statement that you feel very strongly that the Saskatchewan system is the better one. Why do you feel that?

**Mr. McCleave:** And did Mr. Rutherford agree with you?

**Mr. Koester:** No, he did not; he took issue with that. I feel that it is better because, first, the Committee is not faced with a potential political crisis as it is reviewing the regulations. It can review these regulations somewhat more calmly knowing that its report to the assembly is not by any means the final judgment. Second, I am not quite sure from Mr. Rutherford's comments, but I think we have provided for somewhat more consultation between the committee and the government. Bearing in mind that we have a very short session and that a regulation which might be reviewed by the committee in May would not be reported to the assembly until next February anyway, the possibility of clearing up the difficulty by correspondence in June or July is worth some effort. So that having conducted this correspondence, the necessity of making a recommendation to the assembly is fairly remote.

Furthermore, there is the difficulty with any committee report that will be reporting on several regulations. Perhaps the assembly is going to take issue with only one of these. The question then arises about the reference of the report back to the committee for amendment if the assembly is not prepared to adopt the report. Our method, I think, is a little neater. The opinion of the committee is placed before the assembly. If the assembly wishes to proceed on one out of two or three or four matters and drop the rest, they are perfectly free to do so.

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**The Chairman:** During what part of the year does your legislature normally meet?

**Mr. Koester:** February, March and April.

**The Chairman:** Would the committee meet once or twice during the time when parliament was not in session?

**Mr. Koester:** The committee never meets while the house is in session. I attempted at one stage to have our committee included amongst the standing committees of the assembly but the members took the view that as soon as it became a standing committee it would be expected to meet while the House was in session. They felt they had enough committees as it was and did not want to proceed, so you will notice in our order of reference that the committee is given power to sit after prorogation and that all the meetings take place after proragation.

**Mr. McCleave:** Mr. Chairman, may I ask the same question that I put to Mr. Rutherford—and our witnesses heard it—dealing with looking over regulations that preceded the establishment of the committee and, whether there is any practice in that regard?

**Mr. Koester:** Yes, sir. I believe I gave the Clerk a number of copies of our Act and you will notice in the Act that provision is made for filing back regulations. I am afraid I cannot cite the particular section, but any regulation which was not filed with the Registrar of Regulations by December 31, 1968, was null and void.

This has put an added burden on the committee for these first few years while the departments have been filing their regulations up to date. It has produced a certain anomaly in that regulations were filed within the last 12 months signed by ministers who had not held that position for several years.

**Mr. McCleave:** Section 18 of your Act.

**Mr. Koester:** Is that the one?

**Mr. McCleave:** Yes.

**The Chairman:** Mr. Morden, did you have any questions?

**Mr. Morden:** I was going to ask you, Mr. Koester, about the committee's being a special one instead of a standing committee. Is the only reason that it is a special committee the one that you gave?

**Mr. Koester:** That was the reason why the proposal for the committee to become a standing committee was not proceeded with at the time. No one has attempted since then to make the committee a standing committee. Whether minds have changed in the interval I do not know. I think the members are quite right. I think it would be an added burden on

them to be expected to deal with these during the session.

On the other hand, I think it would be preferable if the committee were a standing committee that did not have to be appointed specially at each session. If it were a standing committee it could very easily be given the power to sit after prorogation anyway.

**Mr. Morden:** That is what I was wondering. Then it could choose when it wanted to sit.

**Mr. Koester:** Not quite; it would have to be given the power specifically to sit after prorogation.

**Mr. Morden:** Yes.

**Mr. Koester:** The fact that it was a standing committee would make, in my view, no difference whatsoever.

**Mr. Morden:** Are the meetings that it does have open to the public?

**Mr. Koester:** Yes, all our committees are open to the public unless the committee decides otherwise. I cannot recall that the public has ever attended these meetings.

**Mr. Morden:** Has it been the practice during the life of a particular parliament to appoint the same members at the beginning of each session?

**Mr. Koester:** Yes. The regulations committee is one of the few committees in which the membership is consistent from session to session.

**Mr. Morden:** The Order of Reference to which you referred in your submission sets forth the provision that before any report is made to the assembly, the government department in question should be informed. I take it there is adequate time to give the government department the opportunity either to comment or change the regulation, or would this be at the end of a long, drawn-out negotiation between the committee and the government department?

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**Mr. Koester:** Yes, In our practice, if the committee ever reached the stage where it intended to report adversely on a particular regulation, there would have been a series of memoranda back and forth between the committee and the department on that subject. There is nothing in the order, nor is there anything in our practice requiring a certain interval of time between advising the department of the committee's intention to report adversely and the actual submission of the report.

**Mr. Morden:** The important thing is that the government department has had full opportunity, up to that point, to put its position.

**Mr. Koester:** That is right. The committee does not try to catch the government short. It simply wants to conduct a dialogue with the government. The result of this has been that the government departments are certainly aware of the existence of this committee, and of the fact that there are certain conventions which the committee expects to be followed in the drafting of regulations, and in general terms, of a form of regulation which the committee considers to be desirable. Year by year we notice a marked improvement in the drafting of regulations, simply because of this liaison between the committee and the departments.

**Mr. Morden:** The Chairman read the provisions for the Manitoba rule into the record. Do you have similar rules in Saskatchewan?

**Mr. Koester:** No sir. The complete order as far as the Regulations Committee is concerned is found in the order of reference. It is found in a section of the Regulations Act which sets forth the procedure to be followed in filing the regulations with the Clerk for review by any method that the Legislature may choose to establish, as well as the procedure for the Clerk communicating any resolutions from the assembly with respect to a regulation to a department. Therefore, from the standing orders you would not know that we had a Regulations Committee.

**Mr. Morden:** Would you think that the lack of express treatment in the standing orders is desirable or undesirable?

**Mr. Koester:** I would not care to say that it was one or the other.

**Mr. Morden:** The present system is working all right.

**Mr. Koester:** As far as we are concerned it is working just fine. The committee is appointed automatically at each session, despite the fact that provision has not been made for such an appointment in the standing orders. The Legislature at the moment has a committee which is revising the standing orders, and it may regard this as an oversight and include the Regulations Committee in the standing orders. However, no one felt it was necessary to amend the standing orders in 1963.

**Mr. Morden:** As it now stands, you must have a new sessional order at each session.

**Mr. Koester:** That is right, yes.

**Mr. Morden:** Reference has been made to the lack of any express mention of regulations which impose a fine or imprisonment. Item (c) in your order of reference refers to the:

> . . .unusual or unexpected use of powers conferred by statute;

Has that proven to be a useful catch-all?

**Mr. Koester:** That is similar to the expression that the sailor's greatcoat covers a multitude of sins. It is used quite often in the correspondence which the Clerk is required to conduct with the department. As is the retroactivity. Item (d) of the order of reference, these two seems to be the most useful sections of our order of reference.

**Mr. Morden:** What is meant by Item (e):

> (e) That it has been insufficiently promulgated;

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**Mr. Koester:** This, I think, is something of a wilderness in the way that we are reviewing our regulations so far. If you look at the Regulations Act you will see that under certain conditions a regulation does not need to be published, if it is a regulation, which by its nature, affects only a small and select group. For example the oil industry one, which is of no interest whatsoever to the public at large, while still being regarded as a regulation can be exempt from the publication requirement.

**Mr. McCleave:** Section 4, subsection (3) I think.

**Mr. Koester:** I think that is it, yes.

**Mr. McCleave:** It says:

> . . .mimeographed or typewritten form . . .

**Mr. Koester:** Exactly. The department will make sure that all those in the province who are interested will get copies and to date there appears to have been no difficulty over this. The decision of the Committee as to whether or not promulgation was sufficient is a very difficult decision for them to make under our particular circumstances.

**Mr. Morden:** If the Regulations Act did not have any exceptions and required all regulations to be published in the *Saskatchewan Gazette*, then I suppose it would not be necessary to have that.

**Mr. Koester:** That is right. I said in my paper that there was some need for flexibility in the definition of regulations. This is an example of that.

**The Chairman:** Mr. Koester, could you estimate how many regulations might be considered in the intersession period by this special committee. What percentage of those might it find fault with, or might refuse to correspond or speak to the authorities about?

**Mr. Koester:** I think I indicated an average of about 400 regulations in the course of the 12 month period, of which counsel will report on perhaps 50, and I will conduct correspondence on 20 to 30. Those are very rough figures and include inflationary figures because of the requirement in our Act to file not simply the new regulations but the ones which have been in force for a number of years.

I expect that those figures will fall off proportionately from now on.

**The Chairman:** You mean that all the regulations in force are filed again every year?

**Mr. Koester:** No sir. However, all regulations in force had to be filed by December 31, 1968.

**The Chairman:** Yes, I see.

**Mr. Koester:** In order to assure that the backlog of regulations was published because the purpose of our Act was to do two things. It was to produce a convenient source of the regulations for the public and to provide the Legislature with the basis for the legislative review.

**The Chairman:** Yes. How many meetings of the committee will it take to deal with the 50 or so regulations which you would draw to its attention?

**Mr. Koester:** About four.

**The Chairman:** About four. Could you tell us for what reason the committee would decide not to take issue with all of the regulations to which you have pointed? Your "pointing to" perhaps does not represent a judgment that there is anything wrong, but merely suggests that this is something to which the committee should look.

**Mr. Koester:** Exactly; I do not draw these regulations to the attention of the committee. The counsel for the committee does.

**The Chairman:** The counsel does.

**Mr. Koester:** He looks fairly closely at the order of reference and anything which appears to conflict with the order of reference is drawn to the attention of the committee. The counsel himself will admit, that many of these are perhaps minor infringements of the committee's order. For example, the retroactivity of a few days, and on these grounds the committee would simply say, "To all intents and purposes there is no

point in proceeding further, and it is not a matter which we want to commit ourselves."

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**The Chairman:** You stated that the committee may invite regulation making authorities to submit explanatory memoranda or appear as witnesses. How frequently would they appear as witnesses?

**Mr. Koester:** We have not called witnesses and the memoranda has been sufficient.

**The Chairman:** Yes.

**Mr. Koester:** I might say that the departments respond very well. They are invited and they reply fully to the case which the Committee raises. Very often a small department, which does not have its own counsel, will draft a regulation because it has been doing this sort of thing for years. The regulation is raised in the Committee, the Clerk corresponds with the Department, and the Department then seeks the opinion of the Attorney General. It then comes back to the Committee with a memorandum to which is attached the Attorney General's opinion. The Committee is happy with this situation, even though the Attorney General has not necessarily agreed with them. However, they are happy that the Department has sought proper legal advice. They feel that their work has been satisfactory.

**The Chairman:** Yes. While you were in England did you see the House of Commons Committee in operation, or did you gather any information about it which would enable you to make a comparison of its manner of proceedings with that of the Committee in Saskatchewan?

**Mr. Koester:** Unfortunately Mr. Chairman, I did not have an opportunity to sit in on a meeting of the Statutory Instruments Committee in Westminster. However, on one occasion a Clerk from Westminster came to Saskatchewan to take my place at the table while I was away on leave of absence. He carried on my work of Clerk of the Regulations Committee, for the period he was there. I asked him about many of our procedures including this one, and he left me with the impression that this was operating in a manner very similar to that of the Westminster Committee. Now this is third hand evidence, but it is the best I can do to answer that question.

**The Chairman:** Yes. The Province of Ontario has recently decided to do something along the same lines. Do you know of any movements that are afoot in other provinces to follow this, other than what exists in Manitoba?

**Mr. Koester:** I am sorry, I do not.

**The Chairman:** I think we might look more particularly at the criteria which are used by your Committee, and those which are used by the Manitoba Committee. I do not know if you have a copy of the Manitoba criteria.

**Mr. Koester:** No, I have not.

**The Chairman:** The Clerk will get you one.

**Mr. Koester:** Thank you.

**The Chairman:** The first of the Manitoba criteria is quite a fundamental one which appears to have no echo in the ones which are used in Saskatchewan.

> (a) The regulations should not contain substantive legislation that should be enacted by the Legislature, but should be confined to administrative matters.

Would this be considered to fall under your third class of unusual or unexpected use of powers?

**Mr. Koester:** I think it would indeed. I cannot give you an example of the Committee drawing that sort of thing to the attention of the Department, but our Committee does not seem to have exercised itself on substantive legislation or administrative matters. If they chose to, they could certainly do so under subsection (c).

**The Chairman:** Would anyone like to compare these in a more particular fashion?

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**Mr. McCleave:** Mr. Chairman, perhaps the witness could consider them from (a) to (h), and say where he regards them as being found in (a) to (f).

**Mr. Koester:** Yes, I would be glad to.

In part (b) you will note that on a couple of occasions our order says: "Unless provided for by authority to impose a charge on the revenue or prescribe a payment, unless provided by authority making unexpected use of whatever powers are conferred and retrospected effect where the parent statute confers no express authority? "

I think we are very conscious of the areas for which regulations are provided by statute. Our review would include (b) without saying it in so many words. The Manitoba (c) is our part (b). We have no specific order comparable to the Manitoba part (d), although I think that part of it at least would be found in our part (a).

**Mr. McCleave:** Would that be the first or the second part of Manitoba (d).

**Mr. Koester:** A matter of the "fine" would be included in our (a).

**The Chairman:** I think it would be under the second clause of part (a) that it "prescribes a payment to be made to any public authority. . . ."

**Mr. Koester:** The Manitoba (f) would be our (a) again. Manitoba part (g) is our part (c), and the Manitoba part (h) is Saskatchewan's part (f).

**Mr. McCleave:** What about Manitoba (e) "personal liberties? "

**Mr. Koester:** There is nothing comparable in ours at all.

**The Chairman:** The criteria used in Manitoba would appear to be considerably broader than those implied by your Committee.

**Mr. Koester:** Two areas are essentially like this and cover, the fine, imprisonment or the shift of the onus of proof, and the regulations in respect of personal liberties. These are included in ours only by fairly broad implication.

**The Chairman:** Yes. One other matter on which I think you could help us would be to give some indication of which of your criteria is more frequently employed, or more broadly, what the order of frequency of use of these criteria is by the Saskatchewan Committee?

**Mr. Koester:** I would say that part (d) is the most frequently used: "it purports to have retrospective effect where the parent statute confers no express authority so to provide;" this would be followed by (c), "unusual powers;" followed by (f) "unclear in meaning." We have never used (e), "Insufficiently promulgated." The order of frequency between our part (a) and (b) is difficult to determine. We have used them both more or less equally.

**Mr. Beaudoin:** I would like to have a little more information about (b), the question of ultra vires. How can it be excluded from the action of the courts ? How is it done in practice ?

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As a rule, the regulations should be within the ambit of the statute.

**Mr. Koester:** I am afraid that I cannot give you an example of that. I am sorry. In the case of the Department of Education drafting regulations which dealt with the conduct of teachers in the schools, there was no appeal. This was an order and the teacher had to carry it out. The Committee felt that this was being excluded from challenge in the courts and corresponded with the Department of Education accordingly. That is a poor example, but it is the best I can give you to answer your question.

**Mr. Beaudoin:** Is the criterion of (b) used?

**Mr. Koester:** We have used it on that one occasion.

**Mr. Beaudoin:** Just one occasion?

**Mr. Koester:** Again, that is to the best of my knowledge.

**Mr. Morden:** I can see the problem there. I think it will be usefully shared with the language of Manitoba part (c), Mr. Koester. The language in the Saskatchewan one says that:

> . . .that it is excluded from challenge in the courts; . . .

And the "it" seems to refer back to the word "regulation". The Manitoba one says:

> (C) The regulations should not exclude the jurisdiction of the courts.

which seems to imply that they should not contain provisions providing for a decision to be made which would exclude the jurisdiction of the court to review those decisions.

**Mr. Morden:** The illustration which you gave seemed to be of a decision made by an educational authority under regulations from which there is no appeal.

**Mr. Koester:** Yes.

**Mr. Morden:** You said you relied on (b); I see. You give it a pretty wide interpretation.

**Mr. Koester:** As a very quick answer, I would say that we attempt to accomplish under our (b) what Manitoba attempts to accomplish under (c).

**The Chairman:** Is the Committee agreeable to seeing if Mr. Rutherford had any comments to make by way of dialogue? I am not suggesting that there is any necessity for him to prove that Manitoba excels Saskatchewan in this or any other realm, but as we are dealing with the basic principles it might be of some help to us if we had some discussion as to the relevant merits of the two systems. Mr. Rutherford?

**Mr. Rutherford:** Mr. Chairman, the only thing that occurs to me at the moment, is a matter to which Mr. Koester eluded. We had this discussion on the train, and I think we are agreed in practically every point but one. If I may speak frankly, I feel that the provision that the Committee only brings matters to

the attention of the House and does not make recommendations is a weakness because it leaves the duty or the right of bringing the matter up to the individual members and they may never do so. The question was raised, I think yesterday, that somebody might think that the Committee criticized a regulation by way of saying it should be repealed or amended. This might practically evolve the defeat of the government if the House concurred in it. We have never regarded it in this way in Manitoba. To begin with, the Committee definitely does not discuss policy, or the merits. They confine themselves to these points that are set out. They do not and have not discussed the merits of the policy at all, so that I would think, there is, on that ground, much less chance of anybody raising this point. In actual practice, as I mentioned this morning, the Committee has proceeded in a nonpartisan way, and the question has not been raised. When we have found it necessary to criticize a regulation, I think it has been realized that there was no sinister motive behind the regulation; and that it was due to oversight or inadvertence in the Department that was concerned with preparing it. Nobody, as far as I know, has ever thought of raising the issue that this involved a defeat of the government.

The result is that when our Committee reports with a recommendation and the House concurs, the statute says, "on receipt of that copy of resolution the regulation making authority which may not be the Lieutenant Governor in Council 'shall proceed' as set out in the resolutions of the House". And to my mind, with great respect, this brings a very definite end to the matter. That is all at the moment.

• 1645

There was one other minor matter with regard to these old regulations. In 1945, when we established our Regulations Act, we did as Saskatchewan did, and provided that all regulations which were not registered by the end of that year were nul and void. The departments got busy and went through all their regulations, bringing them up to date and registering them with the registrar, otherwise they would go out of existence. We got rid of all the old deadwood that way. A period of 15 years passed before this new procedure came in, and as I mentioned before, we did not attempt to go back and check all these 15 years of regulations. Perhaps it should have been done, but it was not.

**Mr. McCleave:** I wonder if we could have the other half of the trained conversation on the point raised by Mr. Rutherford.

**Mr. Koester:** My view with respect to committee reports is that the learned clerk of the House of Commons, Arthur Beauchne tended to freeze procedures by some of his citations. One of the procedures, which in my view has been frozen, is that of requiring concurrence of the House in committee report. The House establishes a committee to examine a particular matter. The committee examines that matter and presents its report. What difference does it make, whether or not that report is concurred in by the House? If the House wants to take action, if by way of bringing in legislation which might have been recommended by a particular report or by way specifically of moving a resolution to have a regulation annulled, all well and good. But the House has the opportunity to act on the advice of a committee which has thoroughly studied a matter. The fact that the committee report is not concurred in might suggest, under present procedures, that the House for one reason or another was not prepared to accept somewhat of a cloud for having done something that the House was not prepared to approve of.

On the other hand, the fact that a committee report has not been concurred in would certainly not prevent a government from taking action by way of a resolution, legislation, something in the estimates to cover a certain case. I cannot quite see the importance attached to concurring in a report, particulary when concurrence may be a fairly complicated procedural matter in that the House may be quite happy to concur in half the report, but not in the other half. I believe the House of Commons has had recent experience in this sort of thing. I also think that the British practice does not require concurrence before a report is effective. Reports can be concurred in, certainly there is no reason why they could not be, and I am simply arguing that they need not be, or that a resolution could be brought in. I am thinking of a special committee of the House of Commons at Westminster which examined the question of televising proceedings, and it made a recommendation to the House in the form of a report. No motion was put down for concurrence in the report, but the government did introduce a resolution based on the report to introduce televised proceeding for an experimental period. I understand that resolution was lost by one vote. The committee's report was there, and the House could not change it; It was the committee's opinion. Concurrence or otherwise by the House was not considered to be necessary, and a resolution arising from the report was, in fact, defeated.

**The Chairman:** Mr. Beaudoin are you moved to any comment on this?

**Mr. Beaudoin:** I think we are moving in that direction.

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I think it is true to say that not all reports need to have concurrence. Nothing would prevent the House

or the government from going ahead. I think we are moving in that direction.

**Mr. Koester:** I am sure that this gives greater flexibility to committees. The committee is not always thinking as to what is going to happen if they report in a particular way.

**Mr. Beaudoin:** I mean the concurrence is not always mandatory.

**Mr. Koester:** No.

**Mr. Beaudoin:** Well, this is also the case.

**Mr. Koester:** As I understand present procedures, if a committee report contains a recommendation, that recommendation is not regarded to have any effect unless the report has been concurred in by the House. However, if the committee reports simply facts, concurrence is not required. Therefore, our regulations committee attempts to report simply facts, without making a recommendation as Manitoba does.

A committee may examine regulations and make a recommendation to the House in the form of its report but whether or not that report requires concurrence is another question. I think it would and certainly if I were Clerk in Manitoba, without the concurrence of the House, I would not have the responsibility of advising the department that the House had recommended the revocation or amendment of a regulation.

**Mr. Morden:** As you have indicated, in Saskatchewan you have never reached the stage of actually making a report to the House.

**Mr. Koester:** We have made reports which simply say that the Committee has examined so many regulations and does not choose to draw any of them to attention.

**Mr. Morden:** I suppose you have made no adverse reports?

**Mr. Koester:** Yes, we have not drawn any regulations to the attention of the House on any of these grounds.

**Mr. Morden:** I suppose that one aspect of merely reporting fact, and not a recommendation, might well be academic if there were a report expressing an opinion against a particular regulation or parts of it. Surely at least one member of the Committee in the House would move that the Regulations Act provision be complied with.

**Mr. Koester:** I would certainly think he would.

**Mr. Morden:** It would not just die in the House. It would be most unusual if it were to die in the House.

**Mr. Koester:** I would think it would be most unusual if the committee drew a regulation to the attention of the House that it would die there. I am sure it would be followed immediately by a resolution as required by the Regulations Act.

**The Chairman:** Are there any further questions? We have had a very interesting dialogue, both this afternoon and this morning, and although it is partly by coincidence that these two learned gentlemen have been with us at the same time, I think it has been of real assistance to have been able to combine them both on the same day and in a sense, both in the same afternoon. Is is only through argument of the points involved in the other systems of operation that our Committee will arrive at the best decisions in establishing a new type of committee.

I have already expressed our appreciation to Mr. Rutherford for his appearance this morning and before we adjourn I would like to express our thanks to Mr. Koester for coming and speaking to us this afternoon.

Thank you, very much. The meeting is adjourned.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

Chairman: Mr. MARK MacGUIGAN

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 1

TUESDAY, MARCH 4, 1969

Respecting

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

WITNESS:

(*See Minutes of Proceedings*)

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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## MINUTES OF PROCEEDINGS AND EVIDENCE

No. 7

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TUESDAY, JUNE 3, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS:

(*See Minutes of Proceedings*)

20341—1

SPECIAL COMMITTEE

ON

STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

(Quorum 7)

Timothy D. Ray,
*Clerk of the Committee.*

# MINUTES OF PROCEEDINGS

TUESDAY, June 3, 1969.
(10)

The Special Committee on Statutory Instruments met this day at 9.40 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Gibson, MacGuigan, McCleave—(4).

*Also present:* Mr. John Morden, Assistant Counsel to the Committee; and Mrs. Immarigeon, Research Branch, Library of Parliament.

*Witness:* Professor Daniel J. Baum, York University.

The Chairman introduced Professor Baum and invited him to make a statement.

The Clerk was asked to obtain copies of the U.S. *Administrative Procedure Act* and *Public Information Act.* (See *Exhibits Q and R.*)

Following the statement by Professor Baum, and questioning by the Committee, the Committee adjourned at 12.00 noon, to the call of the Chair.

Timothy D. Ray,
*Clerk of the Committee.*



20341—1½

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Tuesday, June 3, 1969.**

**The Chairman:** The meeting will come to order. We have as our witness this morning Professor Daniel Baum, a Visiting Professor in the Faculties of Law, Administrative Studies and Environmental Studies at York University of Toronto, Professor of Law, at Indianapolis Law School, Indiana University. Professor Baum holds the degrees of B.A. and LL.B. from the University of Cincinnati and the degrees of Master of Laws and Doctor of Laws from New York University.

He is presently Editor-in-Chief of the *Administrative Law Review* of the American Bar Association. He has also served as Visiting Associate Professor at the National Law Centre, George Washington University in Washington, D.C., as Lecturer at the Washington Law School, American University, as teaching Fellow and Ford Fellow, School of Law, New York University. He is Chairman of the Trade Regulation Round Table, Association of American Law Schools: Editor-in-Chief of the *Transportation Law Journal.*

He is the author of *The Silent Partners; Institutional Investors and Corporate Control,* published in 1965 by Syracuse University Press and now in its second printing and with a Japanese edition.

He is also author of *The Robinson-Patman Act: Summary and Content* published in 1964 by Syracuse University Press. He has published articles or comments relating to administrative law and often on the Federal Trade Commission in the following journals; the *Harvard Law Review,* the *Georgetown Law Journal, The University of California (Los Angeles) Law Review, The Indiana Law Journal, The Georgetown Law Journal, The New York University Law Review, The Villanova Law Review, The Notre Dame Law Review, The Antitrust Bulletin,* and *The Administrative Law Review.*

He is a contributor to the *Encyclopaedia Brittanica* on Copyright, Trademarks and Unfair Competition and the *International Encyclopaedia* on Unfair Competition, Pinner edition.

It is obvious from this list of credits that we have a very distinguished witness indeed. It is a privilege for us to have him in Canada as a visiting professor and it is especially a privilege for this Committee to have him before us as a witness this morning. Dr. Baum.

**Mr. McCleave:** Could I ask if the J.S.D. is Doctor of Juridical Science?

**The Chairman:** It is, I happen to have the same letters myself as a Doctor of Juridical Science or Doctor of the Science of Law depending on whether you anglicize it or latinize it. I will now call on Dr. Baum.

**Dr. Daniel Jay Baum (Visiting Professor, Faculties of Law Administrative Studies, Environmental Studies, York University, Toronto, Ontario):** Thank you Mr. Chairman. Members of the Committee, I have been asked to address myself to the American experience as it might relate to the terms of reference of your Committee. I hope that my remarks fulfil that burden.

The United States Constitution imposes upon the Congress the rather obvious responsibility of making laws. Yet how difficult that task has become. Many members of Congress spend as much as 80 per cent of their time in matters relating to their constituents. Sometimes it even exceeds that percentage. The Eighty-seventh Congress, of 1961-1962, initiated 20,316 bills or resolutions and passed more than 1000 public bills. Many days must be given to appropriation bills; foreign affairs and national defence make demands undreamed of before World War II: and every session has a half-dozen measures of prime political importance. Matters are not apt to be improved despite an intricate Committee infra-structure, and it is intricate. There are standing committees with full staffs. There are great resources available to the Congress, but I doubt whether these resources and the committee infra-structure will aid significantly in easing the burden of the Congress.

Legislators have been placed in the role of middlemen in helping constituents adjust to government officialdom. Indeed, even the task of law-making is one that frequently ties legislators to minor problems as contrasted to issues of great moment. The press of detail

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has had at least two immediate results. For that business which the legislature considered lowered craftsmanship tended to occur, and, straining under a heavy burden the Congress sought to delegate more responsibility. By creation of the Court of Claims, the Court of Customs and Patent Appeals, and the Tariff Commission, Congress diverted a considerable amount of business that otherwise would have come to it as special or local bills or as amendments to general statutes.

As I think you will see in terms of the remainder of my remarks, one wonders whether the creation of these special agencies, these special tribunals tends to accelerate the work of the Congress rather than to ease the work of the Congress.

**Mr. McCleave:** For clarification could I ask Dr. Baum to explain very quickly what a Court of Claims does?

**Dr. Baum:** It handles claims against the United States government, for example under the Federal Court Claims Act in terms of tax...

**Mr. McCleave:** Like our Exchequer Court, I suppose?

**Dr. Baum:** Yes.

**Mr. McCleave:** Thank you.

**Dr. Baum:** Whatever the Constitutional restraints against delegating legislative authority—whether to the Congress or to what has been called by the Hoover Commission, "the headless fourth branch of government," the administrative agencies—might have been, they were overcome. Even the loose requirement that there be some intelligible standard in the legislation to confine and direct the agency has been dropped. Why? Is it not the sole function of the Congress to make laws, and not some uncontrolled administrative apparatus. The United States Supreme Court answered the questions bluntly: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."

The Congress must be able to fulfil its function in terms of legislation and sometimes the only way that Congress can fulfil that function is simply by a broad grant of delegation to someone else, to some other agency to resolve the problem that the Congress simply has not been able to resolve, or I might add, even properly delineate.

Faced with the mounting problems of a complex, or as Servan-Schreiber would say "post-industrial", urban society, saddled with the role of middlemen, and that is what legislators tend to be the national legislators frequently were both unwilling and unable to do more than recognize a problem and entrust its resolution, subject to fair process, to an administrative agency. It may well be that no other practical choice was afforded the Congress.

How was Congress to shape, to implement its declared policy of furthering competition, for example? National policy demanded national planning and clear, open statements as to the precise meaning of the law. After all, while the principle of competition might be unambiguous, theory had to be applied to ever-changing business conditions and structure. No legislator handling 20,000 bills annually, and spending considerable time, up to 80 per cent as a middleman, could be expected to shape on a current basis new laws that defines competition.

Dissatisfied with a judiciary which it felt usurped legislative authority, and Congress was dissatisfied with the judiciary, the Congress in 1911 began to consider a Bill which culminated in the Federal Trade Commission Act of 1914. The central portion of that Act gave to an agency of five the power to challenge "unfair methods of competition" in commerce, and the Congress made it plain that the agency was neither to be bound by past court decisions interpreting the common law of unfair competition—it was not to be bound, nor to have its findings of facts set aside by any court so long as there was substantial evidence in their support. The agency was given freedom not only to challenge suspected practices that might be unfair but to conduct general investigations armed with the power of compulsory process.

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I am using the Federal Trade Commission here as an example and not for the purpose of condemnation, if you will, of that agency,

but simply as an example from which I hope more general lessons might be ascertainable.

The Congress was aware of the power granted. One of those who helped lead the legislation through the legislature, Senator Cummins, said:

> "I realize that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the Commission might do great harm. I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people...than... upon the abstract propositions even though they be full of importance, argued in the comparative seclusion of our courts."

Chairmen of the Commission, one after another, have cited the charter granted the agency. The Supreme Court has accepted the restraint imposed on the judiciary, and the corresponding discretion afforded the FTC.

Yet, after more than fifty years of experience there is concern. It is fair to say that the Congress, the judiciary, the Executive, and even the Commission itself are disturbed over the use of the Congressional grant. The nature of that disturbance at its root has major lessons, I think, that can be generalized.

First, however, consider the concern. The agency has not given meaning through application to the statute it is charged with enforcing. It has not given meaning to the statute with which it is charged with enforcing. It is true the agency has brought hundreds of complaints in fifty years, one might even say, thousands, yet except for a few areas, the agency has left unsaid, even unconsidered, any program for enforcement, any priorities in terms of questioned practices, and any full statement of reasoning that would give cohesion and body to the legislative skeleton. The agency, in sum, sits with power that sometimes is used without regard to a statutory scheme. I think I would like to repeat that for what I think it means. "The agency, in sum, sits with power that sometimes is used without regard to a statutory scheme" and, perhaps worse, "without regard to the practices of others".

The Commission holds out the opportunity for advisory opinions. Yet, the same agency withholds all but the most skimpy digest to the public in whose interest the Commission must act. One leading American academic—and one who does not sit in an ivory tower, Professor Kenneth Culp Davis of the University of Chicago Law School—said of the FTC: "The Commission's affirmative accomplishments seem singularly small, and whether or not they are offset by the harm it does is unascertainable because the commission keeps some of its major activities secret. Secret! For instance, the commission apparently considers that the major function of providing pre-merger clearances cannot stand the light of day. For all that an outsider can learn, the commission may be freely giving pre-merger clearances that are contrary to the public interest, and contrary to the intent behind the laws it administers.

Now come the general lessons out of this single illustration. Secrecy in the interpretation and administration of law, yields distrust that only increases the legislator's burden as middleman between constituents and officialdom. From the constituent's viewpoint there is no policy, no general regulation, where none has been announced. Why not seek the good offices of a Congressman? Why not ask him to inquire or even intervene? If secrecy is to mark the disposition of individual matters, why not have the agency decide on other than the merits? Who, after all is to know?

Secrecy by definition leaves unstructured a broad statutory grant. None, including and especially the legislature, know how the problems given to an agency to solve are resolved. When what appears to be arbitrary agency action takes place, the public may be frustrated and their confidence shaken not only in the administering agency, but more impor-

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tant, their elected representatives. There then arises a demand for reform, for more specific legislation which a legislature simply is ill-equipped to produce.

The improper use of secrecy, the felt need to make it a pervasive characteristic of administrative behavior, makes the administrative agency not an asset, but rather a liability to the legislature. In sum, the legislature does not discharge its responsibility simply by enacting law, by bestowing further discretionary power on administrative agencies. The legislature has an affirmative responsibility—and I emphasize the word "af-

firmative"—to encourage the open exercise of discretion on the part of administrative agencies.

For a moment, however, consider agency objections. Take the United States Immigration Service which handles 700,000 applications each year of which 35,000 are denied. I really do not know how the experience of the United States immigration service compares with Canadian immigration service, you might be more familiar with the statistics than I. According to Professor Davis almost all applications are handled without hearings. In his important book, and it is important, *Discretionary Justice* Professor Davis relates his encounter with the Service[12] and I would like to quote from what Professor Davis said:

> "When I discovered in 1964 that reasons were stated in support of denials in only a few classes of cases and not in about nine-tenths of them, I proposed to the commissioner and other top officers of the Immigration Service that an alien should always be entitled to have a written reason for the denial of any application. The initial response to this proposal was that it might require a doubling of the staff of some seven thousand and that the proposal was totally impractical. But on further study the service found the idea feasible. For each of thirty-six types of applications it prepared printed cards, listing all the usual reasons for denials. The officer was required to check the applicable reason and to give the card to the alien. I think that this was a great gain. The alien now knows whether he should take some action to change his circumstances and file another application, whether the denial is based on a mistaken impression of the facts, and whether he should fight the case further by going to a superior officer. Furthermore, if the facts are in the file, a superior officer has the means of checking the officer's judgment. The new system, applicable to the United States Immigration Service, has caused no increase in the size of its staff."

"Has caused no increase in the size of its staff". I guess the impractical suggestion was not so unpractical after all.

Open decisions and reasons need not cause an inordinate increase in agency time and money. Indeed, the more complete the decision and the rationale, the more likelihood there is that the agency's case-by-case approach will be eased. There may be more, rather than less conformity to law.

Yet, open decisions in highly sensitive cases could compel an agency to disclose that which might "dry up" its sources of information, or force it to open confidential, or legally protected data. In the proper execution of their investigative role, and aside from problems relating to prosecution as such, police ought not to be compelled to state the names of informers. Nor should agencies be required to set forth trade secrets to the public.

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This is not to say that police should not set, before the public, their general practices, and police do have general practices. Suppose there is a general law against gambling, but the police choose to draw a line of distinction between that which is commercial and that which is social in terms of enforcement. Why shouldn't the police disclose the policy? Who will be hurt by such disclosure? Is it not possible that the police department, through disclosure, will be protecting itself from possible improper pressure? Is it not possible that the legislature can take advantage of police decision-making and improve upon existing legislation? In Indiana, the legislature did draw lines for the state police in a somewhat different, though I think, related area. Except with the expressed permission of the Governor the state police where forbidden from exercising their powers within or without cities, in labor disputes, or in the suppression of rioting or disorder.[13] In that sense it gave, to a chief political figure, the responsibility for saying to the police, "You go in, and you act". Responsibility could be placed where the people could respond.

Unlimited discretion unexercised is not desirable. It is possible to bring openness and draw lines of jurisdiction without sacrificing agency efficiency. Certain kinds of financial data may be confidential. But this has not stopped the Securities and Exchange Commission, dealing with the most sensitive kind of financial information, from rendering advisory opinions available to the public through the device of hypotheticals. Names are not disclosed, and the salient facts relied upon for decision are set out. From such opinions the public, the courts, the academics, and the legislature learn not only the specific thrust of general law, but also the rationale that impels the agency to conclusions.

Open decisions, advisory rulings, policy statements can not only make for efficiency and a just society which, I might add, is as much a goal in the United States as Canada, but they may allow the agency to safeguard that which merits protection. Still, there is at least one other concern in any formal policy of openness. By necessity open rulings cut back the area of discretion. What of the new agency charged with new responsibilities in an area largely uncharted? What of the agency that desires to experiment, that wants flexibility as it probes toward answers? The decision of yesterday might not fit the needs of today. The policies of today might be based on guess, and guess may be all that realistically is available.

Let this be clear. The exercise of discretion does not deny the agency the right to change course. Quite the contrary is true. Laying before the public the fact of experimentation is a kind of implied expression of confidence in the citizenry which, in turn, could evoke participation—if you will, participatory democracy.

The very fact of openness might bring to the agency those new facts which will allow for still more meaningful experimentation. Why should the agency be compelled to rest solely on its own resources, and, perhaps, for that reason feel somewhat inhibited in changing position, if it can seek the aid of the entire community? Openness in agency decision-making is the friend, not the enemy, of change.

Through appropriations and special committees Congress has sought to review and determine the course of agency action. Through specific legislation such as the Administrative Procedure Act and the Freedom of Information Act—enacted properly on July 4, 1966—Congress has announced a national policy of openness. Through the creation of the Administrative Conference of the United States, Congress and the President have opened a forum for ongoing communication among the legislative and executive and administrative branches of government together with the public.

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These are only beginnings. "We need, said Professor Davis, not only empirical studies but also...more philosophical digging. Our jurisprudence of administrative justice, of police justice, of prosecutor justice—of discretionary justice—is underveloped. *We need a new jurisprudence that will encompass all of justice, not just the easy half of it.*"

I might say this in conclusion: It seems to me that discussion in the United States by academics—and I might add, among legislators—relating to the role of the courts in terms of judicial review and statutory instruments as they relate to administrative agencies in terms of judicial review, may be desirable, but in terms of any scale of priorities the role of the legislature in inducing, encouraging and, if necessary, forcing the open exercise of discretion by administration agencies, I think, will accomplish far more. Thank you, Mr. Chairman. (For footnotes to submission, see. *Appendix E*)

**The Chairman:** Thank you, very much, Dr. Baum. There are so many points at which we could now begin that it is hard to know which is the most appropriate. Perhaps I might, myself, just ask you this broad question in the beginning: You have now been in Canada for some time and I am sure that you have been making some notes about Canadian administrative procedure, and I wonder if you would have any general comments to make on the Canadian administrative process, particularly as it might relate to our interests?

**Dr. Baum:** I have been studying, as closely as I have been able, Canadian administrative procedure. I am hesitant to address myself specifically to any agency or to over-generalize, because I feel that it is important for me to have a thorough understanding and to live in a situation for a good while before I attempt that kind of generalization.

I would say, though, that it does seem to me that many of the same kinds of problems that face American administrative agencies, British administrative agencies, or Australian administrative agencies are just as applicable to the Canadian scene, because I think the kind of problems that I have been trying to talk about are more or less universal problems. They may even be applicable in the Soviet Union.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** May I ask some questions of Dr. Baum? First, may we go back to your example of the FTC. Who appoints the chairman and members of the FTC?

**Dr. Baum:** The Federal Trade Commission is one of several of the great independent regulatory agencies that cause Mr. Hoover to refer to them as the headless fourth branch of government. The commissioners are supposed to be independent; independent to an extent of both the President and the Legislature. There are five in number. They are appointed by the President with the consent of the Senate. No more than three may be of the same political persuasion, though in reality I think you can see that if you have a democratic President, the kinds of Republicans that he might appoint might not reflect the same kinds of Republicans as if you had a Republican President.

President elect Kennedy, following a report submitted to him by Professor Landis in 1960 before he came into office, had recommended and implemented with the consent of Congress reorganization bills as applied to administrative agencies.

Under the terms of some of these reorganization bills, the power was given to the President to name the chairman of the agency. That is, you have your chairman selected and approved in the manner that I indicated, but

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of the five, the President can name the chairman of the Federal Trade Commission, of the Securities Exchange Commission and, I believe, of the Federal Communications Commission. There are separate reorganization bills.

This is an important power because the chairman, in turn, has control of the administrative apparatus of the agency in terms of hiring and firing subject to civil service rules, and he may approve for example, certain kinds of investigations. The administrative agencies, to a great extent—at least the great regulatory agencies—were tied more closely to the executive as a result of these reorganization bills. Does that answer your question?

**Mr. McCleave:** Yes, it does.

**Mr. Gibson:** I have a supplementary. Are there any educational qualifications in the sense of a requirement that these members of the commission have experience in law or political science?

**Dr. Baum:** No.

**Mr. Gibson:** Do you think it would be desirable if there were?

**Dr. Baum:** I suppose at one time when I was working on my J.S.D. I might have thought it desirable, because if I had one everybody else should too. I must say, however, that I have seen people come to agencies without being distinguished by holding a law degree and they have done a good job, in fact, maybe even a better job.

I must say, I had the experience last week—I suppose I can talk about this—I held a communications conference at Osgoode Hall Law School, York University and I met for the first time Dr. Juneau and Mr. Boyle, and as individuals I was highly impressed with them. I do not believe either gentleman holds a law degree, yet I think they have great sophistication in terms of what they are about. I might not like all their decisions, but I think one has to respect them, and the imagination they bring to the job. Mr. Justice Black in a television interview about a year ago, when the question was put to him, "Could you picture any non-lawyers sitting on the Supreme Court?" said, "Yes." The person he named as an example was Mr. Walter Lippman. Anyone who has read his book *Public Philosophy*, I suppose might feel that he would be a good man to put on the Supreme Court. Sometimes I think courts tend to be overly legalistic and thereby lose their function in terms of serving the public.

**Mr. Baldwin:** Might I say that I thoroughly agree with that. After practicing law for 30 years, it took me 10 years after that in the House of Commons to become a reasonably good member of Parliament because I had to unlearn all the improper things I had learned as a lawyer. So, I would say that I agree with you.

**Mr. McCleave:** For those members of the Bar Association who read this report, I disagree very thoroughly. I think in Mr. Baldwin's case he was good from the word go.

Professor Baum, again on the FTC example, does it report to a joint Congressional Committee or a Committee of either House?

**Dr. Baum:** The Congress maintains watchdog Committees, not designated as such, but realistically performing that kind of function as to all agencies. The Appropriations Committee of the House, because revenue legislation must begin in the House, performs this function through a structured subcommittee system. The budget is not submitted by the

administrative agency for that particular agency. The budget is submitted to the Congress through the Bureau of the Budget, which is under the control of the President. If I may just go back a step, so that you might better understand how the system works—at least as I have seen it work—the Bureau does not perform the function simply of accounting, or of saying: "How much do you want and is it in the proper form?" It performs a policy-making function and it may say to an agency like the Federal Trade Commission,

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"Spend more time in the area of voluntary compliance and less time in the area of litigation", and accordingly will shape a budget.

That budget is then submitted to the Congress. Hearings are then convened by the designated subcommittee and it is always the same subcommittee. Therefore, you have the same people year after year, assuming they are re-elected, serving and questioning.

In the course of their questioning of the Chairman and members of the Commission, who must appear before the subcommittee, they do a rather complete job of asking for an accounting of what the agency did and in a sense allowing the agency the opportunity, if circumstances are politically salutary, to make a new bid for a different kind of appropriation.

In addition to the appropriation committees, there are special committees of the House and the Senate where you see specific areas of interest thrust forward. For example, the House and the Senate Select Committees on small business have a real concern over the activities of the Federal Trade Commission. The Federal Trade Commission, to some extent, is their agency in terms of the fulfillment of its function. Therefore, when the agency once provided an advisory opinion in the area of joint advertising and said that joint advertising, that is, taking a single page ad and having several competitors, small businessmen, pay for that ad, was price fixing and therefore unlawful in an advisory opinion, the House Select Committee on Small Business called a special hearing and said to the agency, in essence, in that special hearing, "You are wrong," and issued a report and the agency, in essence, reversed its stand. There is that kind of surveillance, that kind of watchdog function.

**Mr. McCleave:** The matter of secrecy that you also mentioned in your presentation this morning, was this a right that was given to them either expressed or implied in the Statutes that set them up?

**Dr. Baum:** The secrecy is pervasive in government and it is not malevolent, it is not evil. You could have a statute that says, "Be open," and still be secret. It is simply the way agencies operate as they see their interests in terms of fulfilling their responsibility.

**Mr. McCleave:** Do these House Committees have to tackle them like oysters, to pry into them and find out what pearls are there? Is this right!

**Dr. Baum:** Yes, which points to some extent to the limited capacity of a standing committee to achieve much. It just cannot. If you have an agency with hundreds of thousands of cases passing before it, what can a standing committee, powerful though it be, do in a few hours to change the agency?

**Mr. McCleave:** You said in some cases the agency has been directed into a new line of approach to its decision-making processes. Is that not what you told us a few minutes ago?

**Dr. Baum:** Yes, and what is happening in the States, and I consider it a good thing, is that for the first time some academics, like Professor Davis and I hope myself, and some

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legislators are beginning to address themselves to the fundamental question, and it is the fundamental question, of helping agencies to restructure their discretionary functions, which account for about 90 per cent of all their work, really. Most practising lawyers do not really face tough legal issues, because even after the legal issues are resolved, discretion still rests in the agency as to what it will or will not do. Very seldom, in my own practice, have I gone before agencies and said: "You do this." I have often gone before agencies with hat in hand. Our concern in the States has been to help agencies restructure their operations so that there can be an exercise of discretion that will be open. I think the legislature can do much in terms of a restructuring, not in terms of saying to an agency, "You shall exercise your discretion in this way."—that may be up to the agency—but in helping the agency to set up patterns and structures through the exercise of discre-

tion so that you might better understand, as legislators, just what they are doing.

**Mr. McCleave:** On these subcommittees and committees that examine the work of these agencies, you said, "What are they able to do in a few hours?" I do not know whether that was a rhetorical exclamation or frustration or what it was, but may I ask you this: would they not have permanent officials who could maintain some kind of liaison and, indeed, study of these particular agencies and then make a report to the specific committee, or is it left entirely to the Senators and Representatives to do all this digging?

**Dr. Baum:** Each committee has, by and large, a rather full blown staff of, on the whole, high-priced people, which, if they are high priced, hopefully means that they are able. They can inquire into what an agency is doing. Sometimes they can even demand files. But unless the procedures are set up there is no way of being reasonably certain that the agency is acting according to a process by which you want it to act. I have perhaps not stated that very well, but that is about it.

**Mr. McCleave:** My final question, Mr. Chairman, arises out of the American laws, the Administrative Procedure Act and the Freedom of Information Act. Also there is the fact, Professor Baum, that we had some explanation of the guidelines used in the United Kingdom and in Saskatchewan and Manitoba with regard to delegated powers which may be used within the framework of what the legislators intended, or outside that framework. I presume you have studied these seven or eight guidelines yourself. Are you familiar with them?

**Dr. Baum:** Are you talking about the Freedom of Information Act? No, sir.

**Mr. McCleave:** I do not know what is in those Acts, but I have some idea what the practice is in the British House and also in the Saskatchewan and Manitoba Legislatures with regard to screening the Orders in Council and the regulations that flow out of delegated authority.

**Dr. Baum:** Let me say very emphatically that in the United States not all rules of agencies—or a good many rules of agencies, putting it another way—never reach the public for questioning. It is really that to which I am addressing myself. The Administrative Procedure Act and the Freedom of Information Act in the United States allow certain kinds of rulings. Once the rules are publicized, and if they have an effect that is injurious to a party, there is a route for judicial review in terms of questioning those rules.

There is also the route of the Congressman. The cigarette advertising rule of the Federal Trade Commission was one in which the cigarette lobby, I think, had a fairly effective moderating role. But in terms of delegation and control over delegation by the legislature, in terms of the exercise of delegation by the agency, there is no control as such except on

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a case-by-case basis. There are no guidelines as such that are laid down by the Congress, in terms of one delegation being proper or improper. There is the Administrative Procedure Act which spells out how rules should be promulgated. But many agencies live in terms of non-compliance with the terms of that Act.

**Mr. McCleave:** We are dealing with two problems, of course, the one to which I addressed my question and the other to which you addressed your speech this morning.

**Dr. Baum:** Yes.

**Mr. McCleave:** Thank you, Professor Baum. I do not want to trespass on the Committee's good nature, but would it be possible to obtain copies of both these Acts for the assistance of the Committee?

**The Chairman:** Yes, the Clerk could circulate copies of both those Acts. Mr. Baldwin.

**Mr. Baldwin:** In the United States there is a very marked constitutional separation between the executive and the legislative groups, and you made reference to the fact that many of the appointments are made only with the advice—is it advice or consent?

**Dr. Baum:** The consent of the Senate.

**Mr. Baldwin:** I am trying to lead you, and then perhaps ask you some leading questions.

**Dr. Baum:** Like a good lawyer.

**Mr. Baldwin:** We have found that there is an even more serious problem in Canada where the appointments are made without any reference to the legislative body and where there is not that separation. So there is

not the freedom that does exist or could exist in the United States to challenge, as a legislative body, without the intervention of an executive. In other words, the government, sitting in the House of Commons—and I think this applies to all political parties; we know it does—can and does exercise, from time to time, influence on the legislative group, on the members.

These facts are not present in the United States. If this has become a problem in the United States, then possibly it could be far more of a problem in Canada.

**Dr. Baum:** I would think—and it is only a guess, and I say it with a sense of caution—perhaps the problem in Canada may be greater than in the United States in terms of understanding what administrative agencies are doing, that is, how they are using the legislative power entrusted to them.

**Mr. Baldwin:** We recognize, as sensible people of course, that it would be utterly impossible to consider anything but a very small fraction, a very minor percentage, of all issues that could arise covering statutory instruments or the exercise of power and discretion by bodies that are not judicial and which lie outside the ambit of Parliament. If machinery is established which will permit a fairly careful study of the instrument and, in some instances, if there is an opportunity to deal with certain individual cases where there has been an application of the power of the statutory instrument, do you think this could have some salutory effect on the agencies themselves and on the drafting of the Orders in Council and the statutory instruments?

**Dr. Baum:** I would think that it could. Perhaps you might want to consider the structure of the Administrative Conference of the United States, or something that has somewhat the same kind of concept behind it, that is, a statutorily created form financed by the gov-

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ernment by which you bring together members of the legislature, members of the executive, administrative agency heads, informed members of the public, with a view toward first understanding the processes and problems of the administrative agencies, and then trying to make recommendations on an on-going basis. These recommendations could be addressed to the Minister or to Parliament, or they could be addressed to the agency itself to the extent that you would not need that kind of high-level clearance. But you would establish a form for a study of administrative agencies on an on-going basis, not on a one-shot kind of basis. The same kind of form in time could perform the function of ombudsman, not in the sense of individual cases where there has been individual injustice—not that those cases should not be treated; they certainly should—but in any scheme of priorities, in any system of values, it is perhaps more important to prevent similar injustice from occurring in relationship to other individuals and to be able to learn and capitalize on experience. Toward this end, the conference, looking at problems from an institutional point of view, could correct areas of injustice when it sees them. It does not have to be like an ombudsman sitting there alone, perhaps with a staff waiting and searching out individual problems of injustice. Its function would not be one of seeking out injustice as such, but would be one of trying to create the conditions for the efficient, fair operation of an administrative apparatus, a legislature and an executive. It would not be negative, but positive.

**Mr. Baldwin:** Yes, I agree with that. However, would you not agree that possibly at the beginning the opportunity to deal with certain isolated instances where there were obviously aggravated injustices might lead to, not a jurisprudence, but look at it this way; if every dispute that arose between two people—I am using the Interpretation Act in the understanding of individuals—were to be ventilated in court, the courts could not deal with them. There have been leading cases in both the Supreme Court of Canada, even the Privy Council, the principal trial courts and provincial trial courts. A good lawyer listening to the tale of woe each client brings to him is going to say, "Now look, back-up, you have not a case here". I will not say anything more about what a lawyer might do, but obviously the leading cases are going to determine the advice that he gives to his client so the matter is not ventilated and he is relying then on a reasoned decision based on what he knows is the jurisprudence.

I asked you if, under those conditions, without suggesting that whatever tribunal we might recommend should be bound up inextricably and constantly with dealing in a quasi-judicial fashion with illustrations and incidents of unfairness and injustice and the

improper application of statutory instruments, there are times when such an instance at the beginning might have a very salutary affect and might be useful in setting the context in which the future conduct of the agencies is regulated.

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**Dr. Baum:** I think so. I would only add that it is important to have the confidence of the administrative apparatus as well. I hope that in setting up any kind of ombudsman system and seeking out injustice that it ought to be sought out, and ought to be made right as to the individual, and as to the wrong-doing agency. But it is also important, in seeking it out, not to cause an over-reaction on the part of the agency, and not to put such fear in the agency that its power becomes atrophied. I just throw that out, as a kind of caution or caveat.

**Mr. Baldwin:** I agree with you in this regard.

**The Chairman:** Perhaps, Mr. Baldwin, if I might just throw in a comment which I think might be helpful, I suspect that there is a radical difference there between the U.S. problem and our problem. In the U.S.A. I have the impression that most of the regulation making is done by agencies, whereas in Canada it is, in very large part, done by the Cabinet or by ministerial regulation. For that reason it is more on an ad hoc basis to begin with. I would like to ask Dr. Baum, at some point, to talk about the comparative role which the Presidential proclamation and order have in the U.S.A. which is the thing roughly comparable to our own Order in Council, but I suspect that because the weight of regulation making is in a different place in Canada that this leads to the two sides of this discussion which we know.

**Mr. Baldwin:** There is that distinction. On the other hand, there is the similarity that this legislature is, in both cases, the source of the grant of the authority, and ultimately the source of any attempt to rectify an imbalance which has been established. In its actual implementation in practice there is a marked distinction between the two countries; nevertheless, fundementally I suppose you are dealing with the same issue.

Another question is, would you think that if this Committee were to recommend, and if Parliament and the House were to accept some means such as the establishment of a committee of the House or a joint committee to look at these problems, that the hearings of the committee should be, in certain instances, in public? Now I mention that because I have just been over in the United Kingdom where I sat in on a meeting of the Statutory Instruments Committee and I was quite impressed by it, but they met in the bowels of Westminster and no more of the public were present. I am not suggesting that we look forward to sensationalism but there are times when sitting in public might really be useful and this issue was put to me very plainly by some of the members of the committee who were very unhappy about some of its results.

**Dr. Baum:** I wonder whether there is not a conflict of purpose in terms of a committee on statutory instruments sitting in closed session on an on-going basis. I would think that it would be highly desirable to hold as much by way of public hearing as is possible for the efficient operation of a committee. That is not intended to back out of the question, but it does seem to me that the preference ought to be openness. With the administrative conference, consideration is now being given to publishing, in document form, the background papers prepared in terms of the handling of individual problems coming before the conference, so that there can be better understanding of the resolutions of the conference. I think that so much goes to waste with closed hearings, which ought to be open, unless there is some sound good reason for keeping a hearing closed. There must be a really good reason so that if you projected it to the public you could say the public ought not to know about this, and you could feel in all honesty that if you went before your constituents and said to them, "You have no right to know about this because it dealt with the following matter", you would feel they would understand. That would tend to be my approach to the problem.

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**Mr. Baldwin:** I have another question. Assume that we were to consider something along the lines of the British practice—I mean, purely hypothetical, because I have my own doubts about it in its entirety. As you know, they have fairly limited terms of reference, and the appropriate standing order, which I think has been recently amended,

inhibits the full examination. It is only in certain cases, I think, retroactive and has an unusual impact. You are probably aware of it. Have you given any thought to the extent to which there should be certain limitations and what those limitations might be, both in terms of practicality of a parliamentary committee which has limited time and opportunity and the apparatus.

**Dr. Baum:** I would tend, at the conference or committee, to take a general look at the kinds of problems that it has and then on the basis of its own experience draft a frame of reference to put before Parliament or whomever it will be and then proceed accordingly. My opinion is that it would be undesirable to draft a frame of reference too narrowly. I would not do that. I think you would want to fulfil certain functions and it would be desirable to be open and flexible so that you could constantly, on an ongoing basis, redefine. So, that at the end of the year three you do not find yourself in a position where your jurisdiction is this; therefore, you cannot deal with this related problem, you have to set up another committee and then establish liaison between one committee and another committee and the process tends to break down.

**Mr. Baldwin:** I have one more question and then I am finished. Would it be your judgment that there is an increasing tendency on the part of Parliament, in fact all governments, to seek more power and more flexibility in that they are free to act and to change, without having to go back too frequently to the legislature which grants them their powers? I base that on an examination of the most recent issue of the OECD report which includes, as you know, a very large number of the democratic countries. I note that in their report the accent is all on this flexibility, the opportunity to move quickly, speedily, efficiently and to change course from time to time. They are thinking in terms of monetary crises and exchange and so on, but it is obvious what they are driving at as I see it and I was wondering if this is your view, that there is this phenomenon.

**Dr. Baum:** I think there may be but, if there is, in part, if one can use the term "fault", it is the fault of the legislature for not structuring its functions and its operations in such a way that it can perform and do the jobs that must be done when you are working in a complex, industrial, urban kind of society. When you are building a nation, you must be able to be responsive to the needs of the people. I am using the word "you", that maybe improper of me to do so. I am talking about the States and our problems there. If the legislature cannot do it, then someone else will. That someone else may be an executive, it may be an administrative agency or, I might add, it may be the people themselves.

**Mr. Baldwin:** Of course, I am thinking in terms of some years ago when we had an exchange crisis and the government of the day, faced with this during the course of an election campaign, was compelled to deal with this in part by exercising what has been charged since was an illegal use of the customs tariff regulations and other regulations. I will not go into details but this involved hundreds of millions of dollars. The suggestion was then made you exercised powers that were there but you did not exercise them legally. There were powers but you did not proceed properly. Of course, the government's answer was this was a crisis; Parliament was not in session; if we had waited especially during the course of an election campaign until after the election and the new government, such as it was, was going to summon Parliament by that time irreparable damage would have been done.

This is the sort of thing which governments are now saying. They do exist from time to time. I am not an advocate of it, do not misunderstand me, but this is a fact of life which we have to deal with. We are, therefore, asking for more power and more flexibility; consequently, while we oppose it, I certainly oppose it whenever I can, not always too successfully, I ask if this does not emphasize the need for the sort of control which we are trying to discuss in this committee?

**Dr. Baum:** Yes.

**Mr. Baldwin:** It was a hell of a long question for a short answer, but thank you anyway.

**Mr. Gibson:** Mr. Baum, I am very interested in your presentation. We have been struggling with the problem of a review committee of some kind, statutory review, regulatory review, and it seems to me it breaks down into two aspects: one the complaint aspect or perhaps the investigatory aspect and second,

the corrective aspect. On the complaint aspect, it seems that we run into the problem

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of a multitude of regulations and whether we should set up some form of machinery to check every single regulation or whether we should simply have a spot-checking, something like a law society, accounts division, discipline committee, pouncing on a department and taking the regulations from one department and zeroing in on them and looking them over. Which of those two, if either of them, would you comment on that aspect of it. The second feature is once a complaint has been made, for instance, suppose Mr. MacGuigan of our Committee were to say, "A subcommittee will take a look at the Post Office regulations and would they please read them over and in a month report back what they find"?

**Dr. Baum:** He would be a monster to do that!

**Mr. Gibson:** The practical problems are tough and I wonder whether there should be a different group handling the investigation of the regulations from those who, having seen the complaints, deal with them from a semi-judicial point of view.

**Dr. Baum:** My opinion is that I would not want any group to be burdened with the necessity for reviewing the rightness or wrongness of any agency regulations. Rather, what I think might be useful is to have as an ongoing kind of effort an attempt made to help agencies structure a process of decision-making and a means in terms of that structure for ensuring that those who are charged with implementing regulations know and with reasonable certainty understand the import of those regulations.

**Mr. Gibson:** You pointed out that a fellow at the Post Office would be deluged with regulations. What I had in mind was that he would not be if he picked ten at random. What I am thinking is, perhaps, cannot we do it that way? Start very simply, say, take one or two regulations from a department, look them over and start small, in other words.

**Dr. Baum:** If I had the opportunity or the responsibility of looking at the postal service I would be more interested in knowing how they shape their regulations than what their regulations were. I would be more interested in knowing how then ensured that those regulations were carried forward by those charged with that responsibility. I have been in several agencies in the States where the order was promulgated on high and never reached the man in the field. Those matters, I

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think, are of primary concern because you have entrusted to the agency the responsibility for exercising its judgment about what its decision will or will not be in given matters. I would hesitate to have a legislature step in and do the same thing all over again.

I would rather have a legislature and an executive try to ensure that the agency formulates its regulations fairly in terms of a fair process. Whether the regulations are right or not all the time is not the important matter. Sure, you want to strive for it, but people are only people. Those regulations should be made known to the public except where there is good cause for their not being made known and those regulations should be carried forward in a way that will see that they are faithfully and equally executed.

**Mr. Gibson:** I hope you will not mind my being critical, but we meet, say, two days a week for an hour and a half. How can we possibly spend our time doing that? I thought we were set up to spot check the departments' regulations and perhaps take one from the Post Office, one from the Defence; take a look at the regulation, read it over to see what we find, whether it comes within the power of the officer who made the regulation and if it does not, give it all the publicity in the world then.

**Dr. Baum:** You know best your problems in terms of time. In the United States there is somewhat the same press of time, but the Congress, the executive, and the agencies felt that it would be worth while establishing a conference where people would devote whatever time was necessary with adequate compensation toward understanding the structure of agency decision-making and applying themselves to that structure in terms of fairness and openness.

I think it is a great problem that you have, but I would think that you are saddled with a great responsibility; that is, if you are part of a law-making body, then I think you have to ask yourselves—and again, pardon me for putting it in this way. I use "you". It is just a

law professor's way of doing something, a lawyer's way, and I am also in the unfortunate position of formerly being a newspaper reporter, so I...

**Mr. Gibson:** Very interesting. We like your approach.

**Dr. Baum:** You have to ask yourself, in view of what your responsibilities are, whether those responsibilities can be met in terms of what is available to you. If they cannot be met in terms of what is available to you, then there has to be a redefinition either in terms of primary goal or in terms of acquiring the addition capabilities in terms of making time available to do the job that has to be done. I grant that if you are working on two days a week, or two hours, or whatever it is...

**Mr. Gibson:** In this Committee. There are two or three other committees...

**Dr. Baum:** Sure.

**Mr. Gibson:** ...and there is the House.

**Dr. Baum:** Right. I think there has to be a redefinition of some sort. In the United States we set up the conference and we gave to subcommittees who went out and contracted with people responsibilities in terms of specific assignments, reporting back to the full conference for consideration, deliberation, and resolution. This is time consuming but I think it is much more profitable than—if I may be very blunt—in taking on a seriatim basis a look at particular regulations and asking, "What about this"?

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**Mr. Gibson:** Are you aware that there is some sort of a check on regulations in our Privy Council office? They are not just automatically promulgated. We are not satisfied that this is very good, but there is some sort of review.

**Dr. Baum:** I would be very interested in seeing the documents in terms of the kind of review given by the Privy Council office to regulations. I would be interested to know whether all regulations are presented to the Privy Council office; that is, whether agencies do not have policies that never take the form of regulations but are tantamount to regulations.

**Mr. Gibson:** We hope to put all that in the public records later this month.



**Mr. Baldwin:** That is like asking the bridegroom at his wedding if his bride is good looking.

**The Chairman:** Mr. Gibson, do you have any further questions?

**Mr. Gibson:** Yes. I cannot be satisfied that we would have this deep knowledge. We are required to come up with real practical results after digging into the entire administrative review that you contemplate. I would think this would be more the function of a joint committee of the House with political scientists and sociologists as well as lawyers on it.

It would be interesting to know what Mr. Baldwin thinks of that.

I do not think we have the time in our lives as they are here to do it within a year. Perhaps within four years we might.

We have been told that the control of these regulations needs direct review, and it seems to me that there should be some way. Perhaps it would be some token sampling if every Member of Parliament were given 5 regulations taken over, say, 20 departments and asked to report back to this Committee. We would have some sort of practical or impractical suggestions, but a suggestions that would focus on the lack of any sort of legislative zeroing-in on these regulations.

**Dr. Baum:** I think it may be possible for a legislature to say to the administrative apparatus of government, "We have a policy of openness"—if that is your policy—and we prefer to see decisions of policy wherever possible. We would like to see you as agencies formulate policy wherever possible".

Understand that you do not cut back the opportunity to experiment and to change course, but announce your decisions of policy publicly. State your reasons in terms of your policy decisions. Set a structure for the implementation of those policy decisions. Set it publicly. To the extent possible let us have your experience, generalized, but your experience nevertheless.

These are things that I think a legislature can do quite aside from ongoing study as a matter of national policy. You can state, can you not, how you want your administrative apparatus to act as a matter of national policy.

**Mr. Gibson:** I think there is a lot of merit in what you say. It certainly opened a closed

door in my confused head, and I think that there is a lot of merit in it. Thank you.

**The Chairman:** Are you finished, Mr. Gibson?

**Mr. Gibson:** I was sort of struck with a bomb there. This to me is very interesting. Should part of our function be then to not only review and suggest changes in the regulations but really to dig into the theory and principles and to put some thrust into the administrative law in the country in the form of a paper or reports that would really direct these boards on principle?

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**Dr. Baum:** I think so. I think that in this regard I would urge you, if the experience of the United States has value, to put in a proper scheme of value the role of judicial review, the role of the courts, and what I am saying is the limited role of the judiciary.

**The Chairman:** I am not trying to rush you...

**Mr. Gibson:** No, that is all right.

**The Chairman:** If there is anything else you would like to raise, perhaps you could come back later. I have a few questions to ask afterwards, and I am sure that our Assistant Counsel, Mr. Morden, will have some; so you are certainly welcome to come back at any time.

I wanted to return to the matter that I raised tendentiously during Mr. Baldwin's comments, about the differences between our systems. To highlight that, I will take something at random from the Canada Labour (Standards) Code Act, Section 34D., "(1) The Governor in Council may make regulations." The Cabinet, in other words, may make regulations. This is pretty well the standard phrase in Canadian statutes. Another phrase which occurs from time to time can be found in Section 41, subsection (2) of that Act:

> 41. (2) The Minister may, by order, exempt any employer from any or all of the requirements of subsection (1).

We have Orders in Council which are made by the whole Cabinet, and ministerial regulations which are made by the Minister, which we suspect in practice means that they are made by his department. We can probably say that this is the typical instance of rule-making in Canada. What I think you might help us with, Dr. Baum, is to contrast this with the American system. As I understand it, the Presidential proclamation or order would be comparable in the American system. I do not know whether the power which is being expressed is an original power or if it is a statutory power. If it is an original power, then perhaps that is not comparable. However, what is there in the American system that is comparable to our system of regulations through Order in Council?

**Dr. Baum:** There are original powers in the Executive, in terms of the function of the President as stated in the Constitution, as Commander in Chief of the Armed Forces in the powers attendant thereto, for example. There are, however, statutory powers also given to the President. When the administrative study groups of the United States Congress inquired into the functioning of the administrative agencies of government, they drew no warranted distinction between those administrative agencies which were a part of the Executive and those which I call the great independent regulator agencies, that is the statutory agencies.

The Supreme Court of the United States, in considering regulations promulgated by the President, must be sure that those regulations are constitutional, that is, that the power exercised by the President is power that is either original to him or that comes by grant of statute or—because the President obviously, as an individual, cannot promulgate these regulations—there is a delegation of power: for example, a delegation to the Secretary of Defence to promulgate an industrial security program requiring, for instance, individuals who work for aircraft plants to have an industrial security clearance before they can have access to certain otherwise classified information. In matters coming before the Supreme Court, the Supreme Court asked the question, whether the Secretary of Defence in fact exercised the powers given to him by the President. It wanted to be pretty sure that he had, and had done so properly, because of the constitutional nature of what was done, that

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is, the constitutional impact of the powers exercised on individuals; for example, the man who could not get into the plant because he did not have clearance. Therefore, there was a fairly tight reading by the Supreme Court in this regard.

The powers of the President are rather substantial in terms of original powers. He has the power of Commander in Chief; as Commander in Chief he can take a great many actions without any legislative clearance, without any statutory clearance. Where, however, statute is promulgated, and we are not dealing with original powers of the President, generally speaking, where rule-making powers are granted in a statute, that rule-making power generally reads, "to make such rules and regulations as are necessary for the effective carrying out of the statute;" that is, there can never be rule-making power that transcends the original goals of the statute.

In terms of what I said originally, where you have a broad grant of authority and then you have rule-making power under that broad grant of authority, then you can deal with very substantial rule-making power; however, the Administrative Procedure Act requires that where formal rule-making power is used, that that rule-making power must be used except in given circumstances. There are some exceptions. Except in given circumstances there must be public notice of the intent to promulgate a proposed rule, a statement of the proposed rule, the opportunity to comment, not in terms of cross-examination, not in terms of an adjudicatory hearing, but comment on the rule. When the agency then promulgates the rule, it must do so publicly; it must state the rule, and it must offer a brief explanation of what the rule is intended to mean and why. If an individual is adversely affected by that rule—leaving out the lawyer's questions of when he can come before the court—and he comes before the court at a given point, that rule can be challenged in terms of whether or not it bears a reasonable relationship to the purpose of the statute. Does that answer the question, Mr. Chairman?

**The Chairman:** Yes, in part. What you have told us is certainly of considerable assistance. The broader question is this: how important is this part of the American system, as opposed to regulatory or agency rule-making?

**Dr. Baum:** Agency rule-making, I think, constitutes a very major portion of the American administrative system. I think it is fair to say, though, that a good many agencies fail to use the rule-making power given them and make decisions without those decisions being known. What Professor Davis is urging and what I am urging, at least in terms of the United States, is that rule-making power be used.

**The Chairman:** Yes, what I am getting at, though, is this: Since it seems that in our system the weight of regulation-making is through the Cabinet or through ministers, how much of what you have suggested as a policy of openness, which obviously could pertain to regulation-making by agencies, could pertain to and should pertain to regulation-making by the Cabinet? Perhaps I should add that there is a long tradition of Cabinet secrecy involving everything that goes on concerning the Cabinet: those Cabinet Ministers who are members of a Cabinet committee, the numbers of a Cabinet committee, even the names of Cabinet committees, and . . .

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**Dr. Baum:** Recognizing my earlier expressed caution in terms of speaking of Canadian experience, I would say that I can see no reason why regulations promulgated through the device of Cabinet could not be made public; that is, why could a minister not give public notice of an intended regulation, the opportunity for hearing in terms of comment, the promulgation of a regulation that bears a reasonable relationship to whatever scheme it is that he is attaching that regulation to. Why could there not be fair process. What is the need for secrecy? What is the legitimate need for secrecy? This is the kind of question I would ask.

**The Chairman:** Yes. I would like to follow that up in this way. To what extent would these suggestions you have made be relevant to regulation-making by the U.S. Cabinet or by the President bringing us back in the context of the American system because I think that you were speaking largely in the context of regulation-making by agencies.

**Dr. Baum:** When we are dealing with agencies under the control of the President the same rules that I expressed earlier will be applicable. When we are dealing with certain matters, for example, relating to the armed forces, they might not be applicable. There seems to be a growing tendency even there for openness of announcement of decision policy, even in terms of an individual coming through the courts in terms of a writ of habeas corpus and asking what the Vietnam war is all about.

**The Chairman:** Yes. This relates to the dialogue you had with Mr. Baldwin because I believe that since regulation-making by the Cabinet here appears to be more on an ad hoc basis, there is probably for that reason a greater tendency for our parliamentarians to think of an ad hoc form of scrutiny. Whereas, obviously, you have been suggesting a more generalized version of this process to us. But if the regulation-making is on an individual basis, I suppose there is a parallel reason, at least, why the regulation scrutiny should be on that. Your advice to us would be that both should be put on a more general basis.

I have quite a number of other questions, but I will put one to you before I ask our counsel for ones that he might have. You talked a number of times about structuring the process of decision-making. Would you care to be more specific about the kind of structuring that you have in mind. You obviously referred to some of the specific aspects of this, but could you state in a fairly concrete way how a legislature might insist on the structuring of a process of decision-making.

**Dr. Baum:** I think through legislation that would require actions as to policy to be formally stated except for good cause to the contrary; that agencies be encouraged—this could be done through report—to formulate policy; that the use of advisory opinions that are published be encouraged and if agencies feel they do not have the power to render advisory opinions, that that power be granted to the agencies. These are some of the devices that could be used as well as the use of reports on an on-going basis.

**The Chairman:** You mean reporting the decisions?

**Dr. Baum:** Yes.

**The Chairman:** Despite what I said a moment ago about giving the floor to the counsel, there are several other things I want to ask you about at this point. You have spok-

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en about the fact that secrecy in the U.S. regulation-making system is still pretty prevalent despite the official policy of openness. One is tempted to ask at this point what is the use of an official policy of openness? How much effect has it had? Does it refer to all forms or regulation making and why is it more effective with respect to those to which it does refer?

**Dr. Baum:** One could turn the question and ask what would happen if there were not a policy of openness; that is, would we tend to have less openness than we now have and my guess is we would. Rather the question is how can we encourage more openness. I really think this can only be done by on-going discussion and communication with the agencies which comes another key recommendation and that is the use of something like an administrative conference.

Professor Davis has shown with his illustration with the U.S. Immigration Service what can be done. I have worked with agencies in the past. At one time I was an employee of the federal trade commission and attempted to help establish a trade regulation rule division and the advisory opinion division, both of which whose function is to render opinions for rulings in advance of the actual problem being presented through adjudication. In addition to that, I encouraged and there was established at the agency—not necessarily through my encouragement—the office of program review. That is, through legislation why could not the Parliament establish in agencies or in selected agencies a program review unit, the function of which should be to help establish a program for the agency in terms of a utilization of manpower and moneys so that the agency can be somewhat more effective? Instead of having an agency consisting of five bureaux none of which may know completely what the other is doing and each of which is going after its own goals. A program review unit could bring cohesion and could articulate for the benefit, not only of the agency, but of the public and the legislature, just what that agency is about, what it is doing.

**The Chairman:** Mr. Morden.

**Mr. J. W. Morden (Assistant Counsel to the Committee):** Professor Baum, if I might refer to one sentence in your written presentation as a basis for discussion. Beginning at the bottom of page 1:

> Even the loose requirement that there be some intelligible standard in the legislation to confine and direct the agency has been dropped.

You are referring to the United States law on this. Can you formulate in any satisfactory way how enabling legislation should be

drawn? I think you would agree that the grant of power to make regulations has to have some definition in it or some delineation of scope.

**Dr. Baum:** It certainly would be desirable, yes.

**Mr. Morden:** You say it would be desirable?

**Dr. Baum:** Yes.

**Mr. Morden:** Would you agree with the position, if we can give some meaning to the words, that as a matter of good law-making, it is not necessary to insert in the enabling legislation, an intelligible standard?

**Dr. Baum:** You tell me whether I am correct in this judgment I am about to give because I am not sure that I am, but tell me if I am. In Canada, or in the Commonwealth by and large, the courts will look at the legislation and be bound only by the face of the legislation. The courts will not look behind the legislation in terms of legislative intent. Is that a proper statement, by and large?

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**Mr. Morden:** I am sure the Chairman could perhaps give a more satisfactory answer, than I, but I think, from what little I know, that American courts interpret legislation more imaginatively than do Canadian or English courts. But principles of interpretation are quite malleable I think in all courts, depending on what result the court wants to achieve.

**Dr. Baum:** The reason for throwing off the statement is this. If legislation is needed to make the courts more malleable it might be desirable if you had such legislation which would compel the courts to look at legislative history. Then I think that a great deal could be done, at least in terms of major legislation, in terms of establishing rather clearly what it is that is of concern to the legislature. In the States we have a clear process for looking at legislative history and any tax lawyer, any trade regulation lawyer, any securities lawyer knows where to go to find out what that legislative history means section by section, clause by clause. I am a securities lawyer, a trade regulation lawyer and a labour laywer. If you could do that, if you could get legislation which would compel the courts to look at legislative history then, through the device of legislative history, through committees, through conferences, though debate, through the use of more managers and so forth, you could establish very clearly, with some legislation, what it is that you are about, what it is that you want, and this could act as an effective anchor on the use of rule-making power and I think it would be quite useful. That was my reason for mentioning at the beginning the difficulty in terms of judicial review.

**Mr. Morden:** I gather that your general position on this question is that the result arrived at in the United States, which generally appears to be that legislative grants of authority make rules that can be quite wide and do not have to contain an intelligible principle works against a background which allows courts to look at legislative history and perhaps distill come channels, whereas it might not work in Canada because judicial interpretation of statues is more restricted.

**Dr. Baum:** Yes, and that is why perhaps the problem may be greater in terms of setting up some sort of mechanism for inducing a structuring of agency decision-making in Canada than it is in the States, though I must say that it is pretty important in the States. I would add, too, that in the introduction of legislation I would think in Canada, and I know it to be true in the States, the role of the Attorney General, the Minister of Justice, can be quite significant—whether it is or not is another matter. But, for example, on advising the Congress when the executive is proposing legislation through a particular congressman on the constitutionality of that legislation, the Attorney General also performs an important function in the States. By way of example—when the Freedom of Information Act was promulgated the Assistant Attorney General in charge of the Office of Legal Counsel was asked through the Attorney General, and thus the President, to promulgate guidelines applicable to all agencies in the enforcement of the Freedom of Inforformation Act so that there was a standard applicable to all agencies of the federal government. The same office of legal counsel provided the staffing for the administrative conference. So that the use of the Minister of Justice—again, understand the caution that I am using in these examples—in terms of advising as to the intent and, if you will, constitutionality of certain legislation concretely in terms of making available memoranda that has guided him to relevant parlia-

mentary committees could be useful. And in terms of the implementation of legislation, again, the preparation of memoranda or guidelines for relevant agencies can be useful in creating a form of standardization uniformity.

**Mr. Morden:** Thank you, Professor. I wonder if I could ask one or two questions relating to the operation of the Administrative Procedure Act as it bears on rule-making.

**Dr. Baum:** Yes.

**Mr. Morden:** You referred to it and indicated that it does something to encourage openness in rule-making. Has it in your view achieved a significant improvement in the processes of making rules over that which existed prior to 1946?

**Dr. Baum:** Yes. The use of the federal register, for example, is a result of the publicaton of rules.

**Mr. Morden:** As a practical matter, and I have a copy of the Act here, Section 4 deals with law-making generally. I believe Professor Abel, a previous witness before this Committee, referred to this. This sets forth minimum standards—maximum standards can perhaps be found in individual statutes—and, in part, reads as follows:

> General notice of proposed rule-making shall be published in the Federal Register.

Then it confers certain rights on persons affected. But it gives the agency power to except itself from the general requirement merely by making a statement, and this is quite a narrow question, to the effect that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest. Have agencies abused this power?

**Dr. Baum:** No.

**Mr. Morden:** They have not.

**Dr. Baum:** No, because in the final analysis they would be forced to justify the use of that reason before any reviewing court.

**Mr. Morden:** I see. They have to make the finding and then justify it. I think some people would think that any hurdle, procedure or step that an agency has to encounter in getting on with the job could be characterized as impracticable.

**Dr. Baum:** No, I think that the people who staff agencies by and large, like most other people, want to get on with their job and by and large want to do a decent job. I think there is in every agency of every government a core of people who want to do even a first-class job and they want to do what is fair, what is decent, and I would not impute to an agency malevolent purpose or gross

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negligence. I do not think that they always try and take the easy way out. I think sometimes agencies work very hard to do what is fair, sometimes to their own detriment in terms of getting on with the job. It seems to me that establishing lines of communication on an ongoing basis between the legislature and the agencies and the executive and the public at the very least would serve to encourage confidence, one in the other.

**Mr. Morden:** The Act goes on in Section 7 to lay down a hearing procedure which I understand is to apply where the relevant statute provides that regulations shall be made after a hearing.

**Dr. Baum:** Yes, this is where by statute the agency is required to engage in rule-making on the record.

**Mr. Morden:** On the record.

**Dr. Baum:** There are very few agencies that have this kind of responsibility. Those that do have an impossible job. The Food and Drug Administration is such an agency. A rule-making hearing on the record is one that is adjudicatory in nature with the right of confrontation, cross-examination, and contains the kind of evidence that must be entered in an adjudicatory type proceeding subject to the rules of the Administrative Procedure Act.

When you are dealing with a rule that involves literally hundreds or perhaps thousands of people, can you imagine the difficulty in holding a rule-making proceeding on the record? It may be nicely judicious, but it is thoroughly impractical and in the final analysis works to the detriment of the public.

**Mr. Morden:** That is pretty well the question I was going to ask you; that is, how can you judicialize to that extent what a legisltive function is? And you say that it does not work.

**Dr. Baum:** I think, perhaps, really, that kind of proceeding is more applicable to rate proceedings, for example, involving utilities in terms of establishing a rate. Now, is a rate an adjudicatory proceeding or a rule-making proceeding? This is a way, perhaps, of satisfying that limited kind of function. I think that it is possible to hold an adjudicatory proceeding of the rate of the X Y Z utility company where your order is going to be a specific order attaching to them and, yet, do you call it an adjudicatory proceeding or do you call it rule-making?

**Mr. Morden:** In any event, you say that rule-making that has to be proceeded be hearing and decision on the record is relatively rare?

**Dr. Baum:** Yes.

**Mr. Morden:** Thank you, Mr. Chairman.

**The Chairman:** You have mentioned quite a number of times in quite a number of contexts this morning, Dr. Baum, the Administrative Conference of the United States. I wonder if you could tell us a little bit more about this in a general way and also suggest some sources whereby we might improve our knowledge of it?

**Dr. Baum:** The Executive Director of the Administrative Conference is Professor Jerre Williams, formerly of the University of Texas, and he is a first-rate individual. The terms of reference of the Conference are quite broad and I think generally relate to improving the efficient and fair operation of administrative agencies in the United States at the federal level.

The composition of the Conference consists of representatives of administrative agencies, of the Congress, and of informed members of the public including academics.

**The Chairman:** Who chooses these members?

**Dr. Baum:** The President.

**The Chairman:** He designates which administrative officials will be there as well?

**Dr. Baum:** Yes.

**The Chairman:** How large is the whole body?

**Dr. Baum:** I believe it consists of about 80

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people. I am not sure of that figure, I am sorry about that. I am just not sure of the figure. The Conference is funded by the Congress. It had a $250,000 limitation on an annual basis. Recently the Administrative Law Section of the American Bar Association by resolution recommended that this ceiling be lifted and that the Conference be funded in terms of whatever was necessary to do the job.

The Conference makes recommendations, in essence, through the form of resolution adopted by the Conference sitting as a whole. The recommendations generally flow from background papers frequently commissioned out to academics and to others. On the basis of these reports, and the information coming through the reports I might add, often is information made to the individuals charged with the responsibility for preparing the report by the affected administrative agency.

It is my understanding that there is a rather free flow of information. The reports are freely discussed in conference, resolutions are drafted and accepted or rejected, the setting votes are recorded, and reasons for any dissent incorporated. They are forwarded to the relevant bodies, whether it be the Congress or the President. Some recommendations relate only to agencies, and accordingly, are sent to those agencies.

The proceedings of the Conference, we hope, will be published in full; that is, the background papers, the resolutions, any dissenting vote, and the reasons why.

**The Chairman:** When was the Conference first set up?

**Dr. Baum:** About two years ago. It flowed from an interim body that was charged with specific responsibility in terms of looking at the operation of administrative agencies. It was called the Administrative Council. Out of this interim body was created this ongoing permanent body.

I might add that there is now another recommendation to establish an administrative justice centre which would be quite aside from the Administrative Conference. The function of this centre would be to provide ongoing training to the legal officers of the federal government—the hearing examiners, for example, and the lawyers. It would continue legal education, if you will, for them, acquaint them with their responsibilities, and recruit. You see, it would be a way of recruiting new people for the federal service who would be competent people. It would perform

a somewhat different function than the Administrative Conference.

**The Chairman:** How large would the permanent staff of the Administrative Conference be?

**Dr. Baum:** I doubt whether it would be more than four to six.

**The Chairman:** I see.

**Dr. Baum:** I could be wrong on that, but the professional staff would probably be of that number.

**The Chairman:** Yes, and how many days a year would you say that the full Conference was in session?

**Dr. Baum:** I could not estimate that, I am sorry.

**The Chairman:** Would it be a small number?

**Dr. Baum:** I think it is in session a fair number of days. I think that there is thorough consideration given to the problems put before the Conference. I have papers I can make available to the Committee relating to the Conference.

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**The Chairman:** That was the other question I was going to ask. What documentation could you draw to our attention? Would you be able to send us something?

**Dr. Baum:** Yes.

**The Chairman:** Thank you. Madame Immarigeon is one of our staff and we are very pleased to have her ask a question.

**Mrs. H. Immarigeon (Research Branch, Library of Parliament):** I would just like to ask a question about the publication of regulations. You have in the United States the publication of court regulations, but from what you said, I understood that all regulations are not published. What is the criterion for publication or for nonpublication?

**Dr. Baum:** When an agency chooses to call something a rule, then it is required to conform with the Administrative Procedure Act. When an agency has a practice, which it feels for one reason or another does not rise to the level of the rule, then it may feel that it need not conform to the Administrative Procedure Act.

**Mrs. Immarigeon:** In other words, it depends on the agency's decision whether or not it will be published?

**Dr. Baum:** Right.

**Mrs. Immarigeon:** There is no other control?

**Dr. Baum:** No. My own approach would be to forget whatever definition we might give to a rule and simply encourage agencies to formulate policies and practices, to make those policies and practices open; to state what impels the agency to the particular policy or practice.

**The Chairman:** Is there any reason, in your opinion, any given regulation should not be published? What types of regulations are there for which publication would be a bad thing?

**Dr. Baum:** That is a very tough question to answer, I have been asking myself that question. I do not know. Suppose you had certain regulations relating to recruitment, say, in highly sensitive defence positions. Would you make them available? I do not know. Perhaps you should. I suppose the better question would be to turn it around and say to the agency, "You tell us why you will not make it available and we will see whether it holds up under the light of day."

There are some regulations that you certainly would not want to make available beforehand. If you had a change in monetary policy, I doubt whether you would want to publish a notice that you are going to have the change and then have a run on the dollar. I am sorry, you may have the run the reverse way. So there is obvious reason sometimes for delay, but it is hard, is it not, to think of reasons for not making a policy or practice available. That is all, I cannot say any more than that.

**The Chairman:** I have three or four other questions. Do you feel that the legislature has a particular kind of job and that one can say with some exactitude what things should be done by legislatures or what degree of anything can be done by a legislature and what should be done by the administrative process, the executive, or even the judiciary on the other hand, taking this, to broaden it, in terms of the division of powers, which is so much talked about in the American constitution. Do you think that the concept of the

division of power is very helpful in deciding on how to arrive at practical solutions in this area?

**Dr. Baum:** No. It seems to me that a legislature wanting to try to fulfil its function simply must know whether the statutes it has entrusted for faithful execution to particular agencies are being implemented in a way that conforms to legislative purpose. It must know this not only in terms of determining whether initial legislation is being carried out, but to determine whether new legislation is needed. After all, who is responsive to the people, directly responsive to the people? It is the

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legislature; it is not the administrative agency, except to the extent that the legislature establishes the mechanisms and the structure that makes the agency responsive. So it seems to me that the legislature simply must get involved in this area in terms of its primary function of legislation.

President Nixon has said that we have had enough legislation in the United States on civil rights; the time has come to use existing legislation to fulfil its purpose, the purpose of that legislation. Whether or not he is right, I do not know. Certainly one must say that if existing legislation is not beng implemented, then the purpose of the Congress is not being carried forward and it is not only the role of the President to make sure that that legislation is being implemented; the legislature has some concern, too.

**The Chairman:** If I may put it this way, Professor Baum, I think you might very well have answered, yes, rather than no, to my question. It seems to me you do think the division of power has something to do—at least you think a matter which can be legislated ought to be under the control of the legislature?

**Dr. Baum:** Yes.

**The Chairman:** So., at least to that one of the three branches you would give considerable scope. May I ask whether you see this in terms of positive control or negative control? This is pretty nebulous, putting it in these most general terms, but it is perhaps impossible for a legislature to actively supervise all that is being done by way of secondary legislation. Do you think it is generally sufficient if the control that is exercised is a negative control; that is, saying no when something is not satisfactory.

**Dr. Baum:** I think it is difficult to speak in terms of positive or negative. I tend to think of it in terms of positive. Maybe I will end up saying negative by the time I finish explaining it. Positive in the sense of helping agencies to establish structures that encourage and allow for open decision. The import of those mechanisms and structures, may be to exert as kind of negative influence on the agencies, though I think not. I think it will make their job easier and often they would enjoy having recourse to such mechanisms and such structures, so that when they reach decisions they can say, it is not really just us; it is the structure. So there can be a sharing of responsibility for whatever decision has been made.

**The Chairman:** Perhaps I can put the question this way. It strikes me that with respect to individual regulations that the type of legislative scrutiny by the legislature itself you would be interested in seeing would be only a negative one. You would not want the whole mass of regulations to be put before a legislature for specific approval.

**Dr. Baum:** No, I would not.

**The Chairman:** You might be willing to concede that it would be desirable for the legislature to have the right to negative one of those, but at the more general level you think the legislature has a positive function to perform?

**Dr. Baum:** Yes.

**The Chairman:** Coming back to the area I was exploring with you earlier, how satisfactory do you find the present degree of openness in executive regulation-making in the United States? You said you believe your criteria can be applied to that. To what extent is there sufficient openness in that level at present and can you suggest any ways in which it could be improved? I think this may be of some assistance to us.

**Dr. Baum:** All those agencies of the executive that operate as agencies operate more or less on the same basis as other agencies.

**The Chairman:** I am thinking primarily of delegation to Ministers, for example, to cabinet Ministers.

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**Dr. Baum:** This is pretty clear-cut in the States and there are lines of authority and responsibility through executive order that

make it clear what the authority of a particular secretary is or is not. A court, on review, will make pretty certain that there is the line of authority to the secretary to do what has to be done, and, the court will make certain that the secretary has acted in conformance with the constitution.

**The Chairman:** Yes, I recognize that as far as jurisdiction is concerned but with regard to your council of openness, to what extent is this being satisfactorily met in that area?

**Dr. Baum:** In terms of secretaries fulfilling functions that are similar to functions of other agencies, it is being met quite well within the broad area that I have already carved out; that is, if you are comparing it to other agencies. If you are looking at agencies that really are different somewhat from other agencies, like the FBI, then the answer is no. Again, it is consideration of the question of whether this agency should or should not be subject to the same practices, we will say, as other agencies. For example, probably the greatest source of information relating to individuals rests in the archives of the Federal Bureau of Investigation. I suppose if one were interested in blackmail and had access to that particular Bureau—say, if one were President and he wanted to make sure that legislators acted the way he wanted them to act and he had access to the dossiers in the Bureau, that would not be a bad thing, would it as a tool? Kings have used it before, have they not, this sort of device? I do not believe it is now being used. I do not know what regulations the FBI has over the use. I can tell you one experience I had relating to the FBI as a lawyer, if you have time, Mr. Chairman?

**The Chairman:** Certainly.

**Dr. Baum:** I had a case involving a young man who allegedly stole an automobile and took it across State lines; therefore it became a federal matter. The only evidence the government had was a fingerprint. My client said he was not there and we had definitive evidence that he was some place else 24 hours before the car was stolen and the car was stolen about 800 miles away from where he was but he still could have been in the place where the car was stolen. But, everything rested on one fingerprint, literally one fingerprint. So, I served a request for the production of the fingerprint analysis on the Attorney General.

The Office of the Federal Bureau of Investigation is under the Attorney General in the structure of government. It is called Bureau and it is housed in the Department of Justice in Washington on Pennsylvania Avenue. The court approved the motion for the production.

I asked for the production of the original fingerprint by way of a secondary motion because the picture of the analysis that they sent us was inadequate for criminology laboratory at Indiana University to come up with any kind of analysis. There was too much of a smudge. The secondary motion to require the production of the original print was approved and it was served on the Attorney General through his representative, the United States Attorney. The United States Attorney called me and his words were: "What the hell do you think you are doing, Dan? I have no control over the FBI. I cannot compel them to produce anything."

Now, that is not the way the organization is set up. If he does not have any control over the FBI, then who does? If you say no one is to have any control over the FBI, fine, say so, but state your source of authority. Put it our as a general rule. If it is a general rule, if the President has said the FBI is to be left alone, fine, leave it alone, but state what you are doing and why. I cannot see how the general public will be hurt. In any event, this is an example I think; it may not be a good example but it is an example I think through personal experience of an agency that is part of the executive where certain kinds of rules are certainly not made available.

I do not know what rules the FBI has relating to the use of information in its file. Maybe there should be no controls; maybe it should be totally left open to the director of the FBI to use that information as he sees fit. If the

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leading Republic senator asks for information relating to X, Y, and Z, maybe that information should be made available without any controls. But perhaps you want controls and if you do want controls then spell them out by way of regulation. Should these regulations be made public? I do not know. I have to ask the question, why not?

**The Chairman:** In conclusion, I would like to try to bring you back to Canada again not by way of asking you what we should do, but by way of asking you to help us in ascertaining the facts. We, of course, have used a

questionnaire to many bodies to attempt to find out what they are doing and we will be having a few of them in oral testimony, but one of the most important parts of our job and one of the most difficult is just to find out what is happening because there is just no one person who knows or one group of people who know.

You have had some experience with Canadian agencies, I wonder if you could make any comments, either by way of generalization or by speaking of a particular agency of the kind of rule-making it is doing and, if you like, the degree of openness of that rule-making.

**Dr. Baum:** I have had experience with a few agencies in Canada. My feeling is that, in part, because of a tradition I am not sure I understand there is a tendency, as in the United States, to favour secrecy over outwardness.

You have agencies established in Canada that are working in the areas one must call new frontiers. There may be some concern, some fear that in announcing new practices, new policies that the reasons might change. There are other agencies that feel they know best what the law ought to be, and maybe they do. They feel that by open decisions, not only the agency is hurt but the individual dealing with the agency is hurt.

Perhaps the immigration service of the United States, by way of example, may be able to dispense better justice to the individual than having a lawyer walk in waving a set of regulations and demanding a very high fee. Maybe these agencies, such as the immigration service and customs, are able to dispense justice more fairly at less cost than having an individual walk in with his lawyer, but then I think it is a question of values.

In general, Mr. Chairman, that summarizes my experience with Canadian agencies which do not appear to me to be significantly different from American agencies.

**The Chairman:** Except that you feel there is a greater tradition of secrecy with our agencies.

**Dr. Baum:** Yes.

**The Chairman:** You have seen no reason in the differences between our two countries, our two systems of government, which to your mind would justify that greater degree of secrecy?

**Dr. Baum:** I have a value that I consider rather important as an individual. I think government should be open so that I, as an individual, can make my judgment about that government. If, on the other hand, the value is different from the point of view of another person, if he feels that he can have good government and he does not particularly care to know what that government is doing, then of course, he will make a different judgment.

**The Chairman:** Do you have any further questions, Mr. Morden?

**Mr. Morden:** No, thank you, Mr. Chairman.

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**The Chairman:** Well, I think we are deeply indebted to Dr. Baum for his presentation this morning. I understand that he will be forwarding to us some additional information about the Administrative Conference of the United States. It may be that additional problems will arise in our minds on which we might want to get his opinion through letter form, subsequent to our discussion this morning. However it has been very helpful to us.

Obviously the U.S. approach to government is somewhat different from ours but perhaps ours need not be as different as it sometimes appears to us it should be. I think our greater understanding now of what happens in the United States will be of very considerable assistance to us in determining what we should recommend as the best procedures for our government to follow.

Thank you, Dr. Baum.

If there is no further business the meeting will adjourn.

## APPENDIX "E"

### FOOTNOTES

*(To the Submission of D. J. Baum—See Evidence)*

1. Henry J. Friendly, *Benchmarks—Selected Papers,* at p. 58 (1967 University of Chicago Press).

2. James Willard Hurst, *The Growth of American Law: The Law Makers,* at p. 67 (1950 Little, Brown and Company). "So great had this middleman's role grown by the 1930's that a qualified observer of Congress expressed skepticism over the practical results for statesmanship that were apt to flow from reduction of the volume of detailed legislation: The most likely consequence, warned J. P. Chamberlain, was that Congress would spend still more time in the government departments, handling the affairs of individual constituents."

3. Ibid.

4. *Sunshine A. Co. v. Adkins,* 310 U.S. 381, 397 (1940).

5. *Standard Oil of N.J. v. United States,* 221 U.S. 1 (1911): see also, Eugene R. Baker and Daniel J. Baum, *Section 5 of The Federal Trade Commission Act: A Continuing Process of Redefinition,* 7 Villanova Law Review, 517, 520-21 (1962).

6. 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. 341 et. seq. (1965).

7. Senator Newlands, a sponsor of the Bill, said: "Something must be left to human conscience in the determination of these questions and when you have organized a tribunal in such a way that it is composed of men of skill, education, training and experience and character, you get that machinery for the establishment of proper rules and standards." 51 Cong. Rec. 12980 (1914).

8. This general power, however, was weakened when the Executive imposed controls under the Budget and Accounting Act of 1921, 42 Stat. 20, 31 U.S.C. 551-60. Appropriation requests are submitted to the Congress only through the Bureau of the Budget. Further, under the Judges Act of 1925, 42 Stat. 936, the FTC can seek Supreme Court review through certorari only through and with the consent of the Solicitor General. Finally, agency subpoenas may have to be enforced through the Attorney General. See, *Federal Trade Commission v Guignon* 390 F. 2d 323 (8th Cir. 1968).

9. 51 Cong. Rec. 13047 (1914).

10. *Federal Trade Commission v. Motion Picture Advertising Service Co.,* 344 U.S. 392 (1953). "The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question..." id. at 396.

11. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry,* at p. 73 (1969 Louisiana State University Press).

12. Id. at pp. 104-05.

13. Burns Ind. Stats. Ann. 47—855 (1945).

14. The then President of the New York Stock Exchange was anxious for *broad* legislation which would *compel* the SEC to formulate rules and announce reasons. He stated: "Instead of having a fixed rule of law, which can only be changed by an act of Congress and cannot be changed if Congress is not in session—instead of having a fixed rule of law, we advocate the power being put in a commission to make those rules and regulations, which, if they are wrong, they can immediately change." *Hearings on H.R. 7832 and 8720 Before the House Committee on Interstate and Foreign Commerce,* 73d Cong., 2d Sess. 726 (1934).

15. For a specific example of review by a Congressional committee of an agency advisory opinion see, Daniel J. Baum, *The Robinson-Patman Act: Summary and Comment,* pp. 114-117 (1964 Syracuse University Press). See also, *Hearings on Federal Trade Commission Advisory Opinion on Joint Ads before the House Select Committee on Small Business,* 88th Cong., 1st Sess. (1963).

16. Formally titled The Public Information Act, the statute, 80 Stat. 250 (1966) is an amendment to the Administrative Procedure

Act. For a discussion of its import see, 20 *Administrative Law Review* 1-54 (1967).

17. See, Kenneth Culp Davis, *supra*, note 11 at p. 237.

## APPENDIX "F"

EXTRACT from the FIFTEENTH REPORT

of the

SPECIAL COMMITTEE ON PROCEDURE AND ORGANIZATION,

Paragraphs 10, and 12, tabled in the House December 15, 1964

10. Your Committee recommends that a total of 15 Standing Committees be established with the terms of reference set out in paragraphs 11 and 12 below, and that Standing Order 65 be amended in accordance with these recommendations. Two categories of Standing Committees are envisaged, distinguished from each other by the nature of their functions although no terminological distinction between them is proposed. For the purposes of this Report, however, the first category may be termed Standing Committees on Legislation and Estimates, of which nine are proposed, and the second category may be termed other Standing Committees, of which six are proposed. It is recommended that the Standing Committees on Legislation and Estimates have terms of reference corresponding to the jurisdiction of one or more Government Departments, and that their principal function be the detailed consideration of Estimates of Expenditure, thus relieving the burden which currently falls on the Committee of Supply. They would thus play a very important part in the financial process, and would also consider such bills as the House might refer to them. The other Standing Committees would have more narrowly specified terms of reference, and would be concerned with the kind of investigations which fall outside the scope of a Committee of the Whole House.

12. Your Committee recommends the establishment of the following six Standing Committees, described for the purposes of this Report as other Standing Committees, with the functions described below:

(*a*) *Standing Committee on Privileges and Elections*

It is not proposed that this committee should undergo any change in function, but it should be invested with a prestige befitting its special jurisdiction and its membership should be selected to reflect its seniority.

(*b*) *Standing Committee on Procedure and Organization*

It is proposed that this committee be established on a permanent basis with wide domestic terms of reference covering all matters relating to the House of Commons which do not fall within the jurisdiction of the Standing Committee on Privileges and Elections.

(*c*) *Standing Committee on Public Accounts*

It is not proposed that this committee should undergo any change in function.

(*d*) *Standing Committee on Crown Corporations*

The function of this committee would be to review the activities of Crown Corporations, or such of them as are not normally examined by the Standing Committees on Legislation and Estimates, with particular reference to their financial condition, current policy and general operation. It should not concern itself with the details of their administration.

(*e*) *Standing Committee on Delegated Legislation*

The function of this committee would be to act as a "watchdog" over the executive in its use of the powers conferred by statute, with the duty of reporting to Parliament any tendency on the part of the executive to exceed its authority. The committee's terms of reference should exclude it from considering the merits of or the policy behind delegated legislation, but it would be expected to draw the attention of Parliament to any regulations or instruments which impose a charge on public revenues, which confer immunity from challenge in the courts, which have an unauthorized retroactive effect, which reveal an unusual or unexpected use of a statutory power, or which otherwise exceed the authority delegated by the parent statute.

(*f*) *Standing Committee on Private Bills*

Your Committee proposes that this committee should combine the functions of

the Standing Committee on Miscellaneous Private Bills and the Standing Committee on Standing Orders. There would appear to be no good reason for perpetuating these as separate committees, particularly as the proposed Standing Committees on Legislation and Estimates could among them dispose of the majority of private legislation.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 8

THURSDAY, JUNE 19, 1969

*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

WITNESS:

(See Minutes of Proceedings)

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

## MINUTES OF PROCEEDINGS AND EVIDENCE

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WITNESS:

(*See Minutes of Proceedings*)

20343–1

SPECIAL COMMITTEE
ON
STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault–(12). |
| Gibson, | | |

(Quorum 7)

Timothy D. Ray,
*Clerk of the Committee.*

## MINUTES OF PROCEEDINGS

THURSDAY, June 19, 1969.
(11)

The Special Committee on Statutory Instruments met this day at 9.40 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present*: Messrs. Baldwin, Forest, Gibson, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*) (7).

*Also present:* Dean Gilles Pépin and Mr. John Morden, Counsel and Assistant Counsel to the Committee respectively.

*Witnesses: From the Department of Transport*: Mr. J. Fortier, Director, Legal Services and Counsel; Mr. C. K. Kennedy, Assistant Counsel; Mr. W. F. Elliott, Acting Chief, Aids to Navigation Division; Mr. J. H. W. Cavey, Chief, and Mr. W. A. Calladine, Harbours and Property Division; Mr. A. G. MacVicar, Meteorological Division; Mr. G. E. Easton, Canals Division; Captain G. W. R. Graves and Mr. W. E. Harrison, Marine Regulations Branch; Mr. N. L. Yost, Airports and Field Operations Division; Mr. P. S. Walker, Chief, Air Regulations and Licencing Branch; Mr. W. P. O'Malley, St. Lawrence Ship Channel Branch.

The Chairman introduced Mr. Fortier and invited him to make an opening statement.

On a suggestion by the Chairman, the various directors and branch heads of the Department of Transport gave an outline of where the initiative for regulation making lies and what consultation takes place before issuance.

The Committee then proceeded to the questioning of the witnesses during which the answers from the Department of Transport to questions 1 and 2 of the Committee questionnaire were discussed (*See Exhibit Q1*).

On motion of Mr. Marceau, it was

*Agreed,*—That all documents, tabled with the Committee and not printed as appendices, be made exhibits.

On motion of Mr. McCleave, it was

*Agreed*,—That Extract from 15th Report of the Special Committee on Procedure and Organization, paragraphs 10 and 12—tabled in the House December 14, 1964, and Footnotes to Professor Baum's submission, be printed as an appendix to last day's proceedings.

(See *Appendices E and F* respectively)

At 10:05 p.m., the Chairman thanked the officials from the Department of Transport for attending, and the Committee adjourned to the call of the Chair.

Timothy D. Ray,
*Clerk of the Committee.*

EVIDENCE

*(Recorded by Electronic Apparatus)*

Thursday, June 19, 1969.

● 0942

**The Chairman:** The meeting will now come to order. We are pleased to have with us this morning officials from the Department of Transport. I need hardly say that we all regard these hearings of the departments as one of the more important parts of our work because we hope through the hearings to find out by what process regulations are now being made within the Canadian government. This is obviously a necessary prerequisite to any recommendations which we may make concerning the kind of review which Statutory Instruments should have. The Department of Transport representatives are the first of representatives from some four departments who will appear before us. We expect next week to hear officials from the Department of Manpower and Immigration, then the Department of Justice and finally a hearing with the Privy Council Office which has been delayed because of the illness of Mr. Cross.

I think without any further introduction I will call on the Counsel of the Department of Transport, Mr. Jacques Fortier, to make an introductory statement giving us an over-view of what occurs within the Department of Transport in the making of regulations. As you will note, Mr. Fortier has brought with him a small army of experts in the various fields and we can direct particular questions to any of these other gentlemen who are here with Mr. Fortier.

**Mr. J. Fortier (Director, Legal Services and Counsel, Department of Transport):** Mr. Chairman, hon. members, I would like to make a short statement about how, in the Department of Transport, these statutory instruments, the regulations and orders are processed before being officially brought into force. The first step is that a first draft of a regulation is prepared I would say, in the operating branch concerned of the Department by the officers who are here this morning to appear as witnesses. The first draft is prepared by these officers in consultation with the legal officers of the department and this first draft is then submitted for approval of the substance and to ensure the material in the regulation is within the authority given by the statute. Once this has been cleared a draft of the regulation is then submitted to the Clerk of the Privy Council as required under the regulations made under the Regulations Act for the draft regulation to be approved for form and draftsmanship.

● 0945

Once this step has been cleared if the regulation has to be made by the Governor in Council a submission to Council is made. Before that is made I might say that before the submission is prepared the regulation is translated so that it is submitted to the Governor in Council both in French and in English. If the submission only requires to be made by the Minister, instead of a submission to the Governor in Council, it is submitted to the Minister of Transport to be made.

**The Chairman:** Thank you Mr. Fortier. It might be useful if we heard from some of the officials—would you call these gentlemen "section heads" or what is the proper terminology?

**Mr. Fortier:** Most of them are directors, heads of branches.

**The Chairman:** It might be useful if we heard from these directors, heads of branches, about where the initial impetus comes from to draft a regulation. I suppose if they would take a particular example it might be of some assistance to us. Who begins to think about drafting a regulation, first of all; how the problem comes to the Department's attention, and at what stage of the drafting consultation with the legal officers, you and Mr, Kennedy, would begin?

**Mr. C. K. Kennedy (Assistant Counsel, Department of Transport):** I could elaborate.

**The Chairman:** Mr. Kennedy

**Mr. Kennedy:** Yes. I could, perhaps, elaborate a bit on that. To give you an illustration, some years back an incident arose with respect to a model aircraft on

one of the approaches to Toronto airport. In point of fact, this model aircraft was caused to come into contact with an aircraft in flight and the damage done was actually sufficient to cause the aircraft to be grounded. It did substantial damage to the aircraft. Because of an incident like that, although model aircraft never had been regulated before in the Department, it was deemed manifestly clear that this was a matter of safety of flight which would have to be regulated in the immediate vicinity of airports. In that case there was formulated a regulation; it was discussed with the industry, for example the air transport industry and perhaps even the Canadian Owners and Pilots Association which existed at that time and then it was promoted through the process which Mr. Fortier described.

It is quite common on both the air side and the marine side to have prior consultation with people who are directly involved in the transportation process. This does not occur in all circumstances but it does in a great majority of circumstances. I am sure that some of these gentlemen could elaborate further on the type of consultation that does take place.

We are right at the moment in one step of processing what is called a large standards order for aircraft, over 11,500 pounds weight. This order has been the subject of discussion with the industry for about two years and there have been at least two full dress discussions with the air transport industry. Thank you, Mr. Chairman.

**The Chairman:** I think this matter of consultation is one of those that most interests us. It would be helpful if some of the heads of branches could describe in more particularity the kind of consultation which actually occurs with the relevant people in that area. Mr. Walker?

• 0950

**Mr. P. S. Walker (Chief, Air Regulations and Licencing Branch, Department of Transport):** Yes, Mr. Chairman, initially the proposed regulation or the amendment to it would be forwarded by letter in detail giving an explanation of the reasons for the change or the new regulation to certain national organizations such as the Air Transport Association, the Royal Canadian Flying Clubs Association, the Canadian Owners and Pilots Association. I believe there are approximately 12 national associations that this sort of correspondence would be directed to. We would ask those associations to provide us with the comments, the sort of digested comments, of the members and we usually ask them if they could provide us with it in a matter of some two months' time or thereabouts. On receipt of these replies—we have a very good return and nearly always we get a reply from everyone—the matter is collated and a final product prepared. Then if there are still questions of doubt or differences of opinion we will call a meeting of the representatives of these associations. As Mr. Kennedy mentioned, on this particular one two to three meetings took place before we got agreement across the board on all major items and, as a matter of fact, on practically all the minor items as well. When this has been accomplished and we are satisfied that there is agreement within the industry and within ourselves then we go forward on the procedure mentioned by Mr. Fortier.

**The Chairman:** Is it your experience that this is a difficult type of agreement to get?

**Mr. Walker:** In some cases it is and in other cases it is not. Take, for example, a matter dealing with perhaps personal licensing only rather than the broad aspect of commercial operations: we would not necessarily go to all these associations; we would go perhaps to the Royal Canadian Flying Club or the Air Transport Association, who deal with flying training and this sort of thing, but not include all the associations.

**The Chairman:** Do you think it would be useful for us to go around to the various heads and get their comments? I think this might be useful to the Committee.

**Captain G. W. R. Graves (Marine Regulations Branch, Department of Transport):** Mr. Chairman, our procedure on the nautical side of the Marine Regulations Branch is much the same as that described by Mr. Walker. If we are contemplating any new regulations or changes in existing regulations we generally circulate the industry beforehand. I should not say "generally"; we invariably do. Very seldom do we resort to what might be described as a public hearing. It is usually done by correspondence. We send them a draft of a proposed regulation or change in regulation and ask for their comments on it. We have a list which includes shipping associations, employee organizations, representatives of management and workers. We get their comments back. Sometimes it is necessary to redraft what we had and send it a second time. I believe my counterpart, Captain Harrison in Steamship inspection, has even a larger distribution list than we have. But the proposals that we have for any changes are always put up to those affected beforehand.

**The Chairman:** Thank you very much. Mr. Cavey of Harbours?

**Mr. J. H. W. Cavey (Chief, Harbours and Property Division, Department of Transport):** Perhaps I might just explain, first of all, the type of regulations that we have. We have the by-laws of harbour commis-

sions under the various harbour commissions acts. The initiative for setting up these by-laws and making changes generally arises with the harbour commissions unless something comes to our attention where we feel we should approach them, and in such cases we hold talks with the harbour commission about a particular by-law that they may have.

The other acts and regulations that we have are principally the government wharves regulations made under the Government Harbours and Piers Act and the public harbour regulations made under Part X of the Canada Shipping Act. These have to do with control and management of a government wharf and

• 0955

there are several thousands of these around the country. The public harbour regulations under the Canada Shipping Act, Part X, govern the control and operation of about 300 public harbours throughout the country. Many of these regulations with respect to general operations within the harbour, control of traffic or use of a wharf stand because there just are not changes being made in them all the time. Our biggest changes come in the government wharves regulations with respect to rates and charges and trying to keep these up-to-date, practical and on as economic a basis as possible. The initiative for changes in these things generally comes within the department, as we are continually reviewing these things to see if there are ways and means of making the wharves more self-sustaining. This is about the basis of our regulations.

The holding of public hearings is not too common but two years ago we had extensive public hearings on the West coast on the operation of boat harbours. All the floats that you see on the West coast, commercial fishing craft, pleasure craft, every type of small craft were creating a particular problem and public hearings were held. We still have not resolved the matter. These regulations cover a wide variety of situations from small tourist wharves to major commercial shipping wharves, and the same thing with respect to the public harbour regulations.

**The Chairman:** When you hold a public hearing, who would hold it?

**Mr. Cavey:** The public hearings that I am specifically referring to was a special case. The Minister appointed a senior member of the department from air services to conduct these hearings and to receive briefs and submissions from all interested parties.

**The Chairman:** Captain Harrison of Steamship Inspection?

**Mr. W. E. Harrison (Marine Regulations Branch, Department of Transport):** Our procedure is very similar to that of Captain Graves. We send first, second and sometimes third drafts out for comment. The first one is revised as a result of the comments obtained and then the second one goes out. We very seldom have anything approaching a public hearing although sometimes we have a very large meeting in which practically everybody who could be concerned is invited. These are generally in respect of small boat regulations.

While we are on this, of course, I should say that we have more than one list. The type of person who would be interested in regulations concerning large steamships is not necessarily on the list concerning pleasure craft—we would have a separate list there of power squadrons, marinas and associations concerned with that kind of safety rather than the safety of very large ships. However, in respect of dangerous cargo regulations, all the expertise we would require is certainly not in the department. We have a technical committee composed of scientists and explosive experts who are brought in on any regulations of that nature.

**The Chairman:** Thank you. Mr. Elliott.

• 1000

**Mr. W. F. Elliott (Acting Chief, Aids to Navigation Division):** In our branch we have very few regulations and these have been on the books for a great many years. As far as I am aware, the nature of them is such that we cannot go to the public for comment beforehand. They are changed as operation requirements develop. These regulations are for the protection of Aids to Navigation, for the protection of people going to Sable Island and to ensure that private buoy regulations conform with the standard of international practice. This sort of thing is not something that you can discuss very well with the public. So we make these changes whenever they do come up, which is not very frequently, based on our operation and operating experience. The same thing might be said for the regulations under the Navigable Waters Protection Act. In this case we are dealing with a great many private people, those who do not have an organization, and we make our changes here based on operating requirements. I do not know of any case in which we have had a public hearing or anything of this kind. We, of course, listen to any objection that develops and in some cases we have changed our regulations to accommodate these things.

**The Chairman:** If I may interrupt the questioning, Mr. Gibson's arrival will enable us to move several motions, which are routine to the Committee, but I think perhaps we should take advantage of this quorum to have these moved.

The first is:

That all documents, tabled with the Committee and not printed as appendices, be made EXHIBITS.

**Mr. Marceau:** I so move.

Motion agreed to.

**The Chairman:** Second, I suggest:

That Extract from 15th Report of the Special Committee on Procedure and Organization, paragraphs 10, 11, 12–tabled in the House December 14, 1964, and Footnotes to Professor Baum's submission, be printed as an appendix to last day's Proceedings.

**Mr. McCleave:** I so move.

Motion agreed to.

**The Chairman:** Thank you.

**Mr. Gibson:** My absence is not neglect; I am on the External Affairs Committee and we were preparing a report there; that is the only reason I was not here.

**The Chairman:** I think we all realize that, Mr. Gibson, but it is good to have this on the record, thank you.

Returning to Mr. Elliott, I would like to ask one other question while we are talking to you, sir. What does aids to navigation encompass? Are these very technical matters. You say consultation would not be very fruitful in this area. Perhaps you could tell us just what aids to navigation encompass.

**Mr. Elliott:** The Aids to Navigation division, of course, maintains fog-horns, lights, buoys and so on, for the protection of navigation. It also administers the Navigable Waters Protection Act, which protects navigation against the encroachment of any structure in navigable water, against ferry cables and the operation of bridges including removable spans of bridges. So we have two areas of jurisdiction: one is the encroachment of works on navigable waters and the other is the operation of a system of aids to navigation, such as, buoys, fog-horns and so on. In this connection, of course, we do notify the mariners and a number of things of this kind, but there are no regulations in that area.

**The Chairman:** Thank you. Yes, Mr. Muir?

**Mr. Muir (Cape Breton-The Sydneys):** Mr. Chairman, may I ask this gentleman a short question? What consultation takes place between you and those who are affected by aids to navigation? Are there any meetings with groups, associations, or those fishermen or anyone who is affected by aids to navigation?

**Mr. Elliott:** We have regular meetings with the Dominion Marine Association and other large groups in connection with aids to navigation, pilots and so on. On the East and West Coasts, there are no organizations that have approached us, but if any were to come, we would be glad to meet with them.

**Mr. Muir (Cape Breton-The Sydneys):** When your representatives go into a local area, would they not consult with . . . I am speaking from an actual experience where an aid to navigation was erected, against the protests of the fishermen concerned, and some months later, after a lot of playing around, we had it changed. I am just wondering why.

**Mr. Elliott:** We have 11 district officers whom we rely on to be our ears and eyes in the field. These men, of course, devote their full time to going around their various districts. We depend on them to report these things and to be in communication with local people, to keep in touch with traffic patterns as they change, and the requirements of shipping in these areas. This is sort of an informal thing, it is not very often done by formal meetings.

**Mr. Muir (Cape Breton-The Sydneys):** No, it is usually consultation around the docks and wharfs.

• 1005

**Mr. Elliott:** That is right. In this area we have no regulations. The only regulation we have in the Aids to Navigation Division is the private buoys regulation and the purpose of this regulation is to see that whoever puts out a buoy puts it out in the right colour so that it will conform with the international standard and other mariners will understand what it means.

**Mr. Muir (Cape Breton-The Sydneys):** Thank you.

**The Chairman:** Mr. Kennedy?

**Mr. Kennedy:** Just on that point, Mr. Muir, I had occasion about a year ago to check on the number of aids which were maintained in one form or another in the marine category, and I think it runs close to 30,000 throughout the country. These are all maintained, of course, at public expense. I do know from my own experience that if a leading light or mark of some description is not serving the requirements, it is generally the result of some intervention, as Mr. Elliott has mentioned, by a marine

association or a pilot association or something that would bring it to the attention of the Aids to Navigation Division and there will be an investigation made to determine whether there should be a new one or a relocation or whatever.

**The Chairman:** Mr. Fortier?

**Mr. Fortier:** Mr. Chairman, I would also like to point out that there is another part of the Navigable Waters Protection Act which comes under the purview of the Aids to Navigation Division. It is the part which deals with the removal of obstructions from navigable waters; it is, the removal of wrecks, the removal of ships which have sunk.

**The Chairman:** Thank you very much. Mr. Easton, Canals Division.

**Mr. G. E. Easton (Canals Division, Department of Transport):** Mr. Chairman, Canals only have one set of regulations designed to govern the flow of traffic through canals. These regulations are historic, I think Canals probably are the oldest section of DOT. In fact, the regulations have only required amendment once. They are considered to be quite adequate in our work and amending is practically nonexistent really.

These regulations govern such things as speed, right-of-way in restricted channels and this type of thing. I cannot see there will be any great changes. We have reviewed the regulations and find them generally adequate. I believe there has only been one revision to them.

**The Chairman:** Has the review been purely an internal process, or have you consulted, either informally or formally, with others outside?

**Mr. Easton:** No, this was an informal process having to do with the increased traffic on canals and the adequacy of the regulations in that respect. When it comes to consultation, we have our ear to the ground, you might say, through attending annual meetings of groups like the Canadian Power Squadron and various large yacht clubs, which are really our clientele now, rather than commercial shipping interests. We have a rapport back and forth, and receive suggestions from them, but we do not have a formal series of hearings in this respect.

**Mr. McCleave:** May I just clarify this?

**The Chairman:** Yes, Mr. McCleave.

**Mr. McCleave:** I take it, though, the suggestions being made are not really in the way of amending your regulations; this is more the practical operation of your Division?

**Mr. Easton:** Yes, this is true.

**The Chairman:** Mr. O'Malley, Ship Channel Branch.

**Mr. W. P. O'Malley (St. Lawrence Ship Channel Branch, Department of Transport):** Mr. Chairman, the St. Lawrence River Ship Channel Division of the Marine Services is primarily concerned with the application of the St. Lawrence River Navigation Safety Regulations, and as safety is a concern of everyone, particularly the navigators, any changes to these regulations would necessarily involve extensive consultation with the navigators through their associations, the pilots associations or the shipping federation and the marine association. However, as is the case for canals, these regulations have been longstanding and have not required any changes in recent years. However, with the advent of larger and larger ships using the St. Lawrence waterway, safety regulations, in my opinion, will have to be looked at again closely. The process to be followed again will be in very close liaison with the users of the facilities which the government provides.

● 1010

Just recently, some two years ago, as a result of increased activity in winter navigation, navigating in ice in the St. Lawrence, we had to impose very definite speed limits for ships travelling in winter ice. This was done without official consultation with the industry, because the maximum speeds permissible were arrived at by taking several technical factors into consideration. We really had no difficulty with the industry in applying these regulations, because I think everyone realizes that the users and navigators are those who are going to benefit by the rigid aplication of these regulations.

**Mr. Fortier:** Mr. Chairman, the next witness represents the Meteorological Branch of the Department.

I would like to point out that there is no statute, as such, governing the operations of the Meteorological Branch of the Department. There are only items in the estimates every year for their operations. The only regulations that the Meteorological Branch makes are regulations prescribing fees for the services that they render to the public. Those fees are arrived at by the Treasury Board, under authority of the Financial Administration Act.

**Mr. McCleave:** They do not try to do anything about the weather, then, in that Branch!

**The Chairman:** With that introduction, will now hear Mr. MacVicar of the Meteorological Branch.

**Mr. A. G. MacVicar (Meteorological Division, Department of Transport):** Initially, the meteorologi-

cal fees were developed in 1957, and have since been amended on four occasions. The last occasion was October 1, 1968, and I think we have another amendment close to finalization at the present time.

The concept is that largely the Meteorological Branch over the years has accumulated vast amounts of data in the climatological area. These data are of use to various interests, and when the data are made available for specific purposes, rather than for the general public, we have a charge for them. The charges range all the way from charges for weather maps to charges for computer time to process these data.

I do not know if there is much more to be said at this time.

**The Chairman:** Thank you.

Finally, Mr. Yost of the property management of airports.

**Mr. N. L. Yost (Airports and Field Operations Division, Department of Transport):** Mr. Chairman, in the area of airport field operations there are two general categories of regulations. One covers fees and charges and the other covers the control on airports on the ground. The fees and charges do not change too frequently. They have been amended periodically, but the extent of them is very much influenced by what the traffic will bear. We had made studies, but we find there is a limit to what you can charge, especially as the traffic at airports in most cases is very low.

In relation to parking fees, until last April we had a standard fee that applied generally across airports. Effective April 1, we asked the regions to recommend rates that might be comparable to parking rates in the cities that are served by the respective airports.

In the area of traffic control, these regulations were occasioned mainly by the experiences we have had in the movement of vehicles. We have the vehicle control regulations. We also have the personal

• 1015

property disposal regulations. This covers property or personal goods which are abandoned at the airports. We have regulations covering their disposal. We also have the airport concessions regulations, which cover the operation of the concessions at airports. These are the five regulations with which we are concerned.

**The Chairman:** Thank you, Mr. Yost. Would members care to ask questions now? Yes, Mr. McCleave?

**Mr. McCleave:** Much of the work, I take it, relates to safety and health. Are there fines to back up breaches in, say, specific instances Mr. Fortier?

**Mr. Fortier:** Yes, sir. Under the Aeronautics Act there is the authority for the air regulations. The air regulations govern the licensing of airports, the licensing of air crews and the rules for air navigation. There is also in the Act provision for a penalty that may be imposed on summary conviction for contravention of any of the regulations.

**Mr. McCleave:** The penalty, however, is set out in the Act, or can you vary it, or change the amounts by regulation?

**Mr. Fortier:** The privison in the Act is to the effect that every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year.

The maximum fine is prescribed in the Act.

**Mr. McCleave:** Therefore, the penalty is not set by regulation but by statute. This is the point that has concerned us.

**Mr. Fortier:** I might also point out, sir, that in the Act, in addition to the power to make regulation by Governor in Council, there is also the section to the effect that any regulation made under this section may authorize the Minister to make orders or directions with respect to such matters coming within this section as the regulations may prescribe.

The air regulations do provide, in certain instances, for the Minister to issue orders to make directions. In connection with these orders or directions made by the Minister the same section of the Aeronautics Act states that:

> Every person who violates an order or direction of the Minister made under a regulation . . . is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months. . .

**Mr. McCleave:** We are into the area of orders or directions issued by the Minister. I presume that some considerable care is taken in formulating policy in this area and in drafting the orders and directions?

**Mr. Fortier:** Yes, sir. The same care which is taken in the drafting of the regulations to be made by the Governor in Council is given to the drafting of these ministerial orders.

**Mr. McCleave:** Would there be consultation with, in this case, the aviation industry?

**Mr. Fortier:** I will ask Mr. Walker to answer that.

**The Chairman:** Mr. Walker?

**Mr. Kennedy:** May I answer that? A good example of that, Mr. McCleave, is the order we have on flight restrictions in national, provincial and municipal parks.

About a year or so ago, the Ontario Department of Lands and Forests was experiencing difficulty at certain of its provincial parks. The order we had was of about 10-year vintage, I think, at that time, apart from certain minor amendments which may have been made to it. We held two meetings with the Ontario Department of Lands and Forests with a view to working out on that a revision that would meet their difficulties and their requirements. That is the sort of consultation that would go into an order.

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There might be other types of orders that would affect other parts of the industry, and I think you can rest assured that the same sort of consultation would take place. Perhaps Mr. Walker might like to elaborate on that.

**The Chairman:** Mr. Walker?

**Mr. Walker:** Mr. Chairman, I think that is quite right. In point of fact, an order that is under consideration at the moment was one of the ones referred to, on which we have had very extensive consultation. At the same time, though, if the order is very restricted in its application, we would only go to the appropriate segment of the industry for their comments.

**Mr. McCleave:** Could I ask Mr. Fortier how many prosecutions there have been under the section that he has mentioned? I do not mean since time immemorial, but could he give us a rough idea of how many there would be in the run of a year?

**Mr. Fortier:** I doubt that there has ever been any prosecution under the orders or the directions made by the Minister. Am I right, Mr. Walker?

**Mr. Walker:** I would hesitate to say, "yes" to that, sir, based exactly on the orders. There probably have been some.

**Mr. Kennedy:** Mr. McCleave, if I could elaborate on that. Some of the orders, for example, deal with air worthiness of aircraft. The air regulations prohibit the flight of an aircraft which is not in an air-worthy condition. The air-worthiness certification order describes what shall be done in order to maintain an aircraft in an air-worthy condition. If, following an incident, maybe even an accident or just perhaps a routine follow-up by one of our civil aviation inspectors, it were determined that an aircraft had flown with a condition–a modification–which had never been certified by an engineer, it is quite possible there could be a prosecution for a violation of the provision of the order as made pursuant to the provisions of the Act, but the fine which would be applied would be determined by the magistrate in accordance with the provision of the Act. With regard to the numbers–I remember this quite clearly because I came into the Department in late 1958-59 and at that time prosecutions were fairly vigorous in the aeronautics field and they were running at that time somewhere between 150 and 200–I would say that factor has gone down and although I do not have the statistics available I would imagine that in the course of the year there are probably somewhere between 50 and 80 prosecutions.

**Mr. McCleave:** I would like to turn just briefly to another topic. This is in the field of pollution control in our harbours. Do regulations exist in this particular field? We get releases from the Department from time to time about their successful prosecutions. In consultation with whom were these drawn up in the first place?

**Mr. Fortier:** We have what are called oil pollution regulations which cover pollution of the waters from oil escaping or being thrown from the ships. I believe Captain Harrison could tell us how these regulations were made. I know they were made pursuant to an international convention and have been in existence for about eight or ten years. Whether the industry was consulted at the time they were made, I would ask Captain Harrison to . . .

**Mr. Harrison:** Yes, the industry was consulted because there was a good deal of technical content–the type of equipment required to prevent oil from escaping in undesirable quantities necessitates technical changes in machinery and so on. Therefore, for that reason they did go to the industries.

**Mr. McCleave:** It seems to me, however, that the problem of pollution–and I speak from the standpoint of knowledge of the Halifax harbour–still is of serious proportions. Is there a need for more teeth in the regulations or better enforcement? Where might the problem lie?

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**Mr. Fortier:** In addition to these oil pollution regulations which were made under the authority of a section in the Canada Shipping Act, we are also proposing to Parliament–there is a bill before Parliament–in Bill S-23 that authority be given to the Minister of Transport to arrange for the removal of oil or any substance which could pollute the waters

or damage the coasts–damage the beaches. This Bill is now before Parliament.

**Mr. Kennedy:** This subject interests me, too, Mr. McCleave. We have had much greater success in prosecutions on the west coast–I as a Maritimer find this somewhat embarrasing–than we have had on the Atlantic Coast. I helped Captain Harrison and one of his officers set up the first regulations in 1958-59 and since they have been established, I would say, we probably have had in the order of 100 to 120 successful prosecutions against ships. A great majority of these have been on the west coast or in the lakes and rivers, but the west coast does predominate. We have had considerable difficulty on the Atlantic Coast. We think one of the reasons we have had greater success on the west coast perhaps than on the Atlantic Coast is that for some reason or other there is a greater interest in wildlife by wildlife associations on the west coast. Some of the magistrates, in point of fact, have viewed this pollution problem with greater seriousness than has been the case in the Atlantic region. I do not know whether this offers any useful explanation or not.

**Mr. McCleave:** Maybe you should have your enforcement people move from the west coast to the east coast to help us in the fight.

**Mr. Harrison:** Mr. Chairman, it might be of interest to Mr. McCleave to know that there have been a couple of successful prosecutions in Halifax in the last couple of weeks.

**Mr. McCleave:** Yes, I am aware that there have been successful prosecutions. However, today we are in the field of regulations, not in the field of prosecutions. I suppose these regulations are under continuous review because of the seriousness of the pollution problem?

**Mr. Harrison:** Yes, they are. Of course, there is another point. There are several large refineries in Halifax, tank farms.

**Mr. McCleave:** They all blame each other, Captain, do they not? The refineries claim there could not be an escape of oil from them while the vessels claim they have never heard of dirty oil that they dumped overboard.

**Mr. Cavey:** Mr. Chairman, I just might mention that there is a provision in the governments' wharfes regulations about dumping anything from a wharf and also in the public harbour regulations there is a prohibition against draining, discharging or depositing in the water anything that might cause a nuisance or danger to persons or property.

**Mr. McCleave:** Your regulatory authority is wide enough, is it not, to deal with the refineries as well as the ships because you are dealing with open waters. Am I correct in that assumption?

**Mr. Fortier:** Mr. Chairman, at the present time the oil pollution regulations are our only authority in respect of pollution. As I mentioned, Bill S-23, when enacted will give us additional authority, but at the present time the oil pollution regulations are the only ones under which we can act.

**Mr. McCleave:** Would Bill S-23 then cover the refinery problem? Mr. Kennedy thinks not.

**Mr. Kennedy:** No, Mr. Chairman, that is correct because our authority is with respect to navigation and shipping. It always has been considered that the shore installations were a matter of local or provincial concern and, in point of fact, we have lost, crazy enough, the prosecutions where something has happened and a tanker has discharged into the shore installation. In such an instance where the fault was on the ship we have been successful, but where the fault has been on the shore we have been unsuccessful. This is a very difficult area to deal with in so far as we are concerned as it does not appear that our jurisdictional authority goes that far.

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**Mr. McCleave:** This is really a problem of the jurisdiction under the original statute and perhaps cannot be cured by the regulation-making process.

**Mr. Kennedy:** I would say it is a constitutional problem.

**Mr. McCleave:** Yes, I would say so. Thank you.

**Mr. Muir:** While we are on this subject, I have just one short question with regard to pollution, to the regulations as drawn and the possible penalties applying equally as well to Crown corporations as they do to private enterprise. I have in mind the CNR.

**Mr. Kennedy:** I can answer that question, Mr. Muir, because I believe right at the moment there is a prosecution being launched in Sydney, Nova Scotia, at least I understood there was, against the master of the *Abegweit*.

**Mr. Harrison:** Mr. Chairman, Mr. Kennedy has been away for a couple of weeks. That prosecution is now completed and the master and chief engineer have been fined.

**Mr. Kennedy:** I can add to that, Mr. Muir, that the Canada Shipping Act is so written it is possible to

make provisions of the Act applicable to government ships or, alternatively, to exclude certain provisions of the Act from government ships. These provisions have never been excluded from government ships and this is why it is possible.

**The Chairman:** At some stage I am sure we want to go through the answers which the various parts of the Department of Transport gave to question 1 of our questionnaire. Perhaps before asking some questions on that I might come back to Mr. Fortier and ask about the relationship of over-all regulation-making with the Department of Justice and the Privy Council. We have been talking a good deal about the consultation part. This is the scrutiny part. Are you attached to the Department of Justice, Mr. Fortier?

**Mr. Fortier:** Yes, Mr. Chairman. All the lawyers in the Department of Transport are Department of Justice lawyers who have been seconded to the Department of Transport. The transfer was made effective a few months ago.

**The Chairman:** Which transfer?

**Mr. Fortier:** The transfer of the lawyers under the Department of Transport to Justice.

I might say also that in reviewing the draft regulations prepared in the various branches of the Department, on occasion and as the lawyers require, we do consult with the heads of the various divisions in the Department of Justice.

**The Chairman:** Perhaps we might go into this more fully. You did include this in your introductory statement but let us see if we can get the picture more completely. The initial impetus of course for a particular regulation would come from one of the branches represented by the gentlemen at the table with us and that would then come to your attention. I understand that they often discuss this with you at an early stage. What kind of information or opinion would they be seeking at that stage?

**Mr. Fortier:** They would seek information both as to the drafting and whether the material that they would like to include in the regulations may validly be included.

**The Chairman:** By whom is the drafting done?

**Mr. Fortier:** The drafting is done by the branch concerned with the assistance of the legal officers of the Department.

**The Chairman:** What does that mean? Does that mean it is really done by the legal officers or that it is really done by the branch?

**Mr. Fortier:** No, I would not say that. I would say that in the first draft they put down their ideas on paper with our assistance and then the legal officers review this draft and make some changes both as to substance and as to form, but as far as the form is concerned we realize that we are bound by the provisions of the Regulations Act and an Order in Council that was passed under the Regulations Act—that every draft regulation must be submitted to the legal officers in the Privy Council Office for review as to form and draftsmanship. It does not matter how careful the legal officers in the Department may be in drafting, they have their own rules in the Privy Council Office on how to draw up a regulation, a bylaw or an order, and what is the proper wording. They do give it a thorough once-over.

**The Chairman:** At what stage are they brought into the picture?

**Mr. Fortier:** They are brought into the picture as soon as the draft of the Department has been made and is agreed to by the lawyers in the Department and by the heads of the Department.

**The Chairman:** Is that before scrutiny then by the Deputy Minister of Justice? Which comes first?

**Mr. Fortier:** The scrutiny by the Deputy Minister of Justice does not always take Place. If the lawyers in the Department feel that they would like to consult with the Deputy Minister of Justice and his officers then we are free to go over. But I would say in many cases the lawyers and the officers in the Department agree on a draft and then we send it direct to the Privy Council Office.

**The Chairman:** I had the impression that the Department of Justice had to scrutinize regulations with a view to seeing a possible conflict with the Bill of Rights. Now that you are a member of the Department of Justice is your scrutiny considered to be on behalf of the Deputy Minister? Perhaps this requirement of scrutiny is not as absolute as I had recalled.

**Mr. Kennedy:** I would say that when this requirement was implemented or brought in by the Bill of Rights several years ago the process for doing this was through the legal adviser, Privy Council Office.

**The Chairman:** So from your viewpoint the primary relationship is that between yourselves and the Privy Council Office?

**Mr. Fortier:** That is right.

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**The Chairman:** You arrive at a draft that you are satisfied with, that goes to the Privy Council Office

and then comes back to you I suppose either in the same form or a slightly different form. Who then sends this on for action? Does this proceed from the Privy Council Office to the Governor in Council or does this come back to your Department and proceed from your Department to the . . .

**Mr. Fortier:** It comes back to our Department, Mr. Chairman, we rewrite the regulation in accordance with the suggestions of the Privy Council Office, and we have the regulation or the order, as the case may be, translated. After that is done the submission to Council is prepared in the Department of Transport.

**The Chairman:** If there was a disagreement between yourselves and the Privy Council Office on the text of a regulation does their view necessarily prevail or is there someone else to whom you can both appeal for a further ruling?

**Mr. Fortier:** Well, as the legal officer in the Privy Council Office is a lawyer of the Department of Justice, in so far as the various government departments are concerned an opinion or a ruling given by the Department of Justice is the supreme court.

**The Chairman:** Yes, I see.

**Mr. Fortier:** We are bound.

**The Chairman:** So the Privy Council Office through its legal officer has the last word.

**Mr. Fortier:** Yes, sir.

**Mr. Kennedy:** I might add to that, Mr. Chairman, that it is inevitable. Lawyers only exist because there are disputes.

**The Chairman:** Right.

**Mr. Kennedy:** There would be no court cases if there were not two lawyers with different opinions and who felt there was a prospect of winning a case. It is quite true that things do come back from the legal adviser, Privy Council Office, at times through no fault of his own. It may be misunderstanding perhaps on our part or in respect of our draft. We oftentimes have to go back again.

**The Chairman:** But this is a fairly informal proceeding; you do not have any formal confrontation or anything of that kind?

**Mr. Kennedy:** One endeavours to maintain the best relationships that one can maintain.

**The Chairman:** Yes. I was speaking of formal confrontation in the sense of a formal procedure.

**Mr. Kennedy:** No, no formal procedures.

**The Chairman:** Thank you. Are there any further questions along those lines? I wonder if our counsel would like to explore this area any further. Mr. Pepin.

[*Interprétation*]

**Mr. Pepin:** I would like to ask a question that is perhaps more political than legal.

**Mr. Gilles Pepin (Counsel to the Committee):** My question is intended for Mr. Fortier.

The Bernier Report, which is a Royal Commission on Inquiry Report on pilotage, has between 75 and 100 pages on the exercise of regulatory powers concerning pilotage. And if I remember correctly–I did not read it this morning–there are fairly severe criticisms . . .

**The Chairman:** Excuse me, but we are having translating problems.

**Mr. Pepin:** I am going to repeat my question.

A while ago, I read the Bernier Report on the Royal Commission of Inquiry on Pilotage, and this Report has about 75 or 100 pages on the exercise of regulatory powers regarding pilotage. And, if I remember correctly, some severe criticism is addressed to the Department of Transport.

Among other things, it would appear that some of the regulations which have been passed are *ultra vires.* Moreover the Supreme Court and the Exchequer Court have both ruled certains regulations *ultra vires.*

That is why I say that my question may have some political overtones.

I would like to have your comments on the Bernier Report–Volume I–with respect to the exercise of regulatory powers concerning pilotage? Because, the members of the Bernier Commission did not seem to be very satisfied.

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**Mr. Fortier:** Yes. Sir. In the first instance it was the Pouliot case. The Exchequer Court had ruled existing pilotage regulations were *ultra vires*. The Supreme Court decided otherwise.

You are right, when you say that Judge Bernier, who was the Chairman of the Commission of Inquiry on pilotage, made many recommendations, many remarks to the effect that the existing regulations were *ultra vires.*

Following the Report, the Department set up a Pilotage Task Force to make recommendations regarding the legislation that the Department should introduce in order to implement the report of Judge Bernier. This Task Force has not yet concluded its

work, but we hope to be in a position to introduce legislation either late this year, or next year.

**Mr. Pepin:** That is only the legislative aspect. The merger of certain agencies is recommended. If I remember correctly, it was recommended that there be less authority and less power in pilotage matters in Canada.

I am under the impression that you do not see fit to comment on the Bernier Report about the exercise of regulatory powers.

It seems to me that it was pointed out in the Bernier Report that there is a problem concerning relations between the Department of Transport and the Department of Justice. Some regulations that were proposed by the Department of Transport were studied by the Department of Justice, and it would seem that there was no agreement as to the legality of these regulations. And there was a lack of coordination between the Department of Justice and the Department of Transport with respect to the legislative aspect, the *ultra vires* or *intra vires* aspect of the regulations concerned.

**Mr. Fortier:** If you will allow me, I would like to consult my associates.

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[*English*]

Excuse me for the interruption, Mr. Chairman, but I am advised that we cannot recall any instance where there has been any disagreement or where the officers of the Department of Justice and the legal officers of the Department of Transport have not seen eye to eye with respect to any by-law. But I might point out, sir, in connection with the recommendations of Judge Bernier, that the officers in the Department of Justice do not see eye to eye with some of his conclusion that certain things are ultra vires.

[*Interpretation*]

**Mr. Pepin:** I maintain this because it is very important. In pilotage matters there was a practical case of exercise of regulatory powers which was studied thoroughly by the Bernier Commission. And now, you have your own the Task Force which is also studying this particular question.

**Mr. Fortier:** Exactly.

**Mr. Pepin:** Will your report be ready soon?

**Mr. Fortier:** This is an inter-departmental committee. Basing ourselves on the report that the Task Force is going to submit to the Deputy Minister, we will ask authority, as usual, to introduce legislation.

**The Chairman:** Do you have any other questions, Dean?

[*English*]

Mr. Fortier, perhaps you will feel this to be too political or too loaded to answer, although I do not mean this to be a loaded question. Do you find any difficulty with the type of scrutiny relationship which exists between yourselves and the Privy Council Office? Would you like to see expanded scrutiny or less scrutiny? Or are you pretty well satisfied with the way things are?

**Mr. Fortier:** I think that generally we are well satisfied with the state of things as they are today in relation to the work that the legal officer in the Privy Council Office does with respect to our regulations. We are always grateful for the suggestions as to how the regulations should be drafted, the wording that should be used, how they are to be set up. They are supposed to be the experts in that line.

**The Chairman:** One further question. Is there ever consultation directly between your various branches and the Privy Council Office on questions of this kind, or is the consultation always between yourself and Mr. Kennedy of the Privy Council Office?

**Mr. Fortier:** I would like Mr. Kennedy to speak on that, Mr. Chairman.

**Mr. Kennedy:** Mr. Chairman, we have never felt restricted in that regard. Certainly if I am available the Legal Adviser of the Privy Council Office could consult me. On the other hand, bearing in mind that much of the material that we are dealing with, particularly on the aeronautics side, can be very technical and complex, with all due respect, the average lawyer has

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some difficulty with portions of this on first blush. It is the sort of thing that you have to work with for a long time in order to actually comprehend perhaps what is really being endeavoured to be done. Much of the material on the technical side flows to us through international organizations like the International Civil Aviation Organization and Canada is a signatory to that Chicago convention. There world experts sit down and develop technical procedures and processes and a great deal of that ultimately finds its place in Canadian regulatory form in one way or another. I would not hold myself out as an expert in this area at all and I doubt very much that the legal advisor to the Privy Council would suggest he was either. One is ultimately very dependent upon the technical people in the particular technical area they are working in.

**The Chairman:** You keep the technical people close to the Privy Council Office?

**Mr. Kennedy:** We must keep the technical people close to the regulations at all times.

**The Chairman:** As to language, first of all do these drafts come to the Council in both languages or in one language and how do they go to the Privy Council Office?

**Mr. Fortier:** Mr. Chairman, they go to Privy Council before they are translated. They are translated after the legal advisor has given us his okay on the form and draftsmanship. Then as a last step before they are submitted either to the Governor in Council or to the Minister, they are translated.

**The Chairman:** Are they normally in English at that stage or does it depend on the primary language of the branch man who has been working on them?

**Mr. Fortier:** They are first drafted in English.

**Mr. Kennedy:** Mr. Chairman, I think I could add a word of explanation to that. You must bear in mind, for example, in the aviation field that 99 per cent of the aircraft in the world are probably being manufactured certainly in the English speaking world and probably 95 per cent of that in the United States at least in so far as the western world is concerned. Much of the data, the engineering, and everything that is related to aircraft and this sort of thing takes its original form in the English language and on the international side sometimes. Putting some of these things into the French language, or another language, sometimes demands real expertise in the development of appropriate phraseology. I think there has been a tendency on the aeronautic side anyway for this process as a rule in most western countries to develop in this fashion.

[*Interpretation*]

**Mr. Forest:** Mr. Fortier, have you often received complaints from the parties concerned to the effect that the regulations were adopted without publication or sufficient consultations with the people concerned? In general, are the regulations, if not liked, at least tolerated by the people? Do you often receive complaints about the way in which regulations are adopted?

**Mr. Fortier:** To my knowledge, there have not been any complaints once the regulations are published.

[*English*]

**Mr. Kennedy:** Mr. Chairman, I think Captain Harrison might be able to elaborate on this better than I. Standard life jackets carried in pleasure yachts and boats, have been a problem over a number of years. There is a Board, which has developed the type of specification to which these jackets are manufactured, consisting of many people from National Research, the Department of Transport, and industry. Our small vessel regulations require this sort of thing to be carried in a boat where there is a certain horsepower motor on the boat or on the vessel. Depending on your attitude towards these things, many people like to see these carried by anybody who is on the water

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whether they are in a power boat or not. I think a number of years ago as a result of pressures of one form or another there was an amendment made to the small vessel regulations to introduce this requirement with respect to canoes and other types of nonpower propelled craft that did raise objections and it was removed. Subsequently I think there is a great deal of pressure again to have it re-instituted.

**The Chairman:** Captain Harrison.

**Captain Harrison:** Yes, what Mr. Kennedy said is substantially correct, Mr. Chairman. A great many of the complaints have been in the direction of complaining that we do not do enough in this field. As Mr. Kennedy has just said, we had one complaint the other way about canoes and we withdrew the regulations some years ago. There is a good deal of pressure now and a move to re-institute it.

**Mr. Forest:** Would the complaints come mostly from individuals instead of from companies or groups.

**Mr. Kennedy:** Mr. Chairman, that is hard to put your finger on. But, in the case I mentioned it arose in the Ottawa area from one or two people at least who had been ardent canoeists and who felt this requirement was too stringent to be imposed upon this class of person. I do not know how widespread that complaint was but it could well depend on just exactly what segment of the population was affected, I suppose. I do not think there are too many ardent canoeists left in the country.

**Mr. Forest:** There is no general complaint against regulations as a whole mostly because they are not stringent enough? The way they are adopted there is no complaint?

**Mr. Kennedy:** I would not want to say, Mr. Chairman, that there were no complaints. I would say that there are more complaints that enough is not done rather than that things are too stringent. I think this is probably true in any area where one deals with safety, and certainly people who are making their livelihood as a result of the occupation, like a pilot of an aircraft, or somebody who is operating an aircraft, these people recognize the requirement for discipline. You are more apt to get a complaint from the general public perhaps as opposed to the specialized area.

**Mr. John Morden (Assistant Counsel to the Committee):** Mr. Chairman, in answer to question No 23 of the Committee's questionnaire, the National Harbours Board suggested, as a general method of improving the process of making regulations, that it would be an improvement if they were made directly by the Minister of Transport rather than the Governor in Council. I think that answer came directly from the National Harbours Board, but I wonder if any of the witnesses this morning would agree with that and, if so, in what respect would it be an improvement?

**Mr. Fortier:** Mr. Chairman, I can say that, for instance, in respect of the air services fees regulations in the Aeronautics Act there was originally no provision for those fees. We had to make them under Section 18 of the Financial Administration Act, which states that where the Crown provides the service the Treasury Board can authorize a fee to be charged for the service. In 1966, we amended the Aeronautics Act, in order to authorize the Governor in Council to prescribe fees in respect of the services that we provide to aviation, to aircraft or at airports. This year, this section of the Aeronautics Act was amended in order to authorize the Governor in Council to delegate to the Minister of Transport the power to prescribe fees.

**Mr. Morden:** I take it the advantage would be one step less in making the law.

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**Mr. Fortier:** It simplifies a cumbersome procedure. Some of those fees, for instance, the automobile parking fees at airports, are just a few cents, for a set period. From time to time the division that is charged with property management in the Department has occasion to revise these fees, and with the procedure as it then was, we had to follow the regular procedure for regulations, while if the Minister has authority to change them it is done much more quickly.

**Mr. Morden:** Many of the statutes and statutory provisions provide that regulations formulated in your Department be made by the Governor in Council. They would be on recommendation of the Minister of Transport. Would you care to make any comment about whether or not it would be an improvement or otherwise if those regulations were made directly by the Minister of Transport?

**The Chairman:** I should interject that we are not requiring you to answer these questions. You may feel that some of them are matters of policy which ought to be answered by the government, but if you feel free to express an opinion here in however cautious a way you might like to phrase it, we are willing to receive it.

**Mr. Morden:** I did not mean to get into policy matters, Mr. Chairman. I was talking about legislative technique.



**Mr. Fortier:** Mr. Chairman, the improvement that would result would be that it would simplify the procedure and save time. Perhaps Mr. Kennedy has some other observation.

**Mr. Kennedy:** One observation I could make is that the aeronautics Act, as Mr. Fortier has pointed out, enables the Minister to make regulations subject to the approval of the Governor in Council. Although the Minister may make a regulation, it does go forward for approval by the Governor in Council. In the preparatory process there is not really much difference in making a regulation in that phraseology from having the Governor in Council make it. We have to go through the same hurdles on the legislative side in the Department of Transport.

The regulations themselves say the Minister may make an order, and the Minister can make an order pursuant to a regulation which he has made. Good examples of these are military exercises or situations which arise which demand prohibited flight in particular areas. This may be on a gunnery range, or for other reasons. We still have to go through the same hurdles in the preparatory stage. If it were a military exercise, of course, it would not be public. If this were on a high security level there would not be the consultation with industry, not to the same extent in any event. But still, in the mechanics of the thing in the Department, we must go through the same exercise.

The order in fact becomes law, I suppose, when the Minister appends his signature to it. The bulk of the orders are published in the *Canada Gazette.* I suppose it would be only in the rare case of an extremely highly classified security situation that the regulation would not be published. But there would have to be provision in the regulations made pursuant to the Regulations Act exempting such publication.

**The Chairman:** On the question of publication, I might ask whether you see any great need for not publishing all regulations. There is, as you say, the

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requirement for an exemption provision. However, the Regulations Act itself does not apply to all regulations, but only to those of a legislative character and those that impose penalties. Who makes that decision? That is made by the Privy Council Office, I suppose, and it is not your decision to make. Other than the bulk that would develop in the publication, are there other reasons you know why regulations should not be published?

**Mr. Kennedy:** Mr. Chairman, I suppose much depends on what one determines or defines as being a regulation. For example, in the field of movement of ships it has been traditional to issue publications like

notices to shipping, notices to mariners. This is a task which the Minister of Transport has undertaken. They serve a very useful function in the navigational field because there must be some medium for informing mariners of the state of the weather, for example. To put this kind of thing through the regulatory process, based on the time that it takes us now to put through the traditional orders that we put through, would render the whole system a nullity.

The same is true with respect to notices to airmen. For the flight from Montreal to Winnipeg, for example, those who are responsible for traffic control in the Department of Transport must not be impeded in ensuring that when the pilot files his flight plan, the latest modifications which may affect his route will be available to him. There are many factors that could affect the flight from Montreal to Winnipeg in addition to weather: other aircraft, many factors.

It is sometimes possible to get these notices out a day or two earlier than needed, but it is essential that they be tied in with the regulation when professional skill is being exercised. If the master or pilot ignores the notice, it is essential that it be something which a court will take into consideration when judging the circumstances which may have given rise to an accident. In other words, if a pilot flies into a runway in Toronto this afternoon which has been closed for 24 hours for snow removal or something like that, it is essential that this be related to the regulation which provides the penalty. If the regulation tells pilots not to use runway 35 between 1400 and 1700 hours this afternoon, and a pilot goes in with 135 people on board and kills them all, we want to make sure that that pilot does not fly again.

**The Chairman:** Let me see if I can understand what you have just said, Mr. Kennedy and then Mr. Fortier can add an additional comment. As I understand it, you are making a case for directives other than those which would be formal regulations. You are not so much concerned about the question of publication; in

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fact you would want these directives to be published. You are concerned about the other formalities which are required in the making of regulations.

**Mr. Kennedy:** Yes, this is quite correct, Mr. Chairman. If we are inhibited by formalities, this in itself would work a great danger to the whole safety program which is maintained in air and marine matters.

**Mr. Fortier:** Mr. Chairman, if I may add to that, the Regulations Act states that the regulation is not prevented from coming into force and is not invalid by the fact that it has not been published in the *Canada Gazette*. It only states that no prosecution can be made until the regulation has been published. From that, I do not believe there is any complaint or objection or drawback in the Department to our regulations requiring to be published in the *Canada Gazette*.

**The Chairman:** Thank you. Another avenue that I would like to explore with the witnesses is to go through some of the answers to the questionnaire and ask the reasons for some of the practices which exist; not that we are suggesting that the practices should not exist but we want to find out why they are the way they are. The first one that I would fasten on, just taking these in the order in which they appear in the answers, is the Marine Regulations Branch. Is that the one that comes under Captain Graves?

**Mr. Fortier:** In part.

**The Chairman:** In part. I notice there are regulations which are made other than by the Governor in Council. In answer to question 1(b) of our questionnaire there are regulations which are made on the direct authority of the Minister although in 1968 no such regulations were made. Perhaps as administrators this is not a question that you could answer but I will have at least raised the question: what is the reason for having regulations which are made on the direct authority of the Minister in a case such as this? Why not have these made by the Governor in Council as well?

**Captain Graves:** Mr. Chairman, I believe that most of these are what we generally think of as ministerial orders and more often than not they amount more to a list or a schedule rather than a regulatory authority. I have in mind cases where the minister can designate certain countries whose tonnage certificates may be accepted and the Minister simply publishes an order listing the countries where the ships can be accepted. There is another one, designation of minor waters. The Act defines minor waters in general terms and the Minister can designate additional waters which may be considered as minor waters but they are usually employed in that sense.

**The Chairman:** So matters of minor importance would be dealt with in this way?

**Captain Graves:** That is correct, yes. It is more a matter of identifying certain factors rather than saying that this shall be done or that shall be done.

**The Chairman:** I notice also in answer to question 1(c), the Department informs us that there are regulations which are exempted from publication in the *Canada Gazette,* under Section 9 of the Regulations Act. No such instances of regulations making occurred in 1958.

We are informed that portions of certain highly technical regulations such as the Dangerous Goods

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Shipping Regulations are customarily exempted from publication, being of interest to a limited number of persons. Is this to save expense of publishing or what would the reason be, Captain Graves?

**Captain Graves:** Mr. Chairman, we have no such regulations in my division but Captain Harrison might be able to throw some light on that.

**The Chairman:** Captain Harrison.

**Captain Harrison:** The Dangerous Goods Regulations that was mentioned here, Mr. Chairman, is a very bulky volume. There are a great many items, hundreds of items, and the terms are not those ordinarily used. They are chemicals and explosives. It is a looseleaf volume of the type of chemicals shipped and the method of packaging changes very, very frequently. This is subject to continuous amendment and it is of interest to only a very limited number of people and the bulk and the expense of the regulations would be the main reason for not publishing.

**Mr. Kennedy:** Mr. Chairman, another thing involved is a lot of pictorial usage in that regulation for labelling, cautions, packing and things of this nature. The Queen's Printer has not really, at least to my understanding, got into regulations of this type. As Captain Harrison says, shippers of dangerous goods or manufacturers of explosives are basically the people who wish to have this and the pictorial form also renders it, I would say, very awkward to the customary process.

**The Chairman:** What is your exact method of publication or notification, perhaps I should say, with respect to those people who will be involved?

**Captain Harrison:** The original regulation and the amendments thereto are circulated for comment in the same way as others and, as I say, we have this standing technical committee which we treat as advisory in all these things. In addition, we also circulate to the persons concerned, but the technical committee meets frequently and we do not make any changes in these regulations without their advice.

**The Chairman:** Yes, but that concerns consultation and I asked about the mechanics of notifying them just what the regulations are. Do you have these printed, for instance? Are they sent to them in printed form?

**Captain Harrison:** Yes.

**The Chairman:** Who does this printing if it is not the Queen's Printer?

**Mr. Kennedy:** Mr. Chairman, I think I can answer that. It is the Queen's Printer that does it but I think this sort of printing is different, it is a very slow type of printing and I would suggest probably a specialized type of printing as well, different from the ordinary type of legislative instrument that you are so involved with. Therefore, I presume they have to set up probably a special press to do it. I am sure you are all familiar with *Safety Afloat.* It is not a regulatory publication of the Department but it is an informative publication of the Department. There are a lot of pictorial usages in that and I am sure that we would have the same difficulty if we tried to incorporate some of the pictorial uses in *Safety Afloat* into the Small Vessel Regulations so we have gone with two packages in that instance.

**The Chairman:** Are there any further questions on this area?

**Mr. Muir (Cape Breton-The Sydney):** Just one question, I might ask Captain Harrison, although I do not expect him to carry this information in his head. With regard to regulations pertaining to the shipment of explosives across certain docks and wharves, do you change that on occasion? For instance, for a number of years you may ship dynamite to a certain port and then can the regulation changed so it is prohibited for some reason or another?

**Mr. Harrison:** Yes.

**Mr. Muir (Cape Breton-The Sydneys):** Under the regulations?

**Mr. Harrison:** It can happen that it can be changed so that it is prohibited or it can happen that larger quantities can be allowed. If the buildings or the number of persons living in the area have decreased or have increased or residences have been built closer to the facility, it is a matter of safety distances usually inherent in this kind of thing.

**Mr. Muir (Cape Breton-The Sydneys):** I am thinking,

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sir, of the Port of North Sydney. My information is that explosives were shipped through there for quite a number of years but have recently been curtailed. If you had an opportunity at some time could you get a memo for me on it with regard to the regulations?

**Mr. Harrison:** Certainly.

**The Chairman:** The next section of the questionnaire answers that I would turn to are those dealing with the River St. Lawrence Ship Channel. I am taking the portions where there is a positive answer to questions after 1 (a). In that series of answers question 1 (d) is answered "yes"; that is, if the Department in that area issues other rules, orders and instructions not

included within the terms of the Regulations Act which affect the public, and the answer says:

> 1 (d) Yes. Orders and instructions are issued to navigators and shipping interests through the medium of Notices to Pilots, Notices to Shipping and Notices to Mariners as well as Marine Traffic Control by virtue of the St. Lawrence River Navigation Safety Regulations. Approximately 150 such notices were issued during 1968 advising the users of the St. Lawrence Ship Channel of hazards to navigation, dredging operations, etc.

The question I would ask here is: Why not put these in regulation form? Why have these merely in directive form? This would come under whose authority?

**Mr. O'Malley:** Mr. Chairman, with respect to these notices, their nature is not so much regulatory as informative, from a safety point of view. We have units in the ship channel that constantly sweep the bottom for obstructions, for example, and when these obstructions are found, a notice is sent immediately to the industries by these various means to advise them that there is a danger element there and we give them the proper directives as to what should be done. At times we might close off part of the channel until these obstructions can be removed. In other instances, for example where we have technical personnel and engineers working on the ice cover adjacent to the ship channel in the winter months, in respect of their safety, we would issue directives. I would hesitate to say that they would come under the classification of regulations. They are varied in nature and depend on very fluid conditions which change from time to time, and I think it would be difficult to formulate a regulation which could be applied to all these varied instances.

**The Chairman:** Are there any further questions? Mr. Kennedy.

**Mr. Kennedy:** Mr. Chairman, in a way this relates to the sort of thing I was speaking about before. For example, there are in the Canada Shipping Act provisions which make the Master responsible for his ship and the seaworthiness of his ship. There is in the Criminal Code a provision which prohibits people from operating small vessels in a reckless or dangerous manner. There are regulations made under the navigational portions of the Canada Shipping Act which require the owner or operator to navigate his vessel in a prudent and cautious manner. If the person in charge of the vessel has been made aware of the danger and fails to operate in a prudent manner, then you have the regulation which provides the prohibition, if you will, and the penalty. This instrument, it is hoped, brings to the notice of the people in charge of the navigating process these sorts of situations which develop and which the existing process of making statutory instruments is not capable of attending to.

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**Mr. Pépin:** Mr. Chairman, there is no fine prescribed for the contravention of those orders or regulations.

**Mr. Fortier:** Mr. Chairman, these orders, as Mr. O'Malley explained, are not actually orders. They are suggestions–what you might call bringing to the attention of mariners a condition which exists in a certain portion of the river.

**The Chairman:** Cautions.

**Mr. Fortier:** Cautions.

**The Chairman:** Mr. Kennedy.

**Mr. Kennedy:** As I am sure you are aware, Mr. Chairman, the country is covered with hydrographic charts. These indicate that certain waters have certain depth and can be used. You have to have some sort of an instrument that says, "Do not use it between four and six", and the same is true of runways for aircraft or air space. If you relied on getting an amendment through to your regulation or your air navigation order, you would probably have a casualty, a public inquiry and condemnation of the Minister of Transport for failing to have his staff take prudent means to bring this sort of thing to the attention of the users.

**The Chairman:** I would then turn to the Civil Aviation Branch and I note there that question 1(b) is answered yes; that is, that the Department does issue regulations made on the direct authority of the Minister–ministerial regulations, in other words, in the form of Air Navigation Orders, as directions of the Minister of Transport, made pursuant to certain Regulations. Approximately 14 such Orders were made in 1968. Again I would ask the question which I asked with respect to the Marine Regulations Branch, where there was a similar use of ministerial regulations as opposed to Orders in Council made by the Governor in Council. What is the reason for this type of regulation in this area? Who is the responsible . . .

**Mr. Fortier:** It is Mr. Walker. I would like to point out, though, Mr. Chairman, that in respect of these Air Navigation Orders, as I stated earlier, there is definite authority in the Aeronautics Act for the Minister to make orders and regulations, provided that in the Air Regulations made by the Governor in Council there is a statement that says that the Minister may make an order in this matter.

**The Chairman:** Yes, I recognize that, Mr. Fortier. The thrust of my question is really as to whether there is a reason in departmental practice why such power should be exercised or why it should even exist. In other words, taking a broader view than the legal one

of whether or not it is justified by the Act–which, of course, it is–what particular factors in the field make this type of regulation necessary?

**Mr. Fortier:** I would ask Mr. Walker.

**The Chairman:** Mr. Walker or Mr. Kennedy.

**Mr. Walker:** Perhaps Mr. Kennedy might just as well, if it is all right with you, Mr. Chairman.

**Mr. Kennedy:** I think it was felt that a great many of these orders that are issued by the Minister relate to safety equipment of one form or another. For example, an oxygen equipment order related to the type of equipment which should be carried in aircraft pressurized cabins. It may be determined, I suppose, by experience. The people working in the scientific areas continuously discover new things, and sometimes things which are thought to be valid become invalid. The fact remains that this sort of order does become law when signed by the Minister although it is gazetted. I suppose it is possible, in peculiar circumstances such as this, to bring it into force of law quicker than

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it might if you were going through the regulatory process. What I am thinking of is that in fact, although perhaps not published until two weeks later, it would actually be accepted by the industry when signed by the Minister. These orders relate to night flying. You can have changes in the conditions of night flying due to the advent of new equipment, safety harness orders and this sort of thing. I suppose one might say in a way it is a little more of a technical type of thing as opposed to the type of order that says, "Thou shalt not fly recklessly" or thou shalt not do this or that.

**The Chairman:** What type of scrutiny outside the Department is there in the case of a ministerial regulation? Do these go to the Privy Council?

**Mr. Fortier:** Yes, sir.

**The Chairman:** So they receive the same type of scrutiny as if they were to be passed by the Governor in Council?

**Mr. Fortier:** That is right. The same procedure is followed except instead of going to the Governor in Council they go to the Minister.

**The Chairman:** So the Minister does not make them first and send them to the Privy Council office; they are drafted, go to the Privy Council office and then they come back and when you agree on the draft they are at that point made by the Minister?

**Mr. Fortier:** That is right, yes.

**The Chairman:** What is the making process by the Minister? Is it just his signing of the regulation?

**Mr. Fortier:** It is submitted for his approval in the form of a memorandum to which is attached the order that the Department wishes him to make.

**The Chairman:** So it is pretty well the same form as if it going to the Cabinet?

**Mr. Fortier:** That is right.

**The Chairman:** The answer to question 1 (d) also on the Civil Aviation Branch and in respect of other rules not included within the terms of the Regulations Act which affect the public, is as follows:

> Certain publications or directions issued by the Department, i.e., Canada Air Pilot and Designated Airspace Handbook, outline the basis of determining good airmanship and professional air conduct and are not included within the terms of the Regulations Act. These documents and amendments thereto are a form of safety instruction or specification for guidance of the aviation public designed to achieve flight safety in the control of civil aviation. Frequent and continuous amendment is required to inform airmen, air traffic controllers and all those engaged in air navigation of changes in airport conditions, airway structures, rules of the air, hazards to flight, etc. The Canada Air Pilot (East and West Editions) was amended with 63 issues in 1968, each issue containing significant changes to flight procedures or flight disciplines relative to routes and airports throughout Canada. For similar reasons, the Designated Airspace Handbook, which is basically a manual of air traffic control instructions for the conduct of flight procedures, is amended or revised, and published every 35 days.

Perhaps that answer is sufficiently clear without asking for additional explanation, unless there are questions which members of the Committee or our counsel would like to raise.

Question 1 (e) also concerned the Civil Aviation Branch and raised a question about directives which did not affect the public, but only the Department itself. The answer is:

> Within the Department, instructions are issued for the guidance of civil aviation inspectors and other persons engaged in aeronautical matters, designed to ensure a standard interpretation and application of air safety policy.

I think in all directives of this kind the Committee is interested in whether or not this is perhaps not regulation by the back door. Are these directives to departmental officials in effect determinative of the rights of the public in that they determine the interpretation

which will be given to them by the Department. So that an ambiguous regulation, one which is capable of several possible interpretations may, in effect, be further specified by one of these directives and therefore the rights of the public are indirectly affected even

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though directly it would appear that there is no effect on the public. Mr. Kennedy.

**Mr. Kennedy:** I would like Mr. Walker to add to this. With respect to both 1 (d) and 1 (e), the aeronautical field is worse than the motor vehicle field. In point of fact, it is like the motor vehicle field may have been in the beginning. You have a tremendous variety of aircraft. Aircraft are built not in quite the same manner as ships are built. As you can well imagine, if you have a fabricated wing on an aircraft the process of patching a hole in such a wing is totally unrelated to the process which might be required with respect to a rivet in a Viscount. This is why in this area it is so necessary that not only the people involved in the industry itself be availed of all the latest technological data and developments which we may have either as a result of an accident in Peru or wherever it might be, and the instructions which are issued to civil aviation people are designed to ensure that they are aware of the latest developments in this sort of technical application of a very difficult regulatory field. There would be no effort made, for example, to tell a civil aviation inspector, when he was interpreting Section 529 of the Air Regulations which governs the manner in which an aircraft shall be landed at an airport where there are built-up areas, "Well apply it in this circumstance and do not apply it in that." This is not, in my understanding, the nature of the instructions which are issued to civil aviation inspectors.

**Mr. Walker:** That is quite right, Mr. Chairman. They are basically a type of "in house" instruction to our staff in the field to keep them up to date with changes in policy within the Department on how we do our work. For example, perhaps in the matter of licensing a pilot the question arises as to his medical fitness to hold a licence. The procedures for determining medical fitness are laid down quite carefully. The role that the civil aviation inspector has to play in this procedure in relation to the regional medical officer is the sort of thing that is lined out within the body of these instructions.

Another example might be in the registration of an aircraft. There may be a question of determination of nationality. How does the inspector go about determining the nationality of the applicant, the question that would be put to the man, if there was a question of this nature. These are the sort of things that are dealt with in the instructions.

**Mr. Kennedy:** Also the type of documentation perhaps that he might be expected to file. If Canada has arrangements with other countries and if the same consideration is given with respect to Canadian licensing by West Germany, then the intention is that Canada should wherever possible, afford the same sort of treatment. These things change depending upon perhaps a country raising the level of its standard of medical fitness, or what have you. Therefore the only way you can keep abreast of this is by this sort of "in house" information.

**Mr. Morden:** Do you have any instructions of this type under 1(e) that interpret or define words or expressions in regulations?

**Mr. Walker:** We leave the interpretation of regulations to the courts.

**Mr. Morden:** Well, in the initial stage it has to be applied by the inspector. You mention "for the guidance of inspectors to ensure a standard interpretation and application of air safety policy." I just wondered what sort of guidance you gave them.

**Mr. Walker:** No, we do not interpret the regulations whatsoever in this type of document.

**Mr. Morden:** You take the position they speak for themselves.

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**Mr. Walker:** We hope they do not speak on a subject too frequently at all because it is very difficult and dangerous for them to start giving advice to industry on how to interpret a regulation, you see.

**Mr. Morden:** I think the regulations speak for themselves.

**Mr. Walker:** Yes, indeed; that is how we tried to develop them.

**The Chairman:** In relation to 1(e) I notice you have made no estimate of the number of these directives. I assume from the absence of an estimate that it would be difficult to know how many there were. Would they be in the hundreds or thousands every year?

**Mr. Walker:** No, nothing of that scope, I am sure. Probably each branch would be given certain instructions relating to their own area of responsibility; in the area in which I work perhaps 15 to 20 a year—something like that.

**The Chairman:** I see.

**Mr. Kennedy:** To give an example, under the air regulations are listed the types of people who are

qualified to be the registered owner of a Canadian aircraft: A Canadian citizen, to start with; then an immigrant who has been admitted to Canada for permanent residence; and a corporation, at least two-thirds of the directors of which are Canadian citizens. In the case of private aircraft of the type I mentioned to you before: A citizen, or a subject, of a contracting state, who normally resides in Canada; or a corporation incorporated under the laws of Canada.

Not many of our civil aviation inspectors are lawyers, and it may be that in a certain case something happens. As a consequence, the problem is referred to the Director of Legal Services, Mr. Fortier, and an opinion is given on the situation, or the status. This could be interpreted as the result of an instruction to civil aviation saying, "This case arose. This was the interpretation that was given".

In addition to that, for example, we permit aircraft which have chattel mortgages on them, and leases and things such as that. Civil aviation inspectors, again, are not lawyers. We try to lay down for them what they may look for in a document that is filed with them.

When you consider aircraft may be coming in from Japan, Mexico, or Germany, you have to lay down some sort of guidelines for them so that you do not have all sorts of anomalies occurring under the regional aviation program that we have in the Department of Transport.

**Mr. Morden:** On that point, and speaking hypothetically, would there be any objection, in your view, to making these instructions available to those members of the public, or users, who would be affected by them, or do you regard them as a matter of internal departmental policy?

**Mr. Walker:** Yes, Mr. Chairman, the industry is told of anything that affects it. At this very moment we are reviewing these particular instructions with a view to ensuring that over the last several years something has not crept into our internal instructions that has been kept away from the industry. We are extracting certain material now in the form of a handbook, which we hope to publish by the end of the year, and which will bring down the amount of this instruction and increase the amount of information available to the industry.

**Mr. Morden:** If there are instructions to inspectors to ask questions of such-and-such a nature on this type of an application, would these written instructions be made available to the industry or to those interested?

**Mr. Walker:** Yes, sir. Generally, it is included on the application form. For example, if it dealt with an application for a certificate of registration for an aircraft, these sorts of things are embodied in the form.

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**The Chairman:** Turning finally to the Canadian Transport Commission, I note the answer to question 1 (c) is that eight regulations were issued during 1968 under authority of the Railway Act and were exempted from publication in the *Canada Gazette* by the Regulations Act. Can anyone here speak with some knowledge of the Canadian Transport Commission?

**Mr. Fortier:** No, Mr. Chairman, there is no one here.

**The Chairman:** Yes, I realize that. I did not specifically ask whether there was anyone here from the Canadian Transport Commission. Is there anyone here with enough knowledge of the Commission to make any comments on these answers?

**Mr. Fortier:** I would not dare try to comment on that. The answers should be given by the Commission.

**The Chairman:** This would also be true of 1 (d) and 1 (e)?

**Mr. Fortier:** Yes, sir.

**The Chairman:** Having gone through question one, I wish to pose this general question: Would you find any difficulty with a requirement of consultation with those likely to be affected by a regulation?

I have noted that most of the branches have reported that there is, in fact, consultation. If consultation were a legal requirement would this raise any difficulties? First of all, this requirement could be for an informal consultation, such as at the wharf with the fishermen, or secondly, it could be a requirement for some kind of formal consultation—a formal hearing. Would anyone have any comments on whether there are any difficulties inherent in this type of general requirement?

**Mr. Forrier:** On the legal aspect, Mr. Chairman, if we were to provide for a formal hearing, it would considerably delay the actual making of the regulation. We would then have to give a delay of 30 days at the very least so that persons could prepare their briefs. We would likely have to arrange for regional hearings throughout Canada, and that would be the cause of considerable delay. Perhaps some of the officers of the Department have some views on that.

**The Chairman:** It might also be interesting to know what might be the general period within which you might want to put a regulation into effect. I suppose in some cases it would be very short indeed?

**Mr. Kennedy:** If we are talking of our regulations in the pure sense, I think the only area in which one might wish to avoid consultation would be where

there was some sort of classification to the problem from the point of view of national security interest.

The interesting thing about the Aeronautics Act is that "minister" as defined in that Act includes not only the Minister of Transport but also the Minister of National Defence. The Minister of National Defence does, in fact, have certain powers under the Aeronautics Act. This is as a result of its being administered in the early days by . . .

Mr. Fortier: Civil aviation, up to 1936.

Mr. Kennedy: Therefore in the Aeronautics Act there are certain things of a national security classification.

Our great concern in transport, particularly on the aeronautics side—and I think it is becoming increasingly evident on the marine side—is the tremendous amount of safety data that are being developed by organizations more capable than our own, with all deference to our own officials. When one is dealing with supersonic aircraft, none of which are being

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manufacturing in Canada, one reaches a point where one is very reliant upon the things that are developed in an international organization. I think perhaps this is true in some parts of the marine area, as well, though perhaps not to the same degree. But there have been a number of changes in recent years in this area.

The problem is that in many ways—and please excuse my language—we have too damned many regulations with technical content. It is the technical specification incorporated in regulations which constitutes the bind, not only the bind of the administrator, but, I would suggest to a degree, the bind of the person who is trying to find out what the law is. In my own view, if a process were developed which separated and eased the publication of this technical material—did not complicate—it could be a requirement on a maintenance engineer to comply with the technical specification. However, if you have to put this technical material into regulations you just will increase the size of regulations. I am sure you all are aware of this as this is one of the reasons for the existence of this Committee. In my view we are not going to solve the problem by putting this ever-increasing mass of technical material into regulations. By doing this we just will create far greater problems.

The Chairman: Would any of the other witnesses care to comment on the consultation question? Yes, Mr. Graves.

Mr. Graves: Mr. Chairman, as I understand it, you were inquiring specifically about the desirability of formal consultation required by law, as distinct from informal.

The Chairman: Yes.

Mr. Graves: From our experience, I would think, we would get a far better reading of the reaction of the people concerned through informal consultation rather than through a formal public hearing. That is my impression.

The Chairman: Thank you. Mr. O'Malley?

Mr. O'Malley: Mr. Chairman, I think there are probably two extremes in regulations. One, as mentioned by Mr. Kennedy, is the regulation with an extremely complex and highly technical content which affects a relatively small number of people. At the other extreme there are those regulations affecting a large number of people, for example, safety regulations. If it were mandatory to have consultation with these large segments of the population, I think the input from these people would be very beneficial in formulating effective safety regulations and it also would bring to the attention of the public in a very striking manner, I think, by their participation, of the existence and the necessity of having these regulations. Perhaps I would not be prepared to agree that it should be mandatory to have consultation on all regulations, but on specific regulations of a simple nature that affect a large number of people, I think it would, indeed, be beneficial.

The Chairman: Thank you. Are there any other comments? Yes, Mr. Yost?

Mr. Yost: Mr. Chairman, I do not see how we would ever get off the ground in trying to get out regulations if we had consultations every time we intended to issue a regulation or even to amend one. The procedure would be fantastic. I just cannot see it. Perhaps I did not understand your question.

The Chairman: Do you mean in terms of formal consultation?

Mr. Yost: Yes.

The Chairman: I realize the answer is obvious in some cases. I merely wanted you to express the considerations to put them on the record.

Mr. Yost: I shudder at the very thought.

The Chairman: I do not think informal consultation would necessarily lead to the same type of consequence. Presumably, you already either must know the answer through the knowledge of your departmental officials or you have to consult with people

who do know the answers. There has to be, at least, some kind of consultation process within the Department and by going outside to a few more people it probably would not add that much more to the burden if it were informal. Mr. Kennedy?

**Mr. Kennedy:** I am sorry, Mr. Chairman. I think in the area affected by the small vessels regulations

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where, over the years, there have been a number of very formal, but informal, meetings annually—I should not say annually, but they have been held on a number of occasions—with members of the boating federation, manufacturers—even manufacturers of life jackets—yachting clubs and the Red Cross, this, no doubt, has had a beneficial effect. It puts input into the production of amendments to that type of regulation. However, as Mr. O'Malley said, there are probably two types. I think where you are administering an airport or where you are administering certain property, like a canal, there are certainly some aspects of this, but the average person probably does not appreciate a great deal about the activities which should be related to the manoeuvring area of a runway. There is a limited class of people who are involved in this and who really should be involved in this.

**The Chairman:** Mr. Cavey, I think you had a comment, too.

**Mr. Cavey:** I was just thinking, Mr. Chairman, that there are various types of regulations, administrative directives and that sort of thing that could be made, but one where I do not see advanced consultation as being too practical a possibility would be in the setting of rates and charges—nobody likes a rate increase. Just this past winter we determined an increase in rates and charges for the use of government wharfes which were approved around the beginning of December to take effect April 1. We gave lots of advance notice to the industry that these rates and charges were going up and in this way they were advised, but there were no public hearings or meetings at which we said, "Do you mind if we raise this rate from 40 cents to 50 cents"?

**The Chairman:** Did you have any representations that they should not go above 50 cents?

**Mr. Cavey:** I was just checking with Mr. Calladine and there was virtually no protest. Anything that did come in was very local and did not deal necessarily with the rate increase itself or the fact that there should not be a rate increase.

**The Chairman:** Mr. Morden?

**Mr. Morden:** Mr. Chairman, if you would permit me, I would like to ask Mr. Kennedy a question arising out of his general view that with the increasing proliferation of technical detail and knowledge which has to be incorporated into writing, it is not a good thing to put it in the form of a regulation. I understand, Mr. Kennedy, that this technical information in many respects is embodied in the standards to which people are to conform, say, in the safety field. Would that be right?

**Mr. Kennedy:** I think what I said, sir, is that a person in order to be a pilot, a doctor or a lawyer is required to pass examinations; an aircraft maintenance engineer is required to sit for examination; a pilot is required to sit for examination and he is required to do so quite frequently depending upon his classification. I think that part of this is in the examining process when it comes to how a pilot should conduct himself in the cockpit of an aircraft. On the maintenance side, this, again, is knowledge which you expect the individual to demonstrate before he gets a licence. One of the requirements of his licence is that he keep himself abreast of any changes and that he be on a distribution list for engineering, inspection and maintenance manuals, for example, which will keep him up to date in that area of endeavour where he may be working. Yes, I think it is essential that that segment be informed, but I do not think it is essential that the Canadian public be informed.

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**Mr. Morden:** I gathered it was your view, which, I think, probably many people would share, that there might be some other way to accomplish what those regulations intend to accomplish than by doing it through the medium of law and the necessity of having to turn over page after page of regulations in technical language that very few people understand. To get right to my question, if, in fact, notwithstanding all the technical verbiage, they need to impose or lay down a standard with which those affected are obliged to comply, how else can it be done than in the form of a regulation?

**Mr. Kennedy:** It is like a contract. You and I can conclude a contract to build a building and in that contract I can cite that I want you to put on an asbestos roof adhered with a specification produced by the Miner Rubber Company Ltd. and we have a dispute over that roof in court. That specification is well known to you, to me and to the parties involved. It is referred to in the contract. I am sure that court will have no difficulty, as long as the specification is appropriately identified in the contract, of interpreting the contract on the basis of the specification, and it will relate to the manner in which the process was used by you as the manufacturer or builder for me. What I am saying is that I think in some regulations the same thing should be possible, particularly where you are getting these specifications changed so constantly. We are going to have the Concorde aircraft

and we are going to have the super bus and these things. We do not even manufacture them in Canada and we have to accept in many instances the technical data developed by a manufacturer or an aviation agency such as Federal Aviation in the States which is approving this process for their own airworthiness program. If we were to challenge some of this we just do not have the technical backup to do it.

**Mr. Morden:** Thank you.

**The Chairman:** Mr. Fortier.

**Mr. Fortier:** Mr. Chairman, this technical data does not provide for penalties. It is just that the aircraft will not be certified unless it meets certain standards. But in every instance where there is a provision for a penalty for contravening the order it is either covered in a regulation or in an order made by the minister.

**Mr. Morden:** I thought that perhaps the possible answer with regard to putting to good use technical information but keeping it out of the regulations to some extent would be to confer a measure of discretion on inspectors and then in carrying out their inspections they would be guided not by firm instructions but by information of a technical nature.

**Mr. Kennedy:** Maybe I can answer the question with this book called the *Canada Air Pilot West.* This is amended, as was indicated, very frequently. In bulk it is diagramatic. No pilot goes into the cockpit of an aircraft without having this on his seat. In fact it is one of the cardinal rules for governing his conduct. Without it he is lost. Furthermore, also if he were to try and land at an airport contrary to the diagramatic information contained in it he would certainly be acting without good airmanship. Now I would like to see it better referred to in the air regulations, but we do refer to it. We say in a regulation, for example, do not take off or land at an airport except in accordance with this. It is like in a way the hydrographic chart—do not navigate the St. Lawrence river from Montreal to Seven Islands unless you have appropriate hydrographic charts. People do it but if you do it with a big ship, with all due respect to some of the judges in this land, you are not demonstrating good seamanship

• 1205

practice and therefore as a master of the ship you in point of fact are derelict in your duty.

This goes back to what your gentleman friend on the left said about pilots. I do not think having a pilot on board is an excuse for not having a master of a ship who is in command having this data. It is the same with this sort of thing. If somebody lands at an airport contrary to that he is certainly risking life and limb. But that changes so frequently.

**The Chairman:** Are there any further questions? If not, I would like to express our sincere appreciation to the officials from the Department of Transport who have been so good as to spend this two and a half hours with us this morning. It has been very helpful to us. I would not say it has given us a detailed understanding of how the Department operates, but at least it has given us a much better understanding than we had before of how the process of making and applying regulations operates in Canada. I think I should say in conclusion, along with our thanks, that it seems to us your Department is in every sense a well regulated one.

The meeting is adjourned.

The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1969-69

SPECIAL COMMITTEE

ON

# Statutory Instruments

Chairman: Mr. BLAIR MacGUIGAN

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 9

THURSDAY, JUNE 25, 1969

FRIDAY, JUNE 26, 1969

*Respecting*

Procedure for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada

WITNESS:

(*See Minutes of Proceedings*)

and we are going to have the super bus and these things. We do not even manufacture them in Canada and we have to accept in many instances the technical data developed by a manufacturer or an aviation agency such as Federal Aviation in the States which is approving the process for their own airworthiness purposes. If we were to challenge some of this we just would not have the personnel to do it.

Mr. Hunter: Thank you.

The Chairman: Mr. Forbes.

Mr. Hunter: Mr. Chairman, this technical data does not provide for penalties. It is just that the aircraft will not be certified unless it meets certain standards. But in every instance where there is a provision for a penalty for contravening the order it is either covered by regulation or in an order made by the minister.

Mr. Howden: I thought that perhaps the possible answer with regard to putting to good use technical information but keeping it out of the regulations to which it was thought to confer a measure of discretion on inspectors and men in carrying out their duties and who would be entitled and by this instrument to information of a technical nature.

Mr. Kennedy: Maybe I can answer the question with this book called *the Canada Air Pilot West*. This is amended, as was indicated, very frequently. In bulk it is dangerously. No pilot goes into the cockpit of an aircraft without having this on his seat. In fact it is one of the regulations for governing his conduct. Without it he is liable. Furthermore, also if he were to fly into this airport contrary to the diagramatic information contained in it he would certainly be doing without good airmanship. Now I would like to see it better referred to in the air regulations, but we do refer to it. We say in a regulation, for example, do not take off or land at an airport except in accordance with this. It is like in a way the hydrographic chart—do not navigate the St. Lawrence river from Montreal to Seven Islands unless you have appropriate hydrographic charts. People do it but if you do it with a big ship, with all due respect to some of the judges in this land, you are not demonstrating good seamanship.

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The Chairman: Are there any further questions? If not, I would like to express our sincere appreciation to the officials from the Department of Transport who have been so good as to spend this two and a half hours with us this morning. It has been very helpful to us. I would not say it has given us a detailed understanding of how the Department operates, but at least it has given us a much better understanding than we had before of how the process of making and applying regulations operate in Canada. I think I should say in conclusion, along with our thanks, that it seems to us your Department is in every sense a well regulated one.

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The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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MINUTES OF PROCEEDINGS AND EVIDENCE

No. 9

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THURSDAY, JUNE 26, 1969

FRIDAY, JUNE 27, 1969

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*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

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WITNESS:

(*See Minutes of Proceedings*)

20345—1

SPECIAL COMMITTEE

ON

STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | [1] Roy (*Timmins*), |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

Timothy D. Ray,
*Clerk of the Committee.*

(Quorum 7)

Pursuant to S.O. 65(4)(*b*);
[1] Replaced Mr. Murphy on June 27, 1969.

# MINUTES OF PROCEEDINGS

THURSDAY, June 26, 1969.
(12)

[*Text*]

The Special Committee on Statutory Instruments met this day at 9.40 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present:* Messrs. Brewin, Gibson, Hogarth, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*), Stafford—(8).

*Also present:* Dean Gilles Pepin, Counsel to the Committee; and Mr. J. W. Morden, Assistant Counsel to the Committee.

*Witnesses: From the Department of Manpower and Immigration:* Messrs. R. E. Williams, Legal Adviser to the Department; J. C. Morrison, Director General of Operations, Manpower and Immigration; J. S. Cross, Acting Director, Programs and Procedures Branch (Immigration); E. P. Beasley, Director, Home Services Branch (Immigration); J. Drew, Director, Activities Development Branch (Manpower); J. Meyer, Acting Director, Programs Branch (Manpower); S. Gerley, Assistant Director, Manpower and Mobility Program and Employment Stability (Manpower).

The Chairman announced a proposed programme of meetings for the balance of the day and Friday, June 27, 1969.

It was

*Agreed,*—That the President of the Privy Council, and officials from the Privy Council Office be heard this day at 3.30 p.m.; and at 9.00 a.m.

The Chairman introduced the officials from the Department of Manpower and Immigration and invited Mr. Williams, Legal Adviser to the Department, to make an introductory statement.

The Committee then proceeded to the questioning of the officials regarding the source and method of regulation making, then to a discussion of the answers from the Department to the Committee's questionnaire, questions 1, 2, 10, 11, 19 and 20. (*See Exhibit Q2*)

During the questioning, it was requested by Messrs. McCleave and Brewin that the officials after consultation with the Minister file with the Committee by August 31, 1969: The reasons for keeping confidential (*a*) the compilations for arriving at the point value for each occupational category and (*b*) the point values for occupational categories related to the occupational description as determined by the applicant for immigration; as per Schedule A to the Regulations and as referred to in Section 32(2) of the Regulations.

The Chairman asked that the departmental officials file with the Clerk of the Committee information re departmental directives giving an interpretation of the Law, notably (*a*) Under what requirement of the Act are they directed? (*b*) How many were there in 1968 as compared to previous years, and as compared to other directives?

At 12.45 p.m., the Chairman thanked the witnesses and the Committee adjourned until 3.30 p.m. this day.



20345—1½

AFTERNOON MEETING
(13)

The Special Committee on Statutory Instruments met this day at 3.45 p.m., the Chairman, Mr. MacGuigan, presiding.

*Members present:* Messrs. Forest, MacGuigan, Marceau, McCleave, and Stafford—(5).

*Also present:* Same as at morning meeting.

*Appearing:* The Honourable Donald Macdonald, President of the Privy Council.

*Witnesses: From the Privy Council Office:* Mr. J. L. Cross, Assistant Clerk of the Privy Council (Orders in Council), and Mr. Paul Beseau, Legal Adviser to the Privy Council Office.

The Chairman introduced the Honourable Donald Macdonald, President of the Privy Council, and then introduced Mr. Cross. Mr. Cross, during his statement, read the first Order in Council passed in Canada and went on to explain the role of the Privy Council in regulation making, and the requirements therein. Mr. Beseau was then asked to explain his role as legal adviser.

Following the questioning of the Minister and the officials present, the Chairman thanked them for their attendance.

At 5:00 p.m., the Committee adjourned to the call of the Chair.

FRIDAY, June 27, 1969.
(14)

The Special Committee on Statutory Instruments met this day at 9:15 a.m., the Chairman, Mr. MacGuigan, presiding.

*Members present:* Messrs. Gibson, Hogarth, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*), Roy (*Timmins*)—(7).

*Also present:* Dean Gilles Pepin, Counsel to the Committee; and Mr. J. W. Morden, Assistant Counsel to the Committee.

*Appearing:* The Honourable John Turner, Minister of Justice and Attorney General for Canada.

*Witnesses: From the Department of Justice:* Mr. D. S. Maxwell, Q.C., Deputy Minister and Deputy Attorney General of Canada; Mr. D. S. Thorson, Q.C., Associate Deputy Minister of Justice; Mr. J. W. Ryan, Director, Legislation Section; Mr. P. D. Beseau, Department of Justice Legal Adviser to the Privy Council Office; *and from the Privy Council Office:* Mr. J. S. Cross, Assistant Clerk of the Privy Council (Orders in Regulation).

The Chairman introduced the Honourable John Turner, Minister of Justice, and the officials from his department.

The Minister was invited to make a statement during which he outlined the role of the Department of Justice in the regulation making process and also certain recommendations for improving the general process.

The Chairman thanked the Minister and invited the Committee to question the witnesses present.

On motion of Mr. Gibson, it was

*Agreed,*—That the statistical summary prepared by the Privy Council, and the document "Recommendations to the Governor in Council" be printed as Appendices. (*See Appendices G and H*)

On motion of Mr. McCleave, it was

*Agreed,*—That a list of documents filed with the Committee, this list to include the Departmental answers to the questionnaires received to date, be printed as an Appendix to today's proceedings. (*Appendix I*).

At 11:00 a.m., the Chairman thanked the Minister and his officials and the Committee adjourned to the call of the Chair.

Timothy D. Ray,
*Clerk of the Committee.*

## EVIDENCE

*(Recorded by Electronic Apparatus)*

**Thursday, June 26, 1969**

**The Chairman:** The meeting will come to order.

Gentlemen, I will give you our program for today and tomorrow. This morning we are to hear officials from the Department of Immigration. This afternoon at 3.30 we will hear from officials of the Privy Council Office, who will be accompanied by the Hon. Donald Macdonald.

Tomorrow morning at 9 o'clock we will hear from the Department of Justice, with the Hon. John Turner. Mr. Turner has informed me that he wishes to make a personal statement on the subject of our investigation. The reason for calling it at 9 is that the House convenes at 11, and this will ensure, I think, that we will be finished by 11 o'clock. If Committee members have any serious objection to that early starting hour we can just as easily meet at 9.30, but it gives us more time to finish before the House convenes at 11. Is this acceptable to Committee members?

• 0940

**Some hon. Members:** Agreed.

**The Chairman:** There being no objections, we will leave the program as it is.

That ought to complete the public hearings of our Committee. Because of the recovery of Mr. Cross of the Privy Council office, we are able to hear him today and will not have to have the meeting later in July that at one point threatened us.

Our future meetings will be a meeting of the Steering Committee early in August the date for which will be set shortly, and to which all Committee members will be invited, and a meeting of the whole Committee, which will take place about the middle of September when other Committees will also be beginning to meet.

I have summer schedules from a good many of you now. As soon as I contact a few who have yet to give me their summer program we ought to be able to fix exact dates so that you will have plenty of notice of the summer meetings. I hope by tomorrow, or at least by the first or the week, to have those exact dates for you.

This morning we have with us Mr. R. E. Williams, Legal Adviser to the Department of Manpower and Immigration; Mr. J. C. Morrison, Director General of Operations, Manpower and Immigration—I am just going around the table as these gentlemen are seated—Mr. J. S. Cross, Acting Director, Programs and Procedures Branch, (Immigration); Mr. E. P. Beasley, Director, Home Services Branch (Immigration) Mr. J. Drew, Director, Activities Development Branch, (Manpower); Mr. J. Meyer, Acting Director, Programmes Branch (Manpower) and Mr. S. Gerley, Assistant Director, Manpower and Mobility Programme and Employment Stability (Manpower).

As I understand it, Mr. Williams will begin and he has some comments to make about additional answers to our questionnaire which he has just presented to us. I believe he will also give us a short description of how the Department proceeds to make statutory instruments Mr. Williams.

**Mr. R. E. Williams (Legal Adviser, Department of Manpower and Immigration):** Thank you, Mr. Chairman. As you have heard my name is Ronald Williams and I am the legal adviser to the Department. At the outset, I think I should say this Department's initial reply to the Committee's questionnaire seems by inadvertence to have contained a number of answers that are not directly responsive to the questions, owing to what appears to be a misapprehension of some of the questions. When this situation came to light we prepared and have put into the hands of the Clerk of the Committee a supplementary answer to the Committee's questionnaire. Unfortunately not every question has been covered in the time available and the delegation here today will do its best to explain anything that is not covered. Of course we will be glad to discover and provide the Committee with any information that cannot be

provided among the members of the delegation.

I have been asked to make something in the nature of a general statement concerning the manner in which regulations and other subordinate legislation this Department has prepared and I think I might say that as legal adviser to the Department I have a part to play in the drafting of practically all legislative enactments that originate with this Department. In cases of major legislation, the drafting is, of course, done by a legal draftsman in the Department of Justice, legislation Section. However, I ordinarily conduct preliminary meetings with departmental officials and prepare the drafting instructions that are sent to the Justice Department after a Cabinet instruction to prepare legislation has been approved. I then participate in the meetings with the Justice draftsman and assist as necessary until a final draft is ready for printing and a Bill is ready for presentation to Parliament. Statutes in which we have recently gone through this very process are, for example, the Adult Occupational Training Act; the Immigration Appeal Board Act; the Canada Manpower and Immigration Council Act and three years ago the Training Allowances, 1966 Act.

• 0945

In cases of subordinate legislation not passed by Parliament, the case varies according to the importance attached to the legislation. If it is a large and significant piece of legislation, such as the Immigration Regulations Part I, or the Manpower Mobility Regulations, or the Adult Occupational Training Regulations and in some cases some others, the drafting may also be done by the Legislation Section in the Department of Justice. In such cases I ordinarily fill the same role as I do with other cases of major legislation.

Where the legislation to be enacted is less significant, I frequently do the drafting myself, or it is done by one of the officers in the legal division of the Department. Examples of these are the Immigration Regulations, Part II; several Orders in Council; delegations of authorities and preparation of forms and certain kinds of ministerial directions and orders and things of that nature. However, I always have available to help and assistance of officers in the Department of Justice and I frequently use it.

As you know, all legislative enactments that fall under the Regulations Act require to be approved as to form and draftsmanship by the Legal Adviser to the Privy Council and in addition they are required by the Canadian Bill of Rights Act to be certified by the Attorney General as to compliance with the provisions of the Bill of Rights. In those cases where I do the drafting myself, or where it is done in my legal division, I ordinarily try to prepare a draft that is acceptable for both of these purposes myself, but even in such cases, those officers will have the final word on draftsmanship.

After approvals at the Privy Council office and the Justice Department, the regulation or order in council is laid before the enacting authority, the Governor in Council or the Minister in most cases, for signature and bringing into legal effect. I have, of course, been speaking of drafting only from a legal point of view. The drafting process itself is one that involves frequently the most senior departmental officials and in every case involves long meetings and the preparation of many drafts before a final draft that is satisfactory to both the Department as to content and the draftsman as to form is arrived at. All of the officers here present have taken part in that process in relation to enactments affecting their own sphere of operations and they can describe that process equally as well as I.

In the case of the exercise of minor powers conferred by statute, but which do not come within the provisions of the Regulations Act, drafting is sometimes done in the legal division and often by departmental officers. Frequently these are checked with the legal division before signature, or in cases where they are not, the format or the precedent upon which the document is based has usually been approved by the legal division at one time or another. In the preparation of these documents and the checking of them, we try to adhere to the accepted standards of legal draftsmanship and in this connection we always have been able to rely on the assistance of legislative officers in the Department of Justice whenever required.

I think, Mr. Chairman, that sums up the nature of the work I perform in relation to the creation of subordinate legislation in this Department.

**The Chairman:** Thank you very much, Mr. Williams. I think if it is agreeable to the Committee, we will follow a similar procedure to that which we used with the Department of Transport last week and ask each of

the other gentlemen what they might have to add, from the particular viewpoint of their specialty within the Department, to our knowledge of the making of statutory instruments. Mr. Morrison, would you have any comment?

**Mr. J. C. Morrison (Director-General of Operations, Manpower and Immigration):** Mr. Chairman, I do not think I could add anything useful of a general character. My present position is more involved with trying to ensure that the existing regulations are, in fact, adhered to than in being personally involved in developing new ones.

**The Chairman:** Then we will turn to those with more particular responsibilities within the Department and I will first call upon Mr. Cross, the Acting Director, Programmes and Procedures Branch of the Immigration Division.

**Mr. J. S. Cross (Acting Director, Programmes and Procedures Branch, Immigration Division, Department of Manpower and Immigration):** Mr. Chairman, I think that our legal adviser, Mr. Williams, has given a very comprehensive introductory statement. I have nothing to add to it.

**The Chairman:** Perhaps you could tell us what your role in the making of statutory instruments is within the Immigration Branch. Do you have a particular concern with this matter?

• 0950

**Mr. Cross:** No, my concern is primarily with the development of immigration programs. If there are legislative implications there is consultation between the different branches of the Division and of course with the legal adviser.

**The Chairman:** Yes, but when regulations are being developed as to the content that goes into those regulations, do you have a hand in helping to formulate these?

**Mr. Cross:** Yes.

**The Chairman:** With regard to what type of subject matter? What would your responsibilities be in putting the content into these regulations?

**Mr. Cross:** As one of the group of persons within the Immigration Division, I suppose the best example of this would be the rather comprehensive changes that were made to the Immigration regulations in 1967 following the examination of the White Paper on Immigration by the Joint Parliamentary Committee.

**The Chairman:** Yes.

**Mr. Cross:** A team of departmental officials was designated to look into the proposals that were made and to develop in consultation with their seniors a system of regulations which would give implementation to the White Paper and to the Minister's statements made before the Joint Committee.

**The Chairman:** Let me just stop you at that point for a moment because I was not in Parliament at that point myself. The White Paper was presented to the House for consideration or to the House Committee I guess on Immigration.

**Mr. Cross:** It was a Joint Parliamentary Committee.

**The Chairman:** A Joint Committee, but at that point no regulation has been drafted? The drafting of regulations came after the consideration of the White Paper by the parliamentarians and you were a member of the drafting team?

**Mr. Cross:** Of the drafting team, that is correct.

**The Chairman:** Mr. Brewin?

**Mr. Brewin:** The Committee made no report.

**The Chairman:** The Committee made no report?

**Mr. Brewin:** Unfortunately the election intervened before the Committee made any reports.

**The Chairman:** This was the 1965 election. Was it?

**Mr. Brewin:** No. The White Paper was 1966, the Committee met in 1967 and I am referring to the election of 1968, but there was no report of the Committee. Unfortunately the report was prepared but owing to the dissolution of Parliament it was never presented to Parliament.

**The Chairman:** Were there not already regulations before that time?

**Mr. Brewin:** The regulations were 1967, were they not?

**The Chairman:** In October, 1967.

**Mr. Brewin:** October 1967.

**The Chairman:** So the regulations had not awaited the report of the Committee in any event?

**Mr. E. P. Beasley (Director, Home Services Br. Department of Manpower and Immigration):** Might I speak to that point?

**The Chairman:** Yes, Mr. Beasley.

**Mr. Beasley:** If I might speak to that point Mr. Chairman, it is true, as Mr. Brewin has pointed out, the Joint Committee did not table its report because of the intervention of the election, however, during the many and sometimes difficult discussions before the Committee there was a great deal of discussion regarding the inadequacy of the then existing regulations and the Committee made some very helpful suggestions on how these regulations might be improved. I think Mr. Brewin, it would be fair to say that there was a general consensus among the Committee members as to the way in which they were improved. So, although there was no formal report of the Committee studying the White Paper, the suggestions made by the Committee during the hearings were in large part incorporated into the resulting regulations of October 1, 1967. I hope that is helpful Mr. Chairman.

**The Chairman:** Yes, it is, thank you. Mr. Morrison do you want to make a further comment on that?

**Mr. Morrison:** I was just going to say, Mr. Chairman, that really Mr. Beasley has covered it because in my then capacity I was involved in all the work that went into producing these revised regulations and, as Mr. Beasley has pointed out, it really developed out of the discussions wth the Joint Parliamentary Committee that the Minister decided it was not really sensible to wait for the time when a whole new act and a whole new set of

• 0955

regulations could be produced, that it was important to revise the regulations as they affected the admissibility of people of Canada. That set in train a very lengthy period of staff work and so on within the Department which finally produced the regulations through the process which Mr. Williams has outlined.

**The Chairman:** Yes, thank you. Coming back to Mr. Cross then, and his membership on the team that drafted these regulations, one of the inputs to the new regulations was obviously as a result of the discussions of the Parliamentary Committee. Perhaps this question should be directed to Mr. Morrison rather than to Mr. Cross. Do you also consult groups in the country which have large numbers of immigrants or how do you get your reading on how the Act is working apart from the comments which are made by Members of Parliament?

**Mr. Morrison:** In respect to these particular revisions of the regulations, the Department did not consult directly with outside groups but if my recollection serves me correctly the Parliamentary Committee received briefs from a wide variety of interested organizations. We, of course, had copies of these so we did have a pretty good idea of what the general views were amongst these organizations.

**The Chairman:** Do you have conferences of your own officers, too, when you are doing something of this kind apart from the drafting team?

**Mr. Morrison:** I do not think in this particular case we assembled any particular conference of people other than those within headquarters who had some specialized knowledge they could contribute to the work.

**The Chairman:** Do any other Committee members have questions on this? Mr. Brewin.

**Mr. Brewin:** I do not know whether Mr. Morrison or Mr. Williams is the right person to ask, but is it not a fact that the main lines of our immigration policy are set by regulations rather than the Act? To put it another way, the people are excluded from immigrating to Canada. Would I be right in guessing that at least 90 per cent are excluded by the terms of the regulations rather than by the prohibitions in the Act itself?

**Mr. Morrison:** I do not think I would care to comment on your percentage, Mr. Brewin but I think as a statement of principle, it is probably true that the majority of refusals of people who would like to come as immigrants are based on provisions of the regulations rather than on one or other of the specified prohibitions under Section 5 of the Act.

**Mr. Brewin:** In other words, almost all the deportation orders made are based upon the fact that the immigrant fails to comply, I think it is, with Section 5T; that they do not comply with the regulations. In other words, the major legislation in the field of immigration is the regulations rather than the Act?

**Mr. Morrison:** Subject to any views Mr. Beasley may have, who is more knowledgeable on this than I am, I think that is correct. At this time it is the regulations that sort of are the basis for most of our decisions on individuals and whether they may enter the country or if they are already here whether there is any grounds for ordering them deported.

**Mr. Beasley:** Mr. Chairman I have little to add to that. I would question the percentage, too. If one takes into account those who are refused application for admission, then it is true that the majority of them certainly are refused because of their inability to meet regulations made under the provisions of the Act and the deportation is 5T related to the regulations, but for those people who are in Canada, all of those are made under the provisions of the Act itself; that is, Section 19, which outlines people who are subject to deportation and Section 26 which causes an inquiry to be helf in such cases.

**Mr. Brewin:** Mr. Beasley you would not contradict my suggestion that for people seek-

• 1000

ing admission to Canada the major grounds of admissibility or nonadmissibility are set out in the regulations rather than in the Act.

**Mr. Beasley:** No, I did not, Mr. Chairman, intend to contradict that statement and merely to point out that this relates only to those who apply for admission and not to those who are removed after already being here.

**Mr. Brewin:** Then I would like to put this question perhaps to Mr. Morrison or to Mr. Williams. Would it not be advisable because of the importance of the regulations. They should be regularly and consistenly reviewed by the representatives of Parliament, perhaps in some reference to a standing committee on immigration or something of the sort. If this is a major form of legislation, and it is, would it not be helpful, from your point of view in the Department, that some committee of elected representatives, naturally who are in touch with the people who are affected by these regulations, should be consulted as a matter of course, not only about the form of the regulations and the content but about how they work out in practice? Would you agree that that would be a good procedure that could be adopted?

**Mr. Morrison:** Mr. Chairman, I take it that what Mr. Brewin has in mind—although if I am wrong, correct me—is a sort of periodic review, say once every year or once every two years, of regulations that happen to be in existence, or perhaps including review prior to any major revisions in the regulations.

**Mr. Brewin:** Both.

**Mr. Morrison:** I can only say that as a public servant I would see nothing wrong with this. In actual practice this sort of review does go on in a much more informal way through the Annual Estimates, on which you and other interested members of Parliament have the opportunity to raise questions and draw to our attention points that are of concern and that may need to be looked at and perhaps revised, so that a more formalized procedure, I think, from a practical point of view, would probably be quite useful.

**Mr. Brewin:** Mr. Morrison, you would agree, I think, that the estimates do not provide the opportunity for the members of Parliament, who are the elected representatives of the people, to hear why the regulations are made in the form they are and to have a real discussion or dialogue with those responsible for formulating the regulations.

**Mr. Morrison:** Mr. Chairman, I was not trying to suggest that it was the proper solution but merely to indicate that to a limited degree our regulations do come under scrutiny, through that existing medium. In principle, the precedent is there when they put it that way. A more formal procedure on a regular basis certainly would not, I think, be anything but quite useful.

**Mr. Brewin:** Thank you.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** In previous meetings, I think, particularly those of the Transport Committee, Mr. Chairman, we have been told about the liaison between the Department and the people being affected by regulations. For example, to take another specific instance, a certain part of the Department might go to a sailing association and discuss what it plans to do by way of safety regulation.

So, to follow this line of questioning, is there any group with which the Department can consult which is an organized voice for immigrants?

**Mr. Morrison:** I suppose, Mr. Chairman, the precise answer is that there is almost a limit-

less number of organizations that could be consulted which represent either immigrants in a fairly broad way or in a narrower way. Some of my colleagues may have some figures but there is a fairly substantial number of organizations.

**Mr. McCleave:** These would be the ethnic groups?

**Mr. Morrison:** Basically, yes. There is consultation of a somewhat informal kind, and almost accidental in the sense that the organi-

• 1005

zations themselves frequently come to the Department to seek discussions or raise questions and so on. A sort of formal consultation, I think, has perhaps been lacking in more recent years, although with the new Canada Manpower and Immigration Council which has been set up and has had its first meeting yesterday, there is now a formal mechanism through which the Minister, as distinct from the Department, can get advice from a group of people who come from a very wide range of interests throughout the country, including groups interested particularly in immigration. Under the Council, one of the four boards is specifically set up to look at the problems of immigrant adjustment in Canada and that, of course, brings to bear even a larger number of people whose specific interests are in the immigration field. But that is really the only formal mechanism for consultation and it has only just now started to function.

**Mr. McCleave:** The evidence we had from the Transport people was that on occasion, at least in some divisions or branches, they would go out and say to a group, "We propose this sort of action. What do you think of it?" People come to you but do you ever go to people—to any of these ethnic groups?

**Mr. Morrison:** Yes. Mr. Cross has reminded me that the transportation companies, though not ethnic groups, are consulted very frequently with respect to their interests. Beyond that, consultation within the Department, I suppose by the very nature of immigration, has not been of the kind you are suggesting. But that type of consultation with individual or specific interested organizations does take place much more frequently on the Manpower side—with employer organizations, with the provincial authorities on adult training and so on. Perhaps some of my colleagues from the Manpower side would like to elaborate a bit on the forms and types of consultation that go on there. It is a different sort of problem, though, because the interests of the public tend to be narrower and to be concentrated in quite recognizable units or organizations. On the immigration side, the interests are so broad that I think—and I am not trying to be facetious—you tend to get almost a different point of view with every different group you go to speak to. Since our last major effort at revising our regulations, which we have already covered, really came about through and took place while the joint parliamentary committee was in session and where this consultation had gone on at their instance, there really has not been occasion since I have been in the Department in the last five years to undertake the type of consultation I think you have in mind.

**Mr. McCleave:** Do you think this is objectionable in principle or do you see pitfalls in it?

**Mr. Morrison:** I personally have no objection to it as a principle but as a practical matter I am not quite sure how one would do it unless you went about it to try to do it through this new Canada Manpower and Immigration Council. That will provide you with a channel through which this sort of information can be obtained and processed and directed into the Department. Perhaps Mr. Beasley or Mr. Cross might want to comment on either the principle or the practice. I think it is the practice that might be difficult.

**Mr. McCleave:** This new Council is in its infancy. Can it achieve the objectives that I am talking about in my questions here this morning? Do you think that it can bring about this participation between the Department and the people most directly affected by its actions?

**Mr. Morrison:** I can only say, Mr. Chairman, that I do not know. It certainly was one of the hopes in setting up this organization that it would, but I think only time will tell how successful it is going to be.

**Mr. McCleave:** But this is one of its objectives.

**Mr. Morrison:** Yes. I think it would be fair to say that.

**Mr. McCleave:** Thank you.

**The Chairman:** Mr. Muir.

**Mr. Muir:** Mr. Chairman, Mr. Morrison mentioned that there was consultation with transportation companies. What would that consultation be for and what would be discussed?

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**Mr. Morrison:** Perhaps I might ask Mr. Cross to answer that since it is more immediately under his jurisdiction. Mr. Cross.

**Mr. Muir:** And, Mr. Cross, would this consultation be of benefit to potential immigrants?

**Mr. Cross:** No, Mr. Chairman. Only indirectly would it involve the immigrants, but there are a number of sections in our legislation which apply to transportation companies and it has always been the practice to consult with them if there are going to be changes in those regulations which will have an impact on their operations. This is almost continuous. An example of this is the examination of the procedures at ports of entry where all of the inspection agencies, including Customs, Agriculture, Health and Welfare and we are trying to improve the system of examinating the passengers so there is a reasonably quick flow when we come to the age of the Jumbo Jets, which is just a year away. The transportation companies, of course, are involved in this, in such matters as scheduling, documentation of passengers and so on. They have been consulted with respect to the proposals being put forward for the improvement of inspection facilities at our international airports.

**Mr. Muir (Cape Breton-The Sydneys):** Mr. Chairman, may I also ask whether Mr. Morrison or Mr. Cross would care to indicate any prime example of changes in regulations or legislation that were a result of consultations held with representatives of ethnic groups; just something you may have in mind.

**Mr. Morrison:** It is difficult to give you a specific example, but I think it is very fair to say that the regulations as they were revised in October 1967 did reflect in some of their provisions about admissibility points that quite clearly were a major concern to most, if not all, of the ethnic groups; for example, letting in a range of relatives under certain conditions in the nephew-niece category. Our ability, which is less the question of regulation than an administrative capacity to examine or be able to examine reasonably close relatives in iron curtain countries, where for many years we had to take the position that we were sorry but we could not really discover whether they could come to Canada or not, because we had no means of examining. Administrative changes were made, very largely I think, because of the representations of ethnic groups, that now do permit examine people coming who are in one or other of the relative categories, although we are still not able to do anything about the independent immigrant who seeks to come in his own right.

I think those are two quite good examples of influence of representation made by ethnic groups.

**Mr. Muir (Cape Breton-The Sydneys):** In other words, Mr. Morrison, these representations are listened to at times by the...

**Mr. Morrison:** I can assure you we listen very carefully to all the representations we get, but that is not to say we are always able to accept them or do what is asked.

**Mr. Muir (Cape Breton-The Sydneys):** I realize that, yes.

**Mr. Morrison:** But we do a lot of listening.

**Mr. Muir (Cape Breton-The Sydneys):** Yes. No, the reason I was so interested in the possibility of interest being taken in recommendations and representation is the fact that I have seen legislation, not particularly with this Department, introduced in the House, gone over for undoubtedly many months by the law offices of the Crown and the brilliant legal peoples and so on, and then we find that some of these brilliant legal beagles in the House—incidentally I am not a lawyer—find something wrong. So everyone is human and there are times when errors are made, and they are uncovered in the House by colleagues like Mr. Brewin and others concerned. That was why I was wondering how important these representations were taken by your Department.

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**Mr. Morrison:** Our particular regulations, if we are still talking about immigration, are not changed all that frequently. They are not that type of regulations. Perhaps they ought to be changed more frequently. Perhaps it is a matter of judgment, but certainly in my experience changes come at fairly distant intervals and inbetween we do collect a lot of information and points of view from all sorts of sources that when we do come to make a

major revision then all play their part in the types of changes that are made.

**Mr. Muir (Cape Breton-The Sydneys):** Thank you Mr. Morrison.

**The Chairman:** Mr. Brewin, again.

**Mr. Brewin:** Mr. Chairman, I would like to ask our witnesses about the problem of secrecy on certain information that affects immigrants. We know, I think, at the present time immigration is based to some extent on a point system. You get so many points for skill, education, personal assessment and so forth and you are admitted. If you do not get the required points you are excluded. I have had occasion to be concerned about the question of occupational demand. I would like to read to Mr. Morrison Schedule A of the present regulations of PC 1967/1616, which are the main regulations. It says under Occupational Demand:

> ...on the basis of information gathered by the Department on employment opportunities in Canada, units to be assessed according to demand for the occupation the applicant will follow in Canada, ranging from fifteen when the demand is strong to zero when there is an over-supply in Canada of the workers having the particular occupation of the applicant.

This deals with the information gathered by the Department. I am asking whether there is any basic reason or basic policy why that information gathered by the Department should not be available to would-be immigrants or their advisers so they can judge whether the assessment of occupational demand is sound or unsound. So when they take a case to the Immigration Appeal Board, they can know what is the information gathered by the Department on employment opportunities? Is there any reason of policy why that should be kept secret because at the moment it is, and I personally have found that a very serious limitation on my ability to advise or assist would-be immigrants who want to know why they should be admitted or not admitted when they are given, say, zero for occupational demand. When we ask about the information gathered by the Department on employment opportunities we are told this is confidential information. This policy of secretiveness to me is wrong and I should like to know if there is any good reason or justification for it?

**Mr. Morrison:** Mr. Chairman, this is, I recognize, a debatable area that has been discussed at other times. I think Mr. Brewin would probably agree that in the current regulations as they were revised in October 1967 the Department did go much farther than had previously been the case in trying to spell out in a public way just what the basis or the criteria of selection were going to be. I think it is true that before that nothing really except of a very general character had ever been available to anyone about the basis on which immigrants could come to Canada. On this particular question Mr. Brewin has raised, we ran into a difficulty of how much, in fact, did it make sense to make public. The system really is, and I think it has to be,

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on a national basis. In other words, the occupational demand that we are talking about is a national demand because after all once an immigrant arrives in Canada he is completely free to go to any part of the country that he happens to choose, whether it is the place he indicated to us initially, in his home country as where he intended to go or not?

I think it is clear that in any set of occupational demand ratings in any particular part of the country the specified rating may not be true, or it may not appear to be true. In other words, to give an example, we might have a national situation with respect, say, to carpenters which says there is no real demand because there are far more carpenters than there are jobs for them. Yet if you went to a particular place in any particular province you might find in that particular community that there were not enough carpenters, and if there happened to be a visitor in that community who wanted to stay in the country and he happened to be a carpenter, he could argue his case by saying there is a job for him there, and yet on the national basis there is no requirement because we have too many carpenters.

We have other programs within the Department such as our manpower mobility program which has as its basic aim moving surplus workers from wherever they happen to be in the country where they are surplus and cannot get jobs to other parts of the country where there is need for them. We would in a sense be competing within the Department and have conflicting policies if we were not rather careful about how we handle this occupational demand.

**Mr. Brewin:** Mr. Morrison, I understand that. I think you have made the explanation very clearly and well. But what is the necessity for keeping this secret? Why should not the would-be immigrant or his advisor be given the information gathered by the Department as to the regional or national situation? Is there any basic policy of keeping this secret? As long as it is kept secret, in my view, the process of inquiry and the process of appeal is meaningless because you do not have the information.

**Mr. Morrison:** Perhaps you would not mind if I asked a question for clarification because I am not altogether clear as to exactly what information it is that you would like not to be secret. Is it simply the information in relation to the particular occupation that this particular individual is in or claims to be in?

**Mr. Brewin:** That is right. How many points. You are allowed up to 15 points to zero for occupational demand.

Supposing you are a nurse or a nursing assistant or something like that, and you send in your application. This is the occupation you want to pursue in Canada. Then you are given zero, shall we say. Is there any reason why the information available to the examining officer should not be made available to the immigrant if he wants it, or to his counsel?

**Mr. Morrison:** The only information that is available to the officer who makes this decision that zero is the occupational demand rating today for the particular occupation you mentioned, is exactly that, that for nurses, to use your example, at the present time there is no demand. So it is zero.

**Mr. Brewin:** Somebody must instruct him.

**Mr. Morrison:** Yes.

**Mr. Brewin:** And there must be some written information.

**Mr. Morrison:** The only written information he has is in effect a compilation by occupations of all those occupations that immigrants have or claim to have.

**Mr. Brewin:** Why should that be secret? It is secret now and I think this is totally wrong.

**Mr. Morrison:** The total document.

**Mr. Brewin:** The compilation of the points available for different occupations is secret at the moment, and I think it is quite wrong that it should be secret, and I would like you to give some reason for it being kept secret if you have any reasons.

**The Chairman:** Perhaps I might ask a question and, of course, the witnesses realize that there may be questions of government policy which they are not prepared to answer. Are these determinations made on a national basis in advance? That is, are the immigration

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officers across the country given a schedule of how many points they are to allow for this particular occupation at a given time? Or is some discretion exercised by the individual immigration officer as to the points he allots under this category?

**Mr. Morrison:** It might help if I explain how the information, in fact, is gathered, and the basic system that produces the document. Then perhaps I can come back to your question, Mr. Brewin.

We have in our program development a branch that deals with manpower information and analysis. It has a small group of economists and statisticians in Ottawa and a larger group of economists scattered throughout the country in our various regions. One of their responsibilities is, on a continuing basis, to collect information about the job situations by occupations in the geographical area for which they have responsibility, and to feed this information into the group at headquarters, which also, of course, gets information from the Dominion Bureau of Statistics, the Department of Labour, and various other sources on what we call labour market information. Periodically, and I think I am right that it is now on a quarterly basis, an assessment is made by the headquarters group as to what changes, if any, of any significance have occurred, occupation by occupation, in the national demand, which is on a scale of zero to 15. Having made these decisions, a new occupational demand guide is produced which is simply a statistical representation of the conclusions as to what the demand is.

Now whether this should be made public or not was kicked around within the Department. There are arguments against it, and there are arguments for it. I think all I can say to you, Mr. Brewin, is that the Department's policy as decided by the Minister, was that it ought not to be made public.

**Mr. Brewin:** Can you give any reason for that?

**Mr. Morrison:** I had hoped that perhaps my earlier explanation might have given certainly one of the reasons, that any document of this type or any conclusions of this kind are inevitably open to challenge. I do not object to challenge, but to administer any set of regulations such as this, which in effect say that these decisions or the rules that our officiers are to follow are based on information which the Department has, we could not, from a practical point of view, make available in a public way all of the very considerable amounts of detailed statistics that flow in and result in this one single decision.

**Mr. Brewin:** What you are saying in other words, Mr. Morrison, is that the right of the immigrant to be admitted, if he qualified, is dependent upon secret information gathered by the Department and not made available to him. I suggest to you that in those circumstances, the right of appeal and the right of inquiry are virtually meaningless because he just has to accept something that he cannot look into or cannot inquire into at all.

**Mr. Morrison:** Mr. Brewin, I would like to ask a question for clarification. I am not quite sure that I understand of what value, if I can put it this way, it would be to an immigrant to know what the occupational demand happened to be at any given time for all of those occupations in which he has no personal interest. Would this be of any value to him?

**Mr. Brewin:** What would be of great value to him, I suggest to you Mr. Morrison, would be if, for example, he had wrongly described his occupation and had been rejected because that particular occupation was given zero, and he found that there was some other occupational description which entitled him to a substantial number of points and which he had not suggested as being a possibility. In other words, the lack of information makes the appeal procedure and the judicial procedure meaningless, and leaves it entirely with-

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in the control of the Department as to whether a person shall be admitted or not.

**Mr. Morrison:** Is the problem then, Mr. Brewin, perhaps not so much what the numerical demand as we have calculated it at any given time is, but what our system of occupational descriptions is? Is that the problem?

**Mr. Brewin:** Partly that, but it is partly a matter of giving information to the would-be immigrant. What I am objecting to is the secrecy of this procedure, and I do not understand why, if you have statistical information, it should not be disclosed.

**Mr. Morrison:** So what you are suggesting in fact is that any prospective immigrant should have the opportunity to look at a document that sets out our description of occupations as we understand them so that, as there are in many occupations many subdivisions, he has an opportunity to decide which one of these comes closest to his particular aptitudes and also tells him what is the going demand for that occupation at that particular time. This is really what you are proposing.

**Mr. Brewin:** Exactly. I would like to know what the objection is, because to me this is a major weakness.

**Mr. Morrison:** Yes.

**Mr. Brewin:** I am sorry, Mr. Chairman, if I have seemed to depart from the regulations, but the regulations are the effective instrument that sets out these standards. I object to regulations if they are not accompanied by openness, publicity and freedom of the people concerned to understand them. This is why I am raising this subject.

**The Chairman:** Mr. Beasley?

**Mr. Beasley:** There is really little I can add to what Mr. Morrison has said. The immigrant, when submitting his application, does indicate what his particular occupation is, and he signs an affidavit to that effect. He is informed of how many points he gets for that particular occupation. Now if he were aware of the occupation ratings for others, it seems to me it would be irrelevant. To take the question of the nurse, your example, if the points are zero, the girl is a nurse and she is told that she gets zero points for occupational demand, then all I could see that would result from publication of this document would be a controversy and an argument whether that figure of zero was or was not the right figure. She knows what figure she got and she knows what her occupation is, as she declared it. Perhaps this does not answer your question.

**Mr. Brewin:** What is wrong with controversy? Does not the right of appeal given to the immigrant imply some right to controvert the opinion of the immigration officer?

And why should this be secret? I am not saying that the decision should rest with the examining officer, but why is this process covered in a veil of secrecy? As you know, I have been in that position several times. What is to be hidden about this process?

**The Chairman:** I think, Mr. Brewin, we have arrived at the point where the officials appear to be saying that this is a matter of policy in which they do not feel they can give any further reasons to us. If they do wish to make any further statements I am certainly prepared to accept them, but it seems to me that they are implicitly saying to us that this is an area of policy for which the government rather than they must bear responsibility.

**Mr. Brewin:** Thank you, that is all.

**Mr. Morrison:** Mr. Chairman, I would like to make one further comment. I think I indicated much earlier on that this subject was debated at quite some length within the Department. I am trying to think back to some of the reasons that were advanced for the decision that was eventually made. It sticks in my mind that there were some manpower implications brought forward by the

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responsible assistant deputy minister of the day and that these in the end, plus some of the points that would occur to you on the immigration side, tended toward the decision then to be taken that it would not be a public document. Now I would not want to say for a moment whether it should or should not; I would be quite prepared to have some further thought given to this and re-examination of the whole thing to see whether in fact the reasons originally adduced for keeping it secret are still valid. However, I do not think I would care to try to do this off the cuff because I think there are manpower reasons as well as other reasons, the more I try to think back over what happened.

**Mr. McCleave:** May I follow up Mr. Brewin's questions, because I intended to follow this line too. I had a case before the Immigration Appeal Board where that Board directed some rather unflattering remarks to the Department because the Department lawyer could not or was not in the position to produce one of these occupational job reports. My fellow had been in Canada but, yet, his case absolutely depended on being able to get at that report and attack it. Is it not true, Mr. Morrison, that the Immigration Appeal Board is dissatisfied with the Department's position on this?

**Mr. Morrison:** I cannot personally comment on it because I have no responsibilities for what goes before the Board. I am not sure whether Mr. Williams or Mr. Beasley has become involved in this.

**Mr. McCleave:** Well, I assume somebody who briefs your lawyers before the Immigration Appeal Board could say whether in fact the lawyer comes back and says, "Look, we got hell again by the Immigration Appeal Board because of keeping these documents confidential". Is this not true? There must be somebody here who is familiar with that the Department's lawyers have to put up with.

**The Chairman:** Mr. Williams?

**Mr. Williams:** I think I should say, sir, that I believe the view that the Immigration Appeal Board takes is that it does not have, under the law, adequate authority to go behind the assessment that is made of any individual immigrant. They have created a series of precedents of their own, as time has gone by, and they have taken that view thus far. I believe you are right in assessing their feeling of not being entirely happy with that but, on the other hand, they have adopted for their own precedents a number of cases, the names of which escape me at the moment, and I believe they back up the proposition within the Board itself that it will not require the Department to produce these documents.

**Mr. Brewin:** There is a case in the courts now?

**Mr. Williams:** That is right, Mr. Brewin; there is a case going before the Supreme Court of Canada, we hope in the fall, where that exact question will be litigated.

**Mr. McCleave:** Perhaps you can head off something by making your decision beforehand. In following up what I think is a very important point, I gather we will be having a meeting, Mr. Chairman, sometime in September to finalize our report and report back to Parliament. Is it possible that the Department could within the next two months, that is by the end of August, go over the question that has disturbed us here this morning, re-examine it and let us know the decision as to whether these occupational reports, if requested by anybody who does not have a snooping interest but a direct one, can be made public to him. Could you re-examine

your present policy, which I gather is departmental really and not governmental, within two months and let us have a report?

**The Chairman:** I might just say at this point that this question is only tangentially related to our terms of reference and I think we ought to leave it to the discretion of the witnesses here, perhaps to the discretion of Mr. Morrison and his ministers, whether or not they would be willing to produce a further answer to this question. But certainly we would be interested in it if they feel that they can give it to us.

**Mr. Morrison:** Mr. Chairman, I would be perfectly prepared to undertake that within two months we could come back and say to you, "We have reviewed it" and what the decision is, but I would have to add that the decision really, on this particular subject, will be up to the Minister rather than I or any other public servant. I think it is also correct, if my memory is not faulty, that the decision

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about not publishing this type of information really was taken before the regulations went through the final stages and I think the wording of them is sort of indicative of an intent not to make public the information on this particular subject. I am not sure whether a decision to publish would require revision of the regulations. This would raise a legal question.

**Mr. McCleave:** Or a change of heart.

**Mr. Morrison:** Or a change, but we would certainly be quite prepared to come back and tell you the results of our review one way or the other.

**Mr. Brewin:** Mr. Chairman, on a point of order, it does seem to me that this question is more than tangential because if we are to have, do have and we are bound to have, government by regulation, then the question of whether the results of these regulations are secret or public is a very important concern I think of this Committee. I welcome what Mr. Morrison said, that there will be a new look at this and that he will inform this Committee. I am sure Mr. McCleave and myself will be especially interested in getting information on what the result of this review might be.

**The Chairman:** Mr. Brewin, I was not suggesting that the question of secrecy was not of considerable importance to us, but I was suggesting that the question of whether or not the government would reveal its policy on the secrecy was what was tendential, but I think the witnesses have our point. We probably will not be calling them in person, but we will certainly be prepared to receive any written documents they are able to send us.

**Mr. Beasley:** I just have one further comment to clarify the question in my mind. The document which shows the point rating for all occupations is secret, but there is no secrecy about the points given for a particular occupation. The nurse, for example, knows that she gets zero points for that occupations, so in that sense it is not secret.

There are really two questions here, I think. One is that of making available to the immigrant the number of points he or she gets for the particular occupation that he or she claims to possess, and the other is the one that is before the Supreme Court, the right of the Appeal Board to go behind the assessment of the examining officer on whether he properly assessed the individual.

**The Chairman:** On the first point, are you saying that the immigrant does know the points that he or she is getting for a particular category?

**Mr. Beasley:** Yes.

**Mr. McCleave:** This is quite correct, Mr. Chairman. He does know, and he wonders why he is given zero in certain categories. This is the trouble I had in my case. The fellow worked on trawlers, and they thought that there were all sorts of people who would work on trawlers. But the employers I talked to said, "We need somebody we can hire and who will show up for work." That was important, and that fact was never taken into account by the Department.

**Mr. Brewin:** Actually, what happens, if I may insert a piece of information on this, is that the immigrant writes on a form his intended occupation. He may totally misdescribe this, or he may not know how to express it properly, and he is then given zero. He is not allowed to find out why that zero has been given to him, or whether or not there is some other related occupation that more porperly describes his real possibilities in Canada. The person is given a complete blank and then is told, "No; you filled in that you were a nurse". For example, she might be a children's nurse, which may merit 12 points, but, she has no points as a nurse. The

person does not qualify as a nurse, because we do not give any points to a nurse. This is how it operates in pratice, Mr. Beasley, and I think it should be reviewed.

**Mr. Beasley:** Mr. Chairman, with all respect, in addition to the written application form a personal interview is conducted, as you are aware. Very often, where there is a misunderstanding it can be and is, cleared up as a result of this personal interview. Therefore, if the immigrant, in completing the form, wrongly describes his true occupation, the personal interview will disclose it had it will be corrected and he will be given the correct number of points for the correct occupation.

**Mr. Brewin:** I am glad to hear that; but it does not always work that way.

**Mr. McCleave:** No; and if I may add to what Mr. Beasley has said, the points are given, but this is still a judgment process, and a large part of the fact on which that judgment process is based is never revealed either to the immigrant or to the advocate on behalf of the immigrant. The immigrant or his advocate, just do not see that confidential occupational, or economic report and, as Mr. Brewin points out to me, at a further step along the line, it is not before the Immigration Appeal Board. That is the nub of the problem.

**The Chairman:** Mr. Stafford has a question but before calling on him let me review this to be sure that I have no further factual misapprehensions.

I had thought originally that the immigrant was not informed of his own points standing on his particular category. I understand now that he is, and that the difficulty you are referring to is that he does not know the alternative possibilities if he was to describe himself different. He does not have access to the whole scale of the other categories.

**Mr. McCleave:** And also, Mr. Chairman, the point that when he is given a rating in one of these particular categories, say, from zero to 15 in an occupational area, a large part of the

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assessment, I gather, is based on whether or not there are jobs available in that field. This was the point I had my big quarrel about and took to the Immigration Appeal Board. There were all sorts of people wo were qualified to go to sea, but the fact was that some of them were lazy and did not show up. There was a man whose chief virtue was that if you hired him, or asked him to man a boat he would be there ten minutes before-hand, and you would never have to worry about sailing short-handed.

**Mr. Morrison:** Mr. Chairman, may I ask another question to make sure I am quite clear on what is the nature of the problem that you, Mr. Brewin and Mr. McCleave were discussing? I think there is a slight difference among you on how you see the nature of the problem.

From your most recent remarks, Mr. McCleave, are you not perhaps going beyond just a question of what is made public to suggest by implication that the part that occupational demand plays under the present system is wrong, that it should not be on a national basis, simply in the sense of statistically looking at the whole country, but ought to be more directly related—at any rate, for a person already in the country by virtue of a visitor's permit—to a job in his immediate vicinity, or his willingness versus that of other people to take it, or something of this order, quite part from what is, or is not, available for public reading consumption?

**Mr. McCleave:** I do not know the nature of the document so I do not know whether it is on a national basis, or on a regional or local basis.

**Mr. Morrison:** That is why I made the point earlier. The occupational demand rating at any given time is a national one which may not in fact be true in a particular locality. What I am trying to get at is whether you think that also is wrong, as well as the fact that we do not make public this compilation of occupational demand ratings?

**Mr. McCleave:** I agree with you. I would say both.

**Mr. Brewin:** Speaking for myself, Mr. Morrison, I would say both are wrong. First of all, the secrecy is wrong and, secondly, if there is clear evidence in a locality of an occupational demand for this type of person then I think the Immigration Appeal Board and a special enquiry officer in reviewing the case should be entitled to look into that and not just take some word dictated to him about there being no occupational demand.

**Mr. Morrison:** All right, Mr. Brewin; I just wanted to clear up whether in fact both...

**Mr. Brewin:** Both.

**Mr. Morrison:** . . . objections were being tabled?

**Mr. McCleave:** And both of us agree in saying both.

**Mr. Morrison:** Many other people have indicated to us the rather same point of view.

But I will ask you another question: Would you argue that this non-national occupational, demand, or the occupational demand based on a local situation, should apply equally to people who have not yet come to Canada and who are being examined abroad, as the vast majority of our immigrants still are? They are in France, or the United Kingdom, or Italy, or some such place. This was set up on a national basis in the first qlace because that is where the majority of immigrants are examined.

If you do not do it on a national basis, as far as I have ever been able to see, you open up the possibility of getting into Canada a lot of people who simply add to a surplus of people who are already here in certain occupations, even though some of those may not be all that interested in moving to a place where there happens to be a job for them. I simply ask the question: Would you have this sort of more localized demand apply to people who are not physically in the country?

**The Chairman:** I think, Mr. Morrison and gentlemen, with this question we are getting rather more into the content of the immigration regulations than the particular type of problem that concerns us. If either of the Committee members feels a burning desire to answer the question I will permit it, but I think it is. . .

**Mr. Brewin:** I will answer it privately to Mr. Morrison, if you like, to give him an idea.

**The Chairman:** All right.

**Mr. Morrison:** Mr. Chairman, I am not trying to extend the discussion, but I think it is important to our departmental review of the question to have all the parameters of it delineated so that we know what we are trying to review.

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**The Chairman:** From the viewpoint of the Committee on this subject, it is primarily the questions on the secrecy of the administration about which we would be concerned. Mr. Stafford.

**Mr. Stafford:** Before the Immigration Appeal Board the other day, I noticed that sometimes some of your forms do not comply with specific requirements under the Regulations.

**Mr. Morrison:** Some of our which, sir?

**Mr. Stafford:** Some of the forms that you use. For instance, under Section 13 (2) of the Immigration Regulations the master shall, when a desertion takes place by a member of the crew, deliver to the immigration officer a crew index card which sets out certain particulars. I also notice that 16A. (1) of the Regulations sets out those particulars and the details that that crew index card should have. For example:

> 16A. (1) Each statement required by section 12. . . to be delivered by the master of a ship shall. . .

include a crew index card, I take it, and

> . . . shall be certified by that master as having been examined by him and as being true, correct and complete.

I notice on your crew index cards you do not even follow that. You leave out that it was examined by the master; you leave out the fact that it is correct. If, in fact, you do go to all the pains of forming these Regulations, do you not even bother to make certain that your forms comply with the specific requirements of the Regulations?

You have set out specifically what should happen. In other words, the master has no alternative but to set it out exactly as in 16A. Yet I notice your form does not even bother to follow it. It says, "I certify that the contents of this crew index card are true and correct", and that is it.

Why would not a little more special attention be given to that if you in fact do set out specific requirements?

**The Chairman:** Mr. Morrison.

**Mr. Morrison:** Perhaps Mr. Beasley might speak on this. I am not familiar with this particular problem.

**The Chairman:** Mr. Beasley.

**Mr. Beasley:** Mr. Chairman, I can only say that I was not aware that our forms were not in accordance with the regulations, and I undertake to re-examine them immediately.

**Mr. Stafford:** I can show you a crew index card right here.

**Mr. Beasley:** I do not question it for a moment. I simply say I was not aware of it, and I assure the Committee that we will undertake to correct any deficiencies as quickly as possible.

**The Chairman:** This will not necessarily help you win your cases, Mr. Stafford.

**Mr. Stafford:** Oh no, but I just wanted...

**The Chairman:** You may have a better chance if the forms do not fulfil the regulations.

**Mr. Stafford:** That is right. I sometimes wonder whether you do or not. I have a question about these ship-jumpers, by the way. They cannot take advantage of the norms for assessment of independent applicants as set out in Schedule A of the Regulations, can they? Their only appeal would come under compassionate grounds. Is that right?

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**Mr. Beasley:** Mr. Chairman, Section 34 (1) of the Regulations sets out those who are applicants in Canada and it says that a person described in Paragraph J is not included in the definition of an applicant in Canada. Section 7 (J) of the Act refers to members of the crew who have entered Canada without permission, so that they are not included in the definition of applicant in Canada and therefore are not eligible to apply to remain in Canada permanently.

**Mr. Stafford:** Do these principles apply to a deserter from the U.S. Army? And why the difference?

**Mr. Beasley:** I think we are using the term deserter in two different contexts. I thought we were talking about...

**Mr. Stafford:** No. I mean, do they apply? I realize that. You have finished that. I realize that is the case, and now that I have your answer, I want to ask if the principles apply to a deserter from the U.S. Army who may come into the country illegally.

**Mr. Cross:** If the U.S. Army deserter came in on board ship as a member of the crew, the principles would apply.

**Mr. Stafford:** But is that the only exception given in (J)?

**Mr. Beasley:** Section (J) of the Act refers to members of the crew entering Canada or who have entered Canada for shore leave or some other purpose. Therefore a military deserter who came in as a member of a crew would be included in ship deserters.

**Mr. Stafford:** One final question concerning the Immigration Appeal Board. Apparently they are not required to give reasons for the decisions until requested, say by the appellant. But I would think that in order to give a decision the Immigration Appeal Board must have the reasons. Why then does it take them so long to put them in writing once they are requested if in fact they did come to some conclusion before they gave the decision?

**Mr. Morrison:** Mr. Chairman, with due respect I would like to point out that we in the Department have no responsibility for or jurisdiction over the Immigration Appeal Board, and I do not think we could answer that question even if we knew the answer.

**The Chairman:** Perhaps since we have not yet had an opportunity of hearing from the Manpower people who are represented here, I might invite them to make any additional comments they would like to make on the process of making regulations from the Manpower viewpoint. Mr. Drew.

**Mr. J. Drew (Director, Activities Development Branch, Department of Manpower and Immigration):** Mr. Chairman, I am the Director of the Activities Development Branch of the Manpower Division and as such my responsibilities include providing advice, guidance and assistance to the senior management of the Department and the regions. There are no regulations under my direct responsibility.

**The Chairman:** Thank you. Mr. Meyer.

**Mr. J. Meyer (Acting Director, Programmes Branch, Department of Manpower and Immigration):** Mr. Chairman, my responsibility relates to two program areas, the Occupational Training of Adults Program and the Manpower Mobility Program. I will leave the Mobility Program to Mr. Gerley.

As far as the basic process relating to the Occupational Training of Adults Program is concerned, I think Mr. Williams has covered it. In fact he knows about its origin more than I do because he was in at the beginning and I was at that time on the provincial side

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of things. I know more from the provincial perspective.

As far as the amendment process is concerned, this I think is rather extensive, par-

ticularly as far as the involvement of the provincial governments is concerned. Obviously where the provinces are by far the largest providers of the training that we purchase for our clients, they have a very keen interest in everything that surrounds this program. Therefore a rather extensive consultative process has been set up which starts with a committee of deputy ministers under the chairmanship of our own Deputy Minister and which brings together deputy minister's of both labour and education from the provinces. Under this is a review and assessment committee which brings together public servants from both sides at a lower level who study problem areas in greater detail and make their recommendations to the senior body of the deputy ministers. We have not, as yet, gone through the complete process of amending regulations, so I cannot complete the story, but this is the mechanism that is presently available.

**The Chairman:** Mr. Gerley.

**Mr. S. Gerley (Assistant Director, Manpower and Mobility Program and Employment Stability, Department of Manpower and Immigration):** My main responsibility is the administration of the Manpower Mobility Program. In the past year we had three amendments to the Program based on a continuing follow-up survey on the effectiveness of the Program, the follow-up directed to the public who benefit from the Program and general information we receive through economic evaluation of the program. There is also the review of the proposed changes to suit the need of the recipients of the program which are, in turn, sent up to the senior management committee and, if approved, the basic principles are sent down to the legal division. We set out our terms of reference and what we would like to see in the amendments. The legal division follows up from there. All the amendments at the present time are by order in council and the draftsmanship is approved through the legal division and the Department of Justice.

**The Chairman:** May I ask, Mr. Meyer or Mr. Gerley, where the chief input as to the content of the regulations comes from? Does it come from the experience of your officers in the field, from the experience of provincial officials or will it likely come from the new advisory committee?

**Mr. Meyer:** Of course, I can only speak on amendments to the regulations.

**The Chairman:** Yes.

**Mr. Meyer:** Mr. Williams can speak on their original conception. To quite an extent we do involve our field staff. We have had rather extensive task forces bringing a few people at different levels of management to Ottawa, to expose us to the implementation problems requiring changes in the interpretation or, in effect, changes in the regulations.

**The Chairman:** Is this an internal task force composed entirely of members of your division?

**Mr. Meyer:** Yes, that is correct. I think the same thing applies for the Mobility Program.

**The Chairman:** Mr. Morrison, would you care to add anything about the original making of the regulations?

**Mr. Morrison:** I am afraid, Mr. Chairman, I cannot because I was exclusively on the immigration side when the adult training regulations were produced and promulgated. Mr. Williams may have some further comment on them.

**Mr. Williams:** I really do not have much to say,Mr. Chairman. My concern is with the preparation and draftsmanship of the regulations. I assisted in the preparation of the original Manpower Mobitily Regulations which were drafted principally by a justice officer. They are among those regulations to which the Department attaches a fairly high degree of importance. While I assisted in the preparation of drafting instructions and what not and attended a lot of meetings—indeed, I attended all the meetings—I cannot for my own part say how the officers who were pres-

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ent at the time developed the policies they gave to me in the form of instructions for the preparation of legislation, but I know they conducted many meetings themselves, among themselves, without my being present, as well as the ones in which they passed instructions to me.

**The Chairman:** Thank you. There are a number of issues that I think should be raised with respect to immigration by way of further development of the earlier questions. We also want discuss the answers to our questionnaire but would anyone like to ask further questions about manpower before we return to immigration? Yes, Mr. Muir.

**Mr. Muir (Cape Breton-The Sydneys):** Yes, Mr. Chairman, I had intended to pose this question to Mr. Gerley, but after hearing Mr. Willisma perhaps I should pose it to him. I have been troubled for quite some time about the regulations pertaining to the qualifying for manpower mobility benefits; how the regulations were drawn and the reason for drafting them in the matter in which they have been drafted. There may be a completely legitimate reason. I however, will give you a case in point and there have been a number of them.

For instance, a man in my area is out of employment. He gets tired going to the manpower office and cannot find employment in his occupation, so he suggests there may be a vacancy in Toronto, Hamilton or Windsor in his profession or skill. A check is made and the report comes back that there are no vacancies in that field. Rather than lay around and cry on the shoulders of the Unemployment Insurance officers, through his own initiative and aggressiveness he takes steps to correct the situation. I know this in fact, has happened on several occasions. On one occasion, I recall one worker who hitchhiked to Toronto, found a job in his profession and then when, along with myself on several occasions, he made representation to Departmental officials and the Minister for benefits to transport his wife, even forgetting about his own transportation because he has now tried to settle in the city to which he has gone, he has had no luck. He cannot qualify.

To my mind, because of the manner in which the regulations have been drawn, you are penalizing a worker, as I have already mentioned, for his initiative and aggressiveness in trying to find employment for himself. He just could have sat around and waited for his unemployment benefits to run out which would have cost a lot more to the people of the country than probably the transportation to the given point where he has finally found employment. Some would rather sit around and wait until someone called them and said there was a job available in their particular area.

I wonder, Mr. Williams, why they were drafted in this manner. I have tried to point out to you what I feel is a legitimate complaint that individuals are being penalized because they are anxious and ambitious enough to try to do something for themselves. Could you outline to me why they are drafted in the manner in which they are?

**Mr. Williams:** I can only say that the regulations are drafted in a manner which accords with the policy of the Department. I would not wish to comment on a particular case unless I had an opportunity to examine it and to determine whether the person concerned fell precisely within the provisions of the regulation. The situation you described sounds serious, but, on the other hand, unless I had an opportunity to examine the facts surrounding the case you have described and attempted to apply to that case the precise provisions of the regulations, I would not wish to comment upon it.

The implications of manpower policy in this area can be described much better by Mr. Gerley than by me and he might wish to try to do that.

**Mr. Muir (Cape Breton-The Sydneys):** I would hope you would, Mr. Gerley.

**Mr. Gerley:** Mr. Chairman, the regulations

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at the present time would provide for a mobility grant to such an individual, I would say, in very very general terms, if he were unemployed in the locality where he resided...

**Mr. Muir (Cape Breton-The Sydneys):** This is so.

**Mr. Gerley:** ...and if he found a job in another locality...

**Mr. Muir (Cape Breton-The Sydneys):** On his own initiative.

**Mr. Gerley:** ...regardless how he found a job, either through the Canada Manpower Centre, through friends or through his own initiative. The other criteria he would have to meet would be that his prospects of obtaining employment locally would be very minimal and, therefore, this man would be facing continued unemployment in his present locality.

It is not the intention of the program and the regulations to encourage this current movement of workers; we try to assess a person's need in terms of his own expectations and his own problems. I think that if the person meets the basic conditions of eligibility, there is nothing to prevent him from getting a grant. We would be glad to look into the case you have in mind any time.

**Mr. Muir (Cape Breton-The Sydneys):** Well, Mr. Gerley, this is not an isolated case.

It has happened on quite a number of occasions and I have contacted Ministers regarding it and the stock reply comes back, undoubtedly prepared by some of you gentlemen in the Department for the Minister's signature, that he did not qualify because of the reasoning that he left our area and, as you mentioned, regrettably the employment opportunities in my area in Cape Breton are very minimal. But the unfair part of it, I always thought, was the fact that someone really does the work.

In one case, I know a man who hitch-hiked to Toronto; he had no money but he had some friends there. He eventually got a job in the profession in which he was skilled, about which he had been advised by the local manpower officers that there was no vacancy in the Toronto area. But I am surprised to hear you say that they could qualify now, and I am very pleased to hear you say that. I do not have a particular case in point at the moment, but I could check my files and, of course, then the reply would come back that this happened six months ago or ten months ago and regrettably the family has moved now and we cannot give you any money to assist you, or something along those lines. But you said, if he qualified. What does he have to do to qualify under the regulations as drafted now?

**Mr. Gerley:** The first basic qualification, Mr. Chairman, is that the person must be unemployed or about to become unemployed, that is, be under definite notice that at a given time he will lose his job. Or he could become underemployed. This would be a situation where a person is not working in his full capacity in an occupation for which he was trained, or he is not working full-time. Then the next question, of course, is whether or not his prospects of obtaining suitable employment in the locality where he now is are good or bad or non-existent.

The other thing that the manpower counsellor would have to take into consideration is what he can do for this individual apart from mobility, whether or not mobility is the answer to his problem, whether or not occupational training would be the solution to his problem. And if we come to an understanding with the person in question that mobility is the answer, he can get an exploratory grant, or if he found a job he can get a location grant. But we would prefer to discuss with the person all his plans, otherwise we would be losing all control of manpower policies, if everybody just decided to ask us for nothing but reimbursement for removal expenses.

This is an over-all program and it has much broader implications than providing removal assistance to individuals. I think that

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in the majority of cases we have had the opportunity to review, if there are good reasons to believe that his prospects in the new locality are good and he will settle and his family is still in the old locality, I can say from personal experience that almost in every case the person will get a grant. But we would like to talk to these individuals before the move takes place.

**Mr. Muir (Cape-Breton-The Sydneys):** Well, of course, I fully agree with you. There must be consultation, very definitely, and this is why we have manpower counsellors. But in the cases I have in mind, sir, there were plenty of consultations, to the extent that the individuals concerned got very tired of going to the manpower office. There was nothing available, you see, so they went on their own, as I repeat. They covered all the qualifications that you have mentioned. But then when the approach was made, after they were settled in a particular city—and I recall another one was Sudbury—when the approach was made, the stock reply came back that they moved of their own initiative. Manpower in Toronto will say that they had advised Manpower in Sydney Mines, North Sydney or Sydney that there were no vacancies in that skilled profession or the profession in which the applicant was interested. Therefore they were not directed to the particular area by Manpower and they did not qualify for benefits. But if I have any more, I will be very pleased to get in touch with you, Mr. Gerley.

**Mr. Morrison:** Mr. Chairman, I have a couple of general comments. It is my impression from what I have seen of the manpower mobility program and the comparatively few complaints or representations which have come in on it that it is a flexible and generous set of regulations. In addition to the points Mr. Gerley has made, there are two other factors that sometimes produce the kind of decisions that you have been speaking of where we have had to say no. One is that a person on his own initiative may have gone and found himself a job in Toronto, if you wish, when he could have found a job, in the judgment of the counsellor, in some place

much closer to where he had originally lived, or alternatively the job that he has found has very little prospects of being anything other than temporary. Your mention of Sudbury raised this because we have had some experience which was not altogether happy, of grants being given to people going into the Sudbury area who have stayed there for a very short time indeed.

**Mr. Muir (Cape Breton-The Sydneys):** I realize Mr. Morrison that there are abuses. I realize that.

**Mr. Morrison:** But on specifics, it does turn out actually that cases of the kind that you are concerned about almost invariably produce one or two things that make it impossible under the regulations, broad though they are, to say yes. But we would certainly be happy to look at any case where you would feel that everything is as it should be and the grant should have been given. We do make mistakes.

**Mr. Muir (Cape Breton-The Sydneys):** Members of Parliament do, too.

**Mr. Morrison:** We have changed mobility grant decisions after reviewing them at headquarters in a few cases where obviously a mistake had been made.

**Mr. Muir (Cape Breton-The Sydneys):** Well, Mr. Morrison, for further clarification regarding the regulations, if the Toronto office or the Hamilton office reports back to the Sydney office and says that they, in that office, cannot accommodate another carpenter or a welder or something like that, is this the final decision as far as the Sydney office is concerned? Do they have to write it off there? Do they stop there?

**Mr. Morrison:** I think, as a general proposition, that this would be true, unless the individual were able to indicate a specific job that he had managed to arrange for himself, which sometimes does happen through private contacts and so on. But if it is simply a question of the person in, say, your riding seeking an exploratory grant to go to Toronto to shop around, and the Toronto office knows perfectly well that there are only 10 vacancies for carpenters, shall we say, and they have already listed with our CMCs in Toronto 30 or 40 carpenters, I think it would be a misuse of the taxpayers' money to give an exploratory grant to a carpenter to come up and join the 30 or 40 who are already there...

**Mr. Muir (Cape Breton-The Sydneys):** I agree with you completely.

**Mr. Morrison:** ...unless he has something very specific and precise that he can tell us about that we can confirm. Then we would probably be able to let him come.

**Mr. Muir (Cape Breton-The Sydneys):** That is quite reasonable.

**Mr. Morrison:** We know that a speculative trip for a particular occupation is most unlikely to be productive and rewarding because there are already too many people in that occupation looking for employment.

**Mr. Muir (Cape Breton-The Sydneys):** Well, of course, on the other side of the ledger, as I said a few moments ago, there are abuses. I have known people who have been sent by Manpower to different areas, expenses paid and so on and a job found, and human nature being what it is, they did not stay, only a month or something like that.

But these cases I mentioned were specific cases of individuals who were anxious; they did something for themselves. As a result of doing something for themselves, they did not get the benefits that someone else got who likes to lie around and take it easy. So that, in future, I will be glad to bring them to your attention.

**The Chairman:** Well, perhaps we might now return to the immigration area. I think the most fruitful way to handle this would be to go through the answers to the questionnaire. Let me say at the beginning that one of the chief problems which I am sure Committee members see with the type of regulatory powers which are being exercised by the department is that many of the things which are dealt with in the regulations might be thought to be things which could adequately be dealt with in the statute because they are not things that change very often. Many of the things which are dealt with in departmental directives might be thought to be things which could be dealt with within the regulations. I think this is a problem to which we want to direct your attention as proceed through the questionnaire.

Let me very briefly proceed through the first two or three of your answers to our questionnaire and I think we will shortly come to this problem in full force. Our first question was as to the different types of subordinate legislation which come under the administration of your department and

subquestion (a) was "Does your department issue regulations which are approved by the Governor in Council and under what authority". Your answer is that there is statutory authority for regulations made by the Governor in Council under the Immigration Act, the Immigration Appeal Board Act, the Adult Occupational Training Act, the Appropriation Acts the Vocational Rehabilitation of Disabled Persons Act and the Reinstatement in Civil Employment Act and the only regulations passed in 1968 in this whole category were amendments to the Manpower Mobility Regulations of December 8, 1968. Now your answer to subquestion (b) as to ministerial regulations is that there is authority for ministerial regulations under the Immigration Act itself and that there were none passed in 1968.

I think at that point we might pause to ask you if this is an atypical year in that respect or if very little use is made of ministerial regulations in your department as opposed to making Orders in Council by the Governor in Council? Are ministerial regulations used very sparingly in the Department of Manpower and Immigration? Mr. Williams?

**Mr. Williams:** I will try to answer that Mr. Chairman. I wonder if I just could add one thing I discovered as we came in that we had omitted. Part 2 to the Unemployment Insurance Act contains section 23 which authorizes the creation of regulations. Part 2 of that Act was transferred by the Government Organization Act, 1966 to the control of the Minister of Manpower and Immigration and regulations have been made under that section. They were not made at any time while the superintendency of this piece of legislation was in the hands of this Minister. They do exist, however, and they are a part of the unemployment insurance regulations. Nothing of the kind was done during 1968.

To answer your question, the immigration regulations are of two kinds. There are the Governor in Council regulations to which question (a) is addressed and the ministerial ones to which question (b) is addressed. The more important and more controversial are, of course, those required to be passed by the Governor in Council. Ministerial regulations

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pursuant to Section 62 of the act relate only to the conduct of immigration inquiries and this is largely an internal operation of the Department and these regulations relate pretty largely to the way in which special inquiry officers who conduct these inquiries will carry them on. They are not much consulted at all by the public and that is why I believe, I would suggest, Parliament has delegated the power to make regulations of this character to the Minister rather than to the Governor in Council. However, as was pointed out earlier the regulations themselves have been approved by Privy Council officers as to their form of draftsmanship. They do have the approval. These ones were passed fairly recently in 1967. They were revoked and re-enacted and they do have a certification from the Attorney General as to their compliance with the Bill of Rights. They are only 13 sections in length. They are just less important.

**The Chairman:** Dean Pepin?

**Dean Gilles Pepin (Legal Counsel Adviser):** Just one question, you said that those regulations have to be approved by the Privy Council?

**Mr. Williams:** Their form and draftsmanship has been approved, not their policy content; however, they have also received the certification of the Attorney General under the provisions of the Bill of Rights Act that they must comply with. All pieces of subordinate legislation we deal with are treated that way.

**The Chairman:** Mr. Morden, do you have a question on this point too?

**Mr. Williams:** I should say they are treated that way, Dean Pépin, because they fall within the Regulations Act.

**Mr. J. W. Morden (Assistant Legal Counsel Adviser):** I gather from your last answer that regulations which you do not consider to fall within the Regulations Act are not processed through the Privy Council office as to form and draftsmanship?

**Mr. Williams:** That is quite true they are not. We endeavour to conform to the same standards of draftsmanship that the Justice Department insists upon when they do their own drafting. I am a justice officer myself. I have at all times the assistance of any justice officers in the Legislative Section that I care to call upon and I do call upon them. I endeavour to make sure that documents and other things which are in the nature of a legislative enactment, minor ones usually, do conform to proper drafting standards and are in proper form and properly authorized under

the statutes. One of my duties is to take care that they do conform to the power granted in the statutes and do not exceed that power.

**Mr. Morden:** As I see the Regulations Act, in particular Section (2) which defines which defines what is caught by that Act, it seems to me that whether or not a particular regulation made by your department or any other department is in fact, going to be processed under the Regulations Act, in other words submitted to the Privy Council office as to form and draftsmanship transmitted to the Privy Council office, recorded, et cetera, depends on your decision. If you come to the decision that a regulation made say is not of a legislative character pursuant to the exercise of a legislative power it will begin and end in your department, will it not?

**Mr. Williams:** Probably it will be my interpretation of that provision in the Regulations Act, yes. If I have any doubt about it, of course, I consult my own superior officers in the Justice Department and I occasionally do.

**Mr. Morden:** Maybe I am getting into a another area but I would like ask...

**The Chairman:** Proceed.

**Mr. Morden:** ...Mr. Williams if he has run into many problems with regulations that come across his desk from his department as to whether or not they should be processed under the Regulations Act or whether they can stay with him. In other words, do you have to stay with your department? Do you have many difficulties in applying the Regulations Act?

**Mr. Williams:** By and large not, Mr. Morden. I have not encountered any serious difficulties of any kind in the interpretation of that section. Really the answer to your question is that I have not encountered any serious difficulties at all.

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**Mr. Morden:** You say in doubtful cases you refer to...

**Mr. Williams:** On doubtful cases I certainly consult my own superior officers in the Justice Department. There are in the nature of things a good many precedents for this sort of thing. Most kinds of powers have been delegated in one kind or another to officers under other statutes and under other acts. It may be that in following some practice we are wrong but I do not know of any cases where that is obvious. Certainly anything that falls under the Regulations Act we would certainly send it to the Privy Council. You are dealing with a question of how I would interpret that act?

**Mr. Morden:** Yes, it is an important question because its answer turns on what happens to the document before you as far as publicity and everything else is concerned.

**Mr. Williams:** I have not experienced any particular difficulty with this.

**Mr. Morden:** I gather from what you have said that in your personal experience in the Department you would not think that any improvement could be made in the language of the Regulations Act describing what should be processed under it.

**Mr. Williams:** It is a pretty broad description as you can see. Perhaps some improvement could be made. Perhaps if it were thought advisable the net could be drawn wider to include some things that I would not regard as included. A ministerial delegation of authority I would not regard as included and I would not send to the Privy Council for recording. However, the ministerial regulations certainly do fall within the description and it requires to examine every example of a power being exercised pursuant to a statute and comparing it with the regulation and determining whether or not I think it falls within it. If I thought it fell without it I would not send it up but I have not as I say, encountered any difficulty in deciding which was which so far.

**Mr. Morden:** Right.

**The Chairman:** Perhaps it might help us if we knew the length of your experience in the Department, Mr. Williams. How long have you been legal adviser to the Department?

**Mr. Williams:** I have been legal adviser to the Department for eight years.

**The Chairman:** That is a fairly lengthy period.

**Mr. Williams:** I have been with the Justice Department all of that time. I am a seconded officer from the Justice Department and I have been with that Department for nine years.

**The Chairman:** Thank you. You just a moment ago mentioned ministerial delegation. You said you would not consider this to come

under the Regulations Act. What do you mean by ministerial delegation?

**Mr. Williams:** Would you like an example?

**The Chairman:** Yes.

**Mr. Williams:** Under the provisions of Section 71 of the Immigration Act, for example, the Minister has authority to delegate any of the powers he is given under the Act to the Deputy Minister or to the Director. The Minister, under Section 71 is authorized to delegate to:

> . . .the Deputy Minister or the Director to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or the regulations. . .

In the course of doing so, a document is drawn up which the Minister signs. These documents on any particular case are collected and kept in the Department. As the answers to our questionnaire reflect, I think, these documents can be called upon to demonstrate that in fact the Minister exercised the power as required under the Act and when he did it.

**The Chairman:** This section of the Act makes it possible for the Minister to still further delegate the power of making ministerial regulations?

**Mr. Williams:** I think not, because in the case of the ministerial regulations these are quite specific. Section 62 of the Act, which authorizes the Minister to make regulations, I would say, was not within his delegatory power. In any event they do fall under the Regulations Act provision which collects them and requires them to be passed.

**The Chairman:** Even if they are made by. . .

**Mr. Williams:** Even if they were made by someone else.

**The Chairman:** Yes, but as a matter of practice are ministerial regulations signed by the Minister or by some other official in the Department.

**Mr. Williams:** By the Minister, indeed.

**The Chairman:** Always by the Minister?

**Mr. Williams:** All the ones that have ever been made under Section 62 are signed by him personally.

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**The Chairman:** Yes, despite the provisions of Section 71.

**Mr. Williams:** Despite the provisions of Section 71.

**The Chairman:** The answer to subquestion (c) as to regulations which are exempted from publication in the *Canada Gazette* by the Regulations Act itself is that your Department does not have any such regulations. Your answer to subquestion (4) which inquires as to departmental directives which affect the public is one to which you make a lengthy answer and one which I think is very important for us in our consideration here, because I think the question arises in our minds whether some of the matters which are departmental directives, if they do affect the public—that is the premise of the question—should be rather in the regulations than in some other form of directive which is not published, not available to the public and not subject to the same safeguards and scrutinies. Let us just look at some of these in particular, and perhaps we will derive some assistance from that.

In your first answer to the question you state that under the Immigration Act there were quite a number of such directives issued this year. I do not think there is any point going through all of these categories. This will be available to us in the documents for the Committee but you mentioned, for example, that under Section 5(d) during 1968 there were 187 cases where such directives were issued. Do I understand that some of these do receive the approval of the Governor in Council or what are the provisions of that Section?

**Mr. Williams:** In that instance they certainly do receive the approval of the Governor in Council. These are instances in which, and I take the answer to mean, that there were 187 cases in which the Governor in Council authorized the admission of a person who otherwise fell within the prohibited class 5 (d), because that person fell within the exceptions that follow in subsections 1 and 2.

**The Chairman:** So in this particular case, although these would not be published, I assume as they do not fall under the regulations Act they are not made within the department, they go to the Governor in council. What examples are there of departmental directives which affect the public, which do

not go beyond the Department for scrutiny, which do not go to the Governor in Council?

**Mr. Williams:** Could you clarify the question for me please?

**The Chairman:** Section 5 (d) of the Immigration Act apparently provides that—I do not have a copy of the Act before me—that the Governor in Council must issue these directives. Are there other cases in which the Department alone has the authority to issue the directives. I would ask in particular about any matters which generally affect the public? I understand that in many cases the orders you are making are individual orders which affect only one person, or two people who are involved in a particular case. However, we are interested especially in directives of a general character; for example the directives which came to the attention of the members of Parliament during the controversy this winter over the admission of American deserters. The fact was there were departmental directives which dealt with this issue not available even to members of Parliament. We were not able to find out the contents of these directives except in a very indirect way, yet, they did determine to a very large extent the kind of decision given by an individual immigration officer at the border. They were not made in a way that was published. They were not made subject to any nondepartmental scrutiny and yet they were perhaps decisive with respect to the admission of certain classes of people, not just deserters, of course, but this was the particular context within which these directives came to the attention of members of Parliament.

**Mr. Williams:** I think we are talking about two different things, at least so far as our answers have been elicited by your questionnaire.

Your Question 19, requests a listing of powers in the statutes that we have and the regulations that we have where they do affect the public but do not come within the Regulations Act and there is a lengthy list in there. These are quite easy to itemize for you. The examples listed in our response include things such as:

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> approval by the Minister of academic, professional and vocational training courses for students

under section 7(1) (f).

> directions "otherwise" in respect of seasonal workers

and a long list of things that have been included.

The second item you raised has to do with unpublicized directions to immigration officers. I believe that our response is in Question 10 of the supplementary reply to your questionnaire. I hope it gives an indication to you of the nature of instructions of that character. They have to do. They are not exercises of authority granted under a statute to the Minister, they are explications, if you will, of policy for the guidance of immigration officers in the performance of their duties.

As the answer reflects, there are guidebooks, handbooks and manuals used by immigration officers and other employees of the Department in the performance of their duties. It is necessary, of course, from time to time to give an explication of policy and the manner in which these officers are to exercise their duties in the hope that it will be applied uniformly across the country so that there will not be differences in application of policy. I think the answer reflects this. There certainly are these handbooks, they certainly do contain memoranda from time to time which are classified for policy reasons and are not published to the public. The question relating to the United States military deserters is directed at a policy directive of this kind which was indeed issued.

**The Chairman:** I might just say for the record that we did not, before the beginning of the hearing this morning, have even your earlier answer to Question 10. I believe that must be one of the ones which the Privy Council office has not yet forwarded to us. I am pleased to see that we now have an answer to this question. Is not the data which you give us in questions 10 and 19 and the answers to those questions also contained in some form from a different point of view in your answer to Question 1(d)?

**Mr. Williams:** Yes, partly. I am not absolutely certain that the question as drawn covers both categories in a way as to completely overlap, but I endeavoured to prepare the answers in a way which would be a response to the question.

**The Chairman:** Yes, well there is a section in the immigration regulations which gives the authority to the Minister or to the Depart-

ment to make directives of the kind which affected the deserter question. Could you draw my attention to that section in the regulations? It may just be the discretion as to . . .

**Mr. Williams:** It is.

**The Chairman:** —classes of people who may be excluded. The immigration officer has complete discretion over this . . .

**Mr. Williams:** Yes, that is right.

**The Chairman:** . . . even beyond the 50 points.

**Mr. Williams:** That is right. There is a provision in the immigration regulations, section 32(4) which provides "Notwithstanding Subsection (2) . . ." and if you read above subsection (2) it provides for the assessment in accordance with the norms set out therein. It provides:

> Notwithstanding Subsection (2), an immigration or visa officer may (a) approve the admission of an independent applicant who does not meet the norms set out in Schedule A, or (b) refuse the admission of an independent applicant who meets the norms set out in Schedule A if in his opinion there are good reasons why those norms do not reflect the particular applicants chances of establishing himself successfully in Canada and those reasons have been submitted in writing to, and approved by, an officer of the Department designated by the Minister.

A very similar provision appears in section 33(5) which is a section in the regulations dealing with nominated relatives.

**The Chairman:** Yes, but you have not given us any information in answer to Question 1 under those sections of the regulations. I wonder if subsequently you could prepare and send us in writing answers which would give us some indication of the number of directives issued under those particular sections of the regulations.

**Mr. Williams:** Those would be directives in

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relation to the application of policy. They would be administrative in nature. They are not orders issued as authorized by a statute. The only statutory enactment that appears there, which authorizes the Minister to take a particular action, is the one that appears at the tail-end of the section authorizing the Minister to designate an officer who may receive in writing and approve reasons for the exercise of the assessing officers opinion.

**The Chairman:** I suppose that is the question we have to raise with you, are these legislative in character or not. If they, in effect, determine what happens to the public and therefore who comes into Canada or who does not, are they not just as much of a legislative character as any provisions in the regulations or in the Act? On the basis of those directives, immigration officers decide who to admit to the country, for example, an immigrant may get 50 points which is the requisite for admission under the regulations. Yet, as a result of his exercise of discretion with the guidance of these directives, he may still decide not to admit someone to Canada. This, it seems to me, could well be argued to be of a legislative character.

**Mr. Morrison:** May I comment on this, Mr. Chairman?

**The Chairman:** Yes, Mr. Morrison.

**Mr. Morrison:** Not being a lawyer, I would like to say that it has always been my view and understanding, and I think that of my colleagues in the Department, that any document issued as part of one or other of our several manuals was in fact an administrative document of one kind or another which was not a legal document in the sense that in any way, shape or form did it tell our staff to do things that were not permitted to be done under either the governing Act of Parliament or regulations passed by the Governor in Council under the Act.

In this particular case that got so much publicity about deserters—perhaps we could use it as an example although many of us would like to forget it I might say—it has always seemed to me, and again I speak not as a lawyer all that was given to our officers in the field was advice, if you wish, or some guidance as to what sorts of things would constitute the good reasons referred to simply in those terms in the legislation, in this case, being the regulations. Had no advice whatever ever been issued to them, they were just as free to develop their own good reasons whatever they may have been and they would have been just as legally binding had the procedures as laid down in the regulations been followed as any decisions they made as a result of having been given some guidance as to the sorts of good reasons for the sake of consistency in departmental policy and so on.

In my judgment, it did not add or subtract from their legal authority or the authority granted in the regulations as to the exercise of their discretion. I know this is a debatable subject, so I can simply give you my own opinion which I think my colleagues would probably support, but they may wish to speak on it themselves. I think it gets right to the root of the problem that is bothering the Committee, as to whether not only our Department but other departments of government, through the issue of what we as public servants have always viewed as essentially administrative documents, are for practical purposes issuing documents which take our actions in a legal sense beyond what has been spelled out either in an Act of Parliament or in a set of regulations passed by Order in Council. I think this is really the nature of the problem.

**The Chairman:** I think in the absence of the directives our question might be whether or not there is too great discretion given to the border officers. In the presence of the regulations is it not rather unrealistic to suggest these will not be taken by the officers as fairly firm guides as to the bases on which they should decide? Once you have given the

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directives, can you reasonably believe that the officers will not follow them; that they will then exercise their discretion at large just as if there were no such directives? I presume your purpose in issuing them is that they will follow them?

**Mr. Morrison:** I think, Mr. Chairman, it is a fair conclusion that when we issue guidelines or an instruction, or whatever you want to call it, to our officers, we expect them to be kept in mind and used in the course of their duties. This is, as you say, why we issue them. I think it would also be fair to say that if all that we gave to our immigration officers or our manpower counsellors was a copy of an act of Parliament and a set of regulations, considering that we have between 7,000 and 8,000 officers, you would almost get that amount of variation in how they as individuals would interpret such a bare-bones type of documentation. So that in principle they have to have advice, explanations and instructions about procedures, in particular. And I would like to say that the vast bulk of what goes out in our manuals is related to procedure and what to do about the kinds of cases which were spoken of a moment ago, what the qualifications are and so on. And if you find a case that does not appear to quite fit, what do you do about it? Do you throw it in the wastepaper basket, or do you consult a superior officer?

I think it is only very occasionally that the kind of problem that came up with the guidelines about deserters raises any real question as to whether the document issued was of a legislative character, and I suppose every person would have his own view on this. But certainly it was not the intent and never has been, nor would we even think of trying, to legislate by this device of issuing instructions. It is always our aim to make absolutely certain that what we do give out to our officers in the field in this form, through our manuals, is clearly within the ambit and authority granted by act of Parliament or formal regulations, and when there is any doubt about it, as Mr. Williams will confirm, we check with him to make sure that we are not exceeding the authority that we think we have or that we appear to have.

**The Chairman:** I would like to press you further on this but perhaps some of the other members or the counsel would like to get into the act as well. Mr. Morden.

**Mr. Morden:** On this very point, is it fair to say that subsection (4) of Regulation 32 is a recognition of the impossibility of providing in a document for all situations which could arise in the future, and that the purpose is to confer some measure of discretion on the immigration officer to look after it? Is that the main purpose?

**Mr. Morrison:** Mr. Chairman, that is exactly why that provision is in there, because in the earlier version of the Immigration Regulations governing admissibility, the examining officer had a very wide degree of latitude and discretion. The actual standards or criteria on which he was asked to judge the admissibility of an immigrant were quite narrow. They related basically to his educational level or his trade qualifications, and beyond that there was really very little except some general suggestions as to the kinds of things that the examining officer should enquire into about the person's suitability and his motivation and why he wanted to come to Canada, and so on. And we were subjected, I think quite properly, to a great deal of criticism from Members of Parliament and from the public, the criticism being that apart from the fact that none of this information was then public,

nobody knew what our basis was for accepting or refusing and that it was all too wide open to the subjective judgment of the officer.

The new regulations were very specifically designed to be as precise as possible in trying to foresee all of the varied types of individuals who would have to be examined, in trying to establish criteria that were objective rather than subjective, but in the final analysis is making provision for the point you have just raised that you cannot really draft a set of ironclad rules that will apply to every single individual and, therefore, there had to be under controlled conditions some element of discretion left, in the final analysis to be

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applied where an examining officer was confronted with a person about whom the right answer simply could not be found from applying these criteria. That is the whole purpose of it.

**Mr. Morden:** Perhaps Mr. Williams could answer my next question. I gather from reading the Act that this subsection (4) was enacted pursuant to Section 61 of the Act. What clause in the Act confers the power to make a subjective administrative decision? I am not saying it is not there. I would just like you to point it out.

**Mr. Williams:** I would not declare that it was there in paragraph (g). I think that probably what is relied on are the opening words of Section 61, which confer the power on the Governor in Council to make regulations for carrying into effect the purposes and provisions of the Act in a general way. The items which follow do not restrict the generality of the foregoing and I believe in all probability that is the general clause that was relied upon for the creation of a section of that kind.

**Mr. Morden:** Well, it is a legal question, I suppose, in the last analysis. I think that is a very interesting answer.

**The Chairman:** To return to Mr. Brewin's earlier question in a different context, why the secrecy in these directives? Why should not all of these directives be published? Some departments do publish such things. Can you see any reason why all of the departmental directives might not be published, or at least made available to the public? Perhaps they would not necessarily need to be in printed form. They could be in mimeographed form, or in whatever form you distribute them to departmental officials.

**Mr. Morrison:** Well, Mr. Chairman, your question in a sense puts me in an awkward position because as you perhaps are not aware, my Minister was asked this same question in the parliamentary committee on Labour, Manpower and Immigration. . .

**The Chairman:** No, I was not aware of that.

**Mr. Morrison:** . . . and I think it was Mr. Brewin or Mr. Lewis who asked this same question in connection with the guidelines concerning deserters. And as I recall, he took the view that traditionally this type of document which is within the Department has always been considered privileged and has not in fact ever been tabled in Parliament itself. Now, I do not think I could be drawn beyond what my Minister has said is his policy position.

**The Chairman:** I understand that, Mr. Morrison. Could you be of any assistance to us as to why provisions such as those we have been discussing, not all of the directives, but those which at least tend toward the legislative, should not be contained in the regulations or perhaps even in the statutes. After all, this is not the type of thing that you are likely to be changing from day to day.

**Mr. Morrison:** I think, Mr. Chairman, that your last point is the real crux of the issue because the type of thing that is contained in our manuals is in fact the sort of thing that does change or has to be changed quite frequently, because we find the procedure does not work the way we thought it would work and we have to take action to amend it or change it or adopt completely different methods of achieving our object.

**The Chairman:** Well, no, I was not speaking of the procedure. I was speaking of the provisions which verge towards the legislative. Unfortunately since these are secret documents we cannot pinpoint them very well, but for example the phrase was constantly used in the case of the deserters that your officers were instructed that they could exclude those who had not fulfilled their contractual, legal or moral obligations to the country that they were leaving. That is verging towards the legislative, and that is the type of thing. . .

**Mr. Morrison:** If you are asking as a sort of hypothetical question whether our system of manuals should be of a different order so that things which to most people would appear to

be bordering on the legislative ought to be dealt with in a different fashion, then I think I could say perhaps they should.

**The Chairman:** But you would see no administrative difficulties?

**Mr. Morrison:** The administrative problems I suspect are something of this order, that if you try to cater to that type of thing in an act of Parliament you probably run into difficulties of a long-term kind. An act of Parliament, and I am not trying to be facetious, is perhaps the most difficult thing to get changed that exists. If you are not careful you could bind people and a department with quite unforseen results, if you write too much detail into an act of Parliament.

Regulations are subject to the same sort of difficulty to a lesser degree because changes can be effected by orders in council if they turn out to be necessary much more speedily than with an act. Those are the kinds of administrative problem that I would foresee in attempting to draw up more of what now goes out in manuals as departmental administrative instructions into the strictly legal type of document that you are talking about. But as a principle, I personally have no objection to this sort of thing being seriously looked at. It may well be that after years of experience and to satisfy present-day conditions, some things that we have tended to view as strictly administrative should no longer be viewed that way. They ought to be dealt with in a different fashion, provided we recognize the pitfalls of tying the administrators of legislation into such a bind that in the end they wind up not being able to do what they think should be done because the law will not let them.

We have examples of this in the present Immigration Act, I might point out, where the law quite specifically prohibits certain people from coming into Canada, and we would like to let them in because the conditions that led to the probation in the first place no longer apply. Epileptics are an example. It is necessary then to adopt devices such as minister's permits to get around the law. This is the sort of thing that can happen in drafting too much into binding legal documents.

**The Chairman:** I suppose the categorization that we use for what we are concerned about are provisions which interpret legislation, interpretive provisions. These are the directives that we are concerned about and I would like to follow up the question of whether or not these are really administrative. It seems to me that when you use phrases like contractual, legal and moral obligation, you are talking in terms which are very familiar to legal minds. You are in the same tradition as the tradition of statute-making and regulation-making, and I gather that you would feel much more comfortable if such interpretative provisions were to be up-graded, but up-graded only to regulations and not to statutes.

What do you think it is about such directives which gives them administrative character? Is there anything of themselves which makes them administrative? Is there any necessity for changing them frequently and quickly?

**Mr. Morrison:** As I mentioned earlier, Mr. Chairman, it is my view that the vast bulk of what goes out as part of our manual is administrative, certainly in a laymen's sense, because the majority of the documents deal with procedures and things of that kind rather than attempt to be interpretations. Now there certainly are, and we do this for administrative reasons, included in our manuals copies of policy statements that the Minister has made in the House of Commons or things of this kind that we want to get into the hands of all our officers because otherwise they might not see them. This happens to be a convenient method of doing it. There are statements which could be considered policy statements as to why our department exists, what its goals and objectives are, and what it is trying to accomplish. We are given nearly $4.5 million a year. What are we spending it

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on? That is policy, but it is not making any laws. It is an attempt to explain through this device what it is we are doing and how we hope to do it, and things of this order.

This is why I view our manuals and what is in them as essentially administrative as distinct from legalistic.

There may be a narrow range of documents which, depending on where you sit, you might view as being one or the other.

**The Chairman:** That was the group on which I wanted to focus your attention.

**Mr. Morrison:** And I suppose you can identify these only by subjecting them to some form of scrutiny which perhaps does not now exist, unless the author of the document has a real question.

**The Chairman:** Yes. Unfortunately, from our viewpoint, we do not have access to these and in fact nobody else besides the department ever has an opportunity of scrutinizing them. As I understand it, this is not a question which you would be submitting to the Department of Justice for advice, is it, Mr. Williams? Or is this occasionally the type of thing about which you have found it necessary to ask depar.mental solicitors?

**Mr. Williams:** If my advice was asked about it, and if I was concerned about that question, it certainly would be something I would raise with the Department of Justice, if I was not satisfied with the answer myself. Indeed I would.

**The Chairman:** Do you have any comments to make on phrases such as contractual, legal and moral obligations, which have a legal connotation and which do interpret the law for immigration officers?

**Mr. Williams:** I would not say that these documents and these instructions in fact tell immigration officers how they are to make up their minds about these things. I believe the direction in question suggested a number of things which might be suitable subjects upon which an immigration officer might base his decision. In that sense, in my view, they probably do not amount to legislative enactments, certainly not in the sense that they tell those officers what they must do.

The officer brings to bear on the decisions he makes his own background of experience and his own views, but we endeavour to insure—and this indeed is the reason why most of these directives exist—that there is uniformity of operation across the country, so that the kind of thing that did happen in a few instances does not recur continually. It is necessary to give instructions of this kind and they are not instructions as to how an officer should make up his mind. They are instructions concerning the kinds of things which he might consider in making up his mind. And if a document of this kind was brought to my attention and if I felt any concern about it violating what was in effect a statutory enactment, I would have said something about it. I did not feel so in this case.

**The Chairman:** The essential reason then, if I understand it, why you consider these to be administrative is because they are not binding on the officers. Would you say they are suggestions to or guidelines for the officers?

**Mr. Williams:** They are attempts to assist him in the performance of his duties and in the carrying out of policy in a uniform manner across the country.

**The Chairman:** The follow-up question then would be—and I did ask this before in a slightly different way—is this a realistic approach? Given directives which are as legally phrased and as apparently specific as the ones that you give, is it reasonable to suppose that these will not be treated by immigration officers as if they already made the determination without leaving the discretion to the immigration officer?

**Mr. Williams:** That may be the case. I think we do our very best to ensure that is not the case, but as with other human matters, I do not think we can ensure that in every case that does not happen. As you know, we have taken steps to correct it, in this particular case.

**The Chairman:** Yes, I am not complaining about the policy of this particular case, that is, the content of the policy, but just about the procedure followed. You say you have taken steps to correct it. In a general way are you thinking of additional instructions, either verbal or written, which you give to immigration officers, that they are not to take these guidelines as definitive? Is this part of the immigration officer training, that he is to take these things merely as general guidelines and that he is not to be bound by them, that he is to have discretion of his own which has priority in his mind over the directives?

**Mr. Williams:** The steps we took to correct the situation had to do with ensuring the uniformity of the application of policy. That corrected what we thought was a problem in that matter.

**The Chairman:** Let me ask you two further questions. Do you have any idea of the educational level of the immigration officers who would be administering these directives at border points? What do you require? Do you require high school education? This is probably another question for you, Mr. Williams.

**Mr. Williams:** I cannot answer that directly.

**Mr. Morrison:** Mr. Chairman, I think as a general proposition our recruiting level for border inspection officers is high school graduation as a basic rule of educational level. It varies elsewhere. It depends on the level of the position for which you are

recruiting. The new recruit into our offices for duty on the border would probably be on the average, a high school graduate; Grade 12 education.

**The Chairman:** Yes. Might I also ask what type of training you give them? The question I was asking Mr. Williams was what type of training you give them with respect to their own discretion? Are they very clearly instructed when they receive such directives that these are not meant to entirely pre-empt their minds?

**Mr. Morrison:** To answer that, Mr. Chairman, I think I have to draw a distinction here. There are some things which an immigration officer does or is asked to do which in truth, are discretionary such as the sort of thing we have just been talking about where there is a specific provision for discretion within the law. So instructions or advice or documents concerning that we do indeed try to get everybody to understand that they are nothing more than guidance as to how he exercises his discretion.

On the other hand, there are certain things which he is expected to do in which he has no discretion because the legislation does not give him any. Our instructions on those things are designed to make sure he understands what is involved and that, in fact, he does not have discretion; that he is there to establish certain facts and if the facts are such and such then he must do so. If they are something else then he does something else. This is part of the difficulty, I think, and it may be one of the difficulties with our officers who are receiving these that one does not learn this sort of thing immediately. It takes time. It takes experience and with all the best will in the world and as much training as one can manage, you may still find individuals who have not firmly got in their noggins just what the basic distinctions are and they may on occasion read what was intended to be guidance as mandatory and fail to act as they were supposed to act in a mandatory way and exercise discretion when they should not have done it. This is part of our human problem.

**The Chairman:** That granted, it seems to me somewhat unrealistic to expect high school graduates to receive directives in apparently precise legal language, as some of these directives are, and expect them, not in a concrete situation, to consider them to be rather blinding on the way in which they make up their minds.



**Mr. Morrison:** Could I say in response to that, Mr. Chairman, that these people of whom we are speaking and who are relatively inexperienced work under pretty close supervision. They are not sort of there all by themselves. The supervisors are supposed to make certain that they keep a pretty close watch on anything that is other than routine. The individual officer in turn if he suddenly runs across a different problem or a new one that is beond his experience is expected to seek some advice from his supervisor and the supervisor really takes it over.

Therefore, within the frailties of human beings the system is designed to make sure that this type of difficult discretionary decision is not in fact being left in the hands of relatively inexperienced or untrained people. Mr. Beasley would perhaps have some further comment on this.

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**The Chairman:** Mr. Beasley.

**Mr. Beasley:** There is just one further comment I would make with respect to a question you asked earlier about training, Mr. Chairman. When the new regulations came out we put out a very concentrated training program in an attempt to make clear to every officer precisely what the meaning of the new regulations was because they were a drastic and dramatic change from the regulations under which they operated hitherto. Mr. Morrison, who I think was then Director of the Home Service Branch conducted a series of meetings right across the country. Mr. Cross headed up another series of meetings. There was a very intensive training campaign both in Canada and overseas in an attempt to make as clear as possible the provisions of the new regulations; what was mandatory, what was discretionary and how they should make use of their discretion. I think it can be said in all honesty that a sincere effort was made to train the people in so far as was possible not only by directives but by personal meetings and consultation with those concerned.

**Mr. Muir (Cape Breton-The Sydneys):** Mr. Chairman, with reference to your questions to Mr. Morrison regarding educational background of immigration officers may I ask Mr. Morrison would he not agree that an academic background does not always qualify an individual to use good judgment and discretion which may be often required in instances at the border points?

**Mr. Morrison:** Yes. I do not think anyone could seriously disagree with the proposition that an academic qualification in itself guarantees good judgment or discretion. We tend to think, and I think properly, that other things being equal this is a good start, but there is a lot more involved than just the qualification.

**The Chairman:** The reverse side of what I have been asking you about is if you have a situation in which the border officers really believe they have discretion and exercise that discretion, that is, they take these directives as guides and not as laws which they must follow, is whether they should have such discretion. Is there any reason, if you can frame a general rule such as those which you phrased in some of your directives, why an officer should have discretion other than in the interpretation of that rule itself? Why leave many discretions? I am now coming at the question from completely the opposite side. Why should there be discretion in these cases? Obviously there has to be discretion as to your judgment of the individual person.

**Mr. Morrison:** Yes.

**The Chairman:** But why should there be discretion as to the interpretation of the law if the law can be stated fairly accurately?

**Mr. Muir (Cape Breton-The Sydneys):** Would it be for me to interject, Mr. Chairman, so many laws and regulations, and I think maybe the gentlemen here will agree with me, are not cut and dried; they are not entirely black and white. There must be occasions when an individual has to use a certain amount of discretion in regard to particular cases. Would I not be correct in assuming this?

**The Chairman:** Perhaps I may make this more specific. Immigration officers have the discretion to refuse to admit someone who gets 50 points which is the normal admission qualification. I understand that in your directives you give him guidelines on the situations in which he might consider refusing such a person. If that is a pretty complete list, as I believe it is, and it is pretty accurately phrased in legal-line language why not make that list mandatory on him? Why give him additional discretion over and above that? At least why not merely have a catch-all phrase which will give him certain additional powers but does not give him any additional powers by way of interpretation of the things on that list?

**Mr. Morrison:** Mr. Chairman, if I understand correctly are you suggesting that what now we call guidance on what sorts of good reasons would in fact be good should be included in the regulations...?

**The Chairman:** Yes.

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**Mr. Morrison:**... as an elaboration or an extension of what there is now and then that the examining officer thereafter is bound by that. This is certainly possible but I suggest to you if you did that you might very likely find a week later several cases would turn up where the examining officer felt there was an excellent reason for either keeping him out or letting him in but he could no longer do this because he was bound by a specific set of rules. This is exactly what has happened to us with having various classes of prohibited persons listed in the basic Immigration Act, that over the course of time it has become rather out of date and yet in law we have no discretion. This, I think, is the difficulty and is the sort of thing, I gather, you have in mind. In principle it is attractive and it gets away from these difficulties, but in actually trying to work it, as I remarked earlier it is terribly difficult to draw up any list, however comprehensive you try to make it, that will satisfy all the individual conditions and individual people with whom immigration officers have to deal.

**The Chairman:** You are concerned both about the rigidity...

**Mr. Morrison:** That is right.

**The Chairman:** ...of any rule that would be established and also about its incompleteness.

**Mr. Morrison:** That is right.

**The Chairman:** The incompleteness, at least, could be cured by having a catch-all provision which would allow, say, the Minister or the Deputy Minister to have cases referred to him where the immigration officer at the border felt there was some additional reason for excluding a person. I must say with regard to rigidity, if these provisions were in the regulations, rather than in the Act, considering the number of regulations that are made each year, I find it hard to believe that you could not get regulations made within a reasonable time that would solve the problem.

**Mr. Morrison:** Mr. Chairman, on your first point, might I point out that I think it would be a very unfortunate happening if ministers or deputy ministers were forced to be the sole arbitrators of this type of discretion. Indeed, we had a situation like that not so many years ago where matters had reached the point—this was in the days before the new Immigration Appeal Board and for a variety of other reasons—that the Deputy Minister of the day, in the old Citizenship and Immigration Department, was very seldom able to do anything else except examine case files. Either he or the Director of Immigration, because as the law was then being interpreted, were the only two people who had authority to exercise any discretion whatsoever. This was a terrible administrative hangup. It was unfair to the individuals who were waiting for decisions and it was just an administrative monstrosity.

On the second part of your remarks on the flexibility of regulations and the possibility of getting necessary amendments, I agree, this is not an insuperable obstacle, but I still would be concerned about the rigidity of trying to operate on this principle because of our sad experience with things that are too rigid and our own knowledge of the fact that no two immigration cases are ever identical. There are always differences and if there is no flexibility for individual officers to try to make sensible judgments because their hands are completely tied by law, then you really will have a pretty messy situation on your hands. You will have complaints of all kinds coming in from all over the place and not just from the individual who will get fed up and whose family will get fed up. Members of Parliament then would have even more letters than they have now. That is just my personal opinion, but I think it is pretty accurate and I think, perhaps, my colleagues would agree with me.

**Mr. Beasley:** I can only say I do agree and, of course, this is the reason why this discretionary power was inserted in the regulations. Either you had this or you had to have an absolutely rigid set of regulations, spelling out in great detail who was and who was not admissible and our officers would be bound strictly and rigidly by those regulations. I only can endorse Mr. Morrison's statement that it is very difficult to attempt to write into a regulation all the various situations which might arise where it just would not be common sense or good judgment to apply the law strictly. For example, a mother 59½ years of age needs to get a certain number of points.

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It so happens that all her family are in Canada; she becomes a widow, she is left all alone in a foreign country; her family here in Canada are well prepared to look after her and she is not going to go into the labour market. Yet if you strictly apply the regulations as they are written, she cannot come. I just cited this as perhaps not a good example, but an example of where situations arise that are pretty difficult to foresee and which, if one were to apply the law strictly as written, would certainly cause hardship on individuals.

**The Chairman:** How does someone like that get in?

**Mr. Beasley:** You can apply the discretion.

**The Chairman:** What discretion? Is this done by the Minister directly in a case like that?

**Mr. Beasley:** In this question, it is provided in the regulations.

**The Chairman:** Is it within the discretionary authority of a border officer to admit someone who is short of 50 points?

**Mr. Morrison:** Oh, yes. Discretion works both ways, Mr. Chairman.

**Mr. Beasley:** I think our statistics, subject to what Mr. Cross may say, have established that it is used in favour of letting an inadmissible person in much more frequently than the reverse. Perhaps Mr. Cross can...

**Mr. Cross:** I think the ratio the Minister indicated in the Committee on Labour Manpower and Immigration was 10 to 1 in favour of the applicant. Discretion, in other words, was used 10 times to get in an immigrant who did not meet the norms of assessment and only used once to prevent him from coming in even though he did meet the norms.

**The Chairman:** Mr. Muir, would you like to ask anything more?

**Mr. Muir:** I think what I am going to say, Mr. Morrison would like to say, but I will say it. If you did not have this discretion, as I view it, that has been pointed out by Mr. Beasley, Mr. Cross and Mr. Morrison, and if you told some members of Parliament in an instance such as the one cited by Mr. Beasley that it was the law and the person could not

be admitted, they would be camping on Mr. Morrison's doorstep or down at his office, so you would be faced with a rather serious problem. This is only one instance, I would assume, of many cases where discretion can be used.

**Mr. Cross:** Another example, Mr. Chairman, perhaps an exercise in the negative fashion, would be a professional who meets all the norms of the assessment; he gets the 50 points that are required, but is unable to meet professional standards within Canada. He cannot practise his profession and he makes it very clear to our officer overseas that he is not prepared to work in any other occupation. I would suggest that in such an instance the officer would decide that this man is not likely to settle successfully in Canada and would exercise his discretion against him.

**Mr. Williams:** May I just add, Mr. Chairman, strictly from the point of view of anyone who might be required to draft up a piece of legislation that would create a list of the sort we are contemplating here, it requires but to write down one or two of these qualifications in order to make up a list to think of exceptions to every single one of them in very short order and it is almost beyond human ingenuity to devise a comprehensive list. I think those of us who try to do it become aware of this enormous rigidity of such an exercise and, indeed, if the Immigration Act and the regulations were composed that way they would make a document as thick as a phone book.

It is much better, I would venture to say, as nothing more than a personal view, and it probably results in a better and fairer application of the law to allow the small amount of discretion that does exist. As has been observed, it has been reduced drastically from what it was and a serious attempt has been made to bring it within manageable proportions. The personal assessment accounts for only 15 points and that is the largest area in which discretion is exercised. Almost all of the other norms of assessment are fairly factual and do not involve a discretionary judgment. This final one, of course, does, as you have observed, but an attempt has been made to bring it within manageable limitations. You will observe, too, that where that discretion at the end is exercised, it must be approved by a senior officer who has been designated by the Minister. I think this probably reflects, as

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really your main question showed, that the existence of the problem has been recognized and some attempt to cure the unfair aspects of it has been put into legislative form.

**The Chairman:** What you say is certainly generally true about the admission of immigrants, but in the particular area that we have been most concerned with, the question of interpretative documents, I cannot accept the view that you do not have a list. You do have a list, you have it in the directives. It is a list which you can easily amend and which is not available to the public; it is not available to anyone other than your own officers. So it is a list, but it is a more manageable kind of list from your viewpoint. The question we are raising is whether this type of list provides adequate protection to the public.

**Mr. Williams:** It is a list that I would not attempt to pretend is exhaustive and the amendments and changes that are made to it are responses to situations that arise from time to time, and no more than that. Indeed, if we tried to make legislation in that way, we would be persistently behind the situation we wished to correct.

**The Chairman:** But legislation in the sense of regulation would not necessarily carry all of the same difficulties. Mr. Morden, or Dean Pépin, do you have any questions?

**Mr. Morden:** I have one on this and I think this involves law-making. Getting back to Subsection (4) of Section 32—and I do not know whether this has been covered—are the reasons which the immigration officer is to settle upon, which have to be approved, made known to the applicant who is rejected? Secondly, are they made public? Are they publicized in any way?

**Mr. Morrison:** I think, Mr. Chairman, if my recollection serves me correctly, that the reasons probably are not made known to the applicant, certainly if the refusal should occur overseas. It probably may come out if the refusal is in Canada, and that results in the second stage of an immigration inquiry which would come about if a person refused or declined to leave the country voluntarily and had to be brought before a special inquiry officer to discover legally whether he or she was deportable. If the discretion was issued and was done in favour of the applicant, to admit him, I think it would be quite safe to say that no particular reason would be

given; he would be given his visa and that would be it.

**Mr. Morden:** Say there is a refusal of the immigrant at the border point and there is an inquiry to determine, I suppose, whether or not he should be deported. The criteria on which the decision to deport him would turn, I assume, are whether or not the immigration officer had good reasons why the norms should not reflect the particular applicant's chances of establishing himself successfully in Canada, and those reasons have been approved. They would be an issue at the hearing, would they not? Would they not also be an issue on any appeal to the Immigration Appeal Board?

**Mr. Morrison:** They could be an issue.

**Mr. Morden:** They would be the sole ground on which he is being rejected.

**Mr. Morrison:** Not necessarily. It depends on the circumstances. Let us assume that the person is physically in Canada, and came in as a visitor and let us say he is living in Toronto and applies to stay as an immigrant and is turned down. And let us assume that the reason he is turned down is because he does not qualify under the selection criteria; it has nothing to do with a medical or criminal record or anything of that kind.

**Mr. Morden:** He is turned down under clause (b).

**Mr. Morrison:** Yes, all right. Then the special inquiry officer has to determine whether, in fact, he was fairly and properly assessed and that in the assessment he did not secure the required number of points and that the examining officer chose not to use the discretion. I mean, those are the facts and the special inquiry officer is concerned only with establishing facts.

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**Mr. Morden:** Let us assume a case where the man has over 50 points.

**Mr. Morrison:** And the officer decided to exercise discretion and not let him in anyway.

**Mr. Morden:** Yes.

**Mr. Morrison:** Then the special inquiry officer—and I bow to my more expert friends here—would, I think, concentrate on the establishing whether the examining officer had submitted, for approval of his superior, good reasons which were approved and that this, in fact, was the basis on which the refusal was made. That is the legal point that the special inquiry officer has to establish.

**Mr. Morden:** He wants to see that the statute has been complied with.

**Mr. Morrison:** That is right, and he is concerned only with the legal aspects; he is not concerned as to whether it was a good or a bad exercise of discretion.

**Mr. Morden:** Yes, but he would have to know that reasons were formulated, that they were approved, and he would have to know what those reasons were.

**Mr. Morrison:** That is right, but they might or might not get communicated to the appellant in the course of the hearing. This, I think, was your original question.

**Mr. Morden:** Yes, and my subsidiary question to that was whether they were publicized in any other way.

**Mr. Morrison:** Do you want to answer that one, Mr. Beasley?

**Mr. Beasley:** I am not sure that I am clear on the question, but if I understand it correctly, when the examining officer exercises his discretion to refuse a person who gets the required 50 points, he then must make a report to the special inquiry officer saying that he has taken such action and he must spell out in detail the reasons which led him to arrive at the opinion that notwithstanding the fact that he got 50 points, he would not become successful in Canada. In other words, he must detail the good and substantial reasons which caused him to arrive at this opinion, and this then comes before the special inquiry officer for his review.

**Mr. Morden:** I gather from what you have said that it is the practice then that the officer of the Department designated by the Minister will be a special inquiry officer, that is, designated under the regulation to approve the reasons.

**Mr. Beasley:** No, this is not quite so, Mr. Chairman. The examining officer, when he decides to exercise his discretion to refuse, must get the approval of his superior officer. Then, and then only, can he exercise the discretion. Then the machinery begins in motion for a formal inquiry before a special inquiry officer which may result in a deportation order and which then may result in an appeal to the Appeal Board.

**Mr. Morden:** That is my understanding. Is there any reason why the reasons, since they do amount to a form of legislating a policy with regard to the applicant, should not be publicized in some way or another so that future applicants would know of that case, other immigration officers in Canada would know of that case or a series of cases that all went the same way for the same reasons?

**Mr. Morrison:** Mr. Chairman, that raises an interesting point, but under the law at the moment special inquiries have to be conducted separately and apart from the public, not because we are particularly concerned about them being public but to protect the privacy and interests of the individual. Whether this is right or wrong is perhaps a debatable point; we have had arguments thrown at us on both sides. Some would urge that everything be done in public and others, with equal vigour, do not want to have it that way. I do not think we could, under the existing law, publish, in the sense you are speaking of, to the point where individuals could be in any way identified.

**Mr. Morden:** This could be a course of decisions that never got to the special inquiry officer stage. The man presents himself at the border, he is turned down, the reasons are approved, and he backs off. It may be that there is a whole course of decisions based on those same reasons. I am just wondering what publicity is given to this policy which is being applied.

**Mr. Morrison:** In principle, we do not give any publicity to individual immigration cases at all.

**Mr. Williams:** I think in further response to that question that the provisions of Section 27 of the Immigration Act which provide for the inquiry to be held in private, make it clear that the policy of the law is that there shall be no information revealed about what goes on at inquiries, and that the policy of the law is that they should be carried on in private.

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An example of a different approach to the same question is in the Immigration Appeal Board Act where it is provided that the hearing of an appeal should be conducted in public unless at the request of the appellant. He asks that it be conducted in camera and the Appeal Board consents.

**Mr. Morden:** I can see that perhaps in some cases it would be to the advantage of the person in question to have a private hearing. I just wondered why the basic facts of the case, leaving out anything relating to the identity of the person in question, could not be made public, with the policy applying to those facts.

**Mr. Morrison:** Mr. Chairman, I am not trying to argue the merits of whether it should or should not, but merely to point out that within the existing legislation I rather doubt that we could do this. It would require some change I think in the law. It has just been drawn to my attention that the Immigration Appeal Board which operates under a variant of that law are publishing or are about to publish some of their decisions and the reasons for them as part of their own procedures. However, their law, as Mr. Williams has pointed out, is a little bit different.

**The Chairman:** Gentlemen I do not want to trespass much longer on your time. I suggest you might help us by giving us some further information to follow in writing on this one point that I would like to ask you about. You have, reasonably, in answering our first question not included departmental directives which give general interpretations of the law on the ground that these are not legislative documents. I would like to ask you if you would further complete our knowledge of your Department and of the problem that we are dealing with by telling us with respect to departmental directives which give general interpretations of the law to departmental officials these two things: first, to what requirement of the Act or the Regulations they are directed, and second how many directives having this character would there be?

**Mr. Morrison:** These are directives that could be considered as being interpretive of law rather than administrative it in the layman sense, Mr. Chairman?

**The Chairman:** Yes, so we will have some idea of the dimensions of the problem we have some concern about. It may be that there are very few of these in your directives, but since we do not know the content of your directives we cannot make that judgment ourselves. It would be of some help to us if we knew how many such directives did exist.

**Mr. Williams:** Exist or were issued over a period?

**The Chairman:** I asked how many. It would be helpful if you gave us the figures for 1968

as in the case of the other questions and perhaps also indicate whether this is more or less than the usual number in a year. Perhaps these directives do not change very frequently and it might be it would be very helpful to us to say that of the 200 directives your department has in existence 20 would be of this character.

**Mr. Beasley:** Mr. Chairman just to clarify the point in my own mind I take it the Committee are not interested in procedural instructions.

**The Chairman:** Not included in my question unless somebody else on the Committee wants to add a question in respect to that.

**Mr. Morden:** I gather by procedural you mean internal organizational rules that have nothing to do with . . .

**Mr. Beasley:** When an officer gets an application in Owen Sound what does he do with it? What copies go where? Where does he send it and this sort of thing.

**The Chairman:** I do not think we really have any interest in that sort of thing.

**Mr. Beasley:** The vast bulk of our manual instructions are of this nature.

**Mr. Morrison:** I think, Mr. Chairman, really this is what you would like to get a little statistical evidence on, what we view as the proportion between the type of documents you are concerned about, as we understand it, and those we would be quite be satisfied were in no way interpretive of any legislation?

**The Chairman:** Yes.

**Mr. Morrison:** We will see what we can do. I do not know what the result will be. I think the figure that we might come up with will be pretty small and subject to some qualifications. While we may report it we would have doubts that it really is the kind that you are speaking of, but it is in the debatable area so there it is.

**The Chairman:** Yes. In any event it will be of some help to us. I could read into the record some further of your answers but considering the fact that we have already been meeting about three hours and a quarter, I think that I will just invite those who are here to ask any further questions they might have rather than attempt any further formal dealing with your written answers to our questions. Mr. Muir? Mr. Morden? Dean Pepin?

**Dean Pepin:** Would it be possible, if necessary, to consult your operations handbook?

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**Mr. Morrison:** I am afraid that is a question that would have to be addressed by the Chairman to my Minister.

**Dean Pepin:** This is the book we were talking about this morning.

**The Chairman:** Gentlemen of the Committee, as we have another session perhaps of equal length this afternoon beginning at 3:30 with the Privy Council Office, I think for our sake we should now bring this meeting to a close and also for the sake of the very able officials from the Department of Manpower and Immigration that we have had before us who have aided us greatly in our endeavours. I think we ought to offer our sincere thanks and to say that to them as well as to ourselves this meeting is now adjourned.

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## AFTERNOON SITTING

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**The Chairman:** The meeting will come to order.

We are pleased to have with us this afternoon the Hon. Donald Macdonald, President of the Privy Council and House Leader accompanied by Mr. J. L. Cross, of the Privy Council Office and Mr. Paul Beseau who is Legal Adviser to the Privy Council Office. I would like to begin by calling on the Hon. Donald S. Macdonald.

**Hon. Donald S. Macdonald (President of the Privy council):** Mr. Chairman, my function here today is with relation to my responsibilities at the Privy Council rather than as House Leader and I am really only here to introduce Mr. Jack Cross who is Assistant Clerk of the Privy Council, Orders in Council, and who is in my experience the man most knowledgeable about this rather difficult process we have to go through to get Orders in Council. So perhaps it might be most effective if you called upon Mr. Cross to make his statement and to answer your questions.

**The Chairman:** I will then call on Mr. J. L. Cross, the Assistant Clerk of the Privy Council for Orders in council.

**Mr. J. L. Cross (Assistant Clerk of the Privy Council, Orders in Council):** Thank you, Mr. Macdonald and Mr. Chairman.

In relation to Statutory Instruments the main function of my office is to ensure that the requirements of the Regulations Act, the Canadian Bill of Rights and the Regulations made thereunder are met.

Some of the other functions are:

Giving assistance to Departmental officials in the preparation of submissions to the Governor in Council;

Preparing draft Orders in Council on the basis of the recommendations and in conformity with policy and legal requirements;

Preparing agenda for the presentation of submissions and draft Orders in Council to the Governor in Council;

Maintaining records of submissions and Orders in Council;

Collating monthly summaries of Orders in Council for tabling in the House of Commons.

Some of the above functions I shall refer to later in a document called "Processing Orders in Council" I have prepared for you data on Orders in Council and Statutory Instruments to show the number of Orders in Council approved, and the numbers of Orders in Council, Ministerial Orders and Proclamations published during the years 1963 to 1968 inclusive. A copy of the document listing this data is available to each of you. Perhaps you will want to ask me some questions concerning this later.

At this point in my remarks I would like to produce what may be considered an historical document. I have here a photostat copy of the first regulations made by the Governor General in Council. The Order in Council which made the regulations is P.C. 28 dated August 1, 1867. The Ministers present for the meeting were the Hon. George Cartier, the Hon. Alexander Galt, the Hon. William McDougall and the Hon. Hector Langevin. In my humble opinion these regulations are in remarkable good form and draftsmanship; as to legal interpretation I leave that to the lawyers. It is also interesting to note that the authority used for the making of Canada's first regulations was: "An Act to amend the Acts respecting duties of Excise and to alter the duty thereby imposed on Spirits". The following figures may not prove anything but may be of interest to you. During the period July 1, 1867 to December 31, 1867 there were two regulations made by the Governor in Council; during a similar period 100 years later, that is, from July to December 1967 the Governor in Council made or amended 181 regulations.

**Mr. McCleave:** I take it that Sir John A. Macdonald was not at that meeting because he was out drumming up the trade.

**Some hon. Members:** Oh, oh.

**Mr. Cross:** In order to give you a fairly precise report on the operation of my office, and not to prolong my remarks, I am giving you a document entitled "Recommendations to the Governor in Council". This document was prepared to assist Departmental officials in preparing submissions to Council. Use of the document by Departmental officials results in improved submissions.

I have another document entitled "Processing of Orders in Council" to which I referred in my previous remarks which I shall read in order to have it recorded in the minutes of this Committee.

(1) Processing of Orders in Council.

Each recommendation is required to be submitted to the Governor in Council over the signature of the responsible minister. If the action recommended involves areas of responsibility of other ministers, the recommendation will indicate, by their signatures, the concurrence of these ministers.

The Orders in Council Section drafts orders in council on the basis of the recommendations transmitted by departments. The Section tries to ensure that each submission is accompanied, for the benefit of Council, by a brief note clearly indicating the background of the recommendation, and the reasons for making it. Each recommendation should also indicate clearly the exact statutory authority, where applicable, and an accurate statement of the action contemplated, following as closely as possible the phraseology of the relevant legislation.

Departmental officials should consult with the departmental legal adviser in preparing recommendations for their ministers' approval. In addition, the Orders in Council Section, on receiving recommendations, carefully examines them, in consultation with the Privy Council Office Legal Adviser and officials of the department concerned, as necessary, particularly to ensure that, on the one hand, the proposed action does

indeed require the approval of the Governor in Council, and, on the other, that the action does not exceed the Governor in Council's authority. Care is taken to ensure that orders in council do not provide for retroactive operation, unless this is specifically provided for in legislation.

With respect to orders in council making or amending regulations, the requirements of the Regulations Act and the regulations made thereunder are required to be observed. Departments submit to the Clerk of the Privy Council, before submission to the minister, copies of proposed regulations for examination as to form and draftsmanship. The Privy Council Office legal adviser works closely with departmental officials to ensure that the standards of form and draftsmanship are maintained. The role of the Privy Council Office Legal Adviser is interpreted broadly, to include examination to ensure conformity with the law. Only after a satisfactory text is arrived at are the regulations submitted to the minister for recommendation to the Governor in Council. When the minister makes his recommendation, copies of the regulation are supplied in French and English for enactment.

I made several references here to the Legal Adviser to the Privy Council Office; I might say, sitting to my right is our present Legal Adviser to the Privy Council Office, Mr. Paul

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Beseau and you may wish to direct some questions to him after I have finished my remarks.

A further legal requirement for orders in council of a regulatory nature is set out in the Canadian Bill of Rights Examination Regulations. Proposed regulations are required to be submitted to the Minister of Justice, who examines them to determine whether any provisions thereof are inconsistent with the purposes or provisions of the Canadian Bill of Rights. (This examination is undertaken in detail by the legal adviser to the Privy Council Office during examination as to form and draftsmanship). Draft regulations not inconsistent with the Bill of Rights are certified and signed by the Deputy Minister of Justice before enactment by the Governor in Council.

Thus the legal requirements which must be met before regulatory orders can be presented for approval to the Government in Council are rather complex and require time in which to be fulfilled.

Treasury Board minutes requiring approval by the Governor in Council are forwarded to the Orders in Council Section after each meeting of the Treasury Board, generally once a week, shortly before the regular Council meeting. They are approved as one Order in Council, with a sub-designation for each minute.

The quorum for meetings of the Governor in Council is four.

It may be of interest to you to know that the quorum of four was first established by the Minutes of a meeting of the Privy Council on July 1, 1867. The quorum of four was later established by Order in Council; The same Order in Council that set out the Prime Minister's prerogatives.

The Canadian War Orders and Regulations and the Statutory Orders and Regulations made by Order in Council P.C. 5355 of 30th December 1946 were forerunners of the present Regulations Act. The Committee will be familiar with the 1947 and the 1955 consolidation of regulations. You may, however, have wondered why after 14 years a further consolidation has not been made. After the 1955 consolidation of Statutory Orders and Regulations, a decision was made to consolidate the regulations on an ad hoc basis as and when required. At that time I was asked to work with the Legal Adviser to the Privy Council office as an editor to establish a new format for Statutory Orders and Regulations and to revise the index to clearly indicate the law for any given period of time. In that revision we also considered suggestions which had been received from various sources to improve the index. Subscribers to the *Canada Gazette* Part II have found our present index, particularly the Table of SOR, contained in this issue, quite satisfactory; we welcome suggestions for improvement at any time.

The practice of revising regulations as and when required has been very successful and I might add has been much less costly to the taxpayers and to subscribers of regulations. When a particular regulation has been amended several times, or when major amendments are to be made, it is often desirable both from our point of view and for the users of that regulation that a consolidation be then made. In some cases our plan to consolidate regulations as and when required has not

been successful and I refer particularly to the Fishery Regulations for Provinces. There are unique problems with the Fishery Regulations which can most readily be explained by officials in the Department of Fisheries and Forestry. It is not intended to continue our present plan of consolidations for an indefinite period of time.

Before I conclude my remarks I would like to correct an erroneous statement made by this Committee at its meeting on April 22. Professor Brown-John made the following statement during questioning by this Committee. I quote.

> "If I may comment from my own experience I really knew nothing about drafting Orders in Council. I was asked to draft an Order in Council, drafted an Order in Council and immediately upon its completion qualified as a departmental expert in Orders in Council. The commit-

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> tee on minister's power pointed this out, too. They were strongly critical of the fact that just about anybody under the sun down to the janitor could draft Orders in Council."

What Professor Brown-John was referring to were submissions to the Governor in Council not Orders in Council. I regretfully say that in some cases the submissions received in my office and the draft Orders in Council resulting therefrom bear little similarity. That of course is the fault of Departmental officials who draft submissions. If they took the time to read our document entitled "Recommendations to the Governor in Council" the submissions would not appear as though they had been drafted "by anybody under the sun down to the janitor".

Perhaps I should not close my remarks without making reference to the increased responsibility being assumed and to be assumed by my office. The legislation already passed by the present parliament delegates considerably more authority to the Governor in Council. The Government Organization Act 1969, alone, in more than 40 separate portions delegates power to the Governor in Council. The exercise of each of these powers requires an Order in Council, which in its preparation may have to go through all the processes I have described above.

Mr. Chairman, I have confined my comments to the part my office serves in processing Statutory Instruments. I hope they will serve to assist this Committee in the decisions and recommendations it will make.

**The Chairman:** Thank you very much, Mr. Cross for a very helpful statement. Is there anything at this stage that Mr. Beseau would like to add?

**Mr. Paul Beseau (Legal Adviser to the Privy Council Office):** Mr. Chairman, I have nothing to add at this moment unless the Committee members are interested in the precise operations that I have to fulfil in examining regulations as proposed by departments.

**The Chairman:** I think they would be interested in that and perhaps as you are an official of the Department of Justice you might explain to us just what your connection with the Privy Council is both in physical terms—are you located with them—and in the degree of co-operative work that you have with the Privy Council Office.

**Mr. Beseau:** In my position as legal adviser to the Privy Council Office I am located in the Justice Building and consult mainly with Mr. Cross on various problems that arise in his office. I also receive calls and requests for opinions on other matters related to the operation in the Privy Council Office. However, the primary function I have to perform is related to examination of proposed regulations for form and draftsmanship as well as for compliance with the Bill of Rights. Proposed regulations are submitted either to Jack Cross or to myself for approval as to form and draftsmanship. At that point I take the draft regulations, try to review them carefully to understand just what they are trying to do in their proposals. Quite often that requires lengthy consultations with officials in the particular department putting them forward. On any particular set of regulations this may require three, four, or sometimes ten meetings with the officials in order to get the precise intentions expressed in the regulations. On others they will be shorter and consultations will not be required at all.

When a final draft has been prepared, a draft that I am satisfied with and that the department concerned is satisfied with, it is sent back to the department concerned and it has a stamp on it signifying that I have approved it as to form and draftsmanship. This encompasses not only the form in which they are drafted but also the legal authority under which they are being enacted or are to be enacted.

At that stage the department will prepare its submission and forward the submission to Mr. Cross along with the final draft of the regulations or proposed regulations as approved for enactment by the Governor in Council. Mr. Cross then forwards this set of regulations to my office for certification under the Bill of Rights.

At the same time as I examine the regulations for approval as to form and draftsmanship, I also examine them for compliance with the Bill of Rights. As long as our "magic" stamp appears on the back of each page of the draft sent back to the department and no changes appear on the front of that page, the certification under the Bill of Rights becomes almost automatic as I have already dealt with that aspect on the earlier submission. The Bill of Rights letter is then sent back to Mr. Cross, signed by the Deputy Minister of Justice, and the regulations or proposed regulations are put forward for enactment.

If any members have any questions on the operation I would be pleased to answer them.

**The Chairman:** Thank you. You come in at two different stages then, both before they are officially submitted and after they are officially submitted when you give your final approval. Are you also consulted by the departments even before the initial submission is made?

**Mr. Beseau:** Sometimes I am consulted before an original submission is made because the department is not sure just how to draft a

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regulation or to whom it should be sent. They will then consult me; sometimes they will come over and ask questions about how they should set up the regulations.

**Mr. Forest:** There are very few Orders in Council published in Part II of the *Gazette*. Why is that?

**Mr. Cross:** Only those Orders required by law are published in Part II of the *Canada Gazette*; that is, required to be published under the Regulations Act. They are interpreted under the Regulations Act to be a regulation, thereby they are required to be published.

**Mr. Forest:** Do they all go through you or are some published by the departments themselves?

**Mr. Cross:** No. They all go through me. If it is a ministerial order it must also be submitted to the Privy Council Office and must be certified; Previous to that it has been approved as to form and draftsmanship. When it comes to me as a ministerial order it must go to the Legal Adviser to the Privy Council Office to be certified under the Bill of Rights. Then we transmit it to the printers for printing in Part II of the *Canada Gazette*.

**The Chairman:** The process that you were describing to us, Mr. Beseau, was for Orders in Council. To what extent would the process for ministerial regulations be similar to the one you have described?

**Mr. Beseau:** As far as my function is concerned, the process is the same. They are required to be submitted for approval as to form and draftsmanship and they are also required to be certified under the Bill of Rights. So my operation is the same but the minister enacts the Order itself rather than a submission having to be made to the Governor in Council for enactment.

**The Chairman:** Yes. You are still involved at two stages, are you, when the initial submission is made to see if it is in acceptable form and then when the final submission is made?

**Mr. Beseau:** That is correct.

[*Interpretation*]

**Mr. Marceau:** You talked about compliance with the Bill of Rights. Have you got any precise criteria to which you refer or is it just your own personal interpretation? As a matter of fact, on what basis do you establish this compliance with the Bill of Rights?

**Mr. Beseau:** It really comes down to a personal interpretation of the Bill of Rights. The Bill of Rights appears to be very clearly written. Two main considerations I have to apply which I find most often possibly not observed when a proposed regulation is submitted to me are, first, the one requiring that a person have a fair hearing where a right is going to be taken away from him, and second, discrimination of one form or another. Those are the two main violations, if you will, that I find in proposed regulations.

**The Chairman:** Can you tell us to what extent this is a problem? In other words, how useful is this scrutiny for catching possible overzealous, overexcessive applications for departments' regulatory power?

**Mr. Beseau:** I think the function is very useful and necessary. I would not say that

departments become overzealous, but I would think in some cases they forget that there are certain requirements they have to meet. I very seldom have problems with the officials in departments when I point out to them that this section as drafted appears to be contrary to the Bill of Rights and it would never receive my approval. They immediately start to reconsider the matter and find a suitable way of arranging for notices to be sent out and provide for a hearing, that type of thing.

**The Chairman:** Do you have a problem with departments because you are both the preliminary adviser and the final decider? You are telling them what your own position will be later on. Would it be better if there were another person involved as well?

**Mr. McCleave:** Yes, we may invoke the Bill of Rights against you.

**Mr. Beseau:** Upon occasion, if a conflict results between myself and a legal adviser in another department, we always resort to the Deputy Minister of Justice.

**The Chairman:** I see.

**Mr. Beseau:** He is the Deputy Attorney General and he has the power to make the final decision on it.

**The Chairman:** The legal adviser in another department would be a member of the Department of Justice too, would he? So you both have the same superior officer?

**Mr. Beseau:** At the moment that is basically true; there are still legal advisers in certain departments who have not been brought into the Department of Justice.

**The Chairman:** Would you find it helpful if there were a more precise scale, or series of principles, on the basis of which you could pass judgment?

**Mr. Beseau:** I am not sure that I understand the question.

**The Chairman:** You have admitted there is a considerable amount of personal judgment to be exercised in deciding whether or not the drafts are in contravention of the Bill of Rights; would you find it helpful if there were more precise guidelines or do you feel the guidelines are precise enough?

**Mr. Beseau:** I have not had any great difficulty in interpreting the Bill of Rights. It is a matter of looking to court decisions, if there is doubt, and what the courts have decided in a particular area. Otherwise, it seems to me that most people can read the Bill of Rights and arrive at a fairly well-defined idea of what the Bill of Rights says.

**The Chairman:** Mr. McCleave?

**Mr. McCleave:** Following up that question Mr. Chairman, I think, a number of years back, the Procedure Committee brought in a report dealing with this aspect, setting out guidelines, and I believe, guidelines similar to those used in the United Kingdom and, perhaps, varied somewhat to those in Saskatchewan and Manitoba. Have you studied that report?

**Mr. Beseau:** No, I have not.

**An hon. Member:** What year was that, Bob?

**Mr. McCleave:** That was in 1964. Previous witnesses have given their explanation of how these guidelines have worked out in those two provinces as well. You are not familiar with that particular study?

**Mr. Beseau:** I am familiar with the study; I have not had a chance to review it. I might add that I am the only person reviewing regulations from all departments of government.

**Mr. McCleave:** There are only 24 hours a day.

**Mr. Beseau:** There is very little time for outside reading.

**Mr. McCleave:** I can see your problem, sir. I did not mean that in the nature of criticism either.

May I ask Mr. Cross if all the regulations that we now have were put together would this make the 30-foot shelf of Great Books look minute, indeed?

**Mr. Cross:** I do not think a consolidation of our present regulations would go into much more than one more volume than the 1955 consolidation. As you know, the 1955 consolidation consisted of three volumes. A consolidation at the present time would go into four volumes because of the fact that we have consolidated regulations as and when required. One of the things we had in mind when we adopted that plan was that you would not get your shelves full of regulations and amendments thereto.

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I hope I am not disclosing any policy when I say that we are working on a plan to have the regulations printed in a similar form to the statutes, which have the English and the French side by side. I have a proof of that and I am sorry I did not bring it along; we have reached the stage where we have received proofs of that. However, there is considerable work to be done, so I assume our next consolidation would be in a form similar to the statutes because in the format of our statutory regulations we try to follow the format of the statutes.

**Mr. McCleave:** I do not think anybody would quarrel with that approach, Mr. Cross. Tell me, was the 1955 consolidation done as a result of the Regulations Act, or was this just simply some housekeeping done without special direction or statutory authority?

**Mr. Cross:** I believe the Governor in Council has authority under the Regulations Act to make consolidations as and when he sees fit.

**Mr. McCleave:** My final question, Mr. Chairman, concerns the approach used in Saskatchewan two or three years ago—I am not sure of the exact year, but quite recently—in dealing with the problems of regulations and adopting its own regulation act. It is provided at the very tail-end of that legislation that all Orders in Council not resubmitted or reapproved by a certain date would thereby lapse. I think, Mr. Chairman, I have the purport of that Saskatchewan act correctly. It may be, I suppose, that our Committee will get around to considering something similar, when we make our recommendations to the House. Yet, I suppose, we are dealing with a volume of regulations about ten times what would exist in any province.

First, does it commend itself to you as an approach that should be used or does this step of consolidation you mentioned before actually carry that out?

**Mr. Cross:** I think our present plan of consolidating regulations, as and when required, carries that out.

**Mr. McCleave:** Then the consolidation itself is approved by His Excellency?

**Mr. Cross:** Oh, yes.

**Mr. McCleave:** In effect, all the things within those three or four volumes are the Order in Council that is operative, and everything else before it is gone by, repealed.

**Mr. Cross:** That is right. The new regulations are made in substitution for previous regulations.

**The Chairman:** Mr. Marceau.

[*Interpretation*]

**Mr. Marceau:** Mr. Beseau, I do not know if it is a lapse or the truth, but you said it was the deputy minister would determined whether this happens or not.

[*English*]

**Mr. Beseau:** I am sorry, I do not understand French and the interpretation is not coming through.

[*Interpretation*]

**Mr. Marceau:** You said a while ago, I don't know whether this is correct or not, that it was the deputy minister who had the final say in this matter. I find this a little abnormal. It seems to me that the minister would take the final decision with regard to interpretation.

[*English*]

**Mr. Beseau:** Yes, of course that is correct. It is the Minister or in the long run I suppose it would be Parliament that would have the last say, but as a matter of practical application when there is a disagreement between two officials in the Department of Justice working under the Deputy Minister and the Minister, the Deputy Minister usually tries to decide what the proper application of the law is in that case. It would only be something of major importance, I submit, that might go to the Minister for a decision.

**Mr. Macdonald (Rosedale):** Would the correct form not be that conflicting opinions from the public servants are really recommended opinions to the Minister, and his acceptance or rejection of those is the final judgment on that.

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**Mr. Beseau:** Yes, that is correct. Most opinions requested by departments are asked for in the form of a letter directed to the Deputy Attorney General of Canada and in that capacity, the Deputy Minister of Justice sends his opinion, in the form of a letter, back to that department.

**The Chairman:** My recollection is that it is the Deputy Minister under the Bill of Rights who is charged with the responsibility. Am I wrong on that, Mr. Morden?

**Mr. Morden:** I think in regulations made under the Bill of Rights Act that is stated, but in the Bill of Rights itself it is the Minister's job.

**The Chairman:** I see. The Bill of Rights says the Minister, and the regulations say the Deputy Minister, is that it?

**Mr. Beseau:** I believe that is correct.

**The Chairman:** Mr. Marceau.

[*Interpretation*]

**Mr. Marceau:** Mr. Cross, you spoke especially about the Bill of Rights. But what are the other criteria on which you base your drafting or acceptance of the recommendations for the Orders in Council, as you have stated?

[*English*]

**Mr. Cross:** I do not think I quite understand your questions, I am sorry.

[*Interpretation*]

**Mr. Marceau:** You spoke, you referred to the Bill of Rights, but are there other things which come into account in the drafting of Orders in Council?

[*English*]

**Mr. Macdonald (Rosedale):** Are there other criteria besides the Canadian Bill of Rights that you take into account when you decide to reject an Order in Council?

**The Chairman:** I take it, in the draft form?

**Mr. Macdonald (Rosedale):** Yes.

**Mr. Cross:** There are many criteria for refusing and returning submissions made to the Governor in Council. If authority cannot be found for the Governor in Council to act on a submission we will consult with officials and if they cannot produce an authority then usually it is withdrawn. However, the final decision is not with me. If I feel I cannot get satisfaction from the officials of the department and they still want an Order in Council, then the final decision is made by the Governor in Council. I submit it to the Governor in Council with the information I have together with the information I have received from our legal advisers and they make the final decision whether or not they want it to be an Order in Council.

**The Chairman:** Mr. Macdonald.

**Mr. Macdonald (Rosedale):** I take it that probably the most obvious criterion would be whether there exists under the legislation in question the authority to make an Order at all or if the authority is limited. Therefore, the first criterion you would look at would be the statute itself to find if there is an order-making power.

**Mr. Cross:** That is right. That is why we ask in our submissions that the exact authority be quoted. We then examine that authority to make sure that we are not going beyond the powers of the Governor in Council.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** Could I ask a supplementary to the last series of questions I asked which dealt with the Saskatchewan experience? It has struck me now that should the Committee recommend that the English guidelines—Manitoba and Saskatchewan or some combination thereof—be set forth in the Regulations Act and, of course, your four or five books of the consolidation, they would have to be re-examined, would they not, with these guidelines in mind to find whether or not the Orders in Council fitted them?

**Mr. Cross:** Yes, I would think that they would have to be.

**Mr. McCleave:** Could we have your experience and opinion, Mr. Cross, on the sort of deadline this would impose if we make that kind of recommendation so that we would not work our friend here or you or anybody to death. We do not want to place an impossible burden on the Privy Council office.

**Mr. Cross:** I think Mr. Beseau could answer that better than I. He knows the work entailed in examining these regulations and if we went into a consolidation they would all have to be re-examined and submitted by the departments to the Privy Council office. As I recall we had hoped to do the last consolidation in quite a short time—by a short time I mean two years—but it went on for some

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considerable time beyond that because it was difficult to get departments to get all their regulations consolidated, to check to make sure they had included all their regulations and then to have all of them examined by the legal adviser.

**Mr. McCleave:** I think from the answer we can assume that initially the departments would do their own policing and examining of the Orders in Council in the light of the guidelines and then submit the new Orders in Council to your own office?

**Mr. Cross:** That is right.

**Mr. McCleave:** So perhaps with that assumption—

**Mr. Cross:** Yes, instructions would have to go out to departmental officials telling them

what had to be done. We would have to set a deadline and then it would be up to them whether or not they could meet that deadline. Perhaps we could estimate the time it would take after we had received all these regulations for the final enactment.

**Mr. McCleave:** Would three years be a fair period?

**Mr. Cross:** I would think so.

**The Chairman:** Mr. Beseau, I understood from an earlier comment of yours that you are the only one in the Department of Justice who has any primary responsibility in the area of Orders in Council. Does this mean that all of the 3,582 Orders in council which were made in 1968 passed through your hands?

**Mr. Beseau:** Generally speaking, the only instruments or proposals tht end up in Orders in Council that I would see would be the ones that are required to be submitted for approval as to form and draftsmanship under the Regulations Act. The other Orders in Council do not come through my office.

**The Chairman:** I see. So, looking at Mr. Cross' figures, this would certainly be 364 for last year plus 169, I suppose.

**Mr. McCleave:** About one a day.

**Mr. Beseau:** Yes,

**Mr. McCleave:** I suppose the proclamations as well?

**Mr. Beseau:** The proclamations themselves are drafted in the Department of Justice. I do not see all of the proclamations. I get some help from my predecessor who looks after proclamations, so it saves me to that extent, at least.

**The Chairman:** Yes. Therefore, you were responsible last year for the 364 Orders in Council and the 169 Ministerial Orders.

**Mr. Beseau:** That would be approximately right.

**The Chairman:** Plus other consultations, of course, which might not actually have issued any Orders in Council that year.

**Mr. Beseau:** That is right. There would be some that would not have been enacted in that year and there would also be a small percentage that would be withdrawn for one reason or another that had originally been submitted.

**The Chairman:** Even at that, I suspect 533 Orders is a considerable number to handle. You must burn a good deal of midnight oil in order to keep up with the volume.

**Mr. Beseau:** That is true.

**The Chairman:** Mr. Cross are you the only person in the Privy Council office who has responsibility in the area of Orders in Council or are there others in your branch as well?

**Mr. Cross:** I have two officers who assist me in the drafting of Orders in Council.

**The Chairman:** Mr. Marceau.

**Mr. Marceau:** Mr. Cross, have you any suggestions to submit to this Committee in order to improve the work in your area?

**Mr. Cross:** I am afraid I do not understand the question.

**Mr. Marceau:** Have you any suggestion to submit to our Committee?

**Mr. Cross:** To improve the procedure in the Privy Council office?

**Mr. Marceau:** Yes.

**Mr. Cross:** Apart from that of the business of the Privy Council.

**An hon. Member:** The pay perhaps could be improved.

**Mr. Cross:** I think I get pretty good co-operation from the Clerk of the Privy Council with regard to suggestions I make for improving the operations of my office. However, I operate my office, that is the preparation of Orders in Council and statutory instruments according to the legislation that is in force. If you, as advisers, want to change that, I will operate accordingly, but I

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am quite satisfied with the operations as they now are carried out. However, I do think our legal adviser is overworked.

**The Chairman:** You would not make the same claim for yourself?

**Mr. McCleave:** Perhaps Mr. Beseau would say that on your behalf.

**Mr. Cross:** Let someone else decide that.

**The Chairman:** Do our counsel have any questions?

[*Interpretation*]

**Dean Pepin (Counsel to the Committee):** I would like to ask a question to Mr. Cross. I am not asking Mr. Beseau, because I do not know if he is employed by the Department of Justice or the Privy Council; he seems to have a dual personality. Does the Privy Council revise the Regulations with regard to the form and the substance in cases where someone other than the Governor-in-council is responsible for taking the decision?

[*English*]

**Mr. Cross:** That would be something that would be done by Mr. Beseau's office.

**Mr. Beseau:** If I understood the question correctly you asked if the Privy Council office revises regulations on its own initiative?

**Dean Pepin:** Does it revise regulations that are to be adopted by federal authorities other than the Governor in Council?

**Mr. Macdonald (Rosedale):** Ministerial regulations.

**Mr. Beseau:** Not unless they are regulations within the meaning of the Regulations Act. There are certain regulations made by the Canadian Transport Commission that do come through my office, also the Public Service Commission and various other boards of that type. I do not receive them all. Some of these are not regulations within the meaning of the Regulations Act.

**Dean Pepin:** When you are doing that kind of work you are not working for the Privy Council. You are working for the Department of Justice.

**Mr. Beseau:** Yes, that would be basically correct, I believe. I would want to think about it a little more, to be definitely sure.

**Dean Pepin:** Do you sometimes have to decide which regulations would be published and which would not be published? Do you sometimes have to decide this kind of questions?

**Mr. Beseau:** Yes, at times. They initially come from Jack Cross. Jack will send a memorandum over to me asking—does this require publication? Now, if I have a doubt in the matter, I always say publish it and we will be sure, because it is not that great a thing to have to publish it, especially if it is a short order and there is not much work involved. If it is something that is 100 pages long, I will take a little more trouble to try and figure out if it requires publication or not. I will look more to see if there are exemptions from these requirements of the Regulations Act existing in the regulations made under that Act. If there is a doubt, I would say publish it.

**Mr. Morden (Assistant Counsel to the Committee):** On that latter point, Mr. Beseau, if there is doubt you say publish it, which means all the other provisions in the Regulations Act would apply as well as to recording, laying before Parliament, and everything else.

**Mr. Beseau:** That is correct.

**Mr. Morden:** Is there any reason for the extra steps in your processing of regulations? You say you first check it for form and draftsmanship. It goes back to the Department, and comes forward again from Mr. Cross, who sends it to you to certify under the Canadian Bill of Rights, or not certify, as the case may be. Is there any reason why you cannot give both approvals the first time around?

**Mr. Beseau:** It could be done the first time around, but I find it a very useful check to make sure the departments are not changing my draft from the time I send it back to them until it is going forward to be enacted, and upon occasion I do find this.

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**Mr. Morden:** You certainly are familiar with the mechanics. It would seem to me if you stamped one copy approved both as to the form and draftsmanship and, of course, the requirements of the Bill of Rights . . .

**Mr. Beseau:** But then if they changed that copy before it actually gets to the Governor in Council it already has the stamp on it. This way, when it comes back in, I can check to make sure they have not made changes in the copy that I sent back to them.

**Mr. Morden:** But there is no statutory provision or regulatory provision that requires you to effect the step of looking at them again.

**Mr. Beseau:** No, there is not.

**Mr. Morden:** I notice in Section 4 of the regulations made under the Regulations Act that you are required to examine them to ensure that the form and draftsmanship there-

of are in accordance with the established standards. I gather from what transpired that there are not any standard methods of writing that apply. Is that right?

**Mr. Beseau:** That is correct. They are normally the standards that apply to the drafting of legislation for the House. I try to apply those as far as I am able in the short period of time I have to review regulations.

**Mr. Morden:** Do you interpret that phrase to mean apply standards of legislative drafting generally?

**Mr. Beseau:** Generally, yes, and then to ensure that there is authority to make the regulation that they are putting forward.

**Mr. Morden:** Mr. Marceau asked the question in relation to other criteria for testing the regulations and I have noticed in your recommendation to the Governor in Council that you will not approve a regulation with retroactive effect unless it is especially authorized under an enabling section. Is that a rule that has been formulated in your office, to be binding in all cases?

**Mr. Beseau:** If I am not mistaken that is a rule that has been formulated by the courts, that you cannot do something with retroactive effect unless you are authorized to do it. So it is not something that I of my own free choice enforce.

**Mr. Morden:** In other words you would regard it as being an *ultra vires* regulation unless it was especially authorized.

**Mr. Beseau:** That is correct.

**Mr. Morden:** What about the regulation that came before you that subdelegated the power to make further regulations? What do you do in that sort of case?

**Mr. Beseau:** Unless there is authority to subdelegate, it would be an *ultra vires* provision.

**Mr. Morden:** You would look in the enabling legislation and find express authority to subdelegate?

**Mr. Beseau:** I always try to.

**Mr. Morden:** And if it is not there you send it back?

**Mr. Beseau:** That is correct, or I usually take that particular provision right out of the regulation that they have submitted to me and then I will send back a revised draft, leaving that out.

**Mr. Morden:** And telling them to go about it some other way.

**Mr. Beseau:** Possibly some other way, or tell them that there does not appear to be any other way, that the Minister may make these regulations, but not a director or somebody else.

**Mr. Morden:** As a matter of your construction of Section 2 of the Regulations Act, say a balanced subdelegation is made pursuant to express authority. Do you consider the exercise of that subdelegated power to be caught by the Regulations Act? Do you consider that you have the right to check the form and draftsmanship of the subdelegated legislation, and if it has to be laid before Parliament?

**Mr. Beseau:** If it is a regulation within the meaning of the definition of regulations in the Regulations Act, I would say yes, that it would require the formal process.

**Mr. Morden:** As a matter of fact, do you get many of these regulations that are made pursuant to powers conferred by senior regulations.

**Mr. Beseau:** As a matter of fact, I would say that I get very few. I would get a number, for example, of the Fisheries Regulations. There are powers subdelegated to the Minister of Fisheries or a person authorized in a particular province. Some provinces will send in orders that are made by their provincial Ministers dealing with that particular subject-matter for approval as to form and draftsmanship, but by no means all of these orders are sent in.

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**Mr. Morden:** With respect to certain other criteria that have been mentioned from time to time, say you received a regulation that contains, in implementing enabling legislation, a wide measure of discretion on the part of the officer administering the regulation. Would you regard that as being a matter that should be directed back to the attention of the Department? Do you need this wide discretion, or do you consider that a matter of substance that would not attract your comment?

**Mr. Beseau:** It is a pretty fine line as to whether something is substance or form. Now, matters that I consider might have seri-

ous implications in the field in which they are dealing, I might well raise with the Department and say that I think they should reconsider it or at least it should be brought to the attention of their Minister.

**Mr. Morden:** As far as the effect of the Regulations Act is concerned, whatever safeguards it contains, is it true to say that if its initial application is made by the department itself, in other words, it determines whether regulations it makes is not of a legislative character, you will never see it?

**Mr. Beseau:** That is quite possible.

**Mr. Morden:** So the department really has the final say from a practical point of view on whether or not procedures to the Act would apply.

**Mr. Beseau:** If these are ministerial regulations or ministerial orders, I would say that would be true but if it is something that requires the approval of the Governor in Council or it is to be enacted by the Governor in Council the chances are I am going to see that.

**Mr. Morden:** Mr. Cross would refer it to you because the recommendation would be made to his department?

**Mr. Beseau:** That is correct.

**The Chairman:** Mr. Beseau, how long have you been the Legal Adviser to the Privy Council Office.

**Mr. Beseau:** I have been the Legal Adviser since the 1st May, 1968.

**The Chairman:** What provision was there for your apprenticeship and what provision is there for someone to succeed you, say, if you were sick?

**Mr. Beseau:** I first joined the Department of Justice in November of 1966 and as an apprenticeship, if you would call it that, I spent considerable time learning how to draft regulations as well as legislation. So on the 1st May, 1968 I took over the job of Legal Adviser having drafted regulations and reviewed them for approximately a year and a half before that.

**The Chairman:** What happens when you go on holidays or if you are sick?

**Mr. Beseau:** I am afraid a great deal of my work piles up until I get back. Only if something is urgent will somebody else deal with it.

**The Chairman:** I see. I would like to ask both of you why not publish all of the Orders in Council. I mean why not publish all 3582 Orders in Council. Why not eliminate this need for deciding which ones should be published and which ones should not be published?

**Mr. Cross:** There is a summary of Orders in Council as you know tabled in the House of Commons. I would judge by the requests that come following the tabling of this list of Orders in Council that there is not very much interest in the other Orders in Council. Maybe the interest does not justify its publication. However, maybe I am getting into policy here that I have no right to be in.

**Mr. Macdonald:** I gather the chief criterion for not publishing all of them is that they are not of general interest. I take it they are of such a local and private nature that it is felt they will not be of general concern. Is that right?

**Mr. Cross:** Yes. I do not know whether I mentioned in my remarks but we do not consider Orders in Council as being anything but

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public documents otherwise the summary of Orders in Council would not be tabled in the House of Commons. Anyone may look over that list and request a copy of an Order in Council. We try to fill all reasonable requests for copies of Orders in Council, however, if someone called us and said I would like to have all the Orders in Council passed during the year 1968, one would not consider that a reasonable request. The summary is there, anyone can look at the summary and ask for any Orders in Council they may wish to have. They are welcome to come to my office and ask to see a particular Order in Council in which they are interested. So I cannot see that there is any secrecy regarding the Orders in Council that are not published, but they are just not of general interest.

I regret that I have not got a list, perhaps you might look at the last summary of Orders in Council that was tabled and you will see many of them are not of general interest. It may be a small piece of land being transferred from the federal government to the province or vice versa or it may be the selling of a small piece of land. There are a lot of Orders in Council regarding Indian Reserves, setting up parkland for Indian Reserves and enfranchisement of Indians and so on. So

you see these are not of general interest but they are available to anyone who wants to make a reasonable request.

**The Chairman:** It there any Order in Council which is not available, any type of Order in Council?

**Mr. Cross:** No.

**Mr. Forest:** You have nothing to do with notifications to interested parties that is up to the department itself; you do not check for that?

**Mr. Cross:** No.

**The Chairman:** On your schedule of Orders in Council, Mr. Cross, why did you mention separately the Orders in Council which were Treasury Board Minutes approved by the Governor in Council?

**Mr. Cross:** In my remarks I mentioned that Treasury Board Minutes came in a report weekly to the Governor in Council. That report is given one number and then each Minute within that report is numbered.

I did this mostly not to confuse it with some other reports that may have been published, in fact that may have come to this Committee. Someone may ask us how many Orders in Council were passed during a certain year. If we tell them so many Orders in Council of which so many are Treasury Board Minutes it is very clear. However, if we give them the total then they may look at some other list and maybe the person who published the other list only published each Treasury Board report as one Order in Council. So there appears to be some inconsistency about this.

**The Chairman:** Yes.

**Mr. Cross:** I believe Professor Brown-John presented you with some data.

**The Chairman:** Yes.

**Mr. Cross:** If you look at it you will find it is not consistent with this. I think it is that confusion between what are Treasury Board Minutes approved by the Governor in Council and what are Orders in Council enacted by the Governor in Council.

**The Chairman:** Yes. I see there are on the average about 3 Orders in Council in each Treasury Board Minute, at least last year it was roughly that. Is it that same proportion every year?

**Mr. McCleave:** Mr. Chairman, I think Mr. Forest has raised a very useful point in asking about notification to parties when Orders in Council are not published. Is there any way that we could send out a questionnaire to the departments perhaps to determine their policy in this regard?

**Mr. Cross:** Are you referring to...

**Mr. McCleave:** I am sorry, Mr. Cross, I was actually asking the Chairman, because...

**Mr. Cross:** I am sorry.

**Mr. McCleave:** ...it seems to me this would be a Committee decision. I do not think you should be required to do that work I think this is perhaps something that we are supposed to be studying ourselves.

**Mr. Macdonald:** It is the procedure, Bob, by which individuals who might be affected are notified.

**Mr. McCleave:** Yes, in each case, but I think perhaps we could use the same questionnaire mailing list that we used before.

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**The Chairman:** Considering the length of time it has taken us to get answers to our previous questions I am not sure that we will have an answer to that question while we are still working on the problem. Dean Pepin?

**Dean Pepin:** Mr. Cross, am I right in assuming there are two kinds of Orders in Council that are not published, those that come under Section 9 paragraph (2) of the Regulations Act

> (2) The Governor in Council may by regulation exempt any regulation or class of regulations from the operation of section 3, et cetera.

and those you decide not to publish?

**Mr. Cross:** Those we decide not to publish are those that are not interpreted as regulations.

**Dean Pepin:** They are not regulations...

**Mr. Cross:** As defined in Section 2 of the Regulations Act.

**Dean Pepin:** Yes.

**Mr. Cross:** Then in addition there are the regulations which are exempted by the regulations made under the Regulations Act?

**Dean Pepin:** Yes, this is P.C. 1954-1787?

**Mr. Cross:** That is right, yes.

**The Chairman:** Mr. Morden?

**Mr. Morden:** Mr. Chairman, along the lines of questions you put about publication, the Section 9 regulations which are under the act—I think there are some 8 statutes listed—and regulations made under those statutes are exempted from the operation of Sections 3, 4(1), 6 and 7. Does that mean, according to your interpretation, that such regulations are secret? I mean, they have not been reported and regulations made under those statutes are that question because that has been stated in one of the textbooks referring to Section 9 of the Canadian Regulations Act, that if the government wishes to keep a regulation secret it can pass a regulation under that Act.

**Mr. Cross:** I would say the answer to that is no.

**Mr. Morden:** That is what I would have thought. In other words, if someone happens to know about the regulation, they can go to the Privy Council Office, or to the Department, and ask to see it.

**Mr. Cross:** They certainly can.

**Mr. Morden:** In other words, there is no document of a legislative nature that is secret.

**Mr. Cross:** That is right.

**The Chairman:** Can we go so far as to say that there is no such thing as a secret Order in Council any more in Canada?

**Mr. Cross:** We cannot go so far as to say that there has never been.

**The Chairman:** No, that is true, but in present practice there is no Order in Council which you would consider not to be available for public scrutiny.

**Mr. Cross:** I would say that at present, if you came into my office and asked for any one of the Orders in Council, you could have it.

**Mr. McCleave:** Are they numbered consecutively? Is this the practice, Mr. Cross?

**Mr. Cross:** Consecutively, by years. We start in 1969 with 1 and they go on to December, and then we start 1970 with 1.

**The Chairman:** This is so important, Mr. Cross, I would like to go back to it again. You would say this is true even of the exempted regulations, that even those would be made available to any interested party.

**Mr. Cross:** If they are on file in my office.

**The Chairman:** Well, would they be on file in your office?

**Mr. Cross:** They would be.

**The Chairman:** They would be. Is there any scrutiny of those...

**Mr. Cross:** No, I should change my statement there. They would be on file if they were regulations which were approved by the Governor in Council. There might be some ministerial orders which would never be sent to my office.

**Mr. Macdonald (Rosedale):** Any document, whether it is stated to be exempt under the section or is regarded by you as being of a purely local and private interest, or general regulation, any document that records a decision of the Council is available for public inspection, at the very least, in your office.

**Mr. Cross:** Right.

**The Chairman:** What type of scrutiny do regulations which are exempted from the Regulations Act receive? If they are approved by the Governor in Council, do they receive the same type of scrutiny as to form and draftsmanship and as to concordance with the Bill of Rights?

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**Mr. Beseau:** I can answer that. I very seldom see this particular type of regulation. On occasion, regulations that are exempted will be forwarded to me to obtain my assistance in drafting them and reviewing them, but then they are submitted purely at a department's own volition, because they are not required to submit them to me at all. That is the only time I would get to see these particular regulations.

**Mr. McCleave:** Has it ever come to your attention that somebody, say, is hit by a regulation that has not properly been brought to that person's attention and all of a sudden it descends on him out of the, so to speak, clear blue sky? Does this sort of complaint ever get brought to your attention?

**Mr. Cross:** Not in my experience. Paul may have had some experience with that.

**Mr. Beseau:** No, I have never received any complaints from individuals. I have known departments to require an amendment to an existing set of regulations because they find that in certain cases the regulation as it exists would be too harsh on particular individuals.

**The Chairman:** Mr. Morden.

**Mr. Morden:** I have a question as to a small point of form. I have noticed, mainly in recent regulations, that in the recital at the beginning the specific statutory section, which is authority for the regulation, is generally referred to, but in some it is not—just the statute itself. As a matter of form, do you require a specific section or sections to be more or less incorporated in the recital at the beginning?

**Mr. Beseau:** At least in 90 per cent of the cases, I never see the submission that is being made to the Governor in Council; I see the draft regulations themselves. If I receive the submission, I try to find out what that authority is and if it can be pinpointed to a particular section or subsection, I will insert it. In some cases it is not that easy to do.

**Mr. Morden:** No, in other words the part of the regulation that gets into the *Gazette*, at the very beginning it says pursuant to section—whatever it is—of such and such an act, recommends... You never see that.

**Mr. Beseau:** Very seldom. Some departments will forward that at the same time as they forward the proposed regulation, but they are not required to do so, and by and large they do not do so.

**Mr. Morden:** Would you think as a matter of practice that it would be good form to insert someplace in the little to a regulation being published, the exact statutory sections that are authority for it?

**Mr. Beseau:** Where a section can be pointed out, I think that is very desirable. It at least gives an individual an idea of where they got their authority to make this particular regulation.

**Mr. Morden:** If a section cannot be pointed out, you cannot make the regulation.

**Mr. Beseau:** Sometimes there will be a number of sections in an act pursuant to which you are making regulations. You may have five or six different sections, and in that case it is usually made pursuant to the act.

**Mr. Morden:** Or you could refer to all the sections.

**Mr. Beseau:** You could, yes.

**The Chairman:** We submitted a number of questions in our questionnaire to various departments. I understand that we will be getting a collective answer to these questions through the Privy Council Office, I guess on behalf of the government as a whole. I suppose that means, if I may put this question to Mr. Macdonald, that you would prefer not to discuss those questions at this time. If the answer that you are going to give is merely a collection of what the departments say, or will this be a survey of their responses, or will this be a single answer on behalf of the government officially?

**Mr. Macdonald (Rosedale):** I cannot be absolutely certain because the questions that were asked do not leap to my mind now. The problem, if I could just mention it, is that, as

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I recall, some of the questions at least were really requiring an opinion from the Department as to in what period of time they could take this course of action. For some departments this was relatively easy to answer. Others are having a little difficulty internally or in conjunction with the Privy Council Office in expressing an opinion which they feel might bind them in the future. Through the Privy Council Office we have been acting in an attempt to co-ordinate this and we would hope that by July 29, which I think is the date I mentioned, we should have all polls reported from and be able to give you the collective result. Now whether that will be a collective answer or an individual statement of comments, I cannot say at the moment. We will try to make it as informative as we can.

**The Chairman:** Thank you. I must admit, I still have a little bit of confusion in my mind as to the exact degree of scrutiny which ministerial regulations, and these regulations which are exempted, receive. The ministerial regulations, by and large, I understand, do go to you. Are there any exceptions to that, if they are of a legislative character?

**Mr. Beseau:** If there are exceptions to that, they are exceptions of which I am not aware. In a particular department they may just not send them to me, and if they do not send them I have no way of knowing whether or

not they are complying with the Regulations Act. There are certain problem areas with respect to regulations in the area of exemptions and, from my own, probably selfish, point of view I would appreciate it very much if the Committee would make some kind of recommendation on exemptions.

**The Chairman:** What kind of recommendation?

**Mr. Beseau:** I was here when the officials of the Department of Transport were present last week, and I noticed that they made reference to certain publications of the Department of Transport. These were such things as the Canada Air Pilot and the Designated Air Space Handbook, and another one I would add on their behalf is the Engineering and

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Inspection Manual. It appears to me that these are likely regulations within the meaning of the Regulations Act, but I do not get them to review. They are extremely technical and they are limited to a very specialized field. These publications are amended, I believe they said, every 35 days and they are brought to the attention of the people interested in them, and at present there is no way I can possibly review them anyway. The position of these three documents rather disturbs me because I do believe they are regulations and I personally see no reason why they could not be exempted from the requirements of the Regulations Act. The air industry appears to be well satisfied with the methods that the Department are using at this time.

**Mr. McCleave:** Mr. Chairman, I drafted something which might or might not meet the approval of the Committee if we did decide on another questionnaire. It is simply to this effect, after a lead-in paragraph, that the Committee understands that about 10 per cent of Orders in Council are published in Part II of the *Canada Gazette*. Its members are interested in finding out what notification is given to those obviously interested in or affected by the unpublished Orders in Council. The Committee would appreciate it if you could forward a brief statement on this point.

This does not tie them up. A questionnaire at this point, I think, would be—we would get the answers at Christmas time after we get our report in, but perhaps each department could furnish us with a little information, at least, and then perhaps we would be able to decide on what points we wanted further investigation.

**The Chairman:** That sounds all right to me. Should this be handled through the Privy Council Office, or should we write independently to the same bodies to whom we wrote before?

**Mr. Macdonald:** Perhaps, if you like, the Privy Council Office could lend its abilities to summing these up, and I think in due course it would assume the role of co-ordinating the responses as it does, for example, in connection with parliamentary questions, finding out whose responsibility it is and chasing them out.

**The Chairman:** Yes. Well, I think it is fortunate, with the bell ringing for a vote, that we have pretty well finished our questioning. We will have another chance at Mr. Beseau tomorrow morning because he will be here again in his other capacity as a member of the Department of Justice. So if there is anything further that we would like to ask him, we could do it at that time.

Needless to say, we are very grateful to Mr. Beseau, Mr. Cross and Mr. Macdonald for their appearances here this afternoon and their very helpful comments. Thank you. The meeting is adjourned.

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**Friday, June 27, 1969.**

**The Chairman:** The meeting will come to order. We are very pleased to have with us this morning the distinguished Minister of Justice for Canada and four distinguished members of his Department. The Minister is accompanied by Mr. D. S. Maxwell, Q.C., the Deputy Minister of Justice and Deputy Attorney General of Canada; Mr. D. S. Thorson, Q.C., Associate Deputy Minister of Justice; Mr. J. W. Ryan, the Director of the Legislation Section and Mr. Paul D. Beseau, Department of Justice Legal Advisor to the Privy Council Office who also appeared before us yesterday in his Privy Council capacity.

The Minister of Justice who has taken a great interest in the work of this Committee is prepared to begin with a statement, and after the statement from the Minister we will then be free to direct questions either to the Minister or to any of his associates who are

here with him. Without taking any more time by way of introduction, I will immediately call on the Honourable John Turner, Minister of Jus ice and Attorney General for Canada. Mr. Turner.

**Hon. John N. Turner (Minister of Justice and Attorney General for Canada):** Mr. Chairman, as you say I am very pleased indeed to be here with the senior officials having most to do with regulations in-the-making of the Department of Justice because I believe that not only the review function of the regulation-making power but the granting of that power itself are matters to which both the executive and the legislature ought to pay due regard. Particularly in these days when we have the state and government becoming bigger and more remote, as other institutions of our society become bigger and more remote and the citizen feels more and more alienated from the decision-making process, I think the delegation of power by which Parliament has conceded into other hands than its own a quasi law-making function is something that Parliament should look into very carefully.

I want to congratulate you, Mr. Chairman, and the Committee for the fairness of the investigation so far. We have read the minutes of the proceedings. I think you have been fortunate in the calibre of your witnesses and the testimony that you have already received. We will be watching future proceedings and we will be very interested in your conclusions.

First of all, we welcome this inquiry. We hope that the recommendations that you bring forward will do much to help the Department of Justice in the matter of delegated legislation and lead to ground rules that can be applied in reviewing requests for delegated legislative powers in legislation, requests coming from other departments of government. We hope also that your ground rules, if you choose to set them out, will help us in the expression of the exercise of these powers in regulation itself.

I would like to outline briefly what the role of the Department of Justice is, and the regulation-making power. While all government bills are drafted by the Department and have been since a Cabinet directive in 1951—all government bills are drafted—only a limited number of regulations are initially drafted by this Department. This is because the available experienced manpower in the Department has never been sufficient to allow the Department of Justice to take over this very large responsibility, and because experience has proven

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that the drafting of regulations, in particular regulations dealing with the technical aspects of administration, must be done by working very closely with the department involved and the department responsible for the actual operation. As a result the Department of Justice performs primarily a review function in relation to drafting regulations. We perform that review function primarily under the authority of two statutes, the Regulations Act and the Canadian Bill of Rights.

Mr. Chairman, you and your members are familiar with Section 3 of the Bill of Rights. Under that Section the Minister of Justice is charged with the examination of all regulations that have been submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act. Under the regulations made under the Regulations Act, every regulation that is to be published in the *Canada Gazette* is to be examined and approved as to form and draftsmanship by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice.

Who drafts the regulations? The regulations are drafted in the department responsible for the administration of the Act authorizing the regulations. Fisheries regulations are drafted by the Department of Fisheries; food and drug regulations are drafted by the Food and Drug Directorate, and so on. Usually the particular department's legal officers prepare those regulations in draft form and submit them to the Privy Council where they are passed to the Legal Adviser of the Privy Council whom you had before you yesterday.

This officer is a member of the Legislation Section of the Department of Justice. He performs a liaison duty between the Clerk of the Privy Council and the Deputy Minister of Justice. Very few departmental solicitors that is to say, solicitors in the various departments of government, have much training or experience in drafting legislation. The result is that a great deal of revision falls upon the Privy Council's Legal Adviser with respect to the form and draftsmanship under the Regulations Act. This officer also reviews the draft regulations, when received by him, to ensure that the regulation will not offend against the Canadian Bill of Rights. This function is per-

formed at the review stage to save time later and to avoid duplication of effort.

It is not easy to find capable legal officers to perform this function. As a matter of fact, very difficult to find and train people for the Legislation Section at all—the drafting section of the Department of Justice—who have the requisite abilities, and temperament and talent. There is no busier section in government anywhere. There is certainly no busier section in the Department of Justice, responsible for the drafting of every piece of government legislation I think when you take the number of regulations for review drafted by other departments you will see what we are up against.

In 1967 there were about 517 regulations in draft form presented for examination to the Legal Adviser to the Privy Council, who as I said is a member of the Legislative Section also of the Department of Justice: 517 in 1967.

In 1968 there were approximately 528 draft regulations presented; and in 1969, to date, there have been 326. Nearly all of the drafts presented by other departments required revision or reconsideration as a result of the examination by the Legal Adviser.

The total number of these regulations reviewed do not tell the whole story. In typewritten form the draft regulations may be one paragraph or from 50 to 100 pages of very complicated technical matter, each one of these regulations. I have a number of drafts here. I am not going to table them. I just want to show by way of demonstrative evidence—Melvin Belli technique—just what we are dealing with.

Here are regulations relating to gas pipe line uniform accounting regulations, and there are 145 pages. That is one regulation. Here are the similar oil pipeline uniform accounting regulations, 88 pages. The fish inspection regulations, 67 pages. All very closely drafted, and related to extremely technical aspects of government administration.

Prior to the integration of the departmental legal services, the Department of Justice officers had very little to do with drafting

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regulations at all. I have said, the regulations are prepared by departmental solicitors in the various departments.

Prior to the Glassco Commission the Department of Justice had no control over these departmental solicitors. They were responsible to the individual Deputy Minister. One of the prime recommendations of the Glassco Commission was to integrate the legal services within the federal government and bring them under the control of the Department of Justice, and that is being done, and with the exception of one or two departments, the integration is complete. In the system we envisage there will be certain legal officers in every department of government under a departmental solicitor responsible, of course, to his own Deputy Minister, but also responsible to the Deputy Minister of Justice.

Because these departmental solicitors are now being integrated into the Department of Justice, more drafting of regulations is being done by our officers, in the other departments; but it is apparent that we can only apply ground rules. We can only try to reduce the amount of revision work that is incumbent upon the Legislative Adviser to the Privy Council and the Legislation Section of the Department of Justice. We can do that by giving basic training in the principles and techniques of legislative drafting to the legal officers that we are requiring by integration.

A program by this purpose was submitted by the legal officers of the Legislation Section, of the Department of Justice. It calls for training seminars on the requirements of draft regulations. I have to say to the Committee that because of the shortage of staff in that Legislative Section the program was not started this spring as we had anticipated, and it has not started. I am trying to make the appropriate submissions for the increase of staff. It is my intention to continue to attempt to enlarge that Section and to make every effort to get these seminars under way. This is something your Committee may well want to consider.

When we do succeed in providing the training necessary to enable Justice Department solicitors who are assigned to other departments to prepare regulations in accordance with established standards as to form and draftsmanship, and in accordance with the Bill of Rights, and any guide lines that may arise from the operation of Parliamentary review machinery, that your Committee may recommend, Mr. Chairman, not only would the review at the Privy Council level be less onerous than it has been in the past, but the regulations themselves I believe would be more uniform and less likely to offend against good drafting practices. I also believe the

inadvertent unusual or exceptional use of delegated powers could also be avoided more easily than they are at present. Also there would be more time available, at all levels in the preparation of regulations by Justice officers to consider matters of real substance arising out of proposed regulations instead of having because of the force of time to be limited to form and draftsmanship.

To summarize at this stage the role of the Department of Justice in the preparation of the regulations has in the past arisen from requirements of the Bill of Rights and the Regulations Act and neither of these statutes gave the Department a very dynamic or positive role at the drafting stage. We were reviewing officers. We had very little to do with the preparation of the regulations.

It is my hope, as a matter of fact two or three months ago I issued instructions in the Department to review this whole process so that we would take a more positive responsibility for the content and form and substance, not only of the exercise of the regulation making power but of the granting of the regulations making power which I want to deal with in a minute.

But it is hoped that we would be able to play a more positive role through our departmental solicitors in the future both at the original drafting and in applying control guide lines, assuming, of course, that the Department can acquire and keep the trained, experienced officers necessary for such a role. I might just say as an aside there are some lawyers around the table here, they may be very experienced counsel. We were talking about this before the Committee on Justice and Legal Affairs. You could have a very skilled counsel but there is a wealth of difference between being skilled counsel and being a skilled draftsman. I think in this country you could count the skilled draftsman on two hands. I think we are fortunate in the federal Department of Justice to have the majority of them in this country, but they are virtually irreplaceable. They take years to train, and the skills are not acquired easily—

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*Delegated Legislative Powers*

With regard to the statutory instruments, Mr. Chairman, as found in your terms of reference, I would like to make the following points:

1. There should be proper, adequate and workable machinery for controlling the exercise of delegated legislation.

2. The review machinery should not, however, replace the established judiciary in ensuring that power is lawfully exercised. Indeed, the role of our judiciary must be re-inforced in those areas if the citizen is to feel confidence in our legislative and judicial systems.

3. A review of delegated legislative power after its exercise may not be enough. There should be guide-lines available by which one can examine, objectively, requests to Parliament for the granting of legislative power in the first instance.

Your Committee will be interested in establishing a Parliamentary review procedure, I should imagine. To our minds that is going to be insufficient, if your Committee does not interpret its terms of reference in an elastic fashion to go to the granting of that power in the first place. We would welcome whatever guidelines this Committee deemed advisable to set up.

All of these points pose problems that do not appear to have been solved in a wholly satisfactory manner in any jurisdiction. Perhaps in my triple role as Minister of the Crown, parliamentarian and lawyer, I may be allowed to express my views on the subject.

It seems clear from the evidence given before your committee that nearly everyone recognizes the need for some delegation of legislative power from time to time. The reasons that have been given for such delegation in the past are relevant and realistic. The reasons usually given are: urgency; lack of parliamentary time; lack of parliamentary knowledge; political feeling; wanting to take politics out of politics; and the need to experiment with legislation. Parliament would be in the position where it could not anticipate what the real facts were going to be. Let us face it, there is the influence of precedent on the solutions proposed by overworked legislative draftsmen. I will comment briefly on each of these matters, all but one of which has been described in the British context by Desmond J. Hewitt in his book "The Control of Delegated Legislation."

The oldest reason given for the delegation of the power to legislate is urgency. Under the stress of national emergency or crisis, in Canada and elsewhere, much is allowed that would not be tolerated in other circumstances, as in the case of war, epidemics, strikes, floods, etc. At such times, Parliament

recognizes the need to make new laws with the speed not always available to Parliament and gives a great measure of its power to other bodies to enact laws concerning, for example, the slaughter of cattle with hoof and mouth disease, the control of products coming on the market that are hazardous to health, or other matters of national concern.

The second reason given is the lack of parliamentary time. We are all aware of the increase in the number of matters coming before Parliament and this underlies the whole issue of the rules of Parliament now before the House of Commons. As government assumes more and more importance in the everyday life of the citizen, in trade and commerce, corporate affairs, public health, public welfare, pension plans, industrial incentives, broadcasting, and now languages, etc., the time available for parliamentary consideration of all the myriad details of policy must in a great many cases give way to make room for the over-riding consideration of general policy on a number of important matters. I suppose this is as it should be, but if Parliament is to provide the legislative framework for dealing with social problems of the moment, it must leave the filling out of the policy to other bodies by the device of delegating some legislative powers to those bodies. Many of your previous witnesses have noted this phenomenon of modern government.

It is also obvious that while Parliament may, within its jurisdiction, be omnipotent, it cannot be omniscient. We can be all-powerful within the legislative function, but nobody pretends that we are all-knowing. For example, Parliament cannot reasonably be expected to know what potentially harmful drugs are going to come on the market or be invented next year. Nor can it always know the conditions that may exist within a particular industry to which a legislative policy may be directed. So the lack of parliamentary knowledge or Parliament's admission that it cannot predict all of the varied circumstances prompts Parliament to enact general laws that must be capable of adapting to a variety of different situations and contemporary conditions to prevent injustice. Such powers to make laws must be delegated at times to enable the general policy of a law to be adapted to changing circumstances.

There is a basis for delegated legislative power which is related to political feeling, for example, where Parliament makes the effort to defuse some area of administration of the appearance of political considerations. I think this is a contentious matter. It is done by the establishment of a board or tribunal, and this board or tribunal is given a mixture of administrative, quasi-judicial and legislative powers. The exercise of these powers, under the general policy laid down by Parliament, is administered by a non-political tribunal or body thereafter. Examples of this approach can be found in the National Energy Board, National Transportation Commission, and recent broadcasting legislation.

The feeling is that where administrative decisions have a high political content, Parliament ought to ensure that politics is taken out of those decisions. I am not so sure that this really achieves the results that we are trying to achieve, because any time there is a choice open to an administrator, that is by its essence a political choice. Where an independent board or tribunal is not responsible through a Minister of the Crown to the House of Commons, then I believe Parliament has forfeited, and the people through Parliament have forfeited, some of its rights to supervise those boards and to supervise the administration of government. And I think, although this may be *obiter dictum* out of my mouth and maybe *obiter dictum* to what your Committee wants to do, Mr. Chairman, it is something I believe that Parliament has to look at very carefully, because I think it is fundamental that a minister take the heat for every administrative act of the federal jurisdiction. Some minister takes the heat before the House of Commons. I will leave it at that, but I do not think that members will have to exercise their imagination to gauge my feelings on the subject.

There may also be the situation where a legislative remedy is required for a public mischief in circumstances where the general remedy can be specified but the details of implementation must be ascertained from experimenting with the statutory remedy. Such a case arose with the Canada Deposit Insurance Corporation Act. You will recall the power there given to redefine and amplify the meaning of "deposit" under that Act, because despite all the banking expertise we were able to get before the Banking and Commerce Committee, we could not sufficiently or precisely define what a deposit was, nor could we even define what the banking function was, so we had to leave the very essence of that bill, namely deposits, flexible

enough so that it could be changed by regulation. It went to the very essence of the statutes, yet Parliament was unable through all the expertise available to it to sufficiently and precisely define deposits.

Another reason for the inclusion of a delegated legislative power in a bill—it is more a cause than a justification—is one that should be familiar to all lawyers who have ever used a precedent for an application for letters patent for the incorporation of a company, or in drafting a will or in drafting a mortgage. Sometimes the pressure of the moment prompts you to open the drawer of your precedents and use that as the basis of your draft, and you hope to adapt it to the particular circumstance. The same thing happens in government. If a precedent exists in legislation that has not been disapproved by Parliament, there is a tendency for it to recur in other legislation and to recur in other legislation having nothing to do with the original statute. Thus a provision in a health Act may be used in other bills because it is acceptable, does the job, and is known to the officials or draftsman preparing the legislation as not having offended the parliamentary scrutiny. This is a matter of success breeding that sincerest form of flattery, imitation. Those of us on both sides of the House who have had the responsibility for piloting bills, know that when you get in a tough spot and somebody asks you about where that clause comes from, you reply that it is a standard clause, and you get away with it.

Once we admit the fact that delegated legislation is here to stay in one form or another, our concern should be, first, with the granting of delegated powers to subordinate bodies and, second, with the control of their exercise after they have been granted.

Dealing first with the granting of such powers, I realize that, as I said before, this may perhaps be beyond the strict terms of reference of this Committee, but it does appear to me that if one is concerned with the *control* of delegated powers, one cannot logically fail to be concerned with the terms on which those powers are granted.

Judicial review is important. Parliamentary review, I believe, is important, and you will want to suggest to Parliament how that should be done. But those are *ex post facto* remedies. You are chasing after something that has been done, and maybe a grievance has been caused. There may be an injustice done. I believe you cannot look at those aspects of it unless you look at the granting power and the scope of the granting power itself.

A number of the witnesses who have appeared before the Committee have, I believe, directed their attention to this relationship. For example, we were very interested in the testimony of Mr. G. S. Rutherford of Manitoba who described in some detail the principles adopted by the First Standing Committee of the Manitoba Legislature on Statutory Regulations and Orders, for guidance in examining regulations and orders submitted to that Committee. A careful examination of those principles which he submitted to your Committee, however, leads one to the conclusion that some at least of them are really more relevant to the granting of delegated powers than to their exercise after the event. For example, the first and probably the cardinal principle that he submitted and which was adopted by the Manitoba Standing Committee is that "regulations should not contain substantive legislation that should be enacted by the Legislature but should be confined to administrative matters". That relates to the granting of power. This and other principles mentioned by Mr. Rutherford are surely matters that should be in the mind of the draftsman at the time he is framing the terms of the legislation conferring authority to make subordinate legislation. I do not know how you can avoid that problem.

Speaking for myself and for the officers of the Department of Justice, we would welcome this Committee's views as to the principles that should govern the conferring of this kind of authority. Given the conflicting pulls of policy factors involved in the formulation of government legislation, it would be most valuable to me and to the Department, both for our own guidance and in our discussions with other departments, to be able to point to specific recommendations carrying the full weight and authority of this Committee's judgment and presumably by Parliament if these recommendations—as I know they will be—are arrived at after a careful study of both the principles and the practical considerations that appear to your Committee to be relevant. I will say no more about the granting of delegated authority.

Turning now to the control of the exercise of delegated legislative powers after they

have been granted, I would suppose that the Committee might wish to consider how certain kinds of review mechanisms might be built into the grant in those cases where public policy requires more than the ordinary powers to be granted and the extent to which it is practical or desirable to build in such mechanisms in any particular case. There are now isolated instances in our statutes of some kind of resolution being required with respect to the exercise of legislative power. The Committee should look at the United Nations Act, Revised Statutes of Canada 1952 Chapter 275, Section 4, the Maintenance of Railway Operations Act, 1966-67, Chapter 50, Section 11.

One or two jurisdictions have built a recognition of this referral device into their interpretation acts to enable the device to be easily invoked by *pro-forma* words in those statutes where it is required. An example of this device which was brought to my attention is based on the Public General Acts of Northern Ireland, 1954, Chapter 33, Section 41, as taken from a bill drafted in Trinidad and Tobago.

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I will not read this to you, but I am going to leave a copy of this statement with the Chairman and you might look at it because it is a rather interesting example of using the Interpretation Act to refer to *pro-forma* inclusions so that you do not have to spell it out in every statute. No doubt you will want to consider this aspect of delegated legislation in your study. Much time has been devoted to an examination of the manner of controlling the exercise of delegated legislative power. May I say here, in front of this Committee, Mr. Chairman, and as emphatically as possible, that Parliamentary review of a kind that is above partisan politics that represents all the parties in the House seems to me most desirable if the public interest is to be served best. We are in favour of a Parliamentary review mechanism.

A review after the fact may be of two kinds, judicial or parliamentary. A judicial review would be expected to go to the power that is exercised and to the manner in which it has been exercised; that is, is the power legally and validly exercised and has it been exercised in accordance with natural justice and law? That is a judicial function. One of these days I hope I shall be submitting legislation to Parliament that will strengthen our judicial system and broaden the concept of judicial review over the administrative process. That is one aspect of but it is no substitute. It is complimentary to a Parliamentary review and it is certainly complimentary and really cannot work unless the granting power is reviewed as well.

Apart from the matters of validity and natural justice, which are matters for judicial review, is the consideration of whether a delegated legislative power, although lawfully exercised—beyond the scope of judicial review because it is lawfully exercised—has been used in an unexpected, unusual or extraordinary way. It seems to me that any review mechanism that might be established with this consideration in mind should, if it is to be workable at all, operate in such a manner as not to raise an issue of confidence between Parliament and the executive whenever any disagreement is encountered over the exercise of a delegated power.

The committee should operate in such a way that it does not directly challenge the governmental or executive authority or involve a matter of confidence as it relates to the statute itself. It should be done in such a way that it is a non-partisan review without challenge to the executive and not involving a matter of confidence. I say this for various reasons. One of the obvious ones being that the worth of this exercise should bring to the attention of government the transgressions of the delegated legislative power.

If such a review mechanism could be devised, it would, in my view, be likely to prove extremely useful in terms of providing practical guidelines to officials at the stage where proposals for delegated legislation are now being developed and it would also serve to reduce the opportunity for or the likelihood of improper uses of delegated powers.

Here, again, I want to give the Committee our assurance—my assurance and the assurance of my officials—that we would welcome such a result and would co-operate in every way necessary to make such Parliamentary machinery work successfully.

May I say, too, that I would welcome any opportunity to appear before you again and my officials would welcome the opportunity of assisting this Committee in any way we may be able to do so when you have reached that point in your deliberations where you are considering recommendations and the practical application of them both to government and to Parliamentary realities.

We are available, Mr. Chairman, to come back again if we have not stultified you too much this morning. When you are closer to your conclusions, if you wish to cross-examine us on those conclusions, we would be glad to appear—and my officials will—because after all, the Department of Justice is one of its roles is an instrument to assist the carrying out of policy, Parliamentary or executive, and it can do this most effectively if policy is consistent and clear and it can do it most happily if policy accords with the professional sense of the proprieties of law and government and particularly, the rights and freedoms of the citizen.

Anything your Committee can do by way of Parliamentary review, coupled kith a broadening of what we hope we can do in the way

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of broadening judicial review, coupled with what we can do by strengthening the administrative checks and balances even more and anything you can do to redress the balance between the citizen and the state I think will deserve the thanks of Parliament and through Parliament, of the people of Canada.

**The Chairman:** Our thanks are indeed due to the Minister of Justice for this very complete, important and, indeed, very powerful statement. I do not think there has been a statement made before this Committee which will be of as much assistance to us as this endorsement of our aims and interests and the help it has given us in detail.

**Some hon. Members:** Hear, hear.

**Mr. McCleave:** May I follow up the Minister's suggestion, which I think is a very practical one. It strikes me that when our counsels are preparing our report after our instructions to them in August it might be wise to set up some kind of liaison between them and yourself, if you are going to be here, for the drafting of the report with the Department of Justice. Then if there are points where the Department is obviously at variance or strongly at variance with whatever instructions we gave, these could be reported back to the Committee but otherwise as a workable solution I think this is perhaps the best way of tackling it.

**The Chairman:** I would certainly be prepared to undertake that, Mr. McCleave. The Minister can inform me who in his department he would like us to keep in touch with on this. We certainly will be very pleased to take advantage of their assistance at our further thinking about the report.

**Mr. Turner (Ottawa-Carleton):** Yes, you are free at your own motion, Mr. Chairman, to stay in touch with the Deputy Minister, Mr. Maxwell or the Associate Deputy Minister, Mr. Thorson either one of whom will be glad to offer you their co-operation.

**The Chairman:** I do not think we need a formal motion on that, although I see we now have a full quorum which will enable us to have several of the motions we need. I might mention that there seems to have been a remarkable coincidence of thinking on the expanding of our terms of reference as the Minister of Justice presented to us strongly this morning. Mr. McCleave mentioned it earlier in the year and I believe Mr. Hogarth did as well. I have been thinking about it myself and I just had a call from the House Leader saying that he is prepared to move into the House today, if he has the concurrence of the other parties, for the expansion of our terms of reference along the lines that we have been thinking of. If this is agreeable to members of the Committee I do not think we will then need a motion on that either but the House Leader will arrive later in the day to take care of that problem.

**Mr. McCleave:** Is this in line with the document that we had circulated and we have all looked at?

**The Chairman:** Yes. Just while we have a pause here, I might ask the Committee if they would be prepared to move that the statistical summary filed by the Privy Council yesterday and the recommendations to the Governor in Council, which was also filed with us yesterday, be appended to yesterday's proceedings.

**Mr. Gibson:** I so move.

**Some hon. Members:** Agreed.

**The Chairman:** We then can proceed to some discussion on the basis of the Minister's statement and other matters which we may wish to raise with the Departmnt of Justice. Do you have your hand up Mr. McCleave?

**Mr. McCleave:** I did but I was just raising my cigarette. I have questions but I will wait a moment.

**The Chairman:** I believe our counsel had several questions which they wanted to address to the Department so perhaps I will begin with them. Dean Pépin?

**Dean Gilles Pepin (Counsel to the Committee):** Everybody knows the definition of the word "regulation" in the Regulations Act. It covers regulations made by the Governor General, by the Minister, by the Treasury Board, Crown corporations, boards, commissions and a lot of administrative authorities. I would like to read the English version, not the English translation, the English version Section 4 of the regulations made under Section 9 of the Regulations Act reads:

"Two copies of every proposed regulation...". and by regulations it means the regulations mentioned in Section 9 under the Regulations Act, regulations made by the Governor General, Ministers, Crown Corporation, boards and commissions.

> Two copies of every proposed regulation shall before it is made be submitted in draft form to the Clerk of the Privy Council who shall in consultation with the Deputy Minister of Justice examine the same to insure that the form and draftsmanship...

In French it reads, "la rédaction du texte".

> ...the form and draftsmanship thereof are in accordance with the established standards.

I would like to know what that expression means "form and draftsmanship". Does this expression allow the Privy Council in consultation with the Deputy Minister of Justice to control the policy of the regulations, the content of the regulation, the legality of the regulation. I want to say again that the regulations in question under Section 4 are the regulations made by the Governor General, Ministers, Crown corporations, boards and commissions not only the ministerial regulations.

**Mr. Beseau:** The regulations submitted for approval as to form and draftsmanship in accordance with established standards are only those within the meaning of regulations as defined in the Regulations Act. There are a number of Crown corporations and government agencies not required to submit regulations for approval as to form and draftsmanship.

As far as form and draftsmanship is concerned, this has been interpreted as not including matters of merely form but also it goes to the legality of the regulations being proposed by the various departments. That would be the most important function to insure that the regulations fall within the powers delegated by Parliament. To that extent it extends beyond form and draftsmanship and includes the authority under which the regulations are proposed.

**Dean Pepin:** Not the policy?

**Mr. Beseau:** It is very seldom that I get involved in matters of policy. Sometimes the two merge very closely together and it would only be in a rare case that I would ever say anything about the policy involved in regulations.

**Dean Pepin:** I have here an article by Mr. E. A. Dreadger. I would like to read just a paragraph of it. It appears in the Administrative Law Review of the American Bar Association, Volume 19 page 132:

> The regulations under the Regulations Act require every regulation making authority to submit a copy of every proposed regulation in draft form to the Clerk of the Privy Council, who is required, in consultation with the Deputy Minister of Justice, to examine it and to insure that the form is in accordance with established standards. This is done by the respective officials, and an officer of the Department of Justice is stationed in the Privy Council Office for this and other purposes. The Privy Council Office may raise question of policy, and the Justice Department may raise legal matters, both as to form and substance.

Is this not correct?

**Mr. Beseau:** When you say both as to form and substance, the matters of substance I would raise would not be related directly to policy but the manner in which they are trying to convey the intent which they want to put across in the regulations. So to that extent I do get involved in matters of substance. If they set forth a scheme whereby they are going to make regulations and it is obvious they are leaving loop-holes in the regulations I will go into policy to that extent, to try to get these holes filled in so to speak.

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**Dean Pepin:** My next question is a long one and I would like to ask it in French, if you do not mind?

**Mr. Beseau:** No.

[*Interpretation*]

**M. Pepin:** There is a lot of discussion in Canada about the problem of finding out whether a regulation is a law, an act of Parliament. The jurisprudence is not unanimous on this matter. In the Leroy vs Singer case, the Supreme Court said that for the purposes of the enforcement of the Criminal Code, a regulation is not a law. In the dismissal of the Japanese case, the Judiciary Committee of the Privy Council said that a regulation, to all practical purposes, is a law.

Thus, there are different contradictory judgments on the same matter and this has rather quite important implications with respect to the problem of judicial notice especially of regulations. Before the adoption of Section 8 of the Regulations Act, this matter came, so to speak, under the Canada Evidence Act, and jurisprudence for the first time was not consistent on this matter; is the judge supposed to take judicial notice of the regulations?

In 1950, Parliament adopted the Regulations Act, Section 8, and I should read this clause, it would be practical.

> 8. (1) A regulation that has been published in the *Canada Gazette* shall be judicially noticed.

I think it is also important to read clause 2:

> (2) In addition to any other mode of proof, evidence of regulation may be given by the production of the *Canada Gazette* purporting to contain the text thereof.

So, since the adoption of this Regulations Act, there were at least three judgments and the last one, as far as I know is that of Regina vs Mahaffey, which is reported to 1961, 36WWR, Western Weekly Report, page 265, and I would quote a passage of this decision of the judge, he said this:

[*English*]

> Unless publication in the *Canada Gazette* is dispensed with as provided for in paragraphs (a) and (b) of subsection (3) of Section 6 proof of publication is required in addition to proof of a regulation...

[*Interpretation*]

And I don't want to be too long on this point, but I want to put this question: we find in federal acts certain clauses stating that the judge is supposed to know the regulations, for instance in the Bankruptcy Act. In the Extradition Act. There is also clause 687 of Criminal Code that states that the judge is supposed to know:

> Proclamations, decrees, rules, regulations and administrative statutes.

For the purposes of the Criminal Code, it seems the judge is supposed to know the regulations. And if I read clause 8 as interpreted by the judge in the Mahaffey case he is supposed to be aware of the published regulations and the lawyer is obliged to supply proof of this publication. This seems to me to be an exception to the principle that the judge is supposed to take judicial notice of the regulations. So, this is my question now. What does it mean for the Department of Justice, what kind of interpretation it gives to clause 8 of the Regulations Act? Is the judge supposed or not to take judicial notice of the regulations? In order to put my question within the scope of the intervention of the Minister of Justice, the citizen is supposed to know the regulations, but, what about the judge? I think that jurisprudence is inconsistant on this and it seems to me that clause 8 did not end the discussions. What does the Minister of Justice have to say on this matter?

**Mr. D. S. Thorson, Q.C. (Associate Deputy Minister of Justice):** May I ask a clarifying question? Are you trying to strike at the distinction between whether the judge is supposed to know the content of the regulations, or whether he is obliged as a matter of law to take judicial notice of a regulation that has been gazetted?

**Dean Pépin:** Yes.

**Mr. Thorson:** Well the latter...

**Dean Pépin:** I think he should take judicial notice. Section 8 seems to say that the judge is supposed to take judicial notice of all regulations that come under the Regulations Act and that are published.

**Mr. Thorson:** Yes.

**Dean Pépin:** But do you have to prove the publication of the regulation?

**Mr. Thorson:** Oh, no. The *Canada Gazette* is the official gazette of Canada, and notice of that fact must be taken.

**Dean Pépin:** Therefore you do not have to prove the publication of the regulation. I will

read it again. That is what the judge said in the Mahaffey Case.

> Unless publication in the *Canada Gazette* is dispensed with as provided for in paragraphs (a) and (b) of Subsection (3) of Section 6 proof of publication is required in addition to proof of a regulation...

**Mr. Thorson:** I think I see what you are getting at now. As a practical matter, I think you would have to establish that the regulation had in fact been published in the *Canada Gazette* in order to be able to invoke Subsection (1) of Section 8 of the Regulations Act, and in order to establish the basic premise on which the requirement to take judicial notice of a regulation depends.

**Mr. Turner (Ottawa-Carleton):** That would only go to judicial notice.

**Mr. Thorson:** Yes.

**Mr. Turner (Ottawa-Carleton):** It would still be open to other methods of proof, and then you have to fall back on Section 6 of the Regulations Act. Section 6 reads:

> 6. (1) Every regulation shall be published in English and in French in the *Canada Gazette* within thirty days after it is made.
>
> (2) A regulation-making authority may by order extend the time for publication of a regulation...

That is interesting, is it not?

> ...and the order shall be published with the regulation.
>
> (3) ...

This is the one that you want to look at.

> (3) No regulation is invalid by reason only that it was not published in the *Canada Gazette*...

I will leave it at that for the moment. The regulation is not invalid because it has not been published. Therefore it does not have to be published to be proved, but it cannot be accepted as judicial notice unless it has been published. That is the first point.

Then you go on when you are dealing with a criminal offence:

> ...but no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the *Canada Gazette*...

Then you have your two exceptions. Therefore in a criminal matter, not only do you need it published for judicial notice, but you need it published for reason of a conviction, because—this gets down to your point—is a regulation a law or is a law a regulation? Ignorance of a law is no excuse, but ignorance of a regulation is an excuse unless it has been published, in a criminal matter.

**Dean Pépin:** I would like to read Article 687 of the Criminal Code.

**An hon. Member:** All right.

**Dean Pépin:** I have the French version.

[*Interpretation*]

> No order, sentence or other procedure must be annulled, or set aside, and no defendant must be dismissed for the simple reason that no proof was given
>
> *a*) of the proclamation of a proclamation or decree of the Governor in Council or of the Lieutenant-Governor in Council;
>
> *b*) of rules, regulations or administrative statutes established by the Governor in Council according to a statute of the Parliament of Canada or by the Lieutenant-Governor in Council under a law of the legislature or of the province; or
>
> *c*) of the publication of the *Gazette of Canada* or the *Official Gazette* of the province of a proclamation, rule, decree, regulation or administrative statute.

Publication is not necessary.

> Proclamations, orders, rules, regulations and administrative statutes mentioned in paragraph (1) and their publication are recognized for all legal purposes.

There again, it is not clear. It is ambiguous. My question is this: in some federal acts, it seems that it is said that the judge is supposed to take judicial notice of regulations, no matter whether they have been published or not, whereas in the Regulations Act, the matter of publication takes an enormous importance and, when you have to prove the publication, will the rule of the best proof apply here? You will have, I think to produce the *Canada Gazette*. If you have to show proof of publication, do you not in fact prove the existence of the regulation? Because to prove a regulation is to table the *Canada Gazette*; to prove the publication of a regulation is to table again the *Canada Gazette*.

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In other words, I wonder if, the present state, of the jurisprudence, it would not be

valuable to change the Regulations Act, to say once and for all that the judge is supposed to know the Regulations. Since everyone agrees that Regulations are certainly, if not more important at least, as important as the Laws. I believe that the matter should be settled, once and for all, as to whether the judge should know the Regulations or not. I wanted just to state this problem this morning.

[*English*]

**Mr. Turner (Ottawa-Carleton):** We had some discussion in another forum of possible conflict between that Article in the Criminal Code and Section 8 of the Regulations Act; there is some jurisprudence on it. It depends, of course, on the authority under which the regulation is made as to whether the Regulations Act applies or the Criminal Code applies. It may be that we will take a look at that again and see whether the situation is as you describe it. I want to suggest to you, though, the fact that a judge can take judicial notice, does not mean the judge is presumed to know the regulation.

**Mr. Pepin:** No.

**Mr. Turner (Ottawa-Carleton):** Judicial notice means that counsel can draw it to his attention without proof.

**Mr. Pepin:** Yes. I have one last question, if I may. I would like to read Section 7 of the Regulations Act:

> Every regulation shall be laid before Parliament within fifteen days after it is published in the *Canada Gazette* or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

So just the regulations that are published are laid before Parliament, not the other ones. It is a condition of the laying before Parliament that the regulation has been published.

**Mr. Turner (Ottawa-Carleton):** Are you suggesting that if we did not publish it in the *Canada Gazette*, we would not have to lay it before Parliament? We are bound under Section 1 to publish it in the *Canada Gazette*.

**Mr. Pepin:** Yes, but there are many regulations that are not published, as you know, and that means that those regulations do not have to be laid before Parliament.

**Mr. Turner (Ottawa-Carleton):** That is correct. You are suggesting that we ought to consider at the tabling provision, whether or not it has been published.

**Mr. Pepin:** Yes, and I would like to know what is the procedure to lay a regulation before Parliament.

**Mr. Turner (Ottawa-Carleton):** I had better watch myself. Who would like to speak to that?

**The Chairman:** We have the benefit of having Mr. Cross from the Privy Council with us and we will be very pleased to have him give the answer to that question.

**Mr. Turner (Ottawa-Carleton):** I might say, by interjection, no one would like to do away with the regulations power more than Mr. Cross.

**Mr. J. L. Cross (Assistant Clerk of the Privy Council, Privy Council Office):** The hon. Donald Macdonald tables the *Gazette* as required under the Regulations Act.

**Mr. Turner (Ottawa-Carleton):** What happens, though?

**The Chairman:** Is it the whole *Gazette* that is tabled? Is each issue of the *Gazette* tabled?

**Mr. Cross:** Each issue of the *Gazette* and the index as they are published, as required within the 15 days.

**Mr. Turner (Ottawa-Carleton):** How does an ordinary member of Parliament know it has been tabled?

**Mr. Cross:** Through *Votes and Proceedings*.

**Mr. McCleave:** At the tail end of *Votes and Proceedings* reference is made to the questions and new things that are raised by members.

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**Mr. Turner (Ottawa-Carleton):** I want to get this on the record.

**Mr. Cross:** It is by *Votes and Proceedings* yes.

**Mr. Turner (Ottawa-Carleton):** Then, having seen it in *Votes and Proceedings*, a member can get a copy of the regulation that has been tabled from the Clerk of the House?

**Mr. Cross:** That is right.

**Mr. McCleave:** That is the part of *Votes and Proceedings* that nobody reads.

**The Chairman:** Mr. Gibson has a question.

**Mr. Turner (Ottawa-Carleton):** Does that appear in the abbreviated copy?

**Mr. Gibson:** At the risk of seeming extremely inquisitive, what physically happens to the tabled copy? Where does it actually go? Is it placed right in a section of the library or where does it go?

**Mr. Turner (Ottawa-Carleton):** Do you ever see them again, Jack?

**Mr. Gibson:** Where could you find it if you were to look for it in the library?

**Mr. Cross:** I think an official from the House of Commons could explain that better than I.

**The Chairman:** Mr. Beaudoin, the Assistant Parliamentary Counsel is here and he will speak to that.

**Mr. G. A. Beaudoin (Assistant Parliamentary Counsel):** We have a section in the House called Parliamentary Returns from where you may obtain or consult a copy anytime.

**Mr. Gibson:** That still does not satisfy my naïve curiosity. I want to know where it goes, physically.

**An hon. Member:** In the basement of the Centre Block.

**Mr. Beaudoin:** Physically, the Parliamentary Returns Office is on the first floor of the House of Commons. Mr. J. F. Cooke is in charge of this section and he comes under the direction of the English Journals.

**Mr. Gibson:** Thank you.

**The Chairman:** Perhaps while we still have our full quorum, there is one more motion that might be made which should be made now.

**Mr. McCleave:** I think the one the Clerk has given to me is the one to which you refer, Mr. Chairman:

> That a list of documents filed as exhibits, this list to include the departmental answers to the questionnaire received to date, be printed as an appendix to this day's proceedings.

**The Chairman:** Thank you, Mr. McCleave. Are you so moving?

**Mr. McCleave:** Yes, sir.

Motion agreed to.

**The Chairman:** Mr. Hogarth.

**Mr. Hogarth:** Mr. Turner, I have a question arising from your original remarks. When I first sat on this Committee, I had an idea that there should be a special division of your Department or your drafting division should be expanded so that all the regulations of all the ministries of the government could be drafted there.

From your remarks you have led us to believe they are still going to be drafted in the departments by solicitors who are in close association or even under your Department and, presumably, they will be doing other things, too, for their various departments. You must have considered the first idea of bringing all of them into your Department as opposed to dispersing them among the departments of the government. I wonder what led you to the policy decision to do it the way you have suggested.

**Mr. Turner (Ottawa-Carleton):** The administrative and technical expertise required is probably more essential than the legal aspects required. Therefore, it is certainly more practicable and probably more efficient to have it done in the individual departments.

That does not take anything away from the proposition that I believe that at an earlier stage the departmental solicitors now responsible to us should be given guidelines in drafting and in the form and content of the regulation so the the review process becomes less onerous and less retroactive—I mean chasing something after it has been done. Also, I think it would be helpful if the Department of Justice were given guidelines, as a member of the executive, as to what guidelines should be available in the drafting of statutes which confer or grant the power. Armed with a better idea of the scope of granting the delegated power and better equipped to draft it so that its exercise is within proper limits, then I think it would be safe in those circumstances to leave it with the solicitors in the departments concerned because of the heavy administrative, expert and technical advice needed in the drafting of those regulations.

You see, regulations really relate more to policy than they do to law and it is because of the high policy content that we feel this is the best way of handling it. Do you want to add anything to that, Mr. Thorson?

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**Mr. Thorson:** I might merely add, Mr. Turner, that part of the problem, of course, is that many of these regulations—take for example the regulations that are proposed almost on a daily basis by departments such as Transport—are extremely technical in their nature. We have long thought that it made a certain amount of sense to insist that the basic drafting of those highly technical regulations occur within the Department of Transport—to follow through on my earlier example—with the lawyers working very closely with the people responsible for the administration. This seems to us a more efficient way of attempting to do it rather than proceeding as we do with a bill for the government.

**Mr. Hogarth:** That answers my question very well. The next question on my mind is that you speak of the Department getting guidelines. I take it you are suggesting there should be some amendment to the Regulations Act that sets forth the broad general principles upon which any regulation shall be drafted.

**Mr. Turner (Ottawa-Carleton):** I am not suggesting an administrative procedures code or anything that has to be incorporated in the Regulations Act. I think there is a lot of dispute within the profession and in the academic branch of the profession as to whether the administrative procedures code is the best way of doing it. I am suggesting that this Committee may well want to set forth some general guidelines of what Parliament believes the proper limitation of the granting of the power and the exercise of the power should be. Armed with that, the Department of Justice, the Minister of Justice, would have far more leverage within the executive branch than perhaps he has had in the past.

**Mr. McCleave:** Can I ask a supplementary to Mr. Hogarth's question? This was the question I was going to raise. Do you suggest that these guidelines, Mr. Turner be not the conferring of powers. What technique would you suggest to the Committee that we use; simply to make a recommendation in the report but not to suggest it be set forth in the statute? Is this the idea?

**Mr. Turner (Ottawa-Carleton):** Yes, I think because of the infinite variety of regulations; because of the infinite variety of the circumstances under which regulations are imposed; because of the infinite variety of the statutes to which they relate, I believe that a statutory solution is perhaps not the best solution at this stage, and that is my view. We are reviewing this whole matter within the Department of Justice of whether we should have an administrative procedures code. However, there are aspects that are rather inflexible and I am not satisfied personally that this is the solution.

**Mr. McCleave:** We had from our Privy Council witness though yesterday the fact that he thought there were areas—the Department of Transport I think was his example—where what seemed to him to be regulations were being passed by this continuous 31-day manual, or a manual issued every 31 days in the air traffic safety field and yet it seems to me that the Department of Justice, or its lawyer in the Privy Council does not have a chance to get their hands on that document. This, I think, would be a problem to us.

**Mr. Turner (Ottawa-Carleton):** That is right. This is the difficulty both in internal review; it will be the difficulty in Parliamentary review, and certainly the difficulty in judicial review. We are always chasing after the fact, which is why we suggest the guidelines both at the granting stage within the scope that the statutes of the Parliament of Canada ought to be limited. Also guidelines within which that power ought to be exercised. So we could nip some of these problems in the bud.

**Mr. Hogarth:** Cannot that be done within the scope of your own Ministry? My point is that—I am just throwing this in for the purpose of discussion—could we not provide in the Regulations Act that all regulations shall be approved by the Minister of Justice, and you make the guidelines? They are obviously impossible to make in a broad general way?

**Mr. Turner (Ottawa-Carleton):** What happens in practice at the moment is that there is within every executive branch of every government, I assume, the urge towards efficiency, and against it the feeling of pre-

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serving civil rights and the citizen's rights of appeal and so on. It is quite natural for a deputy minister of an operating department to want to extend the administrative authority of his ministry as widely as possible. There are also—and this we have to combat—around any table of ministers, I suppose in

any type of government, those who favour efficiency and who would prompt rather wide delegation and those who are concerned about the extent of that delegation because of what it does to the ordinary citizen.

Depending on the government, depending on the time and depending on the shifting alliances within the government, often one minister will support another in a particular aspect of a discussion because he knows he has a wider power and he is going to try to get through in two weeks. So I am just suggesting to the Committee that it would be helpful to the Minister, and the Department of Justice, if he could point to Parliamentary support.

**Mr. Hogarth:** At the same time it appears to me to solve the problem properly he would also have the power to veto.

**Mr. Turner (Ottawa-Carleton):** Yes, should a Minister of Justice have the power to veto? I am a member of the executive. I am just one of the members of the executive. I might say there have been more clashes in recent months on this particular subject than there have been in the past because I intend to exercise my responsibilities in this respect in the statutory umbrella and in the regulatory framework in a rather more positive way than I think has been the tradition in the Department of Justice.

**Mr. McCleave:** Could I follow-up this point because I think our friend I am...

**Mr. Turner (Ottawa-Carleton):** But I am not winning all the battles.

**Mr. Hogarth:** You have not lost any to me yet.

**Mr. Turner (Ottawa-Carleton):** Mr. Hogarth, I want to say that after this session is over I will carry bruises and scars that will be with me the rest of my life.

**Mr. McCleave:** I think Mr. Beseau made a very strong point though. He suspected this manual was regulation and he was met with the answer that it was not regulation, so perhaps not to have the power of veto as suggested by Mr. Hogarth, but at least the power to haul it in and look at it and say, "No, by gosh, you people are working in the field of regulation by issuing this manual every 31 days and it has to conform with the procedures both under the Regulations Act and the Canadian Bill of Rights, and that is all there is to it." I think that is where our witness put his finger on something of the grey area where if we are to do our duty, I think we have to suggest some greater power for the Minister of Justice to satisfy himself, that either these things are regulations or not and it cannot be left up to the departments themselves to do that.

**Mr. Turner (Ottawa-Carleton):** I think it would be worth contemplation by the Committee.

**Mr. Hogarth:** You said you would assist us further, would you care to draft some recommendations to this Committee as to what those broad general guidelines might be so far as your Department is concerned?

**Mr. Turner (Ottawa-Carleton):** As I said in my opening submission, we would be interested to see what the Committee proposes by way of recommendations. I had not dared to trespass upon the rightful prerogative of the legislative branch of the government.

**Mr. Hogarth:** That is a novel approach, but I think that we would be gratefully assisted in the light of the experiences you have just mentioned if we could have tabled before us a series of recommendations. I am not saying that we would accept them or not but we might have a good look at them because they would reflect directly the practical problems you have had.

**Mr. Turner (Ottawa-Carleton):** Could we think about that?

**Mr. Hogarth:** I just want to continue this for a moment because you went on to say that you were rather anxious to see a non-partisan parliamentary review system, or this is one of your suggestions and frankly if that ever happens in the Parliament of Canada, it will be a

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novel situation. I cannot see how you can get a non-partisan parliamentary review. You might as well have a direct judicial review because where one party might wish to restrict the implementation of policy, they would take a restrictive view of certain regulations that have been passed, whereas, another party might want to expand it and they will take a broad view. It will again be putting politics back into politics where perhaps it belongs.

**Mr. Turner (Ottawa-Carleton):** I am all for that. I am all for politics being put back into politics because I have said that any decision involves a political choice. That political choice, where possible, should be made by somebody who takes the heat and is available and responsible to the Parliament of Canada. What I meant by a non-partisan review perhaps would have been better expressed by all-party review, but what I wanted to avoid—and my suggestion was that the Committee ought to try to avoid—a situation where this parliamentary review of a regulation would so call into question either the statute under which the regulation was made or the regulation itself as to make it a matter of confidence in the House. I think it would be very unwise for a parliamentary review committee to put itself in a position where it was challenging, by way of confidence, the government of the day.

**Mr. Hogarth:** I see.

**Mr. Turner (Ottawa-Carleton):** The reason is that we want to try to get results, and if the review committee of Parliament is to flirt with confidence, then the government of the day is going to tend to challenge the findings of that review committee. Mr. Thorson points out to me that the government will become defensive. I would like to see the government co-operate, and therefore I think the findings of a review committee ought to be beyond confidence.

**Mr. Hogarth:** One last question. Did I take it correctly from your remarks that your ministry is not satisfied with the present procedures available to the public to attack regulations such as by prerogative writs, declaratory judgements?

**Mr. Turner (Ottawa-Carleton):** If that is so, we are unsatisfied.

**Mr. Hogarth:** I take it that you would look forward to a recommendation that certain procedures be expanded if possible so that more means of attacking these regulations could be made available to the public?

**Mr. Turner (Ottawa-Carleton):** Yes we would. I think, and the Department agrees with me, which is not unusual, but not inevitable...

**Mr. Hogarth:** Sometimes vice versa.

**Mr. Turner (Ottawa-Carleton):**.. that there ought to be a three-pronged attack in favour of the citizen against the administration. First, an improvement of the methods, speed and scope of judicial review through the courts against administrative tribunals and quasi-judicial boards. Second, an improvement of parliamentary review machinery such as would fall within the terms or expand the terms of reference of this Committee. Third, an improvement in the administrative machinery itself, in the granting at a statutory level and in the exercise at a regulation level of the administrative delegating function itself. I think all three are necessary. I think the first two tend to be *ex post facto*. They are chasing grievances. They are chasing something that happened. So it is essential that at the drafting stage, at the preparation stage, we improve our machinery and guidelines for the preparation of federal statutes and for the exercise of regulations under those statutes. I think it is a three-pronged attack, and anything this Committee can do to advance those areas within what you interpret to be your terms of reference is just fine with us.

**The Chairman:** Mr. McCleave.

**Mr. McCleave:** The Minister has made comment on the first of the guidelines, but there are others. These are the guidelines in Saskatchewan, Manitoba, in the United Kingdom and other jurisdictions. Does the Minister or the Department think that the ones we have had before us are workable, or that some are unworkable or unnecessary? Do you have any particular thoughts on those?

**Mr. Turner (Ottawa-Carleton):** Yes. Let us just go right through them. I have Mr. Rutherford's guidelines here, such as applied by the standing committee in Manitoba. First, the regulations should not contain substantive legislation.

**Mr. McCleave:** This point you have dealt with already.

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**Mr. Turner (Ottawa-Carleton):** Yes. We agree. But we have a qualification here.

**Mr. Thorson:** Like almost all general principles, there must and always are qualifications. If you think of the body of substantive law right now, you will appreciate that there are, under many of our laws, most important areas that are left to be dealt with by regulation. I would mention, as an example, the regulations under the Aeronautics Act where

virtually the entire body of the law relating to aerial navigation in Canada is found. I would mention also, as an example, regulations such as those made under the Income Tax Act, those relating to capital cost allowances which are currently the subject of the budget of the Minister of Finance. These are most important matters and they are left to be dealt with by regulation. I am not sure that a general principle, which may be a very sound general principle, can be applied uniformly without any exceptions in all instances. That is really the point we wanted to make.

**Mr. McCleave:** Yes, but I suppose in those cases, Mr. Thorson, that Parliament walked in with its eyes wide open and was very careful to frame a rather broad power of reference because of the highly technical nature of these two fields.

**Mr. Thorson:** Yes. I think that is true. In the case of the Aeronautics Act, for example, that Act goes right back to the stage shortly following the time when the Privy Council determined that Parliament had exclusive legislative jurisdiction in relation to the subject matter of aeronautics. The industry was a very new one in those days. There was very little parliamentary experience with aerial navigation which is the constitutional subject matter, and as a result of this I think the Parliament of the day, back in the early 1930s I believe, which was the date of the Aeronautics Act, determined that really the only way they could sensibly cope with the subject matter was to provide a very broad umbrella for the establishment of particular rules by the Minister with the approval of the Governor in Council.

**Mr. Turner (Ottawa-Carleton):** We are not going through this specifically, Mr. McCleave. I think we are in general agreement with what Mr. Rutherford said here. As Mr. Thorson has pointed out, there will be exceptions. There will be policy reasons whereby the particular regulation may not meet the criteria completely as set forth here. But in that event the onus should be on the Minister responsible to justify why the principles are not met. Some of these regulations are close to motherhood.

**Mr. McCleave:** And against forest fires running wild.

**Mr. Turner (Ottawa-Carleton):** Yes. Generally speaking, I agree with him. The burden ought to be on the Minister whose statute does not meet them to explain to a committee why.

**Mr. McCleave:** Thank you.

**The Chairman:** Mr. Morden.

**Mr. J. W. Morden (Assistant Legal Council Advisor):** Mr. Chairman, I would like to deal with the subject of preparation of enabling legislation in the Department of Justice, and certain criteria, if any, that may be applied. What considerations are taken into account as to the subordinate law-making body? For example, what choice leads to the Governor in Council, as opposed to the Minister, as opposed to say a government board or commission that may be operating in that area? I think a review of the legislation indicates that in most cases it is the Governor in Council. What determines that decision?

**Mr. Turner (Ottawa-Carleton):** I would like to ask Mr. Thorson to speak on that.

**The Chairman:** Mr. Thorson.

**Mr. Thorson:** I think the simplest answer that I can give you is that this is a matter of judgment in each individual case. I think you are correct again in stating that in most statutes the power to make subordinate legislation is conferred upon the Governor in Council as being the most reasonable and responsible body to perform that function. This will be particularly true, where, for example, the substance of the regulations have substantial policy implications.

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If on the other hand we are talking about regulations that are purely technical—I have in mind now the sort of thing dealing with air navigation orders, orders that are made relating to the use of prohibited air space for very limited periods of time, for example, for air force manoeuvres—that is the sort of thing that we would normally regard as being not properly for the Governor in Council but a matter for the Minister to make orders about. One will appreciate that there is often a balance of convenience involved here, that it is somewhat more difficult to obtain readily, and quickly where necessary, regulations by the Governor in Council. It is perhaps more expeditious, where the subject matter is of that nature, to provide that the Minister may make the regulation in question.

You mentioned the matter of boards and tribunals of various kinds in terms of being the recipients of legislative power. That, I think, opens up quite a different kind of subject matter. I am sure that you appreciate that it does. That has to do really with the degree to which the prime responsibility ought not to rest in what I would term a politically responsible body or individual, such as the Governor in Council or a Minister, but whether it ought to rest in a specially established tribunal or board. This in turn raises the point, of course, which the Minister dealt with earlier in his remarks concerning the devolution of politically sensitive matters to boards such as the Energy Board, the Canadian Transport Commission, the broadcasting commission, and so on.

**Mr. Morden:** Well, would you consider it desirable if the subject matter of the regulations did not involve important matters of governmental policy, that they be enacted by Ministers directly?

**Mr. Thorson:** Rather than by officials?

**Mr. Morden:** No, rather than by the Governor in Council.

**Mr. Thorson:** Yes. I do not think as a general rule that it is proper to burden the Governor in Council with the making of what I might call purely technical type orders that do not have a policy content of any substantial nature.

**Mr. Morden:** I must say I have not read these regulations but in the example of SOR 1969, No. 1, the index to the regulations indicates that the Governor in Council made the hog carcass grading regulations. Just looking at that without having read them, it seemed to me to be a matter certainly important to people in the area but not a matter of general..

**Mr. Thorson:** I think I would have to defend the way in which it is now being done, namely that a regulation of that kind really ought to be made by the prime policy-making body in question. I readily concede that this is perhaps not of paramount interest or even importance to the ordinary urban dweller. But I submit that it is extremely important to a very substantial industry in Canada. Responsibility ought properly to rest, I think, in those circumstances with the Governor in Council himself.

**Mr. Morden:** Regarding other matters relating to what you find in the enabling legislation, do you have general working criteria? Say you are asked to draw up a bill that involved regulations which would amend another statute or define terms in the instant statute or give a power to subdelegate the power to make regulations or the power to enact retrospective regulations. Do you have certain rules saying that you will not allow this unless it is absolutely necessary?

**Mr. Thorson:** Absolutely, sir. All of these points are very carefully considered. You have given a number of examples, but let us just take the last one, whether the statute ought ever to confer the power to make retroactive regulations. I think you would concede that you go a long way through the statutes of Canada to find such a power.

I would readily concede that there are a limited number of such regulation-making authorities built into acts of Parliament and I am thinking particularly of the Income Tax Act which does contain a power to make a regulation which, when it is published, may

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take effect at a day earlier than the date of its publication. This of course is because of the very special requirements of that law to make regulations that are applicable to entire taxation years. So a regulation that may be made, for example, in January or February may have to be retrospective in its operation to apply to an entire taxation year. But that is a very exceptional power, and that kind of power is not lightly bestowed by any draftsman.

**Mr. Morden:** What about the type of power that you see from time to time expressed in language on the following lines: "the Governor in Council or the Minister may make regulations as he deems necessary to carry out" whatever the purpose of the policy in question is. Does any debate precede the final decision to put that in a statute? Does the subjective limitation have to be justified, rather than stating objectively the scope of the regulation?

**Mr. Thorson:** That kind of formulation, Mr. Morden, is rare where it is unaccompanied by an enumerated statement of specific subject matters for the delegated legislation. I would draw to your attention a distinction, and it is a very important distinction in terms of the power conferred, between a statute that says the Governor in Council may make regulations respecting—and then follows an enu-

meration—a, b, c, d, and then you conclude with a general wrap-up type of provision generally to carry into effect the purposes and provisions of this act.

I think the courts have construed the latter power as being very narrow indeed.

**Mr. Turner (Ottawa-Carleton):** Where you set out particulars to which the general rule can apply, then you may have that general basket clause in there.

**Mr. Thorson:** That is a very narrow power when it follows an enumeration of specific powers, and the courts have so held. But if there were simply a statement that the Governor in Council may make such regulations as he deems necessary to carry out the purposes and provisions of this act, period, full stop, then you get a rather different legal result. Then your scope of regulation-making power is circumscribed by the terms of the statutes.

**Mr. Morden:** Yes, I had in mind the type that says as he deems necessary, then there is an enumeration of the subjects. But I gathered that if a regulation is made pursuant to that power it is virtually immune from judicial review because a court is not going to sit in judgment on what the Minister or the Governor in Council deems necessary. That is for him, and I think that the immunity from judicial review indicates, notwithstanding the listing of subject matter, the broad scope of the power given. Have I put that clearly?

**Mr. Thorson:** This is a very complex question. I do not think we could attempt to give you a definitive answer because there are a number of cases dealing directly with the construction of a power so stated, so conferred. I am thinking of the Nozema Chemical Case in the 1940s and a number of other ones. I am thinking also of the decisions of the Supreme Court of Canada relating to the powers of the Governor in Council under the War Measures Act and the reluctance of the courts to go behind the Governor in Council's determination that indeed a state of emergency did exist. But in terms of the peacetime exercise of a power of that kind, I do not think I would want to go quite as far as you have gone to say that the power is totally unattackable by a court. I am not sure that is correct.

**Mr. Morden:** Yes.

**Mr. Thorson:** I think you would still have to find the exercise of the power four-square within the boundaries of the statute.

**The Chairman:** May I ask, Mr. Thorson, what justification there could ever possibly be for a subjective grant of power, as he deems fit or as he deems necessary?

**Mr. Thorson:** There are many instances, sir, where a power is conferred to take whatever steps the Governor in Council or the Minister deems necessary in order to accomplish a stated objective, and usually the way in which you control the breadth of the power is by narrowing the stated objective.

Suppose the law were to say that the Governor in Council may make such regulations as *are* necessary in order to accomplish a stated objective. Take that as the alternative way of formulating it. Then, of course, the regulation is open to attack as to the validity of its exercise, if in fact the regulation that was so made was not necessary in the judgment of the court.

**The Chairman:** Right.

**Mr. Thorson:** On the other hand, if it is stated that the Governor in Council may make such regulations as he deems necessary in order to accomplish that objective, then presumably so long as the objective is carefully defined and the exercise of the power is not manifestly unreasonable or unjust in its application, then it will not be open to challenge on that ground, on the ground of its necessity alone.

**The Chairman:** This is the distinction to which I wanted to draw your attention. But why should this not be open to review by the court? What policy reason would you have for not leaving it open to court attack?

**Mr. Turner (Ottawa-Carleton):** Because it is a matter of policy. The government has to be responsible for policy and not have that judgment substituted by a court. That is the reason.

**Mr. Thorson:** There are instances when policy on the law is really to accomplish the result intended without endangering the validity of what is being done by an attack in the courts. That is perhaps as simple and bold an answer as I can possibly give you.

**The Chairman:** Thank you. Mr. Muir.

**Mr. Muir (Cape Breton):** Mr. Chairman, just a brief comment on the Minister's state-

ment. His forthrightness and frankness this morning have been most refreshing, and I hasten to add that this is not unusual in Mr. Turner, because those of us who have been here for some time have grown to like him very well and respect him for his frankness and forthrightness.

I was very interested in his comments regarding a nonpartisan parliamentary review. I think the workings of this Committee under the very capable chairmanship of Mark MacGuigan have been an example of how committees can be carried on without any partisanship in matters that I feel are vital to the ordinary citizen. I think the Minister mentioned the citizen, and I go along with him on that because to my mind, this Committee and its findings I hope will bring forth something that will be for the benefit of what we term, the ordinary citizen, protection from, to use an old cliché, the bureaucrats in the ivory towers in Ottawa. There is no offence intended, but there are times when people are not treated properly, through misunderstandings and so on. This, to my mind, among other things that may come out of the Committee findings, is one of the most important.

I would like the Minister to go a little further with regard to his thoughts on a nonpartisan parliamentary review committee and maybe some of us who have been here over the years have mellowed, I do not know, but I like a good political fight at any time.

**Mr. Turner (Ottawa-Carleton):** Maybe we are getting soft, Bob.

**Mr. Muir (Cape Breton-The Sydneys):** Maybe, John, but you know the freshmen come in and they feel that nothing can be conducted or carried on unless it is partisan or political. This, to my mind, is folly because there were times over the years when we have gotten together with all parties and discussed many different things and out of those gatherings and meetings came some good results. I would like to have the Minister give us the benefit of his wisdom further on this point.

**Mr. Turner (Ottawa-Carleton):** Mr. Chairman, Mr. Muir has invited me to do in an indirect way what Mr. Hogarth asked me to do in a direct way; namely, that I suggest to the parliamentary committee what principles they should inject into the review. At this stage, I hesitate to trespass upon what I thought was a legitimate function of a parliamentary committee, but I did say in my statement that when you gentlemen came closer to how you felt it should be that not only would the officials of the Department of Justice be at your disposal to kick it around, as we say, in an informal way, but I would be prepared to come back. As I have been invited by two members, I would be prepared to come back perhaps in a more specific way on what I think the guidelines should be. At this stage I have hesitated to do so because I thought it was beyond my prerogative.

**Mr. McCleave:** I think this is an important point. I had suggested that the Minister's office be available to work with our counsel, once we have set forth on our writing of the report, but I think this further step is probably important too that the Minister and perhaps certain other people should come in with us. We are in a very technical field, let us face it, and there is no point in coming up with something that is absolutely foreign to the working operations of government departments, particularly the Privy Council and the Department of Justice. I think we can avail ourselves, or should, Mr. Chairman, of these two approaches. One, to have liaison while the report is being drafted and then, before it is accepted to have a go at it with the Minister and the Privy Council.

**Mr. Turner (Ottawa-Carleton):** May I just say, Mr. Chairman, with courtesy to the Committee, if I am to be specific in my recommendations it would have to carry the authority of the government, naturally, and I would be bound to consult my colleagues in the Cabinet on this particular matter. That might deprive me of the same free-wheeling presentation I was able to give today but certainly if I were to receive directives from this Committee, or rather a request by the Committee, to come up with some sort of a proposal on what the government was prepared to do, then I would be prepared to consult my colleagues.

**The Chairman:** At least we can have informal discussions on this further. I believe this will be our last public hearing and perhaps, in this blaze of ecumenism, as between parties and also as between the legislative and the executive. This is a good place with the bell ringing for commencement of the House for us to stop our session with our gratitude to the Minister of Justice for a very outstanding statement.

**Some hon. Members:** Hear, hear.

**Mr. Turner (Ottawa-Carleton):** May I just say that I agree with Bob Muir, I do not think anything done by a parliamentary committee in this Parliament will be more important not only to the parliamentary process but to the rights of the individual and the citizen than what your Committee does.

**Mr. Muir (Cape Breton-The Sydneys):** That is very important.

**The Chairman:** The meeting is adjourned.

## APPENDIX "G"

### DATA ON ORDERS IN COUNCIL AND STATUTORY INSTRUMENTS

Below are listed the total number of Orders in Council passed, and the number of Orders in Council, Ministerial Orders and Proclamations published in the *Canada Gazette*, for the years 1963–1968 inclusive.

| | 1963 | 1964 | 1965 | 1966 | 1967 | 1968 |
|---|---|---|---|---|---|---|
| Total number of Orders in Council..... | 3,757 | 3,994 | 4,574 | 4,827 | 4,056 | 3,582 |
| | | | of which | | | |
| | 1,836 | 1,951 | 2,238 | 2,364 | 1,654 | 1,230 |
| | were Treasury Board minutes approved by the Governor in Council. | | | | | |
| Number of Orders in Council published in Part II of the Canada Gazette.... | 273 | 298 | 339 | 382 | 380 | 364 |
| Percentage of Orders in Council published in Part II of the Canada Gazette.... | 7.26 | 7.46 | 7.41 | 7.91 | 9.37 | 10.16 |
| Number of Ministerial Orders published in Part II of the Canada Gazette.... | 173 | 186 | 182 | 169 | 186 | 169 |
| Number of Proclamations published in Part II of the Canada Gazette..... | 28 | 22 | 44 | 24 | 55 | 38 |

## APPENDIX 'H'

*Recommendations to the Governor in Council*

*Format of recommendations*

1. Each recommendation must be submitted to the Governor in Council over the signature of the responsible Minister. If the action recommended involves areas of responsibility of other Ministers, the recommendation should indicate, by their signatures, the concurrence of these Ministers.

2. The usual format for recommendations to the Governor in Council is set out in Appendix A. It should contain, in as brief a form as is consistent with clarity, a statement of the background to the recommendation, and the reasons for making it. In the last, executive, paragraph, the exact *statutory authority* (name of act, section, subsection) should be cited, and a *complete statement of the action contemplated*, following as closely as possible the phraseology of the relevant legislation.

3. Sometimes recommendations are received in this Office in which the proposed action is outlined in the explanatory section, and the executive paragraph states merely, "The undersigned has the honour to recommend the above." In such cases it is necessary for the Privy Council Office staff (who obviously are not expert in the subject matter), to transpose the necessary material from the explanatory to the executive part of the resulting order in council. In such a procedure there is the danger of a mistake or an omission being made.

4. If the whole purpose of the recommendation can be indicated clearly in the one, executive paragraph, there is no need for the introductory and explanatory paragraphs. Most recommendations for the making of regulations and amendments of regulations are in this category, and they may be set up as in Appendices B and C. In such cases, though there is no need for explanatory information to be embodied in the resulting order in council, it is necessary for Council to understand fully the purpose of the action they are being asked to approve. Departments should therefore send with a recommendation of this kind a very short explanatory memorandum. Such a memorandum should clearly indicate and explain the change from the previous situation which the recommendation is designed to achieve, (e.g. an increase in membership of a government board resulting from changes in legislation; an increase or decrease in license fees and the reason for it).

5. Where departments have doubts as to the best way of setting up recommendations, the Orders in Council Section of this Office will be pleased to offer suggestions.

*Annexes and Attachments*

6. Wherever possible, lengthy material required to be included in the executive part of an order in council should be submitted in the form of an annex to the recommendation. This annex can then be used as an attachment to the resulting order. (If such material is embodied in the recommendation, it has to be reproduced in the resulting order, a procedure involving unnecessary typing, proofreading, and the possibility of error). This applies particularly to detailed land descriptions, which are usually lengthy, and which, as departments realize, must be accurate to the smallest detail.

7. Departments should ensure that all attachments referred to in a submission are attached thereto. (Sometimes a submission will refer to a description, which is attached, but in the description will be a statement that another document is attached, and sometimes this is not provided).

8. In some cases there is a legal requirement that documents such as plans or descriptions or agreements form an integral part of an order in council. However, as a general rule, the Privy Council Office tries to keep to a minimum the attachments required to form part of orders in council, for the practical reason that copies of orders in council must be supplied complete, and the reproduction of many pages of attachments is costly and difficult. A useful way in which to avoid the need for elaborate attachments is to state in the recommendation, whenever possible, that documents referred to are on file in the department.

*Use of precedents in preparing recommendations*

9. Most recommendations to the Governor in Council are of a routine nature and follow

a standard form which has been used many times before. It is suggested that, in drafting such a recommendation, departmental officials consult not only the previous *recommendation* of a similar type, but also the *order in council* resulting from the previous recommendation. Often changes in phraseology are made to departmental recommendations in the preparation of the order in council, in consultation with the Privy Council Office legal adviser. If the resulting order in council is not consulted by departments in drafting the next recommendation of a similar type, the divergence between recommendation and resulting order is perpetuated, and further unnecessary checking is required in the Privy Council Office each time a recommendation is received.

*Composite recommendations*

10. It is often possible to combine several recommendations of a similar nature and made pursuant to the same section of an Act (e.g. certain kinds of appointments, leases, grants of land) into one order in council. Departments might consider making one recommendation in such cases, thereby reducing the number of documents requiring to be signed by the Minister and transmitted to the Privy Council Office.

*Citing estimates as authority*

11. It is sometimes necessary for Ministers to cite a vote in the estimates, as the authority for a recommendation. As an estimate does not become authority for action before the vote is approved by Parliament in the form of an appropriation act, a formula has been devised to indicate, as authority for orders in council, votes of interim supply that precede parliamentary approval of the estimates. This formula is in the following form, or in variations of it:

> "...pursuant to any enactment of the Parliament of Canada for defraying the several charges and expenses of the public service from and after the first day of April, ...., that provides for payments in respect of ..... (purpose of vote) ..."

Departments are requested to use this formula in drafting recommendations in respect of votes in estimates that have been only partially approved by Parliament in the form of interim supply.

*Examination by legal adviser*

12. Departmental officials preparing recommendations to the Governor in Council should consult with the legal adviser of their department to ensure that recommendations meet the requirements of the law.

*Liaison with Privy Council Office*

13. Departments should whenever possible designate one officer through whom recommendations to the Governor in Council are channelled. Such an arrangement saves a great deal of time for officials of both the Privy Council Office and recommending departments whenever the former have problems to discuss with the latter in relation to the drafting of orders in council.

*Requirements under the Regulations Act and the Canadian Bill of Rights*

14. Certain orders in council are required to be published in the Canada Gazette Part II, in compliance with the Regulations Act and the Regulations made thereunder. In preparing recommendations of a regulatory nature, departments are reminded that section 4 of the Regulations under section 9 of the Regulations Act states as follows:

> "4. Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards".

Note: Orders in Council made pursuant to the Public Service Rearrangement and Transfer of Duties Act are treated as Regulations, therefore, recommendations made thereunder should be governed by this category.

15. Recommendations in this category should not be submitted to the Minister for signature until they have been approved as to form and draftsmanship by the legal adviser to the Privy Council Office.

16. After a submission in this category has been approved as to form and draftsmanship, it should then be presented to the Minister for signature. After Ministerial approval it should be forwarded to the Privy Council Office together with *five* copies in English and *two* in French of the schedule of regulations or amendments to regulations. (Previously the requirement was for *five* copies in English and *one* in French). These copies

are required in order to process the resulting order in council for publication in the French and English editions of the Canada Gazette Part II.

17. A further legal requirement for orders in council of a regulatory nature is in the Canadian Bill of Rights Examination Regulations:

> "*Examination of Proposed Regulations*
>
> 4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act shall, before the making of the proposed regulation, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.
>
> 5. Forthwith upon receipt of a copy of a proposed regulation, transmitted by the Clerk of the Privy Council pursuant to section 4, the Minister shall
>
> (a) examine the proposed regulations in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Bill of Rights; and
>
> (b) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed regulation has been examined as required by the Canadian Bill of Rights;
>
> and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council."

18. Thus the legal requirements which must be met before regulatory orders can be presented for approval by the Governor in Council are rather elaborate and require time in which to be completed. This should be borne in mind by departments planning to make recommendations in this category.

*Time requirement of the Privy Council Office*

19. All recommendations to the Governor in Council are carefully re-examined in the Privy Council Office to ensure that the action recommended conforms with the statute authorizing the action. This examination sometimes requires consultation with the Office's legal adviser. Departments should therefore arrange that their recommendations reach this Office in ample time for such consideration before they can be submitted to Council.

20. Cabinet meetings are normally held on Thursday mornings at 10:30 a.m. The Special Committee of Council usually meets to consider recommendations to the Governor in Council which are of a routine nature and do not involve policy decisions on Tuesday at 9:30 a.m. Recommendations to the Governor in Council not requiring certification under the Canadian Bill of Rights should reach the Privy Council Office *at least 24 hours* before a meeting of the Special Committee in order that they may be processed. When such certification is required, they should reach the Privy Council Office *at least 48 hours* before a meeting of the Special Committee.

*Retroactivity*

21. Unless there is specific statutory provision to the contrary, *the Governor in Council cannot authorize action to be taken retroactively*. This fact creates a problem in drafting orders in council where recommendations are received, usually for the making of regulations or appointments, to be effective on a date previous to that on which the draft order can be presented to Council. To avoid this problem, departments must arrange that recommendations reach the Privy Council Office well in advance of any effective date indicated.

*Accuracy in recommendations for appointments*

22. To avoid any possibility of ambiguity or error, recommendations for appointments should supply accurately the names, including Christian names, of the persons to be appointed, together with the city or other place of residence in each case.

*Procedures following approval of orders in council*

23. After approval by Council, orders in council are submitted to the Governor General for his approval. These are normally returned to the Privy Council Office early in the afternoon of the day after the Council meeting. The Privy Council Office cannot report to departments that orders have been passed until this stage, since it is not possible to assume that orders have been approved by the Governor General until their return from Government House.

24. Departments are reminded that *public announcement of government decisions taken by order in council must not be made until approval by the Governor General is ensured.*

25. Copies of orders in council passed at the Thursday meeting are mailed to departments on the following Monday. They are addressed to the Minister who made the recommendation on which the particular order was based—to the Minister's office in the House of Commons when the House is sitting; to the Minister's departmental office when the House is not sitting. In cases of urgency, departments can arrange to have copies picked up at Room 138, East Block.

26. Since *orders in Council are public documents*, the Privy Council Office must satisfy all reasonable requests from the public for copies of orders or information about them. In any case where such a request might, in the view of the Privy Council Office, be of particular interest to a Minister, attempts will be made to inform the Minister concerned of the request and the action taken on it.

*Size of paper*

27. All recommendations, and schedules to recommendations, submitted to the Governor in Council must be on standard size paper (8½ x 11").

Orders in Council Section,
Privy Council Office.

APPENDIX A.

(Date)

To His Excellency the Governor General in Council:

The undersigned has the honour to represent:

That.....

That.....

That.....

The undersigned, therefore, recommends that Your Excellency in Council may be pleased, pursuant to subsection . . . . . of section .....of the .....Act, to.....

Respectfully submitted

.....

Minister of.....

APPENDIX B.

(Date)

To His Excellency the Governor General in Council:

The undersigned has the honour to recommend that Your Excellency in Council, pursuant to subsection.....of section.....of the .....Act, may be pleased to revoke the.....Regulations made by Order in Council P.C.....of (date) as amended, and to make the annexed Regulations.....in substitution therefor.

Respectfully submitted

.....

Minister of.....

APPENDIX C.

(Date)

To His Excellency the Governor General in Council:

The undersigned has the honour to recommend that Your Excellency in Council, pursuant to subsection.. of section.... of the .. Act, may be pleased to amend the.... Regulations made by Order in Council P.C. .... of (date), as amended, in accordance with the schedule hereto.

Respectfully submitted,

.....

Minister of.....

## APPENDIX I

EXHIBITS FILED WITH THE COMMITTEE

A.—Parliamentary Supervision of Delegated Legislation—by John E. Kersell.

B.—DONOUGHMORE REPORT

C.—STATISTICAL SUMMARY—C. L. Brown-John.

SOR/51-197

SOR/53-35

SOR/53-111

D.—Proposed Committee on Statutory Instruments; Parliamentary Supervision of Delegated Legislation in Canada—C. L. Brown-John.

E.—Growth of Discretions—Decline of Accountability by Eric Hehener.

F—An Act to provide for Central Filing and Publication of Regulations R.S.M. CH. 224.

G.—An Act to provide for Central Filing and Publication of Regulations CH. 420. R.S.S. 1965.

H.—Article by Sir Cecil Carr.

I.—Proceedings U.K. Committee on Delegated Legislation, 1953.

J.—Memo to Manitoba Scrutiny Committee—Rutherford.

K.—Draft letter—Jacques Fortier, DOT to Gordon MacLaren, Q.C. re: regulations. In answer to Submission: The Legality of Taxation by the Federal Government on Aviation Fuel and Oil—G. F. Maclaren.

L.—Delegated Legislation in Canada: Recent Changes in Machinery, J. R. Mallory; Canadian Journal of Economics and Political Science, Vol. XIX, No. 4. Nov. 1953.

M.—The Use of Legislative Committees, J. R. Mallory; Journal of the Institution of Public Administration of Canada, March 1963, Vol. VI, No. 1.

N.—Letter and sample copy of report of Scrutiny Committee of Manitoba Legislature.

O.—*A Preliminary Survey of the Canadian Statutes—FIRST REPORT*—prepared by Research Branch, Library of Parliament.

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Q.—United States *Administrative Procedure Act.*

R.—United States *Public Information Act* 80 Stat. 250 (1966)—Amendment to *Admin. Procedure Act.*

S.—Submission of Mr. John H. MacDonald, Q.C.

T.—*Control of Delegated Legislation*, 1958, by G. S. Rutherford.

U.—*Delegation and Discretionary Powers—Bill S-9—An Act to Amend the Interpretation Act* by G. F. MacLaren. (Bar Review Dec. 1966).

V.—Documents re New Zealand and Delegated Legislation.

W.—Material Supplied by Jerre S. Williams, Chairman, of the Administrative Conference of the United States—includes History, Selected Reports, problems and current projects of the Administrative Conference.

X.—Delegated Legislation—prepared by the Research Branch, Library of Parliament, November 2, 1966 (with following enclosures, listed on last page of document): Extract from Delegated Legislation—Recent changes in Machinery. Article published in Canadian Public Administration—J. E. Hodgetts and D. C. Corbett (The MacMillan Co.—1960)—pp. 504-514.

From Baldur Kristjanson, . . . Some Thoughts on Planning at the Federal Level. CANADIAN PUBLIC ADMINISTRATION. Vol. 8, No. 2, 1965 pp. 146-151.

E. A. Driedger. THE COMPOSITION OF LEGISLATION. Ottawa, Queen's Printer 1957. pp. 146-151 Chap. XVII, Delegated Legislation.

REGULATIONS ACT 1950.

Y.—Subordinate Legislation—Special lecture given to the law students at Queen's University, Kingston, on October 26, 1959, by Elmer A. Driedger, Q.C., B.A., LL.B., Assistant Deputy Minister of Justice, Ottawa, and Lecturer in Legislation and

Administrative Law at the University of Ottawa Law Faculty.

Z.—Reading List—October 2, 1968.

AA.—Reading List—October 3, 1968.

BB.—Legislative Review of Delegated Legislation—Mark MacGuigan.

CC.—Delegated Legislation in the U.S.A.—prepared by the Research Branch, Library of Parliament, January 9, 1969.

DD.—Copy of letter from Mr. G. S. Rutherford, Revising Officer, Legislative Building, Winnipeg, Manitoba, to Mr. Mark MacGuigan, M.P.—dated January 8, 1969 and Copy of letter from Mr. MacGuigan to Mr. Rutherford—dated January 16, 1969.

EE.—Interpretation Act (Assented to 7th July, 1967)—together with Broadcasting Act (Assented to 7th March, 1968).

FF.—The Enactment and Publication of Canadian Administrative Regulations—Elmer A. Driedger.

GG.—British Answers to Questionnaire on the Reform of Parliamentary Procedure through the System of Committees—Association of Secretaries General of Parliaments.

HH.—*Draft*—Chapter on *Subordinate Legislation* of the REPORT of the ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM.

II.—*Information for Transportation Companies,* published by the Department of Manpower and Immigration.

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The Queen's Printer, Ottawa, 1969

HOUSE OF COMMONS

First Session—Twenty-eighth Parliament

1968-69

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SPECIAL COMMITTEE

ON

# Statutory Instruments

*Chairman:* Mr. MARK MacGUIGAN

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PROCEEDINGS

No. 10

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TUESDAY, SEPTEMBER 16, 1969
WEDNESDAY, SEPTEMBER 17, 1969
THURSDAY, SEPTEMBER 18, 1969
TUESDAY, OCTOBER 7, 1969

---

*Respecting*

Procedures for the review by the House of Commons of instruments made in virtue of any statute of the Parliament of Canada.

20575—1

SPECIAL COMMITTEE
ON
STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

Edouard Thomas,
*Clerk of the Committee.*

(Quorum 7)

[*Text*]

# MINUTES OF PROCEEDINGS

TUESDAY, September 16, 1969.
(15)

The Special Committee on Statutory Instruments met this day, *in camera*, at 3.20 p.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*) (8).

*In attendance:* Mr. Gilles Pepin, Counsel to the Committee; Mr. J. W. Morden, Assistant Counsel.

The Committee discussed its draft report.

At 5.30 p.m., the Committee adjourned to 8.00 p.m. this same day.

EVENING SITTING
(16)

The Special Committee on Statutory Instruments met this day, *in camera*, at 8.05 p.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave (7).

*In attendance:* As for afternoon sitting.

The Committee discussed its draft report.

At 10.00 p.m., the Committee adjourned to 10.00 a.m. the next day following.

WEDNESDAY, September 17, 1969.
(17)

The Special Committee on Statutory Instruments met this day, *in camera*, at 10.15 a.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*), Murphy (9).

*In attendance:* As for the previous day.

The Committee discussed its draft report.

Moved by Mr. Marceau, and

*Agreed*,—That reasonable living and travelling expenses be paid to Mr. Pepin as of September 15, 1969.

At 12.55 p.m., the Committee adjourned to 3.00 p.m. this same day.



20575—1½

AFTERNOON SITTING
(18)

The Special Committee on Statutory Instruments met this day, *in camera*, at 3.25 p.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave, Muir (*Cape Breton-The Sydneys*), Murphy (9).

*In attendance:* As for morning sitting.

The Committee discussed its draft report.

At 6.05 p.m., the Committee adjourned to 10.00 a.m. the next day following.

THURSDAY, September 18, 1969.
(19)

The Special Committee on Statutory Instruments met this day, *in camera*, at 10.00 a.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, Marceau, McCleave (7).

*In attendance:* As for the previous day.

The Committee discussed its draft report.

At 12.45 p.m., the Committee adjourned to 3.00 p.m. this same day.

AFTERNOON SITTING
(20)

The Special Committee on Statutory Instruments met this day, *in camera*, at 3.05 p.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, Gibson, MacGuigan, McCleave (6).

*In attendance:* As for previous day.

The Committee discussed its draft report.

At 3.50 p.m., the Committee adjourned to the call of the Chair.

TUESDAY, October 7, 1969.
(21)

The Special Committee on Statutory Instruments met this day, *in camera*, at 10.26 a.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, MacGuigan, Marceau, Muir (*Cape Breton-The Sydneys*), Murphy (7).

*In attendance:* Mr. Gilles Pepin, Counsel to the Committee; Mr. J. W. Morden, Assistant Counsel.

The Committee discussed its draft report.

At 12.15 p.m., the Committee adjourned to 2.00 p.m. this same day.

AFTERNOON SITTING
(22)

The Special Committee on Statutory Instruments met this day, *in camera,* at 2.08 p.m., the Chairman, Mr. Mark MacGuigan, presiding.

*Members present:* Messrs. Baldwin, Brewin, Forest, MacGuigan, Marceau, Muir (*Cape Breton-The Sydneys*), Murphy (7).

*In attendance:* Mr. Gilles Pepin, Counsel to the Committee; Mr. J. W. Morden, Assistant Counsel.

The Committee discussed its draft report.

Moved by Mr. Murphy, and
*Agreed,*—That a letter and attachment from the President of the Privy Council dated September 30, 1969, be printed as an appendix to this day's proceedings. (*See Appendix J*).

Moved by Mr. Marceau, and
*Agreed,*—That the Chairman table in the House the Committee's Third Report as amended.

Moved by Mr. Forest, and
*Agreed,*—That the Committee's Third Report be printed in booklet form, 1000 copies in number with the English and French in the same booklet.

At 6.00 p.m., the Committee adjourned.

Edouard Thomas,
*Clerk of the Committee.*

## APPENDIX "J"

Ottawa, September 30, 1969.

Mr. Mark MacGuigan, M.P.,
Chairman,
House of Commons Special Committee
on Statutory Instruments,
Ottawa 4, Ontario.

Dear Mark:

I am writing to transmit to you, as Chairman of the House of Commons Special Committee on Statutory Instruments, the Government's answers to questions 13, 16, 17, 18, 21, 22 and 23 contained in the questionnaire relating to statutory instruments that was circulated by the Special Committee earlier this year. These questions, along with the government's answers, are set out for the convenience of members of the Committee in the form of an appendix to this letter, marked Appendix "A".

A further document entitled "An Analysis of the Grant of Power to make Regulations" is also attached as Appendix "B". This latter document, which is concerned with the analysis and classification of the major forms of grants of regulation-making power, is mentioned in Appendix "A" at page 7 thereof.

I trust that this material will prove to be useful to members of the Special Committee and will be of some assistance in the formulation of the Committee's views and conclusions.

Yours truly,

Don Macdonald.

encl.

APPENDIX "A"

*Answers to Questions 13, 16, 17, 18, 21, 22 and 23*

*Question 13:* Who specifically within your Department or Agency formulates the policies found in your regulations?

*Answer:* The Minister or other regulation-making authority formulates the policy found in regulations with such assistance and advice as he or it regards as necessary.

*Question 17:* Is there any reason why regulations could not be published within fifteen days of being made?

*Answer:* Regulations could be published within fifteen days provided all the necessary personnel and facilities were available. This would involve con-

siderable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

*Question 16:* What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the *Regulations Act*, R.S.C. 1952, Chapter 235?

*Question 18:* What circumstances would, in your view, justify the exemption from publication of a regulation?

*Answer:* Extension of the time normally allowed for publication of a regulation under s. 6(1) of the *Regulations Act*, R.S.C. 1952, Chapter 235 and exemption from publication of a regulation may from time to time be justified in the following circumstances:

(*a*) where notification or other form of communication would be more appropriate;

(*b*) where the safety and security of the country or part of it might be adversely affected;

(*c*) where information might be disseminated which could deleteriously affect Canada's foreign relations;

(*d*) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*;

(*e*) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;

(*f*) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with;

(*g*) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

*Question 21:* How would a person, both inside and outside of your Department or Agency, satisfy himself as to the authenticity of a regulation not transmitted, recorded, published or laid before the House in accordance with the *Regulations Act*, supra?

*Question 22:* How would you prove the authenticity of such a regulation in a court of law, should this be necessary?

*Answer:* Resort might be made to section 21 of the *Canada Evidence Act* which provides for the production of certified copies as the means of proving a proclamation, order, regulation or appointment made by or under the authority of the Governor in Council or of a Minister of the Crown or the Head of a Department.

*Question 23:* Please advise as to any suggestions or submissions which you may have respecting the improvement of the mode or process of conferring the power to make regulations and the preparation and bringing into effect of regulations.

*Answer:* Several matters might be considered in connection with reform of the formulation, enactment and review of statutory instruments.

*Firstly,* Parliament should take into account certain guidelines when enacting enabling legislation. It should be borne in mind by both Chambers

of Parliament that personal rights and liberties should not be unnecessarily curtailed. Therefore, when bestowing the power to make regulations upon a person or a rulemaking authority some care should be taken to ensure that the statute is not couched in unnecessarily wide terms. Specifically, certain powers should not be granted except after careful deliberation. These powers include the following:

(*a*) power in a statute or in a regulation made thereunder to exclude the ordinary jurisdiction of the courts;

(*b*) power to amend or add to the enabling Act or other Acts by way of regulation;

(*c*) power to make regulations having retrospective effect;

(*d*) power to subdelegate regulation-making authority;

(*e*) power by regulation to impose a charge on the public revenue or on the public other than fees for services;

(*f*) power to make regulations which might trespass unduly on personal rights and liberties;

(*g*) power to make regulations involving important matters of policy or principle.

When considering enabling legislation the Chambers of Parliament might reflect on whether the delegation of a rule-making power is best adapted to achieve the end desired.

*Secondly*, it would appear desirable for some form of scrutiny to be performed on a continuous basis and a Committee is proposed as the best device to exercise this function. The most appropriate composition of such a committee would appear to be a Joint Committee of members of the House of Commons and Senators. Such a Commitee should have the power to sit during the Parliamentary recess. The Committee should have the power to examine and scrutinize all regulations tabled in the House of Commons or in the Senate.

The Joint Committee for the Scrutiny of Delegated Legislation should have the power to call for oral and written explanations of regulations from the Department or Agency which originally proposed such regulations. The Committee should also have the power to remit regulations to the Department or Agency proposing such regulations. The power of remission would in no way affect the status as law of the regulations remitted, but would merely express the disapproval or concern of the Committee in a formal way. The Committee ought also to have the power to report to both Chambers of Parliament. It is envisaged that the Committee would make periodic reports at such intervals as it may determine. It is also expected that the Committee might make *ad hoc* reports for the purpose of drawing the attention of members of the House of Commons and Senators to particular regulations. This latter power would be exercised within the terms of reference of the Committee.

The assistance of qualified staff ought to be made available to the Committee.

The scope of enquiry of the Joint Committee for the Scrutiny of Delegated Legislation ought not to be limited and might include the following enquiries:

1. Does the regulation tend to oust the jurisdiction of the courts?

2. Does the regulation make unusual or unexpected use of the powers conferred by the enabling statute?
3. Has there been any unjustifiable delay in any stage of the making of the regulation?
4. Does the regulation have retrospective effect?
5. Does the regulation trespass unduly upon personal rights and liberties?
6. Is the regulation clear in meaning?
7. Does the regulation impose a charge on the public revenue or on the public other than fees for services?
8. Is the regulation authorized by the enabling statute, and is judicial determination of this question available in an adequate way?
9. Is it necessary for any reason for Parliament to pay special attention to the regulation?

Consideration might be given by both the House of Commons and the Senate to setting aside a certain time on a regular basis for consideration of the reports of the Committee. Both the *ad hoc* reports and the periodic reports of the Committee might be tabled and deliberation of both these types of report could be undertaken. The timing and length of such period of deliberation should depend on the frequency of the reports of the Committee and the wishes of the members of the two Chambers.

*Thirdly,* requests for broad subordinate legislation-making powers should ordinarily be accompanied by some appropriate pre- or post-review control. While it must be recognized that no mathematical or scientific formula can determine with precision those grants of power that should be subjected to pre- or post-review control, it does appear that control mechanisms such as those found in subsections (3) to (5) of section 5 of the *Atlantic Regions Freight Assistance Act* and in section 24 of the *Maritime Transportation Unions Trustees Act* can and should be resorted to more frequently than in the past.

In considering this problem, grants of legislative power can be analysed and classified into at least three forms or categories—see Appendix "B".

*Fourthly,* the *Regulations Act* or the regulations made pursuant thereto should be amended so as to provide for the authority of the Deputy Minister of Justice to review delegated legislation submitted in draft form for approval having in mind the various criteria and safeguards previously referred to; and consideration might also be given to having the Deputy Minister of Justice make a report to the Clerk of the Privy Council where, in his opinion, any draft regulation fails to meet those criteria or safeguards.

APPENDIX "B"

*An Analysis of The Grant of Power to Make Regulations*

The term "regulations" as here used is all embracing and is intended to equal the definition in the Regulations Act.

A regulation-making authority (abbreviated r.m.a.) includes all authorities other than Parliament itself.

1. *Forms of Grant*

There are three distinct major forms:

(1) Power to make a particular regulation as described in the Act;
(2) Power to make regulations for a specified purpose;
(3) Power to make regulations in relation to a subject-matter.

Forms 2 and 3 are recognized (with slight difference in name only) in the Nolan case (P.C.). Form 1 is added to complete the picture.

There may also be combinations and fusions of these three distinct forms.

2. *Particular Regulation*

This is a power to make a regulation the nature and content of which is described in considerable detail by Parliament itself. Thus, a regulation "to prohibit the import of used automobiles" leaves virtually no elbow room. The r.m.a., and only he, can do just that; nothing more.

The characteristics of this form of power are that in the normal case it is tightly limited and the terms of the regulation are predictable. There can seldom be any surprises.

The *Public Service Superannuation Act* is a good example of powers of this class.

3. *Specified Purposes*

In this form the power given is to make regulations for the attainment of certain objectives or purposes. This is considerably wider than Form 1. The extent of the power depends on the statement of purposes.

The purposes may be governed by the "intent of the Act". Thus, the power may be to make regulations "for carrying the purposes and provisions of this Act into effect", or it may be for certain stated purposes that are clearly ancillary or subordinate to the "intent of the Act" as revealed by the other provisions in the Act. In both these cases, there is a degree of legislative control, enforceable by the courts. The courts can ascertain the "intention of Parliament" from the terms of the Act as a whole, and can say whether the regulation is or is not for the stated purpose. Also, if the purposes of the Act as a whole govern, the nature and kind of regulations that may be made can be envisaged.

The purposes, however, may be stated independently, outside the umbrella of the Act as a whole. Thus, a single-section statute could empower a r.m.a. to make regulations "for promoting the economic welfare of Canada". Or, in an Act with broad purposes (e.g. emergency powers) a statement of purposes might have no discernible verbal relationship to any other provision of the Act. Powers of this kind can be extremely broad—the broader the purpose the greater the power. With a wide purpose, it is very difficult to say that a regulation is clearly outside the purposes, and it is difficult to imagine what kind of a regulation might be made. Hence, there is little legislative or judicial control.

4. *Specified Subject-matter*

Power to make regulations may be in the form of power to make regulations *in relation to* a stated subject-matter. This is the broadest form, because a *relationship* to a general subject can easily be manufactured. Note that sections 91 and 92 of the *B.N.A. Act* take this form.

The characteristics of this form are that there is virtually no limitation on the power by the terms (purposes, intent, etc.) of the Act itself, but only by

the words conferring the power. Since "relationships" can be almost anything, it is also difficult to predict with any degree of accuracy the range of regulations that fight be made. Again, the broader the subject, the greater the power.

The courts do have control, for they can say that a particular regulation is not in relation to the stated subject, but the broader the subject or the more general the words describing the subject, the more difficult it becomes for the courts to strike down a regulation.

Two statutes illustrate how powerful these two forms, purposes and subjects, can be. The *War Measures Act* (purposes) and the *Fisheries Act* (subject).

5. *Judicial Control*

In all three forms, the courts do have a degree of ultimate control. They can say that a regulation is not

(1) of the kind described—class 1

(2) for the purposes described—class 2

(3) in relation to the subject described—class 3.

This power may be seriously eroded or even taken away by the familiar phrase "as he deems necessary, desirable, expedient, etc." Thus, where power is conferred to make regulations

(1) "prescribing such fees as he considers necessary" (class 1),

(2) "as he deems necessary for the purpose of" (class 2), or

(3) "as he deems to be in relation to" (class 3),

the courts have little more than a theoretical power to strike down. (For example, *War Measures Act*—Chemicals Reference). The test whether the regulation falls within the Act is thus converted from objective to subjective.

6. *Sub-delegation*

Whether a r.m.a. can delegate to another r.m.a. is largely a matter of construction. There is probably no valid argument against sub-delegation in Forms 2 and 3. A delegating regulation can be said to be for the purpose, or in relation to a subject, specified in the Act.

7. *The regulation-making authority*

For the most part, power to make regulations is under Federal Statutes conferred on the Governor in Council. This has certain advantages and disadvantages.

It is a disadvantage because it is almost impossible for the Governor in Council (which in Canada must be equated to the Cabinet) to examine proposed regulations even superficially, yet, under our theories of Cabinet and party solidarity, the whole Cabinet and party in power must defend them.

If regulations are made by *Ministers*, the same considerations do not necessarily apply. For the most part the Minister would make his regulations himself (with the advice and assistance of his staff and the Department of Justice) and he would take responsibility for them. He would, of course, be well advised to consult his colleagues or Cabinet on important matters of policy, but the ultimate responsibility would be his and not that of the Government collectively.

Certain Boards, Commissions, etc., also have authority to make regulations. Procedural and administrative regulations can properly be made by them on

their own, but the power to impose fees or penalties should not be broadly conferred without some control.

8. *Control*

The question to be considered is whether any class of grant of power to make regulations should be subjected to some form of control.

There is no mathematical or scientific formula for deciding what classes of grants should be subjected to further Parliamentary control. This is largely a matter of degree and judgment, and one can only suggest a few general principles or approaches.

There are some situations that are fairly clear.

First, the "deems necessary" formula could be eliminated in all but a few exceptional cases. This changes the test of validity from subjective to objective and automatically re-instates judicial control.

Secondly, class 1 grants of power should not cause much difficulty. In most cases there is full legislative control; the regulation that may be made is minutely described, almost to the point where it might be said that Parliament itself has made the regulation, except for minor details. It must be pointed out, though, that class 1 can also be wide and powerful. Thus, authority to make a regulation "prohibiting the import or export or interprovincial movement of any article" is a wide grant because it is vague and general. A case of this kind would need a second look. In the ordinary case, however, class 1 powers are administrative, procedural, subordinate or ancillary, and should not be objectionable.

Class 2 — purposes — may be objectionable or unobjectionable, depending on the terms of the Act and the terms of the power. The thing to look for here is whether the purposes, are expressed in, governed or limited by, or ascertainable from the provisions of the Act *other than the section in which the power is conferred.*

Thus, power to make regulations "to carry out the purposes and provisions of this Act" should be unobjectionable. Similarly, an Act that is complete or detailed one, with an ascertainable overall intent or scheme, would govern the regulation section.

The Acts that should arouse suspicion are those that are only "sketch" Acts and have little in them other than the grant of legislative power, and those Acts where the language of the powers cannot be restricted or controlled by the language of the Act as a whole. But even these powers are not to be condemned outright; it remains to examine the terms of the power itself to see if the degree of legislative control falls short of an acceptable level. Thus the power to make regulations respecting sea coast and inland fisheries is too wide; but power to make regulations respecting the maintenance and operation of interprovincial or international ferries is not. It is a question of judgment and degree.

Class 3, because it lists subjects, is not so easily identifiable with the purposes of the Act. The words used in conferring the power may get their meaning from the whole Act, but it is not as easy to relate subjects to purposes as it is purposes to purposes. Even in a long and detailed Act, subjects can easily be slipped into the power section that bear no discernible relationship to anything else in the Act. Hence, class 3 must be looked at as being suspect. In many cases, the only legislative control may be in the words conferring the power, and we are back to judgment and degree. Power to make regulations

with respect to the licensing of interprovincial ferries may be unobjectionable, but not so a power to make regulations with respect to navigation and shipping.

What is needed for classes 2 and 3 is first to work out the broadness of the description of purposes or subject and then to decide what is acceptable to Parliament and to the people.

9. *Tests for Need to Control*

Two approaches may be taken to see whether a power should be controlled. They are not mutually exclusive, and in some cases come to the same thing.

One is, can the regulations that may be made be predicted with reasonable accuracy? Does the public know what it may expect?

With class 1, there is little difficulty. With class 2, if the purposes are in the Act itself and not just in the power section, it is probably unobjectionable. But if the purposes are described only in the power section, and it is so wide that the public cannot tell what it is going to get, then some safeguards should be inserted or the broad language should be cut down.

With class 3, we depend more on the words of the power alone. The swing should be away from broad general language, and the subject-matter should be closely defined so that we know what to expect. Also a general statement, describing the purposes for which regulations might be made, could be inserted. An example is the *International River Improvements Act.*

Classes 2 and 3 may be combined and thereby impose a double test. Thus the Governor in Council may *for the purpose of* etc. make regulations *in relation to.* This form gives a better clue to what is needed, and provides more room for limiting power by interpretation of the whole Act. The public then has a better idea of what to expect.

Another approach is to ask what legislative control there now is, and whether it is enough. Has Parliament said, expressly or by implication, what kinds of regulations may be made or what they are to be. Bare powers of class 2 and 3 should be looked at with care, and if they are too broad to be acceptable, steps can be taken to cut them down. If the Act is a detailed or full one, the power can be tied to the purposes of the Act. If the Act is a "sketch" Act, the powers should be described in language that leans to the particular rather than the general. And, as indicated above, purposes and subjects can be coupled so as to cut down on broad powers.

10. *Parliamentary Review*

The most effective check on the exercise of power to make regulations is a close examination of the power itself when the Bill to grant it is before Parliament.

Secondly, members should read regulations and protest against any they do not like. Regulations are published and tabled. Greater use should be made of political weapons. Genuine control must necessarily be primarily political rather than procedural. Publicity and criticism, in the analysis, are the real safeguards.

There are two prerequisites to effective Parliamentary review:

(1) members must read regulations; and

(2) time must be made available to members to speak about regulations after they are tabled.

A House scrutiny committee might well be an effective means of providing opportunity for public examination and criticism. The main functions of such a committee would be to expose regulations to the glare of publicity and bring to the attention of the government and the public any objectionable features thereof.

11. *Judicial Review*

Almost certainly the most effective review power by the judiciary is to declare a regulation *ultra vires*.

Any court, from a Justice of the Peace to the Supreme Court of Canada can hold that a regulation is *ultra vires*. But obviously much depends on the nature of the power. If there are adequate legislative controls as previously described, a very important protection against abuse of power is available.

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QUEEN'S PRINTER FOR CANADA, OTTAWA, 1969

HOUSE OF COMMONS

CANADA

# THIRD REPORT

of the

# SPECIAL COMMITTEE

on

# STATUTORY INSTRUMENTS

MARK MacGUIGAN

Chairman

SESSION 1968-69

HOUSE OF COMMONS

CANADA

# THIRD REPORT

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# SPECIAL COMMITTEE

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# STATUTORY INSTRUMENTS

MARK MacGUIGAN

Chairman

SESSION 1968-69

20892—1

## CORRECTIONS

Page 1 — Line number 12, *insert*: Mr. McIntosh was replaced by Mr. McCleave on April 21st 1969.

Page 2 — 3rd paragraph from top: *add the name of* Professor J. E. Kersell

Page 36 — Line 4 from top: *delete* it has
*insert* 17 of these have

Page 40 — Line 36 from top: *delete*

**(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.**

It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

Page 41 — Line 15 from top: *insert* (Emphasis has been added to quotations listed in section (i)).

Page 42 — After 2nd paragraph *insert new paragraph*

**(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.**

It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

Page 53 — Line 21 from top: *insert* (Emphasis added).

Page 91 — Line 18: section (j): *delete* (page 40).
*insert* (page 42).

The Special Committee

on

Statutory Instruments

has the honour

to present its

THIRD REPORT

## SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS

*Chairman:* Mr. Mark MacGuigan

*Vice-Chairman:* Mr. Gilles Marceau

and Messrs.

| | | |
|---|---|---|
| Baldwin, | Hogarth, | Murphy, |
| Brewin, | McCleave, | Stafford, |
| Forest, | Muir (*Cape Breton-The Sydneys*), | Tétrault—(12). |
| Gibson, | | |

Edouard Thomas,
*Clerk of the Committee.*

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# PREFACE

This Report is based on the assumption that public knowledge of governmental activities is the basis of all control of delegated legislation. For parliamentary democracy is a system of government which requires that the executive be responsible to the legislature and that both be accountable to the people, and there can be neither responsibility nor accountability where there is no knowledge of what has been done. In political matters knowledge is the beginning of power, and its lack, impotence.

There are many forms of executive and administrative secrecy. The practice of secrecy relates to such varied matters as the availability of government documents to scholars, the production of official documents in litigation, security screening of individuals and classification of documents, and general access to information about government programs and operations. Your Committee can agree with the view of Dr. D. C. Rowat that the general tradition of administrative secrecy "is based on an earlier system of royal rule in Britain that is unsuited to a modern democracy in which the people must be fully informed about the activities of their government" ("How Much Administrative Secrecy?" (1965) *Canadian Journal of Economics and Political Science,* vol. 31, p. 479 at p. 480). But other bodies have been and are conducting studies of many of these matters, and your Committee wishes to confine itself solely to the area of delegated legislation. Your Committee's contention is, therefore, that there should be, as a general rule, public knowledge of the processes of delegated legislation before, during, and after the making of regulations, and that any derogation by government from this rule requires justification.

Your Committee adopts this position for five reasons. First, the people cannot control their government without knowledge of its actions, nor can Parliament fulfil its role of responsibility with respect to legislation without being fully informed on the operation of those legislative powers which it has delegated to others. Second, the existence of secrecy is likely to lead to popular suspicion of wrongdoing by government whether or not there is any genuine reason for suspicion. Third, we are living today in a period



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in which the validity of authority can no longer be taken for granted but must be constantly demonstrated. Governmental systems which do not take this new attitude seriously are apt to find public confidence in them diminishing rapidly. Obviously a continuing demonstration of the justice of the system necessitates an opening of the processes and products of delegated legislation to the light of publicity. Fourth, your Committee has been able to find no reason, either theoretical or practical, except the force of tradition, why there should not be publicity in the making of regulations. Canadian governments appear to have remarkably little to hide, and therefore nothing to lose, from openness except their psychological investment in existing practices. Indeed, publicity can have the positive value for administrators of helping them to improve weaknesses in their system. Fifth, since regulations have the force of laws, they should be made by processes which as far as possible approximate the openness of the general legislative process.

Just as publicity has a curative value inasmuch as it contains the possibility of exposure of error and stupidity through criticism, so your Committee believes the act of publicizing parliamentary criticism of specific regulations, or of governmental practices in delegated legislation, performs an important service even in the absence of sanctions. Undoubtedly, Bernard Crick goes too far in taking the position that parliamentary control of the executive must mean "*influence,* not direct power; *advice,* not command; *criticism,* not obstruction, *scrutiny,* not initiation, and *publicity,* not secrecy" (*The Reform of Parliament* (1964), p. 77), for parliament must retain ultimate direct control of the executive or lose its status altogether. But your Committee has nevertheless concluded that parliamentary control over delegated legislation should not be such as to automatically threaten the life of the government over every controverted regulation but, rather, such as to keep the government responsive to the views of members of parliament and to the feelings of the public. In short, your Committee has chosen to stress the principle of the responsibility of the executive to parliament for delegated legislation as well as for the enactment of statutes.

Your Committee's proposals to implement the principle of "open government" will urge full consultation with the public and with parliamentary standing committees *before* the making of regulations, the extension of the ambit of the present internal scrutiny of regulations by the Privy Council Office and the Department of Justice *during* the making of regulations, and full publication of regulations *after* they have been made, as well as your Committee's principal institutional recommendation, the establishment of a new Standing Committee on Regulations to provide an initial subsequent scrutiny, followed by the referral of appropriate regulations to the other Standing Committees for further consideration. It is your Committee's intention that the meetings and reports of this new Committee would be public.

In addition, your Committee proposes the establishment of guidelines for the enabling legislation which originally confers on the executive the right to make delegated legislation.

Your Committee's proposals for the fuller implementation of responsible

government will recommend the assumption of complete responsibility for independent bodies which have the power to make regulations and, especially the duty of the government to justify to parliament any departures from the ordinary rules of good regulation-making.

Your Committee believes that in calling for a renewed dedication to the principles of open and responsible government it is not proposing a fundamental change in the character of our system of parliamentary democracy but is rather attempting to actualize potentialities of our present system which can no longer be allowed to remain latent. In sum, your Committee is proposing a much needed reform, not the abandonment of our form of government. It is your Committee's hope that its recommendations will contribute a new dimension to our system of law-making.

Chapter 1

# Introduction

## 1. *Terms of Reference and Program*

The Special Committee on Statutory Instruments was appointed by order of the House of Commons on September 30, 1968, with the following order of reference:

> *Resolved*,—That a Special Committee of twelve Members, to be named at a later date, be appointed to consider and, from time to time, to report on procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.

On November 8, 1968, the House further ordered:

> That the Special Committee on Statutory Instruments appointed on September 30, 1968, be composed of the following Members: Messrs. Baldwin, Brewin, Forest, Gibson, Hogarth, MacGuigan, Marceau, McIntosh, Muir (*Cape Breton-The Sydneys*), Murphy, Stafford and Tétrault.

At the first Committee meeting on November 13, 1968, Dr. Mark MacGuigan and Mr. Gilles Marceau were elected chairman and vice-chairman respectively.

On July 10, 1969, the House made the following additional order:

> That the powers of the Special Committee on Statutory Instruments, appointed by order of the House on September 30, 1968, be extended by adding the following powers:
>
> > To consider and, from time to time, to report on the adequacy of existing statutory authority for the making and publication of Statutory Instruments and on the adequacy of existing procedures for the drafting, scrutiny, and operational review of such instruments, and to make recommendations with respect thereto.

The enlargement of the order of reference by the House of Commons recognizes that an assessment of the processes for reviewing delegated legislation cannot be conducted apart from a consideration of the statutory provisions authorizing them, a point of view with which your Committee fully concurs.

Dr. Gilles Pépin, then Dean of the Civil Law Section at the University of Ottawa, and Mr. John W. Morden, barrister-at-law of Toronto, were appointed Counsel and Assistant Counsel respectively on February 13, 1969

(effective on February 17, 1969, with the adoption by the House of the Committee's Second Report). Your Committee has also had the services of Dr. Henriette Immarigeon of the Research Branch of the Parliamentary Library. Your Committee wishes to express its great indebtedness to Dr. Pépin, Mr. Morden, and Dr. Immarigeon for their faithful and perceptive service.

Your Committee's investigations and research have taken four main forms: the examination of witnesses at Committee hearings; the canvassing of the information and viewpoints of all government departments and agencies by means of a questionnaire (*See Minutes of Proceedings and Evidence,* pp. 46-47); a consolidation of the voluminous literature which exists on the subject of delegated legislation; and the preparation of a survey of the enabling clauses in all the statutes of Canada.

With respect to your Committee's hearings we are grateful to those who gave evidence before us. They are: Professor H. W. Arthurs; Professor C. L. Brown-John; Professor J. R. Mallory; Professor A. S. Abel; Mr. G. S. Rutherford; Mr. C. B. Koester; Professor D. J. Baum; and officials from the Department of Transport, the Department of Manpower and Immigration, the Privy Council Office and the Department of Justice, in addition to Hon. Donald S. Macdonald, the President of the Privy Council, and Hon. John Turner, the Minister of Justice.

Within the purview of your Committee's particular inquiry, many able scholars and others interested in the subject of delegated legislation have written extensively, profoundly and usefully on the very problems with which we are concerned. Your Committee frankly acknowledges that it has heavily drawn upon their work in the preparation of its Report.

Your Committee has, as it intended to do, canvassed the experience of many other countries, especially Commonwealth countries, in the course of its studies, but it has not found it advisable to set out this learning in its Report except where it appeared to be relevant in a particular context.

Despite the presence of the phrase "statutory instruments" in its name, your Committee has preferred throughout to use the more ordinary term "regulations", to describe our subject matter. Your Committee gives "regulation" the general meaning of any exercise of legislative power under the authority of a statute, and defines it more exactly in Chapter 2.

## 2. *The Necessity of Delegated Legislation*

The federal Administration—a modern synonym for the word "Executive"—is composed of numerous authorities having varying degrees of independence from Parliament: the Governor in Council, Ministers, Crown Corporations, various Boards and Commissions often called "administrative tribunals" and public officers who are sometimes designated by statutes ("persona designata") to perform particular acts. One of the principal activities of the Administration is law-making. First of all, the administrative authorities and their staffs play an important role in the preparation of the statutes enacted by Parliament itself, since that vast majority of legislative

proposals originate in the Administration. However, it is also now commonplace for the Administration to make laws directly, without having to observe the complex but safeguarding rules of parliamentary procedure, for Parliament frequently delegates to it its own legislative power, i.e., the power to enact general rules of conduct, which confer legally enforceable rights on citizens and impose legally enforceable obligations on them.

Hence, section 22 (3) of the *Customs Act,* R.S.C., 1952, ch. 58, as amended bestows regulation-making authority on the Governor in Council:

> The Governor in Council may make regulations prescribing
> (*a*) the terms and conditions upon which goods may be entered into Canada free of any requirement that the importer shall, at the time of entry, pay or cause to be so paid all duties on the goods so entered inwards; and
> (*b*) the terms and conditions of any bond, note or other document presented upon the entry of such goods in respect of the duties thereon.

*The National Library Act,* R.S.C. 1952, ch. 330, on the other hand, gives regulation-making power to the Minister (the Secretary of State) in section 11(4):

> The Minister may make regulations
> (*a*) respecting the quality of the copies required to be delivered to the National Librarian of any book the copies of which are not of uniform quality;
> (*b*) prescribing generally the classes or kinds of books in respect of which only one copy is required to be delivered to the National Librarian; and
> (*c*) prescribing the classes or kinds of books in respect of which no copies are required to be delivered to the National Librarian unless specially requested by him.

The *Broadcasting Act,* S.C. 1967-68, ch. 25, section 16(1), gives to the Canadian Radio Television Commission, a body independent of the Ministry in its operation, power to:

> (*a*) prescribe classes of broadcasting licenses;
> (*b*) make regulations applicable to all persons holding broadcasting licenses, or to all persons holding broadcasting licenses of one or more classes
> (i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph (*d*) of section 2 (varied and comprehensive programming, balanced opportunity for the expression of differing views on matter of public concern, high standards, etc.),
> (ii) respecting the character of advertising and the amount of time that may be devoted to advertising,
> (iii) respecting the proportion of time that may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character and the assignment of such time on equitable basis to political parties and candidates, . . .
> (vi) prescribing the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs,
> (vii) with the approval of the Treasury Board, fixing the schedules of fees to be paid by licensees and providing for the payment thereof,
> (viii) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify, and,
> (ix) respecting such other matters as it deems necessary for the furtherance of its objects . . .

The Parliament of Canada has the authority to delegate its legislative powers to the federal administrative authorities (*Hodge v. The Queen,* (1883-84) 9 A.C. 117; *Liquidators of Maritime Bank of Canada v. Receiver General of New Brunswick* [1892] A.C. 437), but it cannot delegate them to the provincial Legislatures (*Attorney-General of Nova Scotia v. Attorney-General of Canada.* [1951] S.C.R. 31), although this principle does not preclude delegation by Parliament to a provincial administrative authority, e.g. a provincially appointed and controlled board (*P.E.I. Potato Marketing Board v. Willis* [1952] 2 S.C.R. 392; *Coughlin v. Ontario Highway Transport Board,* (1968) 68 D.L.R. (2d) 384).

Parliament can delegate its legislative powers. It cannot abdicate them (*Re Gray,* (1918) 57 S.C.R. 150), but the distinction between abdication and delegation seems to have no practical meaning, as long as Parliament can revoke at any time the specific power granted and can nullify anything done under it. As a judge has pointed out,

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not to be considered. (Anglin J., in *Re Gray,* (1918) 57 S.C.R. 150, at p. 176).

But as for delegation, there is no difficulty:

> If then both the law which gives delegated power, and the volition, are those of the legislature, is not the question of abdication a political one for the electorate rather than a constitutional one for the courts? (B. Laskin, *Canadian Constitutional Law,* (3rd ed., 1968) p. 45).

Four hundred and twenty of the 601 Acts of Parliament examined by the Committee (constituting substantially all of the statutes now in force) provide for delegated legislation. Moreover, a substantial majority of the answers given to question No. 2 of the Committee's questionnaire stated that statutory powers to make regulations have been used very extensively. The following statistics confirm this impression: 6,892 regulations covering 19,972 pages were published in the *Canada Gazette* during the period from January 1, 1956, to December 31, 1968, an average of 530 regulations a year. This does not take into account those regulations which are expressly exempted from publication and also some documents which are perhaps in fact of a legislative nature but are not officially considered to be so by the regulation-making authority.

The reasons usually given to justify the delegation by Parliament of the power to make laws are: lack of parliamentary time; lack of parliamentary knowledge on technical matters; the necessity of rapid decisions in cases of emergency; the need to experiment with legislation, especially in a new field; the need for flexibility in the application of laws; and unforeseen contingencies which may arise during the introduction of new and complex pieces of legislation. It also seems that the force of precedent has some bearing on it; sections conferring powers of delegated legislation now tend to be considered as standard clauses by the draftsmen of statutes.

Uneasiness respecting the extent of delegated legislation began to be evident in England toward the end of the nineteenth century, just at the

time that it began to be a frequently used device. The concern multiplied in proportion with its growth. Hence, delegated legislation formed one of the matters referred to the United Kingdom Committee on Ministers' Powers, whose report was published in 1932 (Cmd. 4060); it was also of some concern to the American Committee on Administrative Procedure, whose report was published in 1941. Since that time, although it has continued to grow in bulk and importance, in Britain, in Canada, in the United States and elsewhere, it has not been a subject of such controversy. In the United States, the practice has been accepted by the Courts, although the U.S. Constitution prescribes explicitly that "All legislative powers herein granted shall be vested in a Congress" (Article 1). The contemporary consensus was probably put by Mr. A. Beuvan, before the British Select Committee on Delegated Legislation, in 1953: "There is now general agreement about the necessity for delegated legislation; the real problem is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control".

The same situation seems to prevail today in the United States, despite the constitutional provision just noticed. "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard" said the United States Supreme Court in 1935; the enabling legislation, in other words, must contain a framework within which the administrative action is to be confined. But according to Professor Schwartz,

> It cannot be denied . . . that the attitude of the American Court toward the delegation problem has changed substantially . . . But, if standards such as those contained in the Renegotiation and Communications Acts (to do what is in the public interest or necessary) are upheld as adequate, it becomes apparent that the requirement of standards has become more a matter of form than substance. Provided that there is no abdication of the Congressional function . . . the enabling law will be upheld, even though the only standard which the Court can find is so broad as to be almost illusory. (*An Introduction to American Administrative Law* (2nd ed. 1962), p. 42).

Today, therefore, critics of regulation-making do not seek to deny its necessity in some form; their complaints have been aimed rather against the volume and character of delegated legislation than against the practice itself. (*Report of the Committee on Ministers' Powers,* 1932, p. 53). The more fundamental of the criticisms can be summarized as follows: the parliamentary tendency to enact statutes in skeleton form, leaving the "details" to be filled in by regulations—such regulations being often the very matters that are of most importance to the citizen; uncertainty in enabling statutes as to the extent of the area regulations are intended to cover; sweeping or subjective terms used in enabling acts which exclude the judicial control of the regulations made under their authority; lack of public debate, and inadequate consultation of all interested parties before the making of the regulations; lack of precision in the form and content of the regulations; inadequate publicity given to the regulations after they are made; inadequate parliamentary control over the regulations; and the danger that civil servants may be transformed into our masters.

Each of these criticisms is important, but they do not destroy the case for delegated legislation. They were put in proper perspective by the Donoughmore Committee:

> Their true bearing is rather that there are dangers in the practice; that it is liable to abuse; and that safeguards are required . . . The problem which the critics raise is essentially one of devising the best safeguards. (*Report of the Committee on Ministers' Powers,* 1932, p. 54).

This is also the approach espoused by Louis L. Jaffe's *Judicial Control of Administrative Action* (1965) at pages 85-86:

> A positive approach to the dangers of delegation is to develop the many devices for safeguarding and improving its operations. We have already discussed some of them: the legislative settlement of the guiding principle particularly of legitimately disputed questions of policy; legislative scrutiny of administrative action with a view to revision; rule making with an insistence on a precision which cannot obtain in the basic legislation. Beyond these lies the whole field of procedure which at the same time is the condition of the power being fulfilled and the safeguard of its legitimate exercise.

Your Committee does not accept an abstract analysis of the principle of the separation of powers which would regard regulation-making as a proper function of the legislative branch of government, grudgingly bestowed on the executive because of the human deficiencies of legislators. We believe rather that there is, properly as well as practically, an executive function of subordinate law-making. But we also believe that, because it is a delegated power, the delegator, Parliament, has a continuing responsibility to ensure its well-functioning in the public interest.

It is in this spirit that your Committee has examined the functioning of the Canadian system of delegated legislation and proposes the correction of certain malfunctions.

Such correction, on a continuing basis, necessitates an after-the-fact control, and we therefore agree with Griffith and Street on the importance of controls:

> The real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power belongs to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action. (*Principles of Administrative Law,* (2nd ed., 1963) p. 16).

Your Committee believes that the controls it recommends will provide the safeguards necessary to limit the executive power of law-making without interfering unduly with its exercise.

Chapter 2

# The Making of Regulations

## 1. *The Legal Requirements*

Parliament adopted the *Regulations Act* in 1950 (S.C. 1950, ch. 50, now R.S.C. 1952, ch. 235), without too much debate; its main purpose was to provide a system of publication for regulations. This can be seen from its official title: "An Act to provide for the Publication of Statutory Regulations", and from a statement made at the time by Prime Minister St. Laurent:

> The main purpose of the bill is to ensure that all orders, regulations and proclamations, made or issued in the exercise of legislative powers delegated by parliament, are published and tabled in a systematic and uniform manner. There is no provision here for enlarging the powers to make orders or regulations. It is merely to deal with the exercise of powers already existing under prior legislation. It is to provide that there be one uniform system of tabling and publishing these orders. Such publication and tabling is to be compulsory .... We feel that the time has now come when we can bring to parliament something that should be practical and workable, and which may not have to be varied too frequently or too soon. This does provide unequivocally for the compulsory publication and tabling of all instruments made under the delegated legislative powers; that is the sole purpose of this measure. Although largely based on the statutory orders and regulations order, 1947, this bill will further clarify and extend the procedure, in order to ensure that it covers the whole field of delegated legislation. (*Debates of the House of Commons,* 1950, p. 3039-3040).

The problem of publication will be dealt with later in this report, but there is more in the *Regulations Act,* and in the regulations that were adopted under its authority ("*Regulations made under Section 9* of the *Regulations Act,* P.C. 1954-1787"), than the matter of publication. Much in the way of the actual statutory safeguards turns on whether a regulation is "caught" by the provisions of the *Regulations Act.* If a regulation is so caught, it is submitted to the following prescriptions:

(1) According to the requirements of the *Regulations made under the Regulations Act,* section 4:

> Two copies of each proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

(2) According to the *Canadian Bill of Rights,* S.C. 1960, ch. 44, s. 3:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

And the *Bill of Rights Examination Regulations,* sections 4-7, SOR/61-16:

> 4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act shall before the making of the proposed regulations, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.
>
> 5. Forthwith upon receipt of a copy of a proposed regulation transmitted by the Clerk of the Privy Council ... the Minister [of Justice] shall
>
> (*a*) examine the proposed Regulation in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Bill of Rights; and
>
> (*b*) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed Regulation has been examined as required by the Canadian Bill of Rights;
>
> and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council.
>
> 6. Where any of the provisions ... of any proposed regulation examined [by the Minister] are ascertained by the Minister to be inconsistent with the purposes and provisions of the Canadian Bill of Rights, the Minister shall make a report in writing of the inconsistency and shall cause such report to be deposited with the Clerk of the House of Commons in accordance with Standing Order 40 of the House of Commons at the earliest convenient opportunity.
>
> 7. A copy of every report made by the Minister ... shall, where such report relates to a proposed regulation, be transmitted to the Clerk of the Privy Council forthwith upon the making thereof.

(3) According to section 3(1) of the *Regulations Act*:

> Every regulation-making authority shall, within seven days after it makes a regulation, transmit copies of the regulation in English and in French to the Clerk of the Privy Council.

(4) According to section 3(2) of the *Regulations Act* and to section 5 of the *Regulations made under the Regulations Act*:

> A copy of a regulation transmitted to the Clerk of the Privy Council ... other than one made by the Governor in Council or the Treasury Board, shall be certified by the regulation-making authority to be a true copy of the regulation.
>
> Three copies in English and one in French of every regulation, one copy of which shall be certified, shall be transmitted to the Clerk of the Privy Council, in accordance with section 3 of the Act.

(5) According to section 4 of the *Regulations Act*:

> The Clerk of the Privy Council shall maintain a record in which he shall record the regulations transmitted to him ... [and] every regulation recorded under this section shall bear a number assigned to it by the Clerk of the Privy Council ....

(6) According to section 6(1) of the *Regulations Act*:

> Every regulation shall be published in English and in French in the Canada Gazette within thirty days after it is made.

(7) According to section 7 of the *Regulations Act*:

> Every regulation shall be laid before Parliament within fifteen days after it is published in the Canada Gazette or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

If a regulation is not a "regulation" as defined in the *Regulations Act,* then it is not, at least by virtue of this Act, subject to any of these processes. The reach of the Act is thus established by the definition of "regulation" set forth in section 2 thereof, and by the power given to the Governor in Council, in section 9(2), to exempt regulations from the operation of the principal provisions of the *Regulations Act,* and in the result, from the scrutiny provision of the *Canadian Bill of Rights.*

## 2. *The Legal Status of Regulations*

The regulations made by the Administration are known collectively as delegated or subordinate legislation.

The expression "delegated legislation" indicates that an administrative authority is allowed to make a regulation only when Parliament has delegated to it the power to do so:

> ... every order-in-council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from a subordinate agency derives its legal force solely from ... [an] Act of Parliament. All such instruments derive their authority from the statute which creates the power, and not from the executive body by which they are made. (Duff J., *Chemicals Reference,* [1943] S.C.R. p. 1, at p. 13).

There is only one exception to this principle; the Royal prerogative can also authorize the Governor General to make regulations, although this power is ordinarily used in a non-legislative way. The prerogative was the object of some concern in the House of Commons in 1967 (*Debates,* p. 592-599 and 827-829) and the then Minister of Justice, the Honourable P. E. Trudeau, explained it as follows:

> I was asked to give examples of cases where a regulation, in this general sense, could be made under the authority of the governor in council and not by virtue of a statute. I answered in a general way that there would be many such cases where the governor in council acts by virtue of the royal prerogative, which of course is the most obvious one.
>
> The hon. member asked me for some other examples. I shall give a few today in the hope this will help the discussion. For instance, Mr. Speaker, when an ambassador is appointed under the Great Seal, this is done by the governor in council but not by virtue of any statute. This action is taken under a prerogative which, from time immemorial, has belonged to the king or queen under our form of government and has come down by way of prerogative to the governor in council who exercises the executive power. This is an example of a prerogative where an action is taken without the authority of a specific statute.
>
> Another example is when the governor in council appoints a person as a queen's counsel or indeed confers upon him some other honour. These actions are not taken under the authority of any particular statute. It is a matter of the royal prerogative as it has been understood in this country....
>
> I should like to give another example of action taken or regulations made under the authority of the governor in council but not authorized by statute. I cite the proclamation of a day to be observed, either in part or in totality, as a public holiday. There is no statute of which I know which authorizes the governor in

> council to do that. As an employer the government can do this. The government can decide to issue some rule, regulation, bylaw, whatever it is called in this definition, to the effect that today the employees can go home at three o'clock in the afternoon. This action is not taken under the authority of a statute. . . . (*ibid.*, p. 828).

The only current example of what may be called a legislative use of the prerogative in Canada appears to be P.C. 1954-2029, the Fair Wages Policy, respecting contracts entered into by the Government of Canada. Analogous to this is the proclamation of January 28th, 1965, proclaiming the National Flag of Canada (SOR/65-62). This proclamation, however, followed a resolution by both Houses of Parliament.

Regulations made pursuant to the Crown prerogative are not delegated or subordinate legislation; they are original legislation. It must nevertheless be remembered that Parliament has the sovereign authority to abolish one or all of the prerogative powers (see section 12 of the *B.N.A. Act*) or to merge them into statutes. The Crown prerogative can be a source of legislative power because Parliament accepts, by its silence, this situation. It could perhaps be said that the prerogative legislative powers of the Governor General are actually delegated by Parliament, but in a negative way. In New Zealand prerogative regulations are expressly covered by the *Regulations Act* of 1936, section 2(1)(*c*). Your Committee believes this should also be the case in Canada.

**Your Committee therefore recommends that regulations made in the exercise of the prerogative power of the Governor in Council, in so far as they are of a legislative character, should be subject to the same procedures and requirements as other regulations of a legislative character.**

The general status of regulations as law is, however, not entirely clear. Everyone agrees that subordinate legislation constitutes law and that regulations have the same force as law. The following recent statement of the Ontario Court of Appeal is an accurate description of the general status of regulations: "These Regulations [made under the *Penitentiary Act*] having been made pursuant to the authority conferred by the Act upon the Governor in Council . . .have the same force as law, as have the provisions of the statute itself." (*Regina v. Institutional Head of Beaver Creek Correctional Camp, ex parte MacCaud,* [1969] 1 O.R 373, p. 380).

But is there a difference between a regulation and a statute? In the *Queen v. Walker,* Lush J. said that "an order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids" ((1875) L.R. 10 Q.B. 355), whereas in *The King v. Singer,* the Supreme Court of Canada decided that for the purpose of the enforcement of the Criminal Code, a regulation was not an Act of Parliament ([1941] S.C.R. 111). In the *Japanese Reference,* a few years later, the Judical Committee of the Privy Council said that the regulations in question were laws made by Parliament: "Legislative activity of Parliament is still present at the time when the orders are made, and these orders are law. In their Lordships' opinion they are laws made by the Parliament at the date of their promulgation." ([1947] A.C. 87, p. 107).

The new *Interpretation Act* (S.C. 1967-1968, ch. 7) provides that an "enactment" means "an Act or a regulation or any portion of an Act or regulation" (section 2(1)(*c*)). Since several later sections in the *Interpretation Act* deal with "enactments", it appears that for many purposes regulations have been put on the same plane as statutes. Reference may be made to section 27(2) which affects the distinction made by the Supreme Court in *The King v. Singer*:

> 27. (2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Therefore, the appropriate provisions of the *Criminal Code* apply to a prosecution for contravention of a regulation in the same way that they apply to a prosecution for contravention of a statute. If there is no difference between a law and a regulation, if regulations are "laws made by the Parliament at the date of their promulgation", how is it that they are not published like laws, and that a specific clause was adopted to say that a regulation that has been published shall be judicially noticed, etc.? Does section 133 of the *B.N.A. Act,* which provides that the laws of Parliament and of the Quebec Legislature must be published in English and in French, also apply to regulations?

It is true that in a federal state, there is an additional resemblance between regulations and laws; the former is subordinate to the parent act, the latter to the constitution. But Parliament can legislate in virtue of a power that belongs to itself (*Hodge v. The Queen, Liquidators of Maritime Bank v. The Receiver General of New Brunswick*); an administrative authority has a rule making power only when Parliament delegates such a power to that authority and as long as Parliament does not decide to take it back. There is definitely a difference between a statute and a regulation, even if both have the same force.

The same is true even for the regulations made under the authority of the Crown prerogative, because Parliament has the power to abolish the prerogative. To say that "regulations are laws made by the Parliament at the date of their promulgation" is not exact; but the Judicial Committee was politically obliged to make that assertion because the drafters of the Statute of Westminster of 1931 forgot to mention explicitly that, not only laws made by Parliament, but also, and *a fortiori,* regulations and other decisions adopted by administrative authorities could be repugnant to the *Colonial Laws Validity Act* of 1865.

Mention should be made finally of section 26(4) of the *Interpretation Act*:

> Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.

Thus the power to unmake regulations is a concomitant of the power to make them.

### 3. *The Present Definition of Regulation*

The validity of regulations generally comes into question in proceedings to enforce them when they are prohibitory, or in proceedings in which an individual claims rights conferred on him by the regulations. It must be remembered that a sovereign Parliament may always adopt a law to repeal or to amend a valid regulation or, and this is in practice more important, to validate an illegal, or what is perhaps an illegal, regulation. (See, for example, *An Act respecting an Order of His Excellency the Governor in Council entitled the Surcharge on Imports Order, S.C. 1963, ch. 18*).

But, what is exactly a regulation; more precisely, what is a *Regulations Act* regulation?

Existing legislation contains varying definitions of "regulation":

> "regulation" means a rule, order, regulation, by-law or proclamation... (*Regulations Act,* section 2(a)).
>
> "regulation" includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs and fees, letters patent, commission, warrant, proclamation, by-law, resolution... (*Interpretation Act,* S.C. 1967-1968, ch. 7, section 2, para. 1(*e*)).

Many of the same synonyms are found in a different context:

> "judgment" when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof... (*Supreme Court Act,* R.S.C. 1952, ch. 259, section 2(*d*)).

It is not too unusual to find in statutory conjunction power to make "orders", "rules" and "regulations", with no indication as to what the difference is. The confusion of names is not only due to the use of many different words for the same thing. It is aggravated by the use of the same word for different things. The word "order" is used for an administrative act, for a judicial act, for a legislative act and for a prerogative act. The name of this Committee is the "Special Committee on Statutory Instruments" and its terms of reference use the expressions "instruments made in virtue of any statute of the Parliament of Canada" and "statutory instruments". There does not appear to be any Canadian statute which uses the expression "statutory instruments". In fact, not all instruments issued under statutory authority can be regarded as regulations. A statute may confer power to make legislative, judicial, quasi-judicial, administrative and ministerial decisions.

"Statutory instruments" is a commonly used term in the United Kingdom where it means, generally, regulations, but only because the *Statutory Instrument Act* of 1946 says so:

> Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, if the power is expressed,
>
> (*a*) in the case of a power conferred on His Majesty, to be exercisable by Order in Council;
>
> (*b*) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,
>
> any document by which that power is exercised shall be known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly. (Section 1).

We are of the view that many of the "instructions", "directives", "guide-books", "manuals", etc., issued by departments may be, in essence, regulations, and we shall develop this point further on in this Report.

It has been suggested that the term "regulation" covers legislative statements of general application; "order", a particular direction in a special case; rule, a procedural law; and by-law, a regulation made by a public corporation for its internal management. No doubt the expression "order in council" has become sanctioned by long tradition and presents perhaps a further difficulty by being another term to describe the rule-making activity of the Governor in Council.

In our view, Parliament has not paid enough attention to the importance of clear and consistent terminology. Of course, it must be recognized that it is not always easy to draw a line between what is a legislative matter of general application and a particular direction in a special case. The McRuer Commission found a similar difficulty:

> We have taken pains to demonstrate that there are no precise and mutually exclusive definitions of legislative, judicial and executive powers so as to dispel any idea that any clear distinction could be drawn when solving problems referred to the Commission.
>
> The absence of clear distinctions raises problems of terminology. Probably in no other branch of the law or political science are the difficulties arising from terminology as great. (*Royal Commission—Inquiry Into Civil Rights,* 1968, p. 31).

Delegated legislation is thus known by a variety of expressions and one has to look at the content of a decision to see if it is a regulation:

> The essential nature of a statutory power is to be found by examining the decision its possessor is empowered to make . . . But the important issue is not who does it or in what way, but rather what it is the agency has been authorized to do. (J. A. Corry, "Statutory Powers", in *Legal Essays in Honour of Arthur Moxon,* 127, at p. 133).

The main difficulty in practice is to distinguish between a legislative act (regulation) and an administrative act. The following statements show what is generally involved in the term "legislative" but also how very difficult it is to give it a definitive meaning:

> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction, or the application of a general rule to a particular case in accordance with the requirements of policy . . . Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinions of judges as to the proper characterization of a statutory function are often at variance. If a Minister has power to requisition houses and to delegate his power, and he proceeds to delegate his power to an individual town clerk, there can be no doubt that this delegation is an administrative act; but if he delegates his power to all town clerks, is the instrument of delegation a legislative or an administrative order? Fortunately, decisions in the courts seldom turn on this type of question alone; and when it arises it is apt to be glossed over. (S. A. de Smith, *Judicial Review of Administrative Action,* (2nd ed. 1968), pp. 56-57).
>
> The meaning of 'legislative' and 'executive' may be determined by reference to the nature of the action. By this test, a power to make rules of general application is a legislative power and the rule is a legislative rule. A power to give

> orders in specific 'cases' is, by the same test, an executive power and the order is an executive order. Similarly, a power to take specific action is an executive power and the action is an executive action. The difficulty here is that of distinguishing between what is 'general' and what is 'specific'. These words, although they have some extreme and easily recognizable forms do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary, to the old and comparable riddle: 'how many sheep make a flock? (J. A. G. Griffith and H. Street, *Principles of Administrative Law,* (3rd ed., 1963) p. 51).
>
> It is often said that legislative power consists of the authority to lay down general rules for the future. The making of such rules is the main activity of our best known legislative bodies and we tend to take it as the indicium of legislative power. Yet we acknowledge that a private act of Parliament which lacks generality and makes rules for one or a few specific persons or situations is nevertheless legislation. Equally, an ex post facto law is still an exercise of legislative power determining retrospectively the legal effect to be given to actions already completed. (J. A. Corry, "Statutory Powers", in *Legal Essays in Honour of Arthur Moxon,* p. 134-135).
>
> One of the most helpful definitions of rule making is that of Professor Fuchs, who concludes that rule making should be defined as 'the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations'. (K. C. Davis, *Administrative Law Treatise,* (1958) p. 286).

Your Committee believes it would be helpful to use the following description: a regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons; it does not matter if this rule of conduct is called an order, a decree, an ordinance, a rule, or a regulation.

Your Committee must presume that the Parliament was of a similar mind when it stated in the *Regulations Act* that a regulation is "a rule, order, regulation, by-law or proclamation made in the exercise of a legislative power conferred by or under an Act of Parliament" (Section 2(*a*)). The expression "made in the exercise of a legislative power", or a practically similar term, is found in the Regulations Acts of many jurisdictions (Ontario, Manitoba, Alberta, Saskatchewan, British Columbia, United Kingdom—for regulations adopted under the authority of statutes passed before 1947—and Australia). On the other hand, the New Zealand *Regulations Act,* 1936, avoids the problem (and thereby undoubtedly sweeps all sorts of documents within its purview) with the following definition:

> 2. Interpretation—(1) In this Act the expression "regulations" means and includes—
>
> (*a*) Regulations, rules, or bylaws made under the authority of any Act by the Governor-General in Council or by any Minister of the Crown or by any other authority empowered in that behalf:
>
> (*b*) Orders in Council, Proclamations, notices, Warrants and instruments of authority made under any Act which extend or vary the scope or provisions of any Act;
>
> (*c*) Regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand,—
>
> but does not include regulations made by any local authority or by any authority or persons having jurisdiction limited to any district or locality.

To conclude that a document is the result of the exercise of a legislative power and that it is a regulation, has very important legal consequences. It

must be subjected to the *Regulations Act* procedures unless expressly exempted. Moreover, according to section 8(1) of the *Regulations Act,* a regulation that has been published in the *Canada Gazette* shall be judicially noticed. Further, the common law procedural rules of natural justice do not apply to the exercise of subordinate legislation. Finally, regulations cannot be held invalid for unreasonableness. Hence, important legal consequences flow from a characterization that is sometimes very difficult to make.

Let us now examine the definition adopted by Parliament in its *Regulations Act*:

> 2. In this Act
> (*a*) "regulation" means a rule, order, regulation, by-law or proclamation
> (i) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by the Governor in Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada or
> (ii) for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament,
> but does not include
> (iii) an ordinance of the Yukon Territory or the Northwest Territories,
> (iv) an order or decision of a judicial tribunal,
> (v) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal, or
> (vi) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within subparagraph (ii) ....

For the moment we shall not deal with the problem of exemptions.

A decision is not a regulation, according to the *Regulations Act,* unless it (A) satisfies each and every one of four requirements or, alternatively, (B) satisfies two requirements:

(A) (1). It must be "a rule, order, regulation, by-law or proclamation." (Section 2(*a*)). This can probably be satisfactorily determined if the parent Act, in its express terms, enables a "rule, order, regulation, by-law or proclamation" to be made under it, and the document is expressed to be a "rule, order, regulation, by-law or proclamation".

According to the *Interpretation Act* (S.C. 1967-1968, ch. 7, section 2), the word "regulation" includes the above-mentioned expressions but also:

> form, tariff of costs or fees, letters patent, commission, warrant, resolution or other instrument issued, made or established
> (i) in the execution of a power conferred by or under the authority of an Act, or
> (ii) by or under the authority of the Governor in Council.

Obviously many of these documents, for example, letters patent and commissions respecting the appointment of persons, are not in fact regulations. The definition given by the *Interpretation Act* corresponds to a particular need, as was pointed out by the Minister of Justice (Hon. P. E. Trudeau) in 1967, when this Act was adopted:

> We are discussing here an interpretation act which tends to give general definitions which will be applicable to the greatest possible number of statutes. In due course when we revise the other statutes, when they are before the house, I expect parliament will ... achieve the laudable aim of reaching uniformity of

> definition. But of course we cannot do it by way of an interpretation act. All we are doing by way of the Interpretation Act is trying to get as large a definition as possible applicable to the greatest number of acts.
>
> There will always be, for particular statutes, particular definitions. It is not the intention of this bill, nor could it be the will of parliament, I think, to dispense in the future with all interpretive sections which appear at the beginning of each statute and which mean to give particular definitions to particular statutes.
>
> This is a general one. Indeed, I hope that when we look at the various other statutes we will tend toward a general definition but we cannot, I repeat, do it by this Interpretation Act.... If we look at section 2 of the Interpretation Act we see that 'enactment' includes a regulation. Therefore every time the word 'enactment' or 'enact' appears in a section it includes a reference to regulation. In that sense, therefore, although the word 'regulation' does not appear in a great many places, it is really included in the word 'enact' which does appear frequently. That is why it was found useful in clause 2(1)(e) to define the word 'regulation' in a general way which will apply to all sections of this act.
>
> Incidentally, in rereading what I said the other night I noticed that I indicated that since 'regulation' is defined in the bill it would tend to apply to all other statutes. Of course this is not necessarily so. Clause 2(1)(e) gives the definition of 'regulation'. When it appears in other acts it will have the particular meaning ascribed to it in the context or in the definition in that particular act... If such an order is given granting a holiday or part holiday or appionting a Queen's Counsel, it may be useful to know when the order takes effect. The Interpretation Act will permit us to say, if a day is mentioned, that it will begin on that day or, if an hour is mentioned, it will begin at that particular hour. The Interpretation Act will tell us whether it should be understood in terms of standard time or what.
>
> These are a few examples. There are quite a few others which I could give if the discussion is continued. I do not want to prolong this debate. I believe I have given sufficient examples to indicate that the Interpretation Act is not increasing the government's power to issue regulations in the general sense. The intention of this bill is to show what the words mean, how they shall be interpreted in a case where the power does exist. However, Mr. Speaker, if the power does not exist under some statute or under some prerogative, then the Interpretation Act cannot create such power. If the power does exist under an act or under a prerogative, then the Interpretation Act tells us how the words we find in that act or regulation shall be interpreted. (*Debates of the House of Commons,* 1967, pp. 597, 828).

(2) It must be made "in the exercise of a legislative power." As we have already seen, this is the most difficult and crucial test (section 2(*a*) (i)).

(3) Legislative power must be "conferred by or under an Act of Parliament" (section 2(*a*) (ii)). Prerogative regulations are thus excluded. While it may be easy to determine whether or not a power is conferred *by* an Act of Parliament, it may not be so easy with respect to powers conferred *under* an Act of Parliament. Wherein do these differ from those conferred *by* an Act? Could *"under* an Act of Parliament" apply to regulations made pursuant to a *sub-delegated power*? This is difficult to answer. In fact, some sub-delegated legislation has been *numbered* and published apparently under the *Regulations Act.* See, for example, SOR/53-111 passed under a regulation made pursuant to a power conferred by the *Fisheries Act,* 1932. See also all of the regulations made pursuant to what may be considered sub-delegated powers under the *Agricultural Products Marketing Act. In any event, the reach of the Regulations Act to regulations made pursuant to sub-delegated powers ought to be established beyond doubt.*

The necessity of internal scrutiny, filing, publication, laying, etc., apply *a fortiori* to regulations that are adopted by an authority which is not the one designated by the enabling Act.

(4) It must be made "by the Governor in Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada" (section 2(*a*) (i)). It is clear that the "other body or person" must be an agent or servant of Her Majesty. Does this qualification apply also to "a board, commission (or) corporation"? This point ought to be clarified.

(B) (1) It must be a "rule, order, regulation, by-law or proclamation". As to this, see above.

(1) It must be a rule, order, etc., "for the contravention of which a penalty of fine or imprisonment is prescribed by or under an Act of Parliament". According to paragraph (vi) of section 2(*a*), the word regulation does not include "a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within sub-paragraph (ii)." The following excerpt from the 1950 *House of Commons Debates* (p. 3498) can be usefully referred to here:

> *Mr. Browne* (St. John's West): I should like to ask the Prime Minister if he can make a little bit clearer to me the reason why the conjunction 'or' comes at the end of section 2(*a*) (i) and not 'and'?
> *Mr. St. Laurent:* Because there are orders that we wish to have come under the provisions of this statute which are not made by government agencies such as, for instance, those made by the board of directors of a railway company with respect to the conduct of the passengers on their trains. Suppose they are regulations the infringement of which is punishable by fine or imprisonment under a section of the Railway Act. We want those included. If we used 'and' they would not be included unless they were orders made by the kind of government agency described in one of the subsections.
> *Mr. Browne* (St. John's West): That is what puzzled me. Would you not call a railway company a corporation?
> *Mr. Knowles:* Not the Canadian Pacific Railway.
> *Mr. Browne* (St. John's West): Oh, I understand.
> *Mr. St. Laurent:* It is not a corporation representing the government.
> *Mr. Browne* (St. John's West): Now I understand. Thank you.

Normally regulations sanctioned by a penalty with all the requirements in (A), though Mr. St. Laurent's words when the Act was first passed in 1950 would suggest that they were intended to catch regulations of a merely administrative character which provided for penalties. (*Debates,* 1950, pp. 3039-3040). Section 2(*a*) (ii) would also catch regulations made by persons other than these named in section 2(*a*) (i).

### 4. *Expressed or Implied Exemptions from the Regulations Act*

When the *Regulations Act* was first passed in 1950, it was said by Prime Minister St. Laurent that its ambit would be "sweeping" and that it was better to allow specific exemptions from its application than to narrow its range:

> It was not possible to make a definition of regulations that would exclude the sort of thing one does not want to have in this [Bill]. For instance, it might be

that an order given to an aeroplane from a control tower would be a regulation. That would be one thing for one occasion. This bill provides that the general rule will be that everything has to be published, but that the governor in council may except certain classes. In order to do so, however, that class or those classes would have to be published and tabled, so that members of parliament will see what is to be excepted. Then they can make such comment as they think justified upon the exception that will be made...

With respect to this definition [of regulation] I want to state again that we found it would not be possible or prudent to make statutory exemptions with respect to the application of this statute. We wanted it to include everything to make it necessary for us to call attention to anything that was not going to be governed by it. So we said we would make it as sweeping as possible so it would apply to every kind of order that has legislative effect, made under authority given by parliament; and if we wanted to take anything out of that general, sweeping declaration we would have to call attention to what we were taking out so if there should be any controversy as to whether it should be in or out the matter would be brought to the attention of hon. members and the public. This would apply to a great many things if we did not make exceptions. It would apply, for instance, to all the orders given from time to time from the control towers at our airfields. Of course no one would want those published in permanent form, for they operate once and are spent. We have quite a variety of things of that character which are spent immediately, and which will be excepted from the application of this act. (*Debates of the House of Commons,* 1950, p. 3040 and 3497).

Thus it was intended that the Act should have a general application with the exception of the Governor in Council's power to exempt certain regulations or certain classes of regulations. The exempting power is found in section 9 (2) of the *Regulations Act.* But in fact there are other express or implied exemptions as well, and we propose to consider them in turn.

(A) *The power of the Governor in Council to exempt any regulation or class of regulations*

Section 9(2) of the *Regulations Act* provides:

The Governor in Council may by regulation exempt any regulation or class of regulations from the operation of section 3, section 4, subsection (1) of section 6, and section 7, but every regulation made under this subsection shall be published in English and in French in the *Canada Gazette* within thirty days after it is made and shall be laid before Parliament within fifteen days after it is published in the *Canada Gazette* or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

The provisions from which regulations may be exempted are those dealing with the transmission and certification of regulations to the Privy Council, their recording and numbering by the Clerk of the Privy Council, their publication in the *Canada Gazette,* and their laying before Parliament. As mentioned later, to exempt a regulation from the operation of Section 3 means in practice, according to the information given to the Committee, to exempt it from the Privy Council office scrutiny as to form and draftsmanship, and hence from examination under the *Canadian Bill of Rights.* Some form of publicity is given to exemptions made pursuant to section 9(2). This is what Mr. St. Laurent said on this question, when the Act was being debated:

We had quite a discussion over the necessity of even publishing the order made exempting such things because of their security implications; but the decision was that we wanted to give as complete information as possible, and that we would have to take the risk. If there was something of a legislative character

that was not going to be published we would have to take the risk of describing it as an excepting order, and we would have to make the excepting order public so that all members of parliament could question the propriety of our doing it. We wanted in no way to call attention to everything that was not going to come under the general provisions of the statute.

*Mr. Knowles:* So that it is clear that there cannot be any completely secret regulations. The regulations themselves can be secret, but only by virtue of an order in council passed under this subsection which exempts those regulations from being published?

*Mr. St. Laurent:* Yes, and you will have to make the exemption public. It may be that in certain cases we will have to use terms perfectly innocuous to attract as little attention as possible to anything that we think should not be talked about; but nevertheless it will be on the table of parliament and if hon. members choose to talk about it, it will be their privilege to do so. (*Debates of the House of Commons,* 1950, p. 3500).

One must not forget that the *Regulations Act* applies to these exempting regulations; hence, for example, the Governor in Council "may by order extend the time for publication of a regulation and the order shall be published with the regulation" (section 6(2)).

The power given to the Governor in Council by section 9(2) has been used just once, in 1954, when the *Regulations made under Section 9 of the Regulations Act* (P.C. 1954-1787) were made:

Pursuant to section 9 of the Act the following regulations or classes of regulations are hereby exempted from the operation of section 3, section 4, subsection 1 of section 6 and section 7 of the Act:

(1) *Aeronautics Act*—Orders made by the Air Transport Board that do not apply to all carriers or to a class of carrier.

(2) *Atomic Energy Control Act*—Orders made by the Atomic Energy Control Board under the Atomic Energy Regulations of Canada.

(3) *Canada Grain Act*—Orders made under section 11 and orders as defined in section 16.

(4) *Canadian Wheat Board Act*—Orders made by the Canadian Wheat Board as specified hereunder:
   (*a*) Orders entitled "Instructions to the Trade";
   (*b*) Orders addressed to particular persons or corporations only, requiring them to do or to refrain from doing specified things;
   (*c*) Orders adjusting grain storage quotas at delivery points according to the availability of storage space from time to time; and
   (*d*) Orders providing for the allocation of railway cars available for the shipment of grain at delivery points.

(5) *Financial Administration Act*—Regulations that deal exclusively with matters of internal practice and procedure within the Public Service, that do not impose fines or penalties, and that are restricted in their application to persons within the Public Service.

(6) *Indian Act*—Regulations and orders for the control and management of Indian reserves and property, residential and day schools, procedure at band and band council meetings, and generally in respect of all matters of a local or private nature within reserves.

(7) *National Defence Act*—Regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces, that are restricted in their effect to members of or persons attached to the Canadian Forces.

(8) *Penitentiary Act*—Regulations made under section 7.

(9) *Prisons and Reformatories Act*—All regulations made under the Act.

(10) *Post Office Act*—Orders made by the Postmaster General for the guidance and government of officers and employees of the postal service.

(11) *Railway Act*—By-laws, rules and regulations made by the Canadian National Railways under sections 290 and 300.

(12) *Railway Act and other related Acts*—Rules, orders and regulations of the Board of Transport Commissioners for Canada made in the exercise of any power conferred on the Board by the Railway Act or any other Act.

(13) *Royal Canadian Mounted Police Act*—Orders and regulations relating to the organization, discipline, administration and government of the Royal Canadian Mounted Police, that are restricted in their effect to members of or persons attached to the Royal Canadian Mounted Police.

In the 1952-53 session of the House of Commons, a private member's Bill (Mr. Knowles') was introduced to amend the *Regulations Act*. The purpose of the Bill was to abolish the right which the government had under section 9(2) "to pass secret orders in council" (*Debates of the House of Commons,* 1952-53). The Minister of Justice in replying to the motion for second reading did not have time to meet the substance of the arguments made by the mover before the six o'clock recess. However, according to the Assistant Clerk of the Privy Council (Orders in Council), *all* Orders in Council are now available for public scrutiny. (*Minutes of Proceedings and Evidence* p. 222).

Your Committee is of the opinion that, in matters of national security, there should be no general exemptions from the requirements of the *Regulations Act*. Your Committee feels that it is important that every regulation coming within the Act be integrated, according to the Act's procedures, into an organized system of subordinate laws. However, your Committee shall state reasons later for exempting the text of some regulations from the simple requirement of publication.

This requirement would probably be less onerous on the government in practice than it would appear, because in your Committee's view many of the matters covered by the thirteen categories above are not of a legislative character at all and therefore not in any event subject to the *Regulations Act* (unless they impose penalties). In such cases the present exemption provisions have the effect only of making explicit what is already implicit in the definition section of the Act.

**Your Committee therefore recommends that, except in the interests of national security, there should be no exemptions from the requirements of the Regulations Act other than as to publication.**

(B) *The regulations exempted by section 2(a) (ii)-(vi) of the Regulations Act.*

Section 2(*a*) of the *Regulations Act* provides that "regulation" does not include:

(iii) an ordinance of the Yukon Territory or the Northwest Territories,

(iv) an order or decision of a judicial tribunal,

(v) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial tribunal, or

(vi) a rule, order, regulation or by-law of a corporation incorporated by or under an Act of Parliament unless the rule, order, regulation or by-law comes within subparagraph (ii) ....

Mr. St. Laurent had this to say on subparagraph (v):

> [Those regulations] are required to be published otherwise, and are available in a separate booklet from the King's Printer. That is the reason these rules of practice are made by the Supreme Court, by the Exchequer Court, by the Board of Transport Commissioners and by the Income Tax Appeal Board, and they are available separately for the convenience of those who practise before these tribunals; they can be obtained separately. It was felt that they would not be of general interest to the public at large. They are of special interest to those who practise before these courts but they are not of general interest to the public at large. (*Debates of the House of Commons,* 1950, p. 3497-3498).

It may be noted that the Board of Transport Commissioners and the Income Tax Appeal Board were considered "judicial tribunals". However, the rules of these two bodies are nevertheless published in the *Canada Gazette* (see, respectively, S.O.R. Consolidation, 1955, Vol. 3, p. 2676 and Vol. 2, p. 1870) as are the rules of the Canada Labour Relations Board (S.O.R. 1955, Consolidation, Vol. 2, p. 1981, as amended), of the Immigration Appeal Board (S.O.R. 67-559), and of the Public Service Staff Relations Board (S.O.R. 67-155, as amended). One can only speculate as to the meaning of the term "judicial tribunal". In any event, your Committee thinks that the *Regulations Act* should be amended so that the matters in subparagraph (v) should come under its operation.

**Your Committee therefore recommends that rules governing practice or procedure in judicial proceedings should not be excluded from the requirements of the Regulations Act.**

Subparagraph (iv) excludes from the operation of the *Regulations Act* the judgments of judicial tribunals.

Subparagraph (vi), when read with paragraph (*i*) is not easy to understand. Private corporations incorporated by or under an Act of Parliament evidently do not come under the operation of the *Regulations Act,* unless their regulations come within subparagraph (ii). In the 1950 Debates, Mr. St. Laurent gave as an example the regulations of the Canadian Pacific Railway which was not "a corporation representing the government" (p. 3498). It is difficult to understand what was meant by Parliament in 1950 when section 2 (*a*) (i) and 2 (*a*) (vi) were adopted. The inclusion in the *Regulations Act* of the expression "agent or servant of Her Majesty" raises a difficult question when it is remembered that a corporation is an agent of Her Majesty not only when an Act of Parliament says so but also when courts of justice say so. (For a review of the main criteria, see *Regina v. Ontario Labour Relations Board, ex parte Ontario Food Terminal Board* (1963) 38 D.L.R. (2d) 530).

(C) *The regulations made under the authority of the Crown prerogative.*

Prerogative legislation, discussed above, is excluded by the definition in section 2(*a*) (i). It must be noted that prerogative regulations would be caught by section 2(*a*) (ii) if they imposed penalties.

(D) *Departmental Directives and Guidelines.*

Your Committee's questionnaire contained three questions relating to the borderline between legislative power, on the one hand, and administrative or executive power on the other. They read:

> 1. With reference to the different types of subordinate legislation which come under the administration of your Department or Agency . . .
> (*d*) Does your Department issue other rules, orders, instructions not included within the terms of the *Regulations Act*—which affect the public? If so, about how many, including amendments, were issued during 1968?
> (*e*) Does your Department issue other rules, orders, or instructions, not included within the terms of the *Regulations Act*—which affect only your own Department? If so, about how many, including amendments, were issued during 1968?
>
> 10. Does your Department or Agency issue documents in the nature of policy statements or position papers which are used by your Department or Agency to implement policies under legislation administered by it? If so, please specify. If so, what steps are taken to bring such documents to the attention of interested or affected persons?"

In general, the answers indicated that the Departments and Agencies have issued a substantial number of documents coming within each of the three questions. It appears that the general reason the documents in question were not considered to come within the terms of the *Regulations Act* is that they were not called "regulations" and, also, were thought to be of an executive or administrative nature and so excluded by section 2(*a*) (i) of the Act.

As mentioned before, it is very difficult in some cases to draw a line between what is a legislative act and what is an administrative or executive act. According to Professor S. A. de Smith,

> Other criteria for distinguishing legislative from administrative acts appear in ordinary linguistic usage. In the first place, every measure duly enacted by Parliament is regarded as legislation. Thus, if a parcel of land is compulsorily acquired by means of a Private Act of Parliament or a Provisional Order Confirmation Act, the acquisition is deemed to be a legislative act; though if the acquisition is effected by means of a compulsory purchase order made under enabling legislation, it will usually be classified as an administrative act. Secondly, departmental instruments or announcements which, although general in application, neither confer legally enforceable rights nor impose legally enforceable obligations are commonly referred to as examples of 'administrative' action. In this sense the decision to allow certain classes of aliens to be heard before a metropolitan magistrate on a question of deportation was administrative. Similarly, Circular No. 9/58, whereby the Ministry of Housing and Local Government invited local authorities to supply objectors and appellants concerned in inquiries into compulsory purchase and clearance orders and planning appeals with fuller particulars of the cases they had to meet, and also announced the Minister's own intention to make several important concessions in the light of recommendations made by the Franks Committee on Administrative Tribunals and Enquiries, was not a legislative instrument, because it was not made in pursuance of express statutory authority and failure to comply with its provisions did not afford a legal remedy to any member of the public; legal remedies became available only when the terms of the circular were translated into statutes and statutory instruments. The position would have been no different if the Ministry or the Minister had purported to issue mandatory instructions to local authorities in such a circular. Just as the Crown is without authority to alter the general law of the land by prerogative, so are its servants and other public authorities without inherent authority to impose legal duties or liabilities or to confer legal enforceable rights, privileges or immunities on the subject. Hence, the extra-statutory concessions to taxpayers that the Inland Revenue authorities announce from time to time cannot be relied

upon in any court of law, although they have been styled administrative quasi-legislation. It must not be assumed, however, that departmental communications issued in the form of circulars, notes for guidance or letters to local and regional authorities, or press notices, are necessarily destitute of legal effect. If they are issued in pursuance of statutory powers which authorise the Minister to confer rights, directly or indirectly, on members of the public, and if the Minister does purport to confer such rights (as where a Minister who is empowered to impose restrictions upon his own powers or the powers of local authorities in certain transactions with members of the public imposes restrictions in a circular letter or other document), the relevant provisions will be recognised and enforced by the courts; and to that extent these informal instruments may be characterised as having legislative effect. (*Judicial Review of Administrative Action,* (2nd ed., 1968) p. 58-59).

It appears from the evidence gathered by this Committee that such decisions are made by the regulation-making authorities themselves. In his evidence before your Committee, the Legal Adviser to the Privy Council Office said with respect to ministerial regulations (the same remark could probably be made for regulations enacted by boards, commissions and corporations):

> In a particular department they may just not send them to me, and if they do not send them, I have no way of knowing whether or not they are complying with the Regulations Act. (*Minutes of Proceedings and Evidence,* pages 223-224).

Mention should be made at this time of section 5 (1) of the *Regulations Act:*

> A regulation is not invalid by reason only that it was not transmitted to the Clerk of the Privy Council, certified or recorded as required by this Act.

Subject to what will be said later on the question of publication (see section 6 (3) of the *Regulations Act*), the operation of the present system of safeguards depends upon decisions made by the regulation-making authority itself. The first decision relates to whether or not to *name* the document in question a "regulation" and to "make" it as such; the second decision is as to whether or not the document so made is made in the exercise of a legislative power.

The evidence before us suggested the possibility that a decision by a rule-making authority that a particular document is not of a legislative character is the way sometimes chosen to remove regulations from the operation of the *Regulations Act*; that could perhaps explain why the *Regulations made under Section 9(2) of the Regulations Act* have not been amended since 1954. The Department of Health and Welfare, in answer to question 1(e) advised:

> It is almost impossible to distinguish in some instances between an instruction issued in the day-to-day administration of the work and an instruction that could be regarded as supplementing legislation. It is more difficult still in retrospect to distinguish between instructions which may affect the public and those which do not affect the public but which affect only the Department.

Reference can be made here to evidence given before your Committee as well as to answers to the above-mentioned questions of our Questionnaire.

It was maintained by the Legal Adviser to the Department of Manpower and Immigration, when reference was made to unpublished directions to immigration officers, that:

> They are not exercises of authority granted under a statute to the Minister, they are explications, if you will, of policy for the guidance of immigration officers in the performance of their duties.
>
> As the answer reflects, there are guidebooks, handbooks and manuals used by immigration officers and other employees of the Department in the performance of their duties. It is necessary, of course, from time to time to give an explication of policy and the manner in which these officers are to exercise their duties in the hope that it will be applied uniformly across the country so that there will not be differences in the application of policy. I think the answer reflects this.
>
> There certainly are these handbooks, they certainly do contain memoranda from time to time which are classified for policy reasons and are not published to the public. The question relating to the United States military deserters is directed at a policy directive of this kind which was indeed issued. (*Minutes of Proceedings and Evidence,* page 197).

Here we have an admission that "policy" affecting a person's rights is explained to departmental officers but is classified information and not published.

In reference to Section 32(4) of the *Regulations* made under the *Immigration Act* (R.S.C. 1952, ch. 325, as amended) which enables an immigration officer to refuse the admission of an independent applicant who meets the norms set out in Schedule A "if in his opinion there are good reasons why those norms do not reflect the particular applicant's chances of establishing himself successfully in Canada . . . ," another departmental witness said, with respect to the policy directives of the department:

> . . . all that was given to our officers in the field was advice, if you wish, or some guidance as to what sorts of things would constitute the good reasons referred to simply in those terms of the legislation, in this case, being the regulations . . . In my judgment, it did not add or subtract from their legal authority or the authority granted in the regulations as to the exercise of their discretion. (*Minutes of Proceedings and Evidence,* pages 198-199).

There would appear to be no argument as to the "authority" of the immigration officer affected by a policy directive. However, it appears clear from all of the evidence that the *manner* in which this authority was exercised, which is the crucial consideration, was directly affected by the directives.

With respect to the classified nature of these directives it was said:

> And as I recall, he [the Minister] took the view that traditionally this type of document which is within the Department has always been considered privileged and has not in fact ever been tabled in Parliament itself. (*Minutes of Proceedings and Evidence,* p. 200).
>
> It may well be that after years of experience and to satisfy present-day conditions, some things that we have tended to view as strictly administrative should no longer be viewed that way. They ought to be dealt with in a different fashion, provided we recognize the pitfalls of tying the administrators of administration into such a bind that in the end they wind up not being able to do what they think should be done because the law will not let them. (*Minutes of Proceedings and Evidence,* p. 201).

The legal adviser to the Department of Manpower and Immigration also had this to say on the nature of the policy directives:

> I would not say that these documents and these instructions in fact tell immigration officers how they are to make up their minds about these things. I believe the direction in question suggested a number of things which might be suitable subjects upon which an immigration officer might base his decision. In that sense, in my view, they probably do not amount to legislative enactments, certainly not in the sense that they tell those officers what they must do.
>
> The officer brings to bear on the decisions he makes his own background of experience and his own views, but we endeavour to insure—and this indeed is the reason why most of these directives exist—that there is uniformity of operation across the country, so that the kind of thing that did happen in a few instances does not recur continually. It is necessary to give instructions of this kind and they are not instructions as to how an officer should make up his mind. They are instructions concerning the kinds of things which he might consider in making up his mind. And if a document of this kind was brought to my attention and if I felt any concern about it violating what was in effect a statutory enactment, I would have said something about it. I did not feel so in this case. (*Minutes of Proceedings and Evidence,* p. 202).

The following are some of the other answers given to our Questionnaire:

The Department of Agriculture, Question 1 (*d*):

> Yes. These are largely instructions to field staff and modifications to inspection manuals. Considering the numerous commodities covered, there would be a few dozen per year . . .
>
> Under the Destructive Insect and Pest Act, Section 7 the Minister is authorized to restrict the movement of vegetation, etc. under certain circumstances and notices are forwarded to affected people and staff about any such restriction. There were four such notices in 1968.

Farm Credit Corporation, Question 1 (*d*):

> The Corporation issues instructions from time to time to its staff with respect to *the interpretation and application of the provisions of the legislation* which it administers and with respect to principles and procedures to be followed in the making of loans. *Such instructions affect that portion of the public who are interested in loans applied for or made.* These instructions, however, are not in the nature of Regulations and would appear to fall within the purview of Question 10 in the Questionnaire and are dealt with thereunder. (Emphasis added).

The Farm Credit Corporation, Question 10:

> Yes. The Corporation issues a Lending Policy Manual with respect to the interpretation and application of the provisions of the Farm Credit Act and the Farm Machinery Syndicates Credit Act. *This manual is intended to provide equitable interpretation and application of the provisions of the Statutes to farmers in all parts of Canada.*
>
> The farming public is informed of the general nature of the credit facilities available under the Statutes by means of information brochures. Those members of the public who indicate an interest in obtaining credit under either of these Statutes are informed in discussions with credit officers of the Corporation about those aspects of our Lending Policy Manual which are applicable to their circumstances. (Emphasis added).

The Department of Manpower and Immigration answered Question 1 (*d*), in part as follows:

> Immigration Officers are provided with Immigration manuals for guidance in carrying out their responsibilities. In 1968 there were 490 amendments to it which come within the area of this question.

The Department of Manpower and Immigration, Question 10:

> . . . There are immigration and manpower handbooks or manuals that are intended to serve as a guide to employees of the Department to assist them in carrying out their duties . . . in a uniform manner throughout the country and abroad . . . In addition, statements on matters of policy require to be modified and added to in the light of changing circumstances and as time goes on. Hence, a series of operations memoranda are sent out from time to time under the same classification as the Manuals, to be included therein, for the added guidance of employees and officers . . . In addition to these documents the handbook, where necessary, elaborates on these regulations to ensure their correct application.

The Public Service Staff Relations Board, Question 10:

> Yes. Shortly after the Board was established, it issued a number of documents which it described as Policy Statements. The purpose of these statements is set out in an introductory note to the first of these policy statements and reads as follows:
>
> > . . . It is obvious that no hard and fast rules can be established at this stage on some of the matters with respect to which the Board will issue policy statements. It is the opinion of the members of the Board that their present thinking on some issues should be made known to employee organizations and the employer to serve as guidelines for the parties in the presentation of their cases to the Board. . . .
>
> These statements dealt with the following matters: the date when an application for certification was to be deemed to have been filed; proof of membership in an employee organization; nature of proof required to show that a council of employee organizations had been properly formed and that the constituent elements of the council had vested appropriate authority in the council; . . . Policy statements are not published in the *Canada Gazette.*

The Department of Transport, Marine Regulations Branch, Question 10:

> Yes. We have issued a 'Concentrates Code' for the guidance of port wardens in determining what is 'approved practice' under Section 624(4) and a document entitled 'Ships Centralized and Automated Control Systems Recommendations' for the guidance of Steamship inspectors in determining what such systems are likely to be approved by the Board of Steamship Inspection. *We expect that eventually, after we gain further experience, these will be converted into regulations.* Our practice is to consult with the industry before these documents are put into final form and to make copies freely available thereafter. (Emphasis added).

If these latter documents can be converted almost verbatim into regulations, and there is statutory authority for such regulations, when it would appear that they are of a legislative nature.

The Department of Veterans Affairs, Veterans Welfare Services Branch, Question No. 10:

> In a few cases Ministerial Orders are issued, normally to define the boundaries of items of discretion in legislation. In such cases, persons applying for benefits are counselled concerning this area in the same manner as if they were contained in the legislation.

The Department of Indian Affairs and Northern Development, Question 1(*d*):

> There are instructions not included within the terms of the Regulations Act which affect the public, issued by this Department, namely instructions and rules laid down for the appropriate use of National Parks facilities. In 1968 prior to the tourist season, numerous new instructions were posted having to do with such things as conduct in the National Parks, use of camp grounds, use of all other facilities in National Parks, for the enjoyment of the public etc.

One may query why these are not in the form of regulations duly published.

Department of Finance, Question 10:

> In administering the Municipal Grants Act an Assessment Manual has been issued for the guidance of the field officers who check on the valuation of Crown property . . . Information concerning the interpretation of the Crown Corporations (Provincial Taxes and Fees) Act is communicated from time to time by circular letters to the heads of Crown Corporations and to Provincial officials concerned . . .

As a result of this oral and written evidence as to the multitude and scope of departmental directives, your Committee is not satisfied that some, perhaps many, directives are not legislative in character. This is a matter on which it was impossible for your Committee to satisfy itself because such departmental directives and guidelines are secret documents, available neither to your Committee nor even to Parliament itself. Your Committee feels that such directives, where they affect the public, ought to be published and subject to parliamentary scrutiny.

5. *The Proposed Definition of "Regulation"*

**Your Committee recommends that the Regulations Act should be amended to provide a more inclusive definition of the word "regulation".** Section 9 (2) would still enable the Governor in Council to provide for limited exemptions. We would suggest replacing Section 2(*a*) by the following:

> 2. In this Act,
> (*a*) "regulation" means
> (i) a rule, order, regulation, directive, by-law, proclamation, or any other document made in the exercise of a legislative power conferred by or under an Act of Parliament;
> (ii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power conferred by or under the prerogative rights of the Crown and having force of law;
> (iii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power coming within sub-paragraphs (i) and (ii) and which has been subdelegated;
> (iv) a rule, order, regulation, directive, by-law, proclamation or any other document for the contravention of which a penalty or fine or imprisonment is prescribed by or under an Act of Parliament;
>
> but does not include a rule, order, regulation, directive, or by-law or any other document of a legislative character of a corporation incorporated by or under an Act of Parliament, which is not a Crown corporation, unless such a rule, order, regulation, by-law or document comes within sub-paragraph (iv).

This definition casts the net as widely as is reasonably possible. *All* exercises of subordinate *law-making* power are covered (except those of private corporation), and, so that the matter is put beyond doubt, all regulations, etc., for the contravention of which penalties are prescribed, are also covered. Apart from private corporations, the identity of the regulation-making authority should be irrelevant, since we want to cover all such authorities.

Your Committee feels that in the interest of providing a basic safeguard of wide initial application the definition should be cast in these general terms. Your Committee recognizes that there are situations where the publication provisions of the *Act* may not be appropriate or serve any useful

purpose. These cannot reasonably be provided for in the language of a general statute. They should be decided by the Governor in Council on an *ad hoc* basis according to his judgment of what is reasonable and fair.

It should be remembered, however, that the Governor in Council's decisions to exempt regulations or a class of regulations have to be exercised through the medium of regulations (made under section 9(2) of the Act) which will be subject to the general Parliamentary scrutiny which your Committee recommends later in this Report. Your Committee believes, therefore, that it has provided for a safeguard which is suitably all-embracing, while remaining flexible.

In the United Kingdom, in cases of doubt as to whether a regulation made under Acts passed before the *Statutory Instruments Act* 1946 is covered by this Act it is provided that the doubt may be resolved by a Reference Committee appointed by the Lord Chancellor and the Speaker of the House of Commons: *Statutory Instruments Act,* 1946, Section 8(1) (*e*) (iv); S.I. 1948 No. 1, Reg. II. Canadian provincial Regulations Acts contain similar provisions. In the Ontario *Regulations Act,* s. 6, it is provided that:

> 6. The Minister may,
> (*a*) determine whether a regulation, rule, order or by-law is a regulation within the meaning of this Act and his decision is final . . .

The Manitoba *Regulations Act,* provides:

> 6. (1) Subject to subsections (2), (3), and (4), the Registrar may decide whether any regulation, rule, order or by-law, that has been presented to him for filing, is a regulation within the meaning of this Act.

Subsequent subsections provide a procedure for an "appeal" from the Registrar's decision to the Lieutenant Governor in Council. It may be noted that the Registrar has jurisdiction only over those documents which have been presented to him for filing. He does not have the opportunity of making a decision on those documents which may be of a legislative nature and which never leave the Departments.

Section 10 of the Saskatchewan *Regulations Act*, contains virtually identical provisions.

The *Regulations Act* of Canada contains no procedure whatsoever for determining whether or not a document is a regulation within the meaning of the *Act*. With respect to regulations made by the Governor in Council there is probably no problem in this regard. Such regulations have to be processed through the Privy Council Office and the officials of that office would therefore have the opportunity of deciding whether or not a particular document should be subjected to the procedures of the Act. The difficulty relates to regulations which are made by Ministers and by boards, agencies and commissions. As we have said, it appears that whether a document made by a Minister or by a board, agency or commission is processed under the *Regulations Act* depends upon the decision made at the departmental or board, agency or commission level.

Your Committee feels that the *Regulations Act* should prescribe a procedure, along the lines of those obtaining in the other jurisdictions described above, for determining whether a doubtful document is a regulation. In your Committee's view, the procedure should provide that the Minister of Justice be the deciding authority. The chief purpose of such a procedure would be to standardize, as far as is possible, under the chief Law Officer, *all* governmental decisions on whether a document is covered by the *Regulations Act*. These decisions should not be made on an individual basis within each department.

Your Committee states that it recognizes an obvious frailty in this recommended procedure. It relates to the characterization of a document as "doubtful". If a document is considered by a Department to be doubtful then one might reasonably expect that the Department would process it through the prescribed procedure to have the doubt resolved one way or the other. However, it may well be that there are doubtful documents, or even documents which are clearly of a legislative nature, which a department quite erroneously would consider to be of a purely executive or administrative nature. Such documents would never see the light of any doubt-resolving procedures. However, in your Committee's view, this unavoidable defect is not a sufficient reason why the procedure should not be instituted.

Your Committee should also point out that its recommended procedure is in no way intended to oust the jurisdiction of the Courts to decide, in a final and binding manner, where it is material to the judgment in a case, whether or not a document comes within the Act. Nor does your Committee intend to restrict the power to reconsider of the parliamentary scrutiny committee it shall propose.

**Your Committee therefore recommends that the Minister of Justice should be charged with the responsibility of deciding for all regulation-making authorities which documents should be classified as regulations.**

Your Committee expects that this recommendation would result in many departmental guidelines and directives being classified as regulations. But whether or not this is the result, your Committee believes that in any event they should be published and scrutinized by Members of Parliament. **Your Committee therefore recommends that all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny.** Interpretation guidelines which instruct examining officers how to exercise their vast discretion in admitting applicants to Canada as landed immigrants are a good case in point.

6. *Criteria for Enabling Acts.*

"In general, if delegation of legislative power is mischievious, the mischief must primarily have been done when the Bill was passed which conferred the power". (Sir Cecil T. Carr, before the Select Committee on Delegated Legislation (1953)).

Acts of Parliament are the main source of regulations. It is Parliament, on the recommendation generally of a Minister, which decides in each enabling Act a) whether power shall be delegated to make subordinate legislation; b) to whom the power shall be delegated; c) the extent of the power; d) the form in which it shall be exercised. Your Committee wishes to emphasize the importance of the care and attention which must be exercised when an enabling provision is being prepared for enactment.

Your Committee shall, shortly, outline ten basic criteria which it thinks should control the form and content of enabling provisions. However, we would first like to discuss certain very general matters which should be considered with respect to the preparation of all such clauses.

(A) *The expression of the power to make regulations*

One may observe with interest the variations in the form of statutory language which conveys the power to make regulations. The "standard" verbal formula is exemplified in the *Regulations Act*:

> 9(1) The Governor in Council may *make regulations*. . . .

There is no equivocation about the nature of the power conferred by this provision.

However in some statutes the power to make regulations is not expressly conferred but is merely implied. Section 3(2) of the *Experimental Farm Stations Act* reads:

> (2) Such farm stations shall be under the direction and control of the Minister, *subject to such regulations as are made by the Governor in Council.*

The foregoing implication is such that it leaves in doubt the nature and scope of the regulations which the Governor in Council is to make. Similar implied powers may be found in the *Explosives Act,* Section 5(2) and the *Foot and Mouth Disease Act,* Section 2(1).

It is fair to observe that the power to make laws should be expressly conferred and this can be achieved if the statutory formula employs the appropriate verb in the active voice.

In several cases the power to make regulations is more than just implied but the expression "make regulations" is not used. For example, see the *Agricultural Co-operative Marketing Act,* Section 4(1): "The Minister *may . . . prescribe . . .*"; the *Agricultural Products Marketing Act,* Section 2(1): "The Governor in Council *may by order grant authority to any board or agency . . .*"; the *Motor Vehicle Transport Act,* section 5: The Governor in Council may *exempt* any person or the whole or any part extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act. We would refer also to Sections 137(1) and 495(1) of the *Canada Shipping Act.*

In your Committee's view, it is important for the application of the *Regulations Act* and for other obvious reasons that, when it is intended that a power is to be exercised by regulation (i.e., it is, generally, a legislative

power), that the word "regulation" find its way into the statutory formula. Where this is done much potential uncertainy can be avoided.

(B) *The importance of apparently minor details in the language employed*

There is much significance in the small phrases and prepositions used in enabling sections. In *The Composition of Legislation* (1957) at pages 149-50 Driedger says:

> Power to make regulations may be conferred, by describing the specific regulation that may be made, by assigning a subject-matter in relation to which regulations may be made or by prescribing a purpose for which regulations may be made.
>
> The Minister may make regulations prohibiting the export of grain.
>
> A section in these terms authorizes the Minister to make a regulation saying, as the statute contemplates,
>
> No person shall export grain.
>
> There is no authority to say anything else and no ancillary regulations are authorized.
>
> The Minister may make regulations respecting the exportation of grain.
>
> This is a wider authority. The regulations to be made are not described, but the Minister has authority to make regulations on a specified subject-matter. Ancillary regulations, and even a regulation authorizing a subordinate official to make a prohibitory order, would come within the authority conferred.
>
> The Minister may make regulations for the purpose of prohibiting the exportation of grain.
>
> Here again, a wide authority is conferred. Any regulation may be made, so long as it meets the test—is it for the purpose prescribed? If outside the statutory purpose, it would be *ultra vires*: but if within the purpose it would be *infra vires* . . .

Examples of enabling Sections of the three types just discussed are, respectively: *The Canada Agricultural Products Standards Act,* Section 5(1); *The Aeronautics Act,* Section 4(1); and the *Animal Contagious Diseases Act,* Section 3.

Your Committee believes that Mr. Driedger's useful analysis of apparently insignificant language should be borne in mind by Members of Parliament when considering enabling provisions in Bills. It is highly relevant to determining the scope of a statutory power.

(C) *Conferring power to make regulations "for carrying out for the purposes and provisions of this Act"*

Such a provision, or some variation of it, is found in most Canadian statutes. At page 148 of *The Composition of Legislation* Mr. Driedger says with respect to such powers: "Such power can, without any harm being done and without causing dispute, be given a fairly liberal interpretation if only administrative regulations are made. But a general power should be narrowly construed (either when drafting the statute or the regulation) if penal regulations are intended. If members of the public are to be punished, or deprived of their rights, by regulations, is it not better to confer the power specifically?" In his evidence Professor H. W. Arthurs said that such powers are "not usually held to sustain anything more than fairly routine procedural regulations." (*Minutes of Proceedings and Evidence.*

page 25). Reference can be made to *Frobisher Limited v. Oak, Canadian Pipelines* (1956-57), 20 W.W.R. (N.S.) 345 (Sask) holding that the general language there in question could not sustain a regulation creating a substantive legal right and, by way of contrast, to *Blackwood v. Bank of Australia* (1874), 30 L.T. 45 at p. 47, where a general enabling provision was given a much wider interpretation.

A variation on the usual theme is contained in Section 61 of the *Immigration Act* which reads:

> 61. The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act and, without restricting the generality of the foregoing, may make regulations respecting . . . [seven matters are specified].

The evidence of the Legal Adviser of the Department of Manpower and Immigration was to the effect that this general language was authority for Section 32(4) of the Regulations made under the Act—which is the most far-reaching of all of the provisions in the regulations. (*Minutes of Proceedings and Evidence,* page 200). Briefly, this regulation enables an immigration officer to form a subjective opinion on the basis of which he may refuse a person admission to Canada. Your Committee has referred to it above.

The following are other variations on the usual theme of this type of enabling provision:

*The Destructive Insect and Pest Act,* Section 4(*j*):

> Generally for any other purpose that may be deemed expedient for carrying out this Act, whether such other regulations are of the kind enumerated in this section or not.

*The Emergency Gold Mining Act,* Section 7(1)(*j*):

> Generally dealing with any matter arising in the course of the administration of this Act, for carrying into effect the purposes of this Act and the true intent, meaning and spirit of its provisions.

*The Fair Wages and Hours of Labour Act,* Section 6(*k*):

> Generally for the due enforcement of the provisions of the Act and regulations.

*The Aeronautics Act,* Section 13(*o*):

> Providing for the effective carrying out of the provisions of this Part.

*The Cheese and Cheese Factory Improvement Act,* Section 7(*f*):

> Any other matter deemed necessary for the efficient enforcement of this Act.

*The Civil Service Insurance Act,* Section 18(*i*):

> Any other purpose for which it is deemed expedient to make regulations in order to carry this Act into effect.

It should be asked with respect to each statute being prepared whether (*a*) it is necessary to have a general enabling clause in it, and, if so (*b*) whether the clause would vary the standard formula "for carrying out the purposes and provisions of this Act."

Your Committee now sets forth ten fundamental principles which it believes must be kept in mind when statutory provisions enabling regulations

to the made are being prepared. To our minds, these principles represent desirable constitutional and legal values. In some particular statutes the desirable is not possible. The principles are, therefore, intended as presumptions, and not as hard-and-fast rules which should govern in all cases. Where the occasion demands, it may be necessary to depart from one or more of them. However, in such cases, the onus should be upon the Government to justify to Parliament the necessity for a departure from the usual norm.

**Your Committee recommends that all enabling acts for regulation-making authorities should accord with the following principles:**

**(a) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language.**

Under this principle your Committee stresses the importance of precision in the expression of the periphery, or outer boundaries, of the law-making power conferred. Such precision reduces difficulties in determining what falls within, and what without, the scope of the power. This determination logically should precede the assessment of an enabling provision against the background of other relevant principles. It is unnecessary to stress that clearly written enabling provisions tend to avoid litigation involving the validity of regulations.

**(b) There should be no power to make regulations having a retrospective effect.**

Legislation, whether it be in statute or regulation form, which has retroactive effect is generally not looked upon with favour. It involves changing the rules after the game has started. Section 117(2) of the *Income Tax Act* is an example of an enabling provision allowing a regulation to be made having retroactive effect:

> No regulation made under this Act has effect until it has been published in the Canada Gazette but when so published, a regulation shall, if it so provides, be effective with reference to a period before it was published.

At this point it is useful to refer to a portion of the evidence which refers to this provision in the *Income Tax Act* and to other principles respecting the preparation of enabling legislation. The following question was put to the Associate Deputy Minister of Justice:

> Regarding other matters relating to what you find in the enabling legislation, do you have general working criteria? Say you are asked to draw up a bill that involved regulations which would amend another statute or define terms in the instant statute or give a power to subdelegate the power to make regulations or the power to enact retrospective regulations. Do you have certain rules saying that you will not allow this unless it is absolutely necessary?

He answered:

> Absolutely, sir. All of these points are very carefully considered. You have given a number of examples, but let us just take the last one, whether the statute ought ever to confer the power to make retroactive regulations. I think you would concede that you go a long way through the statutes of Canada to find such a power . . . I am thinking particularly of the Income Tax Act which does contain a power to make a regulation which, when it is published, may take effect at a day earlier than the date of its publication. This of course is because of the very special requirements of that law to make regulations that are applicable to entire

> taxation years. So a regulation that may be made, for example, in January or February may have to be retrospective in its operation apply to an entire taxation year. But that is a very exceptional power, and that kind of power is not lightly bestowed by any draftsman. (*Minutes of Proceedings and Evidence,* p. 241)

The exception in the *Income Tax Act,* appears, therefore, to be justifiable, but at the same time it strengthens our belief that there should be a general rule, with an onus on the Government to justify exceptions to it.

**(c) Statutes should not exempt regulations from judicial review.**

It is basic that a regulation not authorized by statute is invalid. However, some statutory provisions attempt to regulate in one way or another the operation of this principle.

The *Excise Act* provides in Section 127:

> All regulations made under this Act shall have the force of law,....

*The French Convention Act,* Section 3(2) provides:

> Any order in council or regulation made under this Act shall have effect as if enacted in this Act but may be varied or revoked by a subsequent order or regulation, and shall be laid before both Houses of Parliament as soon as may be after it is made.

The case law appears to indicate that such "boot-strap" provisions do not turn an unauthorized regulation into an authorized one. See Wade, *Administrative Law,* (2nd ed., 1967) at p. 306 and Griffith & Street, *Principles of Administrative Law,* (3rd ed., 1963) at p. 118. Such provisions are, however, potentially dangerous, and, in any event, appear to serve no useful purpose. On this point see Driedger's *The Composition of Legislation* at page 148.

The *Disfranchising Act,* Section 11(2), contains a most unusual provision. It reads:

> Any general rules and orders so made (by the judges of every court constituted for the purposes of the Act) and not inconsistent with this Act shall be deemed be within the powers conferred by this Act, and shall be of the same force as if they were herein enacted.

There is obviously a far cry between something which is not inconsistent with a statute, on the one hand, and something which is not authorized by it, on the other. The same provision can be found in the *Dominion Controverted Elections Act,* Section 83(2). It should also be noted that powers to make regulations which can be exercised on a subjective basis (see subparagraph (i) below) are often immune from effective judicial review. Any statutory provisions which indicate an intention to validate what would otherwise be an invalid regulation demonstrate an unfortunate parliamentary indifference to the legislative process, hardly in keeping with basic constitutional principle.

**(d) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be subject to disallowance by the Governor in Council or a Minister.**

While independence is the hall-mark of the judicial branch of government, it should be quite alien to the executive branch. The government of

the day should be fully responsible to Parliament, and through it to the people, for all subordinate laws which are made, whether or not the policy embodied therein was initiated within the existing departmental structure or elsewhere. On this subject the Report of the *Royal Commission—Inquiry Into Civil Rights,* at p. 356, observed:

> Subordinate legislative power is a law-making power exercised by persons or bodies subordinate to the Legislature. In its exercise rules having the force of law are formulated as a result of a decision or decisions made on grounds of policy. In accordance with constitutional principles discussed earlier, the exercise of powers to make decisions affecting rights of individuals on grounds of policy by persons or bodies other than the Legislature should be subject to political control. As in the case of administrative powers, political control of subordinate legislative power should be maintained by conferment of power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers.

In his submissions before this Committee the Minister of Justice observed on this point:

> There is a basis for delegated legislative power which is related to political feeling, for example, where Parliament makes the effort to defuse some area of administration of the appearance of political considerations. I think this is a contentious matter. It is done by the establishment of a board or tribunal, and this board or tribunal is given a mixture of administrative, quasi-judicial and legislative powers. The exercise of these powers, under the general policy laid down by Parliament is administered by a non-political tribunal or body thereafter. Examples of this approach can be found in the National Energy Board, National Transportation Commission, and recent broadcasting legislation.
>
> The feeling is that where administrative decisions have a high political content, Parliament ought to ensure that politics is taken out of those decisions. I am not so sure that this really achieves the results that we are trying to achieve, because any time there is a choice open to an administrator, that is by its essence a political choice. Where an independent board or tribunal is not responsible through a Minister of the Crown to the House of Commons, then I believe Parliament has forfeited and the people through Parliament have forfeited, some of its rights to supervise those boards and to supervise the administration of government .... I think it is fundamental that a minister take the heat for every administrative act of the federal jurisdiction. (*Minutes of Proceedings and Evidence,* p. 228).

Some statutes already provide that regulation-making authorities require the approval of the Governor in Council or of a Minister. See, for example, the *Harbour Commissions Act* (S.C. 1964-65, ch. 32) which provides by s. 13 (1) that the Harbour Commission "may, with the approval of the Governor in Council, make by-laws respecting the management of its internal affairs and the duties of its officers and employees, and for the management and control of the harbour and the works and property therein under its jurisdiction," etc.

Where there is not such an affirmative limitation, we believe that there should normally be a power of subsequent disallowance.

**(e) Only the Governor in Council should be given authority to make regulations having substantial policy implications.**

Out of 601 Acts surveyed for this Committee, 420 provide for delegated legislation. In 225 of these Acts or statutory provisions the Governor in Council is the authority vested with the power to make regulations. In 93

Acts, several authorities are vested with the power to make regulations, but in 74 of these Acts, the Governor in Council is among the authorities given the power. In 36 of the Acts providing for delegated legislation, the power is given to a Board or a Commission, but it has to be exercised with the approval of the Governor in Council. In 24 other Acts, the Minister of National Revenue is the authority vested with the power; in 8 of them, the power is given to judges; in 7 to the Minister of Agriculture; in 2 to the Registrar General, in 2 to the Secretary of State; in 1 to the Minister of Labour; in 1 to the Minister of National Defence; in 1 to the Postmaster General; in 1 to the Minister of Veterans Affairs; in 1 to the two Speakers of the Houses and in 1 also to the Houses themselves.

Those statistics confirm that the Governor in Council is in Canada the principal regulation-making authority. This fact was also recognized before the Committee by the Associate Deputy Minister of Justice:

> I think you are correct again in stating that in most statutes the power to make subordinate legislation is conferred upon the Governor in Council as being the most reasonable and responsible body to perform that function. This will be particularly true, where, for example, the substance of the regulations have substantial policy implication. (*Minutes of Proceedings and Evidence,* p. 240).

Those statistics also confirm that in Canada much less use is made than in England of ministerial regulations and, also, that the power to adopt regulations is vested in boards and commissions perhaps a little more often than may have been thought.

According to the Associate Deputy Minister of Justice, the choice of the person on whom a rule-making power is conferred "is a matter of judgment in each individual case" (*Minutes of Proceedings and Evidence,* p. 240). Nevertheless, your Committee wishes to emphasize that the first safeguard respecting the device of delegating power to legislate is that the power should be given to a responsible authority. This is the reason that your Committee urges that only the Governor in Council be given authority to make regulations having substantial policy implications.

This principle reflects the same policy as that set forth in (*d*) immediately above. It also appears to be in accordance with the present practice followed by the Department of Justice. The following question was put to the Associate Deputy Minister of Justice:

> What considerations are taken into account as to the subordinate law-making body? For example, what choice leads to the Governor in Council, as opposed to the Minister, as opposed to say a government board or commission that may be operating in that area? I think a review of the legislation indicates that in most cases it is the Governor in Council. What determines that decision?

He answered:

> I think the simplest answer that I can give you is that this is a matter of judgment in each individual case. I think you are correct again in stating that in most statutes the power to make subordinate legislation is conferred upon the Governor in Council as being the most reasonable and responsible body to perform that function. This will be particularly true, where, for example, the substance of the regulations have substantial policy implications.
>
> If on the other hand we are talking about regulations that are purely technical—I have in mind now the sort of thing dealing with air navigation orders, orders

that are made relating to the use of prohibited air space for very limited periods of time, for example, for air force manoeuvres—that is the sort of thing that we would normally regard as being not properly for the Governor in Council but a matter for the Minister to make orders about. One will appreciate that there is often a balance of convenience involved here, that it is somewhat more difficult to obtain readily, and quickly where necessary, regulations by the Governor in Council. It is perhaps more expeditious where the subject matter is of that nature, to provide that the Minister may make the regulation in question.

Further light is thrown on this matter by the Government's answer to question 23 of our questionnaire, which invited suggestions "respecting the improvement of the mode or process of conferring the power to make regulations". The Government replied:

> For the most part, power to make regulations is under Federal Statutes conferred on the Governor in Council. This has certain advantages and disadvantages.
>
> It is a disadvantage because it is almost impossible for the Governor in Council (which in Canada must be equated to the Cabinet) to examine proposed regulations even superficially, yet, under our theories of Cabinet and party solidarity, the whole Cabinet and party in power must defend them.
>
> If regulations are made by *Ministers,* the same considerations do not necessarily apply. For the most part the Minister would make his regulations himself (with the advice and assistance of his staff and the Department of Justice) and he would take responsibility for them. He would, of course, be well advised to consult his colleagues or Cabinet on important matters of policy, but the ultimate responsibility would be his and not that of the Government collectively.

Your Committee believes that the Governor in Council should remain charged with responsibility for regulations having substantial policy implications. But your Committee also recognizes the fact that too many regulations are being made by the Governor in Council. Many witnesses have told your Committee that more use could be made of ministerial regulations in purely technical matters. The processing of technical regulations through the Cabinet appears to some witnesses to be a time-consuming formality. Thus, your Committee is of the opinion that the power to enact technical regulations should be delegated more often to Ministers. Your Committee agrees with the Associate Deputy Minister of Justice's statement on this question:

> I do not think as a general rule that it is proper to burden the Governor in Council with the making of what I might call purely technical type of orders that do not have a policy content of any substantial nature. (*Minutes of Proceedings and Evidence,* p. 241).

**(f) There should be no authority to amend statutes by regulation.**

"Amend" is a word of wide import. Your Committee, for its purposes, intends to include the legislative acts referred to hereunder. It will be noted that your Committee refers to existing examples of each type of act:

1. The power to define words in the governing statute: the *Adult Occupational Training Act,* section 12.
2. The power to amend provisions or to add to provisions in the governing statute: the *Narcotic Control Act,* section 14 and the *Dominion Water Power Act,* section 12, (the power to pass regulations "to meet any cases which arise, and for which no provision is made in this Act"). Sometimes

this may be an open-ended power to add to or delete from a statutory schedule.

3. To proclaim acts into and out of force: the *Foreign Aircraft Third Party Damage Act,* section 5.
4. The extension of the time that a statute is to remain in force: the *Maritime Transportation Union's Trustees Act,* section 24(1).
5. The extension of the act to a matter not otherwise covered: the *Canada Grain Act,* section 57(3).
6. The exemption of something which would otherwise be covered by the act: the *Canada Shipping Act,* section 12(2). (This Act is replete with this type of provision).
7. The modification of the provisions of an act: the *Canada Shipping Act,* section 94(7).

The reasoning behind your Committee's recommended principle is stated in the *Report of the Royal Commission—Inquiry into Civil Rights,* page 348, as follows:

> Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body .... Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action .... The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.

**(g) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a licence fee or the like). Where the power to charge fees to be fixed by regulation is conferred, the purpose for which the fees are to be charged should be clearly expressed.**

This principle, insofar as it bears upon taxation by regulation, is in accordance with well established constitutional principles. Your Committee recognizes that many important aspects of schemes of taxation are governed by regulations and with this practice we have no quarrel. What your Committee objects to is the imposition of the basic liability to taxation by subordinate legislation. Your Committee is of the view that section 7 (1) (*r*) of the *National Parks Act* contravenes this principle. It reads:

> 7. The Governor in Council may from time to time as he deems expedient, make regulations for . . .
>
> (1) (*r*) levying taxes upon the interest of any person in land in a Park in order to defray, in whole or in part the cost of the establishment, operation, maintenance and administration of any public works, improvements or utility services referred to in paragraph (*j*) and prescribing that such taxes may be levied with respect to any or all of the following lands, . . . .

Insofar as the charging of fees is concerned (since it has some similarity to the imposition of taxes) it is important that it be confined to the purpose intended in the statute and that, therefore, this purpose be clearly expressed.

**(h) The penalty for breach of a prohibitory regulation should be fixed or, at least, limited by the statute authorizing the regulation.**

This principle, which your Committee considers to be an obvious corollary of the principle of parliamentary responsibility in the field of civil liberties, is generally honoured in legislation enacted by the Parliament of Canada. See, for example, section 13(*n*) of the *Aeronautics Act*:

> 13 . . . The Board may make regulations:
> (*n*) prescribing penalties, enforceable on summary conviction for
> (i) contravention of or failure to comply with this Part or any such regulations . . .
> but such penalties shall not exceed a fine of $5,000.00 or imprisonment for six months, or both such fine and such imprisonment . . . .

In *The Composition of Legislation,* Mr. Driedger at pages 147-48 gives convincing reasons why the power to fix penalties by regulation, and not statute, is often necessary:

> There is a further difficulty in setting out the penalty in the Act. One penalty must be selected for all cases. Yet some of the offences may be trifling and others serious. The tendency, therefore, will be to select a penalty too high for many of the offences.

The only statutory provision which we have found that departs from our principle respecting penalties but contains certain safeguards which are not standard is section 1(2) of the *Austria Treaty of Peace Act,* which reads:

> (2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

**(i) The authority to make regulations should not be granted in subjective terms.**

Powers to make regulations can be conferred in objective or subjective terms. There is a vast difference between the two following examples in the extent of the power conferred:

> The Governor in Council may make such regulations *as may be necessary* for carrying out the purposes of the Act
> The Governor in Council may make such regulations *as he deems necessary* (advisable, expedient) for carrying out the purposes of the Act.

There are many typical examples of the way in which power to legislate may be exercised on a subjective basis.

The *Agricultural and Rural Development Act,* section 8 reads:

> The Governor in Council may by regulations make provision for any matters *concerning which he deems regulations are necessary or desirable* to carry out the purposes and provisions of this Act.

The *Agricultural Co-operative Marketing Act* provides:

> 4(1) The Minister may, . . . prescribe . . . (*c*) any other matter *deemed necessary* for the efficient administration of the Act.

The *Canada-Australia Income Tax Agreement Act,* section 4 reads:

> The Minister of National Revenue may make such orders *and regulations as are, in his opinion, necessary* for the purpose of carrying out the Agreement or for giving effect to any of the provisions thereof.

In subject matter, undoubtedly the most far-reaching subjective delegation of legislative powers is found in the *War Measures Act,* R.S.C. 1952, ch. 288:

> 3. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, *as he may* by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable* for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:
> (*a*) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
> (*b*) arrest, detention, exclusion and deportation;
> (*c*) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
> (*d*) transportation by land, air, or water and the control of the transport of persons and things;
> (*e*) trading, exportation, importation, production and manufacture;
> (*f*) appropriation, control, forfeiture and disposition of property and of the use thereof.

But perhaps the widest of these powers can be found in section 4(1) of the *Migratory Birds Convention Act*:

> The Governor in Council may make such regulations as are deemed expedient to protect the migratory game . . . that inhabit Canada during the whole or any part of the year.

The word "expedient" confers a wider scope than the word "necessary".

It is interesting to note that, since 1962, no further use has been made in New Zealand, on principle, of such expressions as "as in his opinion may be necessary or expedient":

> 'Any previous restriction on the power of the Court to enquire into the matter is removed' . . . It is clear that the "subordinate" nature of regulations made under [the clause] is preserved and that the rights of persons to test the validity of such regulations in a Court of Law is fully protected. (*Report of the Delegated Legislation Committee,* New Zealand, 1962, p. 8).

**(j) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations.**

It is obvious that the establishment of such tribunals is of such importance that it should be provided for by statute.

The common criticism of these subjective provisions is that they enable regulations to be made under them which are virtually beyond challenge in the Courts, except as to their constitutionality. The extent of the control of the Canadian Courts of Justice over the legality of regulations is not so extensive, in principle, as that which is exercised by the American Courts of Justice. Under the American doctrine it is for the courts to say whether or not there is a rational relationship between particular delegated legislation and the governing statute; judicial review of the reasonableness of delegated legislation is possible in the United States but not generally in Canada and in Britain. This is why judicial review of delegated legislation is virtually

impossible when the power is granted in subjective terms. This point is well made by Driedger:

> An even wider authority can be conferred by saying:
>
> The Minister may make such regulations as he deems necessary for the purpose of prohibiting the exportation of grain.
>
> Here the Minister is made the sole judge of the purpose, and, in a practical sense, it is not possible to challenge the validity of the regulation. Thus, the War Measures Act of Canada provides that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, *as he may* by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable* for the security, defence, peace, order and welfare of Canada. The authority to make laws under the above enactment is virtually unlimited, and there is only a theoretical possibility that a specific order or regulation will be held ultra vires. (*The Composition of Legislation* (1957) pp. 149-50).

Parliamentary as well as judicial control is made more difficult by subjective grants of regulation-making power. It would be hard effectively to challenge a ministerial discretion if the only standard of judgment were the Minister's own perception of the exigencies of the situation. Parliamentary scrutiny of regulations could not be successfully instituted as a general practice if all enabling provisions were subjectively phrased, and to the extent that there are any such provisions, parliamentary scrutiny would be weakened.

The Associate Deputy Minister of Justice admitted to your Committee that the purpose of subjective grants of power was to prevent "judicial" review:

> There are many instances . . . where a power is conferred to take whatever steps the Governor in Council or the Minister deems necessary in order to accomplish a stated objective, and usually the way in which you control the breadth of the power is by narrowing the stated objective.
>
> Suppose the law were to say that the Governor in Council may make such regulations as are necessary in order to accomplish a stated objective. Take that as the alternative way of formulating it. Then, of course, the regulation is open to attack as to the validity of its exercise, if in fact the regulation that was so made was not necessary in the judgment of the court . . .
>
> On the other hand, if it is stated that the Governor in Council may make such regulations as he deems necessary in order to accomplish that objective, then presumably so long as the objective is carefully defined and the exercise of the power is not manifestly unreasonable or unjust in its application, then it will not be open to challenge on that ground, on the ground of its necessity alone. (*Minutes of Proceedings and Evidence,* p. 242).

To the further question "what policy reason would you have for not leaving it open to court attack?", the Minister of Justice replied:

> Because it is a matter of policy. The government has to be responsible for policy and not have that judgment substituted by a court. That is the reason. (*Ibid.,* p. 242).

And the Associate Deputy Minister added:

> There are instances when policy on the law is really to accomplish the result intended without endangering the validity of what is being done by an attack in the courts. That is perhaps as simple and bold an answer as I can possibly give you. (*Ibid.,* p. 242).

The McRuer Royal Commission recommended that "powers with subjective limitations should not be conferred except in legislation of an emergency nature" (*Royal Commission—Inquiry Into Civil Rights* (1968), p. 343). In its lengthy answer to our Question 23 requesting suggestions "respecting the improvement of the mode or process of conferring the power, to make regulations", the Government conceded that "the 'deems necessary' formula could be eliminated in all but a few doubtful cases." The Government answer goes on set out in more detail considerations respecting the different types of grants of power.

Your Committee has decided to recommend that as a general rule authority to make regulations should not be granted in subjective terms. The adoption of our rule would leave it open to the Government to justify its language in a particular case where it felt that subjective language was imperative.

We do not wish to rigidify the processes respecting the preparation and passage of bills through Parliament and therefore would not recommend any mandatory procedure to be followed with respect to the scrutiny of enabling povisions. However, **your Committee recommends that the Minister of Justice should, where he deems it appropriate, refer the enabling clauses in any Government bill to the proposed Standing Committee on Regulations at the same time as the bill is referred to the relevant Standing Committee for Committee consideration.**

The repeated reluctance of the Minister of Justice to refer such provisions to the Committee might become subject matter for debate on bills in the House.

In the same spirit of avoiding rigidities we have decided not to recommend such further principles as (*a*) power should not be delegated to make regulations involving matters of policy or principle or (*b*) which trespass unduly on personal rights and liberties. We would certainly hope that enabling acts would not allow regulation-making authorities to infringe the civil liberties of citizens, but we are of the opinion that they are not likely to do so if they conform to our ten criteria for enabling acts. Moreover, scrutiny of this general kind is already provided for under the *Canadian Bill of Rights*. We hesitate also to include a principle as broad as one opposing powers of regulation over matters of policy or principle, because of the interference it might cause to the main operations of the Administration. Again, we feel that our more specific criteria are sufficient.

Chapter 3

# Advance Consultation

A common criticism of subordinate legislation is that, unlike Parliamentary legislation, it is, so it is said, made privately and without the benefit of public advice and criticism. We propose to examine the law and practice on this subject in Canada and in other jurisdictions.

Two Canadian statutes provide for a type of formalized consultation, or hearing, prior to the making of regulations. The *Broadcasting Act,* S.C. 1967-68, ch. 25, s. 16(2) provides:

> (2) A copy of each regulation or amendment to a regulation that the Commission proposes to make under this section shall be published in the *Canada Gazette* and a reasonable opportunity shall be afforded to licensees and other interested persons to make representations with respect thereto.

The *Grain Futures Act,* R.S.C. 1952, ch. 140, s. 5(2) provides:

> Before any such regulation is made notice thereof shall first be given to The Winnipeg Grain Exchange and The Winnipeg Grain and Produce Exchange Clearing Association Limited, and each of the said associations or any members thereof shall be given an opportunity to be heard in connection therewith.

These are the only two formal requirements which we have found in Canadian legislation respecting consultations or hearings prior to the making the regulations. With respect to the practice of prior consultation, in the absence of legal requirements, this Committee put to the Departments and Agencies the following questions:

> 11. Does your Department or Agency consult interested or affected persons when preparing regulations so as to obtain their views with respect to the scope and content of the regulations? If so, please advise as to the procedures used, formal or otherwise, for obtaining or implementing this consultation.
> 12. Are parliamentary committees ever consulted in the formulation of your regulations?

The answers to question 11 show that almost invariably departments and agencies consult interested and affected persons and representative parties through meetings, correspondence, telephone calls and even formal hearings. In some cases the proposed regulations are published in draft form for comment and criticism by those affected. This particular method of obtaining assistance exhibits, perhaps, one feature of making laws in

regulation form which gives this form an advantage over statute law, since it is not the practice to circulate draft Government bills prior to their first reading in the House.

The answers to question 12 indicated, generally, that parliamentary committees are not consulted in the formulation of regulations. However, several departments and agencies advised us that the appropriate parliamentary committee has reviewed, with useful effect, existing regulations. During the presentation of its submissions to this Committee, the Department of Manpower and Immigration advised that suggestions made by the Joint Parliamentary Committee on Immigration examining the White Paper on Immigration in 1967 "were in large part incorporated in the resulting regulations of October 1, 1967", even though this Committee did not issue a report. (*Minutes of Proceedings and Evidence,* p. 178). Three governmental agencies advised us that they consulted statutory advisory committees, which, in some cases, are representative of interested persons, prior to the making of regulations: The Farm Credit Corporation; the Canadian Livestock Feed Board; and the Unemployment Insurance Commission.

The variety of comments made by members of the Department of Transport during this Committee's hearings is instructive both as to existing practices and their utility in varying areas of regulations:

> From our experience, I would think, we would get a far better reading of the reaction of the people concerned through informal consultation rather than through a formal public hearing. That is my impression.
>
> I think there are probably two extremes in regulations. One, is the regulation with an extremely complex and highly technical content which affects a relatively small number of people. At the other extreme there are those regulations affecting a large number of people, for example, safety regulations. If it were mandatory to have consultation with these large segments of the population, I think the input from these people would be very beneficial in formulating effective safety regulations and it also would bring to the attention of the public in a very striking manner, I think, by their participation, of the existence and the necessity of having these regulations. Perhaps I would not be prepared to agree that it should be mandatory to have consultation on all regulations, but on specific regulations of a simple nature that affect a large number of people, I think it would, indeed, be beneficial.
>
> There are various types of regulations, administrative directives and that sort of thing that could be made, but one where I do not see advanced consultation as being too practical a possibility would be in the setting of rates and charges—nobody likes a rate increase. Just this past winter we determined an increase in rates and charges for the use of government wharfs which were approved around the beginning of December to take effect April 1. We gave lots of advance notice to the industry that these rates and charges were going up and in this way they were advised, but there were no public hearings or meetings at which we said, 'Do you mind if we raise this rate from 40 cents to 50 cents'?" (*Minutes of Proceedings and Evidence,* pp. 172-73).

In the United States the *Administrative Procedure Act,* 1946, provides for certain minimum procedures to be followed by federal agencies before they make laws. Section 4 thereof provides, in part:

> Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency

management or personnel or to public property, loans, grants, benefits, or contracts—

(*a*) Notice—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(*b*) Procedures—After notice required by this section, *the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner;* and after some consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection. (Emphasis added).

We find the exceptions to these minimum requirements are as significant as the requirements themselves.

Professor Abel, of the Faculty of Law in the University of Toronto, who has had considerable academic and practical experience in American administrative law, outlined to this Committee four different methods of obtaining advance participation in the subordinate legislative process in the United States—based substantially on the analysis described in Professor Ralph F. Fuchs' *Procedure and Administrative Rule-making,* 52 Harvard Law Review 259 (1938). Professor Abel said:

> I do not think that categories of concepts can be rigidly adhered to in this connection, but he [Fuchs] indicates four general types: one, investigative, two, consultative, three, conferences, and four, adversary.
>
> The first one, investigative, is the sort of correspondence inquiries that are addressed, when a regulation is intended, to persons who might be thought to be interested. The initiation by the department for requests for information to such other government departments or officials as it thinks can usefully supply information.
>
> The consultative one stresses actually the existence of advisory committees, which undoubtedly are useful devices that can be employed. If there is not an official advisory committee constituted, the trade associations, unions, and other regularly operating groups in the area—who might have sentiments on the matter—are solicited and their opinions are utilized advance at the preparation of the regulation.
>
> The conference method contemplates the assembly of a group of people at a designated time and place, or designated times and places, where they meet to discuss the possible content of regulations in a certain area.
>
> The adversary one, as its name implies, suggests something in the nature of a formal trial or hearing with the presentation of witnesses and the evidences of records. They are in a somewhat ascending order of formality and formalism.
>
> It is suggested—and I think that the suggestion is undoubtedly true—that the propriety of employing one or other of these methods or, perhaps, some variant, is dependent upon a number of factors. You cannot have appropriately the same

kind of operation incident to the formulation of every kind of regulation. Such matters as the character of the parties affected, the nature of the regulations, the nature of the agency or department itself, and its personnel, in similar matters will govern, from time to time, the choice of one or the other of the methods. (*Minutes of Proceedings and Evidence,* p. 67).

He then offered some examples, which in his view, illustrated that advance consultation was not always desirable:

> There are undoubtedly types of regulations where nothing in the way of advance consultation, or formal activity outside of the department itself, is required or would be appropriate. I have in mind, for instance, such matters as one sees gazetted year after year, and quite properly, prescribing the open seasons and the game limits for fishing in the various waters of Canada. This is something that must be handled that way but where the matter is repetitive, and where there would seem to be no necessity for going outside for any information.
>
> Take another kind of situation of somewhat the same order. I know it is the policy of the Government of Ontario now—and I should think, perhaps, it is that of the Government of Canada, judging from a casual survey of the legislation—no longer to attempt to fix in statutes a prescribed scale of fees or money levels from time to time but to allow these to be fixed by Order in Council. This takes into account the varying values of money and the circumstances that there have been over the course of years which indicate something of an inflationary tendency. There is certainly no point where we are trying to do something like adjust a scale of fees from time to time to hold hearings on that matter. This is the kind of thing that does not adapt itself well to that.
>
> There are other kinds of matters that one can recognize—although they would certainly be exceptional—where a sudden and grave emergency arises and here there would hardly be time to have any sort of a preliminary consultation. This again, must be taken into account. (*Minutes of Proceedings and Evidence,* p. 67).

Professor Fuchs, at pages 265-66 of the article referred to, discusses the possible variations in relevant factors, giving examples, bearing on the relevance of formalized prior consultation and hearings:

> Administrative rule-making procedure necessarily requires adaptation to the varying circumstances under which general regulations are prescribed by administrative action. Thus a regulation applying to the railroads of the United States permits, if it does not require, an antecedent procedure involving a full hearing to the affected parties, whereas a rule of the Bureau of Marine Inspection and Navigation applying to thousands of unknown owners of small boats can scarcely be preceded by an investigation of the same character. It is one thing, moreover, to lay down a simple regulation governing a particular aspect of the use of streets by motorists, and quite another to prescribe the detailed accounting practices of a large group of utilities in matters of great technical difficulty affecting claims to large sums of money. There is an equally important distinction between regulations put forth with an eye single to the maintenance of a smooth-working routine in the conduct of a public service, and the highly discretionary code of financial controls by which it is sought to direct, in part, the workings of a credit economy.
>
> A single official, moreover, who perhaps is only intermittently in touch with the problem to be governed, may proceed quite differently in arriving at a regulation from the way in which a board of experts or of representative character is likely to attach a rule-making problem. Finally, a regulation whose breach entails simply the loss of a minor privilege is quite different from one whose violation may result in a penitentiary sentence.
>
> Between the extremes which these examples represent many shades of difference may be found. The aspects of rule-making which determine the significant categories for procedural purposes may, however, be grouped under the following headings: (1) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the

types of administrative agencies exercising the rule-making function; and (5) the character of enforcement which attaches to the resulting regulations.

In the United Kingdom the *Rules of Publication Act, 1893,* provided that public notice should be given to proposals to make "statutory rules" and the departments concerned had to consider representations or suggestions made by interested parties, who were made aware of the proposed rules by the public notice. This provision was repealed in 1946. Dr. Kersell has commented on this pre-1946 practice as follows:

> All interested and affected parties were invariably consulted long before it became necessary to consult them under . . . the Rules of Publication Act, 1893. To then publish notification and wait the required forty days simply wasted time. (*Parliamentary Supervision of Delegated Legislation* (1960), p. 8).

While there is now no general requirement in the United Kingdom as to giving notice prior to the making of subordinate legislation, informal and various types of formalized consultations usually take place. Significant use is made of statutory advisory committees which must be consulted prior to the making of regulations. The general practice may well be reflected in the following evidence which was given before the Committee on Ministers' Powers:

> No Minister in his senses with the fear of Parliament before his eyes would ever think of making regulations without (where practicable) giving the persons who will be affected thereby (or their representatives) an opportunity of saying what they think about the proposal. (See Minutes of Proceedings and Evidence, pages 35-36(4). (Quoted on Pages 127-28 of Griffith & Street, *Principles of Administrative Law* (3rd ed., 1963)).

Professor H. W. R. Wade in his *Administrative Law* (2nd ed., 1967) at page 317, sums up the British position and offers his own views on compulsory consultation:

> Consultation before rule-making though usually not required by law, is in fact one of the major industries of Government. That being so, it is doubtful whether anything would be gained by imposing more general legal obligations and formal procedures. At any rate, no such reform has been demanded.

It may be noted that the recent *Report of the Royal Commission—Inquiry into Civil Rights* (February, 1968) concluded that "advance publication of regulations before they are made is not required in Ontario as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation." (page 364).

The advantages of prior consultation before the making of regulations is obvious, and **your Committee therefore recommends that, before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper** (as in the case of the White Paper on Immigration, discussed above), **stating its views as to the substance of the regulations,**

**to the appropriate Standing Committee,** which might conduct hearings with respect thereto. It is essential that all relevant facts and viewpoints should be taken into account before regulations are finally made.

Having said this, we should state that we are of the opinion that no useful purpose would be served by laying down in legislation of general application minimum procedures respecting prior consultation or hearings which would apply to the making of all regulations. However, **your Committee recommends that, when enabling provisions and statutes are being drawn, consideration should be given to providing for some type of formalized hearing or consultation procedure where appropriate,** e.g. where all affected parties may be easily identifiable and the matters to be covered by the regulations lend themselves to a hearing or consultation type of procedure. It should be left to the individual enabling sections, where feasible and practical, to provide for the appropriate type of consultation procedure.

Chapter 4

# The Drafting of Regulations

It is difficult to over-estimate the importance of good drafting in the regulation-making process. It is important that regulations be drawn with the same care and attention as statutes. We refer to the following observations on this point:

> An administrator who keeps steadily in view the intelligibility of his regulations finds his work facilitated in three ways. First, it is very much easier to bring a measure into operation among people who understand it. Secondly, the area of controversy is defined by the elimination of mere misunderstanding and misrepresentation. Thirdly, but certainly not least important, it is only by carrying the terms of the law down to the particular case of John Smith that the administrator can tell whether he has covered the ground. Omissions disclose themselves, anomalies start to light, and the system, as it gains in adaptability, advances equally towards precision, completeness, and fairness. (A letter in The Times (London), February 22, 1935 quoted in Frankfurter & Davison, *Cases on Administrative Law* (2nd ed., 1935) p. 211 at page 212).
>
> The importance of good drafting cannot be over-emphasized and the more resort to delegated legislation is practised by Parliament, the more necessary is it that its draftmanship should be uniformly good ... Prevention is both better and less expensive than cure. If ten cases of ultra vires regulations occur to-day, and nine of them would be avoided by a general improvement in the standard of drafting, it is obvious that an important public advantage would be achieved, and one peculiarly relevant to the object of our reference. If we assume that legal proceedings result in two or three of the ten cases, the saving of expense direct and indirect which would result is in itself a public economy. But the value of good drafting is not limited to the avoidance of illegalities. In the ordinary life of the community what is above all important is that legislation, whether delegated or original, should be expressed in clear language. (*Report of Committee on Minister of Powers,* 1932, Cmd. 4060, at p. 50).
>
> Finally, I repeat a point that I have made: regulations should be intelligible to the person affected by them ... There is no more important principle than intelligibility when you are dealing particularly with laymen. (Professor H. W. Arthurs, *Minutes of Proceedings and Evidence,* pages 14-15).

Before dealing with our recommendations respecting improvement in the drafting of regulations, it is well to repeat the provisions in existing laws on this subject.

P.C. 1954-1787, made under the *Regulations Act*, provides in Section 4:

> Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with

the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

The *Canadian Bill of Rights,* S.C. 1960, c. 44, s. 3, provides:

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* . . . in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any inconsistency to the House of Commons, at the first convenient opportunity.

Sections 4 and 5 of the S.O.R./61-16, made under the *Canadian Bill of Rights,* provide:

4. A copy of every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* shall, before making of the proposed regulation, be transmitted to the Deputy Minister of Justice by the Clerk of the Privy Council.

5. Forthwith upon receipt of a copy of a proposed regulation transmitted by the Clerk of the Privy Council pursuant to Section 4, the Minister shall

(*a*) examine the proposed Regulation in order to determine whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Bill of Rights;* and

(*b*) cause to be affixed to the copy thereof so transmitted by the Clerk of the Privy Council a certificate, in a form approved by the Minister and signed by the Deputy Minister of Justice, stating that the proposed Regulation has been examined as required by the *Canadian Bill of Rights;*

and the copy so certified shall thereupon be transmitted to the Clerk of the Privy Council.

6. Where any of the provisions of any Bill examined by the Minister pursuant to Section 3 or any of the provisions of any proposed regulation examined by him pursuant to Section 5 are ascertained by the Minister to be inconsistent with the purposes and provisions of the *Canadian Bill of Rights,* the Minister shall make a report in writing of the inconsistency and shall cause such report to be deposited with the Clerk of the House of Commons in accordance with Standing Order 40 of the House of Commons at the earliest convenient opportunity.

It would appear from the evidence given to this Committee by the Legal Adviser to the Privy Council Office that the examination of regulations pursuant to the *Regulations Act* regulation is mainly as to legal validity, form and efficacy. He said:

Proposed regulations are submitted either to [the Assistant Clerk of the Privy Council, Orders in Council] or to myself for approval as to form and draftsmanship. At that point I take the draft regulations, try to review them carefully to understand just what they are trying to do in their proposals. Quite often that requires lengthy consultations with officials in the particular department putting them forward. On any particular set of regulations this may require three, four or sometimes ten meetings with the officials in order to get the precise intentions expressed in the regulations. On others they will be shorter and consultations will not be required at all. (*Minutes of Proceedings and Evidence,* p. 212).

As far as "*the* established standards" referred to in Section 4 of the *Regulation made under the Regulations Act,* are concerned, we were advised that these mean "high standards of legislative drafting generally". (*Minutes of Proceedings and Evidence,* p. 219). (The transcript, which says "apply standards of legislative drafting generally" is incorrect). Nowhere are any "standards" expressly laid down.

As far as the *Canadian Bill of Rights* scrutiny is concerned we were advised:

> It really comes down to a personal interpretation of the Bill of Rights. The Bill of Rights appears to be very clearly written. Two main considerations I have to apply which I find most often possibly not observed when a proposed regulation is submitted to me are, first, the one requiring that the person have a fair hearing where a right is going to be taken away from him, and second, discrimination of one form or another. Those are the main violations, if you will, that I find in proposed regulations. (*Minutes of Proceedings and Evidence,* p. 213).

Two comments may be made. First, it is fair to observe that not all lawyers and parliamentarians would share the same feeling about the ease of application of the *Canadian Bill of Rights.* Secondly, it appears that the practice is not to report an inconsistency with the purposes and provisions of the Canadian Bill of Rights to Parliament, as provided for in the statute, and the regulations made thereunder, but to continue to work with successive drafts of the regulation until the inconsistency has been removed. We have no fault to find with this technique, but the burden it imposes on the Department of Justice is considerable.

We were advised that in 1968 some 528 draft regulations were presented to the Clerk of the Privy Council and examined by the Legal Adviser. Nearly all of these drafts required revision or reconsideration as a result of examination by the Legal Adviser. (*Minutes of Proceedings and Evidence,* p. 226). The burden imposed on the Legal Adviser, who now works without any direct assistance, is all the more appreciated when it is considered that regulations may vary from one page to 150 pages and, as we were advised, some drafts require up to ten meetings with departmental officials.

It would appear, generally, that the present form of scrutiny, as far as pure legal draftsmanship is concerned, is serving a useful purpose and is resulting in a better quality of regulations than we would have without it. In answer to one of the questions put to the departments and agencies in this Committee's Questionnaire, we were advised that at some point in the drafting process of a regulation (generally not at the beginning), the Legal Adviser to the department in question, who in most cases is a Department of Justice Officer, either prepares or revises the regulation.

The Minister of Justice advised us, that "the Department of Justice performs primarily a review function in relation to drafting regulations. We perform that review function primarily under the authority of two statutes, the Regulations Act and the Canadian Bill of Rights . . . Neither of these statutes [gives] the Department a very dynamic or positive role at the drafting stage. . . We [have] very little to do with the preparation of regulations". (*Minutes of Proceedings and Evidence,* pp. 225 and 227). The Minister further advised us that he intends to institute a programme of training seminars for the benefit of the legal officers coming under the jurisdiction of the Department. Attempts are being made to enlarge the Legislative Section of the Department of Justice and to get the seminars underway. (*Minutes of Proceedings and Evidence,* p. 226).

By way of answer to a further question in this Committee's Questionnaire we have been advised that the majority of regulations are drafted initially in English and are translated into French after they have been approved by the Legal Adviser to the Privy Council Office. In some cases, in the interest of speed, translation commences much earlier in the drafting process. Most departments indicated that there was negligible delay occasioned by translating a regulation but some answers indicated that there was considerable delay—up to six weeks, in some cases—occasioned by the necessity to translate regulations. We understand that the Royal Commission on Bilingualism and Biculturalism will be reporting in considerable detail on the question of the translation of regulations into French or English, as the case may be. The only observation which we can make at this point is the obvious one that, if insufficient qualified translation personnel are responsible for any significant delay in the making and bringing into effect of regulations, it is a matter which requires urgent attention in the way of increased staff and training.

**Your Committee recommends that the Government should take all necessary steps to facilitate the expansion of the Legislative Section of the Department of Justice and to provide thorough training for legal officers in the Department, including those seconded to other departments, in the drafting of regulations.** At the present time far too heavy a burden is placed on the Legal Adviser to the Privy Council Office. This burden should be shifted to the departments and agencies responsible for producing draft regulations for examination by this Office and this can only be accomplished by improving the quality of draftsmanship at the departmental level by the Department of Justice lawyers there.

We are of the opinion that the present procedure for examination as to form and draftmanship should continue. It is a useful device to enable the Government to ensure, to some extent, a uniformly high standard of executive and administrative law-making. The subsequent legislative scrutiny which we recommend later in this Report should in no way relieve the executive from responsibility for producing laws drawn in accordance with the highest standards of draftmanship.

It is of interest, as far as existing practices are concerned, to refer to a document prepared by the Privy Council Office entitled "Recommendations to the Governor in Council" respecting the procedure laid down by that Office to be followed by departments preparing recommendations which will result in Orders in Council of all types—executive, administrative and legislative. This document has some bearing on the drafting of regulations. We quote the following portions thereof:

> 2. The usual format for recommendations to the Governor in Council . . . should contain, in as brief a form as is consistent with clarity, a statement of the background to the recommendation, and the reasons for making it. In the last, executive, paragraph, the exact *statutory authority* (name of act, section, subsection) should be cited, and a *complete statement of the action contemplated,* following as closely as possible the phraseology of the relevant legislation.

4. . . . It is necessary for Council to understand fully the purpose of the action they are being asked to approve. Departments should therefore send with a recommendation of this kind a very short explanatory memorandum. Such a memorandum should clearly indicate and explain the change from the previous situation which the recommendation is designed to achieve, (e.g. an increase in membership of a government board resulting from changes in legislation; an increase or decrease in licence fees and the reason for it).

12. Departmental officials preparing recommendations to the Governor in Council should consult with the legal adviser of their department to ensure that recommendations meet the requirements of the law.

15. Recommendations in this category should not be submitted to the Minister for signature until they have been approved as to form and draftsmanship by the legal adviser to the Privy Council Office.

16. After a submission in this category has been approved as to form and draftsmanship, it should then be presented to the Minister for signature. After Ministerial approval it should be forwarded to the Privy Council Office together with *five* copies in English and *two* in French of the schedule of regulations or amendments to regulations. (Previously the requirement was for *five* copies in English and *one* in French). These copies are required in order to process the resulting order in council for publication in the French and English editions of the Canada Gazette Part II. (*Minutes of Proceedings and Evidence,* pages 246, 247, 248.)

We note with interest the instruction contained in recommendation 2 as to the citing of the precise statutory authority for the action contemplated. We are of the opinion that it is more than just a matter of good form for a regulation, itself, to contain a statement of the specific statutory section(s) or sub-section(s), as the case may be, which authorize the making of the regulation. This practice is not always followed: see *Minutes of Proceedings and Evidence,* p. 223.

Two other points relating to the substantive aspects of drafting should be mentioned. First, the draftsmen of regulations pursuant to existing statutes should pay close attention to the criteria respecting the drafting of enabling provisions which we refer to in Chapter 2 of this Report. While some of these existing provisions may be defectively drawn, according to our recommended criteria, this should not afford an excuse for the making of defective (from our point of view) regulations thereunder. Secondly, the criteria which we recommend with respect to the work of the proposed Standing Committee on Regulations should also, obviously, serve as a guide to draftsmen of regulations. The fewer the confrontations with this Committee the more effectively our proposed system will be working.

**Your Committee therefore recommends that the present examination of regulations by the Privy Council Office as to form and draftsmanship and by the Department of Justice as to conformity with the Canadian Bill of Rights should be continued, and that the scrutiny by the Department of Justice should also take into account the other criteria for regulations proposed in this Report.**

Chapter 5

# Commencement of Operation of Regulations

There is nothing in the *Regulations Act* respecting the commencement of operation of regulations. Reference has to be made to the *Interpretation Act,* S.C., 1967-68, c. 7, s. 6(2) which provides:

> (2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force upon the expiration of the day immediately before the day the enactment was enacted.

By virtue of section 2 (1) of the *Interpretation Act* "enactment" means an Act or a regulation or any portion of an Act or regulation, and "enact" includes to "issue, *make* or establish" (emphasis added). It is, therefore, clear that unless the enabling statute, or the regulation itself, states that the regulation is to come into force on a particular day, it shall come into force at midnight preceding the day it is made.

With the exception of regulations made in the form of orders in council, which require the signature of the Governor General, there is, generally, little, if any, formality associated with the making and coming into force of a regulation. Regulations become operative law upon their execution by the regulation-making authority and without any further procedure. This lack of formality ill accords with the degree of openness which we believe should be associated with law-making, particularly having regard to the possibility that there may have been no antecedent publicity respecting the making of the regulation. One may contrast the publicity given to Bills passing through Parliament and the formal act of Royal assent which "shall be the date of commencement of the Act, if no other date of commencement is therein provided." (*Interpretation Act,* s. 5(1)).

Further, in the realm of subordinate legislation itself, this informality may be contrasted with procedures applicable in some, if not all, of the provinces in Canada and those in the United Kingdom. The *Regulations Act* of Manitoba (R.S.M. 1954, c. 224, s. 3) provides:

> 3. (1) Every regulation or a certified copy thereof shall be filed in duplicate with the registrar.

(2) Unless a later day is provided, a regulation shall come into force on the day it is filed with the registrar *and in no case shall such regulation come into force before the day of filing.*

(3) Unless expressly provided to the contrary in another Act, *a regulation that is not filed as herein provided shall have no effect* .... (Emphasis added).

See also section 5 of the *Regulations Act* of Saskatchewan (R.S.S. 1965, ch. 420) and sections 3 and 4 of the *Regulations Act* of Ontario (R.S.O. 1960, ch. 349) both of which contain similar but more elastic provisions with respect to the coming into force of a regulation.

In the United Kingdom the *Statutory Instruments Act,* 1946 provides:

4. (1) Where by this Act or any Act passed after the commencement of this Act any statutory instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each House of Parliament and, subject as hereinafter provided, *shall be so laid before the instrument comes into operation*:

Provided that if it is essential that any such instrument should come into operation before copies thereof can be so laid as aforesaid, the instrument may be made so as to come into operation before it has been so laid; and where any statutory instrument comes into operation before it is laid before Parliament, notification shall forthwith be sent to the Lord Chancellor and to the Speaker of the House of Commons drawing attention to the fact that copies of the instrument have yet to be laid before Parliament and explaining why such copies were not so laid before the instrument came into operation. (Emphasis added).

In Canada there is legislative machinery respecting the processing of regulations *after* they have been made. The *Regulations Act* provides:

3. (1) Every regulation-making authority shall, within seven days after it makes a regulation, transmit copies of the regulation in English and in French to the Clerk of the Privy Council.

(2) A copy of a regulation transmitted to the Clerk of the Privy Council under subsection (1), other than one made by the Governor in Council or the Treasury Board, shall be certified by the regulation-making authority to be a true copy of the regulation.

4. (1) The Clerk of the Privy Council shall maintain a record in which he shall record the regulations transmitted to him under Section 3 and the regulations made by the Governor in Council or the Treasury Board.

(2) Every regulation recorded under this section shall bear a number assigned to it by the Clerk of the Privy Council, but all copies of the same regulation, whether they are in English or in French, shall bear the same number.

5. (1) A regulation is not invalid by reason only that it was not transmitted to the Clerk of the Privy Council, certified or recorded as required by this Act ....

P.C. 1954-1787, (S.O.R. Consolidation 1955, p. 2676) made under the *Regulations Act,* provides:

5. Three copies in English and one in French of every regulation, one copy of which shall be certified, shall be transmitted to the Clerk of the Privy Council, in accordance with section 3 of the Act.

6. When received and recorded pursuant to section 3 and 4 of the Act, regulations shall have affixed to them by the Clerk of the Privy Council the designation 'SOR' followed by an appropriate number.

**Your Committee recommends that the Regulations Act should provide, as a general rule, that a regulation shall not come into force until the date on which it is transmitted to the Clerk of the Privy Council.** (In Chapter 6 we

shall consider the provision for, in certain cases, later dates for the commencement of operation or regulations). This would not appear to impose any undue burden on the Administration as, in most cases, a regulation could be so transmitted immediately upon making. It would involve an improvement over our existing law in that a regulation would become a document of public record and integrated into an organized accumulation of delegated public law from the time of its commencement.

There may be cases where, by reason of geographic distances or other factors, it would not be possible to transmit immediately to the Clerk of the Privy Council a regulation concerned with, say, a situation of an emergency nature. In such cases, if the regulation so provided, it should come into effect upon its making and be transmitted to the Clerk "as soon as possible".

**Your Committee therefore recommends that in cases of emergency a regulation might come into effect at the time of making.** As a precedent for his type of provision reference can usefully be made to the provision to section 4(1) of the Statutory Instruments Act, 1946, set forth above.

Chapter 6

# The Publication of Regulations

## 1. *Whether to Publish*

The importance of publishing regulations is obvious. If the general purpose of law is to make human actions conform to certain standards then there must be adequate publicity given to laws of all kinds before compliance therewith can be reasonably expected.

We have indicated above in Chapter 2 the ways in which a regulation may avoid being "caught" by the *Regulations Act,* and hence, being published. We have referred to, and quoted, the *Regulations Act,* section 9(2) and section 9 of the *Regulation* made thereunder which provides for the exemption from publication, and from other *Regulations Act* requirements, of regulations made under thirteen particular statutes. As noted, we understand that the Privy Council Office takes the view that any regulations referred to in section 9 of the Regulation are also exempt from the form and draftsmanship examination required by section 3 of the Regulation. According to the strict language of section 9 of the Regulation, this does not necessarily follow. This approach of the Privy Council Office also has the effect of allowing exempted regulations to avoid *Canadian Bill of Rights* scrutiny.

The Government has presented us with a combined answer to questions 16 and 18 of our questionnaire. Question 16 asked: "What circumstances do you envisage would make it necessary to extend the time for publication of a regulation under section 6(2) of the *Regulations Act*?" Question 18 read: "What circumstances would, in your view, justify the exemption from publication of a regulation?"

The Government's answer is as follows:

> Extension of the time normally allowed for publication of a regulation under section 6(1) of the *Regulations Act,* R.S.C. 1952, Chapter 235 and exemption from publication of a regulation may from time to time be justified in the following circumstances:
>
> (*a*) where notification or other form of communication would be more appropriate;
>
> (*b*) where the safety and security of the country or part of it might be adversely affected;

(*c*) where information might be disseminated which could deleteriously affect Canada's foreign relations;
(*d*) where the regulation involves the distribution of information which might adversely affect the relations of the provinces *inter se*;
(*e*) where the regulations are of limited application and involve the granting of privileges or the relaxation of rules;
(*f*) where other conditions from time to time necessitate that a regulation should be exempt from publication or that its publication be postponed provided that the provisions of the *Regulations Act* are complied with;
(*g*) an extension of the time normally allowed for the publication of a regulation may be necessitated where the matter is one of urgency.

We are prepared to accept the validity of all these circumstances, but we believe that in such cases, as we said above in Chapter 2, there should not be a corresponding exemption from the other requirements of the *Regulations Act*.

In other words, **your Committee recommends that section 9 of the Regulations Act, which allows exemptions from the provisions of that Act, should be amended to provide for exemptions from publication and time of publication only.** Hence, all of the other provisions of the Regulations *Act,* and the *Regulations* made thereunder, would continue to apply: the examination as to form and draftsmanship (including Canadian Bill of Rights scrutiny), transmittal, certification, recording, numbering and laying. Regulations which are expressly exempted from publication only should be described in *Votes and Proceedings* of the House of Commons as outlined in Chapter 7, following their laying before the House. The information respecting such regulations which we recommend should be set forth in *Votes and Proceedings* should be also published in the *Canada Gazette*. They would then be available for examination notwithstanding their non-publication.

As mentioned above, we were assured by the Assistant Clerk of Privy Council (Orders in Council) that there are, as far as his office is concerned, no Orders in Council which are secret, regardless of non-publication. (*Minutes of Proceedings and Evidence,* page 222). This is as it should be, and all regulations, regardless of the regulation-making authority, should stand in this position. It is useful to refer to the provisions of section 9 of the *Regulations Act* of Saskatchewan (R.S.S. 1965, c. 420) which provides as follows:

> 9. (1) During the regular office hours of the registrar and upon payment of the prescribed fees, every person shall have access to and be entitled to inspect any regulation filed with the registrar.
> (2) No person shall be required, as a condition of his right of inspection under subsection (1), to disclose the name of the person for or in respect of whom such access or inspection is sought.
> (3) The registrar shall, upon request accompanied by payment of the prescribed fees, produce for inspection or furnish a copy or a certified copy, as the case may require, of any regulation filed with him.
> (4) The fees payable for services under this section shall be such as may be prescribed by the Lieutenant Governor in Council.

We are of the opinion that, subject to one qualification, a similar provision should be enacted in the *Regulations Act*. We do not believe that a fee

should be charged for the inspection of a regulation. It is, however, reasonable that an appropriation fee should be paid to cover the cost of obtaining a copy thereof. Since the great bulk of regulations will be published in the *Canada Gazette,* we feel that little resort will be held to the rights conferred by such a provision. Nevertheless, we believe that the right to inspect regulations should be statutorily guaranteed with as little qualification as possible. A statement should be inserted at the beginning of Part II of each number of the *Canada Gazette* to the effect that even unpublished regulations may be examined and copies obtained at the Office of the Clerk of the Privy Council.

**Your Committee therefore recommends that all regulations, regardless of the regulation-making authority, should be available for public inspection.**

2. *The Effect of Publication on the Commencement of Operation of Regulations*

As the law now stands, the general rule is that regulations become effective when made (See Chapter 5 above). Section 6 (1) of the *Regulations Act* requires that every regulation shall be published in English and in French in the *Canada Gazette* within thirty days after it is made. This, again, is the general rule. Individual statutes often require regulations to be published at times earlier than 30 days. See, for example, the *Army Benevolent Fund Act,* section 12 ("when made"); the *Broadcasting Act,* section 27(2) ("forthwith"); the *Central Mortgage and Housing Act,* section 11(4) ("upon becoming effective"); the *Export Credits Insurance Act,* section 12(2) ("upon becoming effective"); and the *Extradition Act,* section 7 ("as soon as possible"). Some statutes specifically provide that a regulation shall not have effect until it is published: the *Canadian Forces Act,* section 195 (2); the *Estate Tax Act,* section 52(2) and the *Income Tax Act,* section 117(2) (although both these statutes make provision for the retroactive operation of regulations); the *Hamilton Harbour Commissioners Act,* section 20(2); the *Immigration Appeal Board Act,* section 8(2); and the *Public Service Staff Relations Board Act,* section 19(2). Thus, the general position is that regulations are in effect for up to thirty days before they are published, except where individual statutes or regulations provide otherwise. A further exception can be found in section 6(3) of the *Regulations Act* which reads:

> (3) No regulation is invalid by reason only that it was not published in the *Canada Gazette,* but no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the *Canada Gazette* unless:
> (*a*) the regulation was, pursuant to section 9, exempted from the operation of sub-section (1), or the regulation expressly provides that it shall operate according to its terms prior to publication in the *Canada Gazette,* and
> (*b*) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged.

Having regard to the recommendations which we shall make respecting the principles bearing on the connection between publication and operation, we are of the opinion that this subsection, generally, provides adequate safeguards. However, we feel that it would be improved if clause (*b*) were amended by inserting "reasonable steps had been taken for the purpose of bringing the terms of the relevant provision in the regulation to the notice of the public" were inserted in the place of "reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public".

The safeguard afforded by section 6(3) would be buttressed if more enabling provisions provided that regulations made thereunder should not come into effect until publication or some stipulated period of time after publication. Further, even in the absence of such a provision in the enabling legislation, regulations themselves should, where possible, provide that they are not to come into effect until publication or some later point in time.

Your Committee put the following question to the departments and agencies of the Government:

> 3. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until:
> (*a*) published in the *Canada Gazette;* or
> (*b*) thirty days after publication in the *Canada Gazette.*

The answers to this question indicate conclusively that the effect of such requirements depends entirely on the nature of the regulation in question. Some regulations are of a benefit-conferring nature only. They can only benefit affected persons. The answers indicated that there would be no useful purpose delaying the operation of such regulations until they were published. Other regulations are required to be passed quickly in the interest of public health and safety. To require such regulations as these to be published before they become effective could well defeat the purpose of delegating the power to make such regulations in the first place. Some regulations, of their nature, have to become effective when made. It is useful to reproduce, by way of example, the answer of the Department of Finance to question 3:

> In some cases such as regulations dealing with matters of procedure under the guaranteed loan legislation, a statutory requirement that a regulation could not become law until published or until some time after publication would probably have no harmful effect other than to further delay the already time-consuming process of enacting subsidiary legislation. There are, however, certain areas where such delays could be harmful. The following are some examples:
> (i) Because of the nature of capital markets and the need for last minute decisions to tailor the Government's borrowing program to market conditions, it would not be possible, administratively, to wait until Orders in Council passed under Part IV of the Financial Administration Act authorizing borrowings had been published in the *Canada Gazette.* A day or so after such Orders are passed, the terms and conditions of new bond issues are made public. It is important at that stage to proceed expeditiously with the issue and there can be no suggestion that the terms and conditions of the issue could be changed.

(ii) The guaranteed loans legislation provide that interest rates are to be prescribed by regulations. It would seem essential that once an interest rate has been established, it should be applied immediately. Otherwise the lending institutions, knowing of a pending increase, would suspend further loans until the new rate became effective.

(iii) Another example relates to the imposition or removal of surtax under section 7 of the Customs Tariff. It would obviously be undesirable to have advance publicity of any such changes. The same difficulty is encountered with respect to any regulation changing excise, tariff or other rates.

(iv) In some areas of the Department's responsibilities the time factor may be critical where the regulations are made to remedy specific problems. For example, an Order exempting goods or classes of goods from the application of anti-dumping duty to meet contingencies or the application of an emergency surtax to deal with injurious imports.

(v) The above comments are also applicable with respect to the Government's financial relationship with the Crown corporations.

In the Committee's view, the decision as to whether or not a regulation is to become effective only on publication, or some time thereafter, should be left, as it now is, to the individual statutes. However, **your Committee recommends that statutes should resort more than they now do to the use of provisions stating that the regulations made thereunder, or under specified sections thereof, do not become effective until published or some specified period thereafter.** Even if it felt in some cases that this type of decision cannot be made when the statute is being prepared, careful consideration should be given to the question when the regulations are being drawn and the practice of inserting in the regulation that it is not to become effective until published, or some time thereafter, should be encouraged. This is now done in some regulations. The Department of Transport, Marine Regulations Branch, advised us, as part of its answer to question 3, that:

> The remaining 20 of our regulations cover such non-safety matters as pollution, registry, licencing and the imposition of fees for services rendered by the Department; and there would be no particular administrative difficulties arising out of delaying their effective date until publication in the *Canada Gazette* or even 30 days thereafter. Even now, such regulations are frequently given an effective date some weeks or months after enactment.

A good example of the type of regulation which should not become effective until some time after publication is afforded by the Patent Rules relating to the organization of the Patent Office and the procedures respecting applications for patents, etc. These rules were amended by P.C. 1969-1319, on Friday, June 27, 1969, which came into effect on that date. The amendments made substantial changes in the law. We were advised that, at the outset of the operation of these amendments, copies were not available for those affected by them. Some were advised by an official in the Patent Office that no copies would be available until the amendments were published in the *Canada Gazette* two or three weeks later. On being apprised of the situation, the Commissioner of Patents arranged for the mimeographing and distribution of copies to patent practitioners immediately, on an urgent basis. The amendments were eventually published in the *Canada Gazette*—on the 23rd day of July, 1969.

The commencement date for the operation of a regulation should be one of the stipulated subject matters for scrutiny by the proposed Standing Committee on Regulations. Each department should have valid reasons why a regulation does not contain a provision to the effect that it is not to become effective until publication or some time thereafter.

3. *Time within which Regulations are to be Published.*

It may be queried whether the thirty day period provided for in section 6(1) of the *Regulations Act* is not too long. As far as the mechanics of publishing a regulation are concerned, we were advised to the following effect: A regulation has to be submitted to the Queen's Printer at least the second Friday before the Wednesday of publication—i.e. 12 days prior to the publishing date. In exceptional cases a regulation may be received for printing in the *Canada Gazette* if it is furnished to the Queen's Printer on the morning of the second Monday, prior to the date of publication. The *Canada Gazette* is now published on the second and fourth Wednesday of each month. (See section 3(1) of the *Regulation made under the Regulations Act*). It would appear, therefore, that the soonest a regulation can be published is 12 days after making and that it is possible for a regulation to be published as long as 25 days after it is made, even if it is furnished to the Queen's Printer the day it is made. The only apparent solutions to the problem respecting shortening the time for publication appear to be (*a*) shortening the 12 day period required by the Queen's Printer and (*b*) requiring that the *Canada Gazette,* or at least Part II thereof, be published every week—even more often.

In some cases special editions of the *Canada Gazette* have been published on days other than every second Wednesday. See for example the *Canada Gazette* published on Friday, January 10, 1969, setting forth regulations made under the *Anti-Dumping Act*. This practice should be encouraged, where appropriate.

The Government's reply to question 17 of our questionnaire ("Is there any reason why regulations could not be published within fifteen days of being made?") was as follows:

> Regulations could be published within fifteen days provided all the necessary personnel and faciilties were available. This would involve considerable additional expense both to the Departments and Agencies involved and for the central Agencies. The current inhibiting factors are purely administrative.

If the expense is not prohibitive, we would encourage earlier publication of regulations.

4. *Consolidation and Indexing.*

Section 9(1) of the *Regulations Act* provides that the Governor in Council may make regulations providing for, *inter alia,* the publication of consolidations and the indexing of regulations.

Section 7 of the Regulation made under this provision provides:

> 7. A consolidation of all regulations then in force shall be published from time to time when determined by the Governor in Council.

Pursuant, apparently, to this power, P.C. 1955-539, SOR/55-138 was passed ordering that a consolidation of all regulations in force on January 1st, 1955, be published, the said consolidation to be entitled, *"Statutory Orders and Regulations, Consolidation, 1955"*. The regulations have not been consolidated since that time. Your Committee has been advised that the regulations now in force will be so consolidated again after a new issue of the Revised Statutes of Canada has been completed. This project is now under way.

**Your Committee recommends that regulations should be consolidated** (which involves, perforce, revising each regulation so that all of its amendments since its first enactment are incorporated in its text) **on a much more regular and frequent basis than has been the practice in the past, and at least once every five years.** Consolidation makes it much easier to find the law.

We would also refer to section 19 of the *Canada Grain Act* which provides:

> 19. The Board shall, during the month of August in each year, publish in the *Canada Gazette* in consolidated form all regulations made by the Board under this Act and in effect on the first day of that month.

This is a useful precedent which could be used in other statutes which provide for the making of regulations which are frequently amended. We suggest that more resort be had to such provisions in the statutes, where appropriate, that is where a regulation is subject to frequent amendment.

Section 8 of the Regulation made under the *Regulations Act* provides:

> 8. The Clerk of the Privy Council shall cause to be published quarterly a consolidated index and table of all regulations and amendments, revocations or other modifications made since the last preceding consolidation.

The quarterly consolidated index and table of statutory orders and regulations which is published pursuant to this regulation is a very useful document. Regulations are listed therein alphabetically according to their title, subject matter or title of the Act under which they are made. Further, this publication contains a table of statutory orders and regulations according to the enabling statutes under which they were made. This table enables one searching the law to satisfy himself that he has the titles and numbers of all regulations passed under any given statute (which are not exempted from the *Regulations Act*) up to the point in time covered by the table.

In keeping with our previous recommendation, **your Committee recommends that the present quarterly consolidated index and table of statutory orders and regulations 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 under which they were made, their date, and the date of their transmittal.

Chapter 7

# Laying of Regulations Before Parliament

Section 7 of the *Regulations Act* provides:

> 7. Every regulation shall be laid before Parliament within 15 days after it is published in the *Canada Gazette* [which should be within 30 days after it is made, s.6(1)] or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

This provision applies to all regulations covered by the *Regulations Act*. It may be noted, however, that approximately twenty-five other statutes of the Dominion of Canada provide for the laying before Parliament of regulations made thereunder. Some of them provide that the regulations made thereunder shall be laid "as soon as may be after they are made", "forthwith", "fifteen days after the making thereof", "as soon as possible" and "at the session next after the making thereof".

The subject of the laying of regulations before Parliament should be considered, to some extent, together with the scrutiny of regulations, Parliamentary action with regard thereto, and publication. All of these are considered in other parts of this Report. E. A. Driedger has observed that the purpose of Section 7 of the *Regulations Act* is twofold:

> To acquaint the public with the law, and to provide an opportunity for comment. Publicity and freedom of discussion are probably the best safeguards against the abuse of power. ("The Enactment and Publication of Canadian Administrative Regulations", 19 *Administrative Law Review* 129 at p. 134).

It is useful, in assessing whether or not the present laying procedure provided for in Section 7 has an practical value, to describe what in fact is involved when a regulation is laid.

A regulation is now laid when a member of the Privy Council tables Part of the *Canada Gazette* in the House. Reference in this respect may be made to Standing Order 41(1) of the House of Commons which provides:

> (1) Any return, report or other paper required to be laid before the House in accordance with any Act of Parliament or in pursuance of any resolution or standing order of this House may be deposited with Clerk of the House on any sitting day, and such return, report or other paper shall be deemed for all purposes to have been presented to or laid before the House.

Members may thereupon consult or obtain a copy in the Parliamentary Returns Office. (*Minutes of Proceedings and Evidence,* pp. 235-36). Standing Order 41(3) provides that a record of any regulations so laid "shall be entered in the *Votes and Proceedings* of the same day". It may be thought that *Votes and Procedings* brings regulations to the attention of members. This is not the case. Reference may be made, by way of a typical example, to *Votes and Proceedings* dated May 29, 1969 at p. 1085 where the following appears:

> *Returns and Reports Deposited with the Clerk of the House*
> The folowing papers having been deposited with the Clerk of the House were laid on the Table pursuant to Standing Order 41(1), namely: . . .
> by Mr. Macdonald, a Member of the Queen's Privy Council,—Copies of Statutory Orders and Regulations published in the *Canada Gazette,* Part II, of Wednesday, May 28, 1969, pursuant to Section 7 of the Regulations Act, chapter 235, R.S.C., 1952. (English and French).

Such a statement obviously does not inform the Members, in any respect, of the nature of the regulations laid.

There are other reasons why this procedure, as a matter of law, appears to be useless for bringing regulations to the attention of Members. The provisions of P.C. 1954-1787, the *Regulation made under the Regulations Act,* provides in Section 3(2) thereof as follows:

> (2) Copies of Part II [of the *Canada Gazette*] and of all consolidations of regulations shall be delivered to such persons as are entitled to receive copies of the Statutes of Canada, . . .

It appears from Section 10(3) of the *Publication of Statutes Act,* R.S.C. 1952, c.230 that the members of the two Houses of Parliament are to receive copies of the Statutes of Canada. The Queen's Printer has adopted the practice of distributing the statutes and Part II of the *Canada Gazette* "on written request only" according to a manual prepared for use by this agency. This requirement, insofar as it relates to Members of Parliament, does not appear in the *Publication of Statutes Act,* in Order in Council P.C. 1953-609 (April 27, 1953) as amended by P.C. 1953-1661 (October 28, 1953), which are said, in the manual, to contain "regulations governing the free distribution to authorized categories." Nor does it appear in P.C. 1955-538 which further amends P.C. 1953-609, but which is not mentioned in the manual.

Members of Parliament should receive Part II of the *Canada Gazette* automatically, as is contemplated by section 3(2) of P.C. 1954-1787. Premising such receipt, it would appear that the laying procedures contemplated by Section 7 of the *Regulations Act* would not be necessary (assuming *Votes and Proceedings* contained more particulars with respect to regulations laid), to inform Members of the existence of the regulations. Further, it is obvious that the present laying procedures do not in any way further publicize regulations, or their existence, beyond the publicity already given to them by their publication in the *Canada Gazette.*

As far as the legal effect of laying is concerned, it is of interest to note by way of contrast, the general position in the United Kingdom where regula-

tions must be laid before they come into force. See section 4(1) of the *Statutory Instruments Act,* 1946, quoted in Chapter 5.

It is fair to say that the present laying procedure provided for in Section 7 of the *Regulations Act* is an empty formality. In our opinion, there is constitutional value in the formal notification of Parliament of laws made pursuant to powers it has delegated to the executive and the administration. Apart from the convenience of being able to table regulations in their *Canada Gazette* form there appears to be no reason why a regulation should await a potential total of 45 (30 days for publication, then 15 days thereafter) days before it is laid before Parliament. **Your Committee recommends that all regulations should be laid before Parliament forthwith after their transmittal to the Clerk of the Privy Council and their recording and numbering by him.** Any delay in the laying of the regulation pursuant to such a provision should be subject matter for scrutiny by the proposed Standing Committee on Regulations and, where appropriate, report to the House. **Your Committee recommends that Votes and Proceedings should list under "Returns and Reports Deposited with the Clerk of the House" the title of each regulation (which should be as descriptive as possible), the Act under which it is made, its date and the date of its transmittal.**

When Parliament is not sitting, by reason of dissolution, prorogation or adjournment, the regulation should be laid forthwith upon the resumption of sitting of the Parliament. Alternatively, in cases of prorogation and adjournment, it could be provided that depositing a regulation with the Clerk of the House on *any day* (and not just a sitting day), should be deemed for all purposes to laying the regulation before the House. This would require an amendment to Standing Order 41(1).

We think that it would be advisable if the *Regulations Act* were amended to expressly empower each House to decide for itself what constitutes "laying". Such an amendment would have the effect of confirming the present practice. Reference may be made to the United Kingdom *Laying of Documents before Parliament* (*Interpretation*) *Act,* 1948, c. 59, which makes such a provision with respect to the United Kingdom Houses of Parliament and which was enacted "for removal of doubt".

Chapter 8

# The Scrutiny of Regulations

1. *General.*

It seems obvious to us that, as a general principle, Parliament should be concerned with the nature and quality of laws made pursuant to powers which it has granted to the Governor in Council, to Ministers and to other persons and bodies. "The grant of general powers, however justified, implies a responsibility for close legislative attention to the course of administration". (Louis L. Jaffe, *Judicial Control of Administration Action,* (1965) at page 41). It is not possible for Parliament, as an institution, to keep directly under satisfactory review all subordinate legislation.

It is of value to review the institutional machinery which has been established by legislatures in other jurisdictions to deal with the review of this type of legislation. We should state, at this point, that the central problem relating to legislative review of executive and administrative law-making is the degree to which Parliament should involve itself in attempting to influence and control the course of administration. If Parliament goes too far into the substance of day-to-day administration it defeats many of the underlying reasons for delegating powers to make laws in the first place: lack of parliamentary time; lack of parliamentary knowledge on technical matters; the need to make rapid decisions in cases of emergency, etc.; (see Chapter 1). It is against this background that it is useful to examine, briefly, the experience of other jurisdictions.

2. *History of Parliamentary Scrutiny of Regulations.*

In England in 1925 the House of Lords, being concerned with the rather routine nature of the manner in which it was accustomed to approving, where required by statute, subordinate legislation, established a Special Orders Committee to examine regulations requiring an affirmative resolution before coming into effect and to report to the House thereon. As described by Dr. Kersell, the Committee considers these four matters:

(1) Whether the provisions raise important questions of policy or principle;
(2) How far the special order is founded on precedent;

(3) Whether the instrument can be passed by the House without special attention and whether there ought to be further special inquiry before the House proceeds to a decision, and if so, what form that inquiry might take;

(4) If the Committee has any doubt as to whether or not an instrument is *intra vires* it must report to the House accordingly. (*Parliamentary Supervision of Delegated Legislation* (1960) p. 29).

In 1931 the Senate of Commonwealth of Australia established a Standing Committee on Regulations and Ordinances to examine regulations to ascertain:

(1) that they are in accord with the statute;

(2) that they do not trespass unduly on personal rights and liberties;

(3) that they do not make rights and liberties of citizens dependent on administrative and not judicial decisions;

(4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment.

It should perhaps, be noted that the Australian Senate is not an appointed, but an elected, body.

In 1932 in the United Kingdom the Committee on Ministers' Powers (the Donoughmore Committee), paying scant attention to the existing House of Lords Committee, made the following recommendations respecting scrutiny of regulations by both Houses:

XIV. Standing Orders of both Houses should require that a small Standing Committee should be set up in each House of Parliament at the beginning of each Session for the purpose of... considering and reporting on every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement...

Every regulation or rule made by a Minister in the exercise of delegated lawmaking power, and laid before the House in pursuance of statutory requirement, would stand referred to the Committee. It would be the duty of the Committee to consider the regulation or rule forthwith, and to report to the House within fourteen clear days of the day on which the regulation or rule was laid. The Committee would not report on the merits of the regulation or rule but would report:

(1) whether any matter of principle was involved:

(2) whether the regulation or rule imposed a tax:

(3) whether the regulation or rule was

(*a*) permanently challengeable; or

(*b*) never challengeable, i.e., unchallengeable from the commencement; or

(*c*) challengeable for a specified period of time and thereafter unchallengeable and, if so, what was the specified period:

(4) whether it consisted wholly or partly of consolidation:

(5) whether there was any special feature of the regulation or rule meriting the attention of the House:

(6) whether there were any circumstances connected with the making of the regulation or rule meriting such attention:

(7) whether the regulation or rule should be starred, on the grounds that it was exceptional, and subjected to the procedure described below. (*Report*, pp 67-69).

These recommendations bore no immediate fruit. However, in 1944 the British House of Commons established a Select Committee on Statutory Rules and Orders. Its function is to consider subordinate legislation "with a

view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payments;

(ii) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts either at all times or after the expiration of a specified period;

(iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

(iv) that it purports to have retrospective effect where the parent Statute confers no express authority so to provide;

(v) that there appears to have been an unjustifiable delay in the publication or in the laying of it before Parliament;

(vi) that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section 4 of the Statutory Instruments Act 1946, where an Instrument has come into operation before it has been laid before Parliament;

(vii) that for any special reason its form or purport calls for elucidation;

(viii) that the drafting of it appears to be defective;"

In South Africa in 1949 a Select Committee of the House of Assembly of the Parliament of the Union of South Africa recommended the appointment of "an officer" to examine regulations and report to the House thereon on any one of the following grounds:

(*a*) That they appear to make any unusual or unexpected use of the powers conferred by the statute under which they are framed.

(*b*) That they tend to usurp control of the House over expenditure and taxation.

(*c*) That they tend to exclude the jurisdiction of the courts of law without explicit enactment.

(*d*) That for any reason their form or purport calls for elucidation or special attention.

In 1953, in India the House of the People established a Committee on Subordinate legislation. The general function of this Committee is to scrutinize and report to the House "whether the powers to make regulations, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation." In scrutinizing regulations the Committee is to consider:

(1) whether the Order is in accord with the general object of the Constitution or the Act pursuant to which it is made;

(2) whether it contains matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(3) whether it contains imposition of any tax;

(4) whether it directly or indirectly bars the jurisdiction of the courts;

(5) whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(6) whether it involves expenditure from the Consolidated Fund of India or the public revenue;

(7) whether it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(8) whether there appears to have been unjustifiable delay in its publication or the laying of it before Parliament;

(9) whether for any reason its form and purport call for any elucidation.

In New Zealand Standing Order 360 of the House of Representatives provides:

> 360. Statutes Revision Committee—At the commencement of every session a Statutes Revision Committee shall be appointed to consider all Bills containing provisions of a technical legal character which may be referred to it; and to consider any regulation within the meaning of and published pursuant to the Regulations Act 1936 which may be referred to it, with a view to determining whether the special attention of the House should be drawn to the regulation on any of the following grounds:
>
> (*a*) That it trespasses unduly on personal rights and liberties:
>
> (*b*) That it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
>
> (*c*) That for any special reason its form or purport calls for elucidation:
>
> The Committee to have power to sit during any adjournment or recess; to require any Government department concerned to submit a memorandum or to depute a witness for the purpose of explaining any regulation which may be under its consideration; and to report to the House or the Government from time to time.

In the Province of Manitoba in 1960 a Standing Committee on Statutory Orders and Regulations was established to examine regulations referred to it under the Act. This Committee applies the following principles in assessing regulations:

(*a*) The Regulations should not contain substantive legislation which should be enacted by the Legislature, but should be confined to administrative matters.

(*b*) The Regulations should be in strict accord with the statute conferring the power and unless so authorized by the statute, should not have any retroactive effect.

(*c*) The Regulations should not exclude the jurisdiction of the Courts.

(*d*) The Regulations should not impose a fine, imprisonment or other penalty or shift the onus of proof of innocence on to the person accused of an offense.

(*e*) A Regulation in respect of personal liberties should be strictly confined to things authorized by the statute.

In 1963 the Province of Saskatchewan established a system whereby the legislature appoints at the beginning of each session a Special Committee on Regulations. Its scrutiny criteria are:

(*a*) That it imposes a charge on the public revenues or prescribes a payment to be made to any public authority not specifically provided for by statute.

(*b*) That it is excluded from challenge in the courts;

(*c*) That it makes unusual or unexpected use of powers conferred by statute;

(*d*) That it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(*e*) That it has been insufficiently promulgated;

(*f*) That it is not clear in meaning.

It is of interest to review the highlights of Canadian Parliamentary history respecting legislative review of regulations. In 1943, in a speech in the Throne Speech Debate, the Honourable Brooke Claxton stated (*Debates* 1943, Vol. I, p. 297) that

> . . . the "practice of tabling orders in council, is, for all practical purposes, an empty form. I suggest that orders in council be referred to a committee for con-

sideration—not all the orders but orders having the effect of legislation of a general nature. Even when they get to the committee, all the orders of that kind would not be discussed; but if the committee felt that one particular matter should be discussed it could take up that order, have the departmental officials there to explain it, and make its report to the House. This could be done exceedingly quickly. In this way there would be an opportunity of improving the drafting of the orders, which sometimes leaves a great deal to be desired; there would be exercise of control over the executive, opportunity for ventilating grievances, and also observance of the important principle of the supremacy of Parliament."

In 1950, when the present *Regulations Act* was passing through Parliament, the Prime Minister observed (*Debates,* 1950, Vol. III, p. 3040):

> We do not believe we should recommend at this time that sort of committee because most of the statutory regulations have to be made by the governor in council, and that gives considerable time for checking, whilst in the United Kingdom most of these things are done by boards or other agencies of the crown. No one who is responsible to parliament or to the public hears of these regulations until they have become law. This United Kingdom Committee has strictly limited terms of reference that probably would not fit our situation. They have to report on whether or not the order infringes seven stated principles. If it does not, the committee has nothing to do with it. If it does, they call attention to that fact. We do not believe that would be a remedy that would fit our situation.

This statement implies that it was the view of the Government at that time that legislative scrutiny and executive scrutiny would, in fact, fulfill the same basic function.

In 1964 the Special Committee on Procedure and Organization of the House of Commons issued its Fifteenth Report (paragraphs 10 and 12 tabled in the House on December 15, 1964) which read, in part:

> 12. Your Committee recommends the establishment of the following six Standing Committees, described for the purposes of this Report as other Standing Committees, with the functions described below: . . .
>
> (*e*) *Standing Committee on Delegated Legislation*
>
> The function of this committee would be to act as a "watchdog" over the executive in its use of the powers conferred by statute, with the duty of reporting to Parliament any tendency on the part of the executive to exceed its authority. The committee's terms of reference should exclude it from considering the merits of or the policy behind delegated legislation, but it would be expected to draw the attention of Parliament to any regulations or instruments which impose a charge in public revenues, which confer immunity from challenge in the courts, which have an unauthorized retroactive effect which reveal an unusual or unexpected use of a statutory power, or which otherwise exceed the authority delegated by the parent statute.

The *Ontario Royal Commission Inquiry into Civil Rights Report,* 1968 at page 378, recommended the appointment of a legislative committee to scrutinize regulation having regard to these principles:

(*a*) They should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

(*b*) They should be in strict accord with the statute conferring the power, particularly concerning personal liberties.

(*c*) They should be expressed in precise and unambiguous language.

(*d*) They should not have retrospective effect unless clearly authorized by statute.

(*e*) They should not exclude the jurisdiction of the courts.

(*f*) They should not impose a fine, imprisonment, or other penalty.

(*g*) They should not shift the onus of proof of innocence to a person accused of an offence.

(*h*) They should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like).

(*i*) They should not make any unusual or unexpected use of delegated power.

(*j*) General powers should not be exercised to establish a judicial tribunal or administrative tribunal.

The Report stressed at page 377:

> The terms of reference for the Committee should exclude from review any consideration of the policy of the parent Act or of the merits of the regulations. The policy of the Act, having been settled by the Legislature after full debate and discussion, ought not to be re-opened for discussion in the Committee. The merits of the regulations, i.e., an evaluation of the need for them and their efficacy within the framework of the policy approved and provided for by the Act, are matters for which the government is responsible to the Legislature. It is not proposed that the functions of the Committee should be to supervise the operations of departments of government. Elimination of the consideration of policy or merits should permit the Committee to proceed in a non-partisan way as it has done in the United Kingdom and Manitoba.

Following this recommendation the Ontario Government has introduced Bill 125 into the Legislature. At the time of writing, it has had two readings, April 17, 1969 and May 2, 1969. It reads in part:

R.S.O. 1969, c. 349, amended — 1. The *Regulations Act* is amended by adding thereto the following section:

Special Committee on Regulations — 12. (1) At the commencement of each Legislature, a special committee of the Assembly shall be appointed for the duration of the Legislature, to be known as the *Special Committee on Regulations, with authority to sit throughout each session of the Assembly*.

Regulations referred — (2) Every regulation stands permanently referred to the Special Committee on Regulations for the purposes of subsection 3.

Terms of reference — (3) The Special Committee on Regulations shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes, and shall deal with such other matters as are referred to it from time to time by the Assembly.

Authority to call persons — (4) The Special Committee on Regulations may examine any member of the Executive Council or any public servant designated by him respecting any regulation made under an Act that is under his administration.

Report — (5) The Special Committee on Regulations shall, from time to time, report to the Assembly its observations, opinions and recommendations.

3. *Functioning of a Scrutiny Committee.*

The function of the United Kingdom House of Commons Scrutiny Committee has been thus described by one of its chairmen:

> If Members of Parliament were all perfect and able to do an inestimable amount of work, they would read all [the statutory instruments] through themselves and, if they desired, they could put down a prayer against any particular one but to save them doing that, this Committee is set up. Our function is to go through them and report to the House for their action if we think there is anything

unexpected or any unjustifiable delay or something that calls for elucidation. (*Minutes of Proceedings for Third Report of Select Committee on Procedure* (H.C. 189-1 of 1946) Para. 4704 (Sir Charles MacAndrew). Quoted on p. 93 of Griffith & Street, *Principles of Administrative Law* (3rd ed., 1963).

All the scrutiny committees have the following features in common: they are relatively small committees; they rely heavily upon preliminary examinations and reports of their legal counsel; they are more concerned with the form, language, and operation of regulations than their substance; they are objective and non-partisan; and they report the results of their examinations to the Legislature. The action which may be taken by the Legislature with respect to a regulation depends upon the terms of the applicable statutes and Standing Orders.

Most of the available literature relates to the British House of Commons Committee. We quote the following observations with respect to its work:

> To sum up: the amount of work, most of it drudgery, which is done by the Committee with the assistance of Counsel to the Speaker is considerable. The value and importance of this work are undeniable. The very existence of the Committee must prevent more shortcomings than the Committee detects; unjustifiable delay in publication and laying before Parliament has almost ceased; statutory instruments have became more intelligible. (Griffith & Street, *Principles of Administrative Law,* (3rd ed., 1963) at p. 99).
>
> Since [1944] it [the Select Committee on Statutory Instruments] has been in continuous existence and has done valuable work contrary to a good deal of expert and official opinion to the effect that its tasks were impracticable, undesirable, and so forth. (H.W.R. Wade, *Administrative Law* (2nd ed., 1967) at p. 319).
>
> Although sharply restricted in its terms of reference, the [Select Committee on Statutory Instruments] has had a considerable measure of success in inspiring legislation which tidied up the process of delegation reducing sharply objectionable uses of the device, arousing an informed public opinion, and even in curbing the verbosity of the framers of delegated legislation. The government departments are more careful in their later framing of new delegated legislation after the Committee has chided them . . . The civil servants fear it, and Cabinet respects it. (J. A. Corry, "The Prospects for the Rule of Law," Hodgetts and Corbett ed. "*Canadian Public Administration.*" (MacMillan Company, 1960) pages 547-48). Further the Committee on its own has achieved great improvements in the performance of departments with regard to lucidity in drafting and with regard to use of powers. Its very existence has had a salutory effect in these important matters. Delay in publication, laying and notification has been virtually eliminated for the past six years. No other serious abuses have really required the attention of the House. (John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at p. 60).

4. *A New Standing Committee on Regulations.*

We should comment, at this point, on the adequacy of the existing form and draftsmanship scrutiny being conducted by the Privy Council Office, described in Chapter 4. Within the scope of its defined purposes this scrutiny fulfills a useful role and we have not hesitated to recommend its continuance. Its significant feature is that it is executive review of executive law-making. As such it is not, in our view, a substitute for legislative review of executive law-making.

On the basis of the evidence which we have heard and the submissions which we have examined, we are firmly of the view that: (a) Parliament has

a particular role to play in the examination of certain aspects of the regulation-making process and (b) this role requires the instrumentality of a Committee, the chief function of which would be to isolate for the attention of the House matters pertaining to regulations which relate to the criteria which we set forth further on in this Chapter.

**Your Committee therefore recommends that a new Committee on Regulations** (hereinafter called the Scrutiny Committee) **should be established** with the following particulars:

**(1) It should be a Standing Committee of the House of Commons.**

As we have seen, the first scrutiny committee established in the Commonwealth was the Special Orders Committee of the House of Lords, which came into being in 1925, and the comparable House of Commons committee, the Select Committee on Statutory Rules and Orders, was not established until 1944. In November, 1952, Viscount Stansgate suggested that a joint committee of both Houses should be set up to examine delegated legislation. However, the fact that the scope of review has always been different in the two Houses apparently made this proposal politically unacceptable.

Sir Cecil Carr suggests a further reason for two committees:

> Why, it may be asked, cannot the two Houses set up a Joint Committee instead of having two separate committees working independently? Well, we must not expect British institutions to operate on rigidly logical lines. In the past a Joint Committee has not been enthusiastically favoured by the Commons House, and anyhow a First and Second Chamber will have a different approach. In 1950 the affirmative resolution for approving a draft Order in Council affording immunities and privileges to the Universal Postal Union sailed serenely through the Commons but ran into heavy weather in the Lords, where the Government withdrew it, the Commons then having meekly to cancel the approval they had given. Maybe Second Chambers are better equipped for sifting and reporting: our House of Lords has plenty of members with executive experience; the peers are 'less encumbered with the pressing distractions of everyday work' and are 'less dedicated to party allegiance'; their service can contribute the element of continuity. Two sieves must be better than one. ("Parliamentary Control of Delegated Legislation", *Public Law*, 1956, p. 200 at pp. 210-211).

In Australia the only scrutiny committee, the Standing Committee on Regulations and Ordinances, was set up by the Senate in 1931. Dr. Kersell analyzes the advantages of Upper-House scrutiny as follows:

> It would appear ... from a comparison of the Australian Senate Committee and the British House of Commons Committee that, useful as the House Committee is, an upper chamber Committee enjoys a number of significant advantages, even over a joint committee, which make it more effective. Undoubtedly the most important of these advantages is that its actions and utterances do not threaten the stability of the Government. Thus the Committee can be left free to scrutinize instruments on broad terms of reference, initially, perhaps, of its own choosing, which do not exclude substantive matters. Its reports, even when highly critical of the substance of delegated legislation, are likely to be considered on their merits and not on party lines. The Australian Government has on at least four major occasions found it possible to meet the criticisms of the Senate Committee by making appropriate concessions rather than by 'stone-walling' for a time before quietly implementing necessary changes.
>
> A second chamber and its committees, in addition, are not as squeezed by clock or calendar as are a lower house and its committees. They are not as distracted by the urgencies of political and governmental problems. Their memberships include, in each of Britain, Australia and Canada at least, a generous proportion

> of able men some of whom have had long executive and administrative experience. Particularly in Britain and Canada, but in Australia to a considerable degree, there is in second chamber committees the valuable element of continuity which is often difficult to maintain in the complexion of House Committees . . .
>
> The question now arises, could a committee of the Canadian Senate be as effective as that of the Australian, for the Australian Senate is elective, the Canadian is appointive. The Canadian Senate is understandably a much more reserved chamber than its Australian counterpart, but it does not necessarily follow that reports of a Canadian scrutiny committee made up of Senators would be ineffective. Much would depend on the quality of reports which in turn would depend on the quality of the Senators serving on the Committee and on the ability of the Committee's adviser or advisers. The Canadian Senate has in the past established committees of outstanding merit and there is no reason to believe it will cease to be able to do so in the future. If a Senate Scrutiny committee could produce reports of quality similar to reports from other Canadian Senate committees and to reports from the Australian Regulations Committee, they would carry much of their own conviction. This might be enhanced by making reports from a scrutiny committee easily available not only to Senators but also to M.P.s . . . (*Parliamentary Supervision of Delegated Legislation* (1960), pp. 76-79).

In India the scrutiny committee is of the Lower House, which is also necessarily the case in New Zealand where there is only the one House. The McRuer Commission recommendations are intended for a unicameral legislature and so provided no assistance on this point.

The Committe was divided over the question of the desirability of a Joint Committee of both Houses as opposed to a Standing Committee of the House of Commons alone, as some members felt that the non-elective and non-representative character of the Senate made it unsuitable for this role; but in the light of its terms of reference, which required it "to report on procedures for the review *by this House* of instruments made in virtue of any statute of the Parliament of Canada" (emphasis added), we have decided that we must in any event limit our recommendation in this respect to the setting up of a House of Commons committee. We therefore recommend the establishment of a new Standing Committee of the House of Commons charged with the scrutiny of regulations.

We should also state that we gave serious consideration to the scrutiny of regulations by the existing standing committees of the House—each committee examining regulations within its particular field of competence. Such committees would, of course, be much better suited to reviewing the policy content of regulations than would a specialized committee concerned chiefly with the processes respecting the exercise of delegated legislative powers. We came to the conclusion, however, that the continuous and sustained examination of regulations necessitates the establishment of a new Standing Committee on Regulations. We shall deal later with the substantial role which we believe Standing Committees should play with respect to the substantive aspects of regulations.

**(2) All regulations should stand permanently referred to it.**

The *Regulations Act* should provide that all regulations, as defined in that Act, including existing regulations should stand permanently referred to the Scrutiny Committe. This is the basic rule in Australia, Saskatchewan and

Manitoba and it may be noted that Ontario Bill 125 makes a similar provision. Specifically, each regulation should stand referred to the Scrutiny Committee forthwith upon its transmittal to the Clerk of the Privy Council. Such a rule enables the Committee to scrutinize the same regulations more than once, if it should so desire. It should be noted that under your Committee's proposed definition of "regulation", the Committe will have a broad subject matter: departmental directives, orders in council which add to or delete from statutory schedules, prerogative orders in council, regulations by independent agencies, regulations which are exempt from publication, as well as standard instances of regulatory power, provided always that they are exercises of legislative power.

**(3) It should strive to operate in an objective and non-partisan way.**

The Scrutiny Committee should approach its work in as objective and non-partisan a manner as possible. This appears to be one of the most significant features of Scrutiny Committees in other jurisdictions and we shall elaborate its implications in the course of the Report.

**(4) It should have a small membership to enable it to operate effectively.**

The Scrutiny Committee should be composed of a minimum of seven members and a maximum of twelve. It may be noted that in the United Kingsdom the Scrutiny Committe of the House of Commons, which is much larger than the Canadian House, is composed of eleven members. The Committee itself should be empowered to decide what its quorum should be. Standing Order 65(6) now provides that a majority of the members of a Committe shall constitute a quorum. The English Committee has a quorum of three. It is important that the work of the Committee not be frustrated by the lack of a quorum.

**(5) To make the objectivity of the Committee apparent, there should be some rotation among parties in the chairmanship.**

The objectivity of the Committee should be made apparent in its selection of its chairman.

In the United Kingdom the House of Commons Committee has a tradition of appointing an opposition member as Chairman. In most other jurisdictions it appears that a government member is the chairman.

In India the Chairman of the scrutiny committee is appointed by the Speaker, but the Deputy Speaker, if he is a member, *ipso facto* becomes chairman. On one occasion, at least, the Chairman has been a member of the Opposition. See M. P. Jain, "Parliamentary Control of Delegated Legislation in India", (1964) *Public Law* 3 and 152, at pp. 172-175.

It has been suggested that the British practice recognizes the theory that "as the Committee scrutinizes the handiwork of the government departments, a member of the ruling party may feel embarrassed in the Chair due to his conflicting loyalties" (Jain, *supra,* at p. 172).

On the other hand, Dr. Kersell gives the following evidence in favour of having a government member as Chairman:

> ... The advantage of having a senior member of the government's own party as chairman, I think, would be in the same terms as Senator Wood told me, that he

> would have much readier access to any minister or to the minister chiefly responsible for an Order in Council in the Cabinet. If there was something that needed tightening up in an instrument, it would be more easily possible for him to get this done informally. I am convinced that it is better to do things informally, if at all possible, than to have a "knock 'em down, drag 'en out" fight in public. (*Minutes of Proceedings and Evidence,* p. 90).

It should be observed that this suggestion was made in the context of a submission that a majority of the members on the Committee should be from the Opposition.

We do not think that any binding rule should be laid down on this point but would hope that a tradition would develop which would allow some alternation in the chairmanship between government and opposition members.

**(6) It should normally sit in public session.**

The Scrutiny Committee should normally meet in public, but have the power to sit *in camera* where necessary. The British Committee does not meet in public, but it appears from information furnished to one of our members that some members of the present British Committee feel that it might be advisable to have some public meetings. In Manitoba and Saskatchewan the general rule is that the Scrutiny Committee meets in public. We feel that while public meetings might, in some cases, impinge upon the objective nature of the Committee's approach, the paramount interest is the openness of the legislative process. It should be remembered that the Scrutiny Committee is dealing with regulations which have become law and are part of the "public domain".

**(7) It should be empowered to sit while Parliament is not sitting.**

The Scrutiny Committee should be empowered to sit during vacations and, if possible, during prorogations of the House. This is provided for in Saskatchewan and Manitoba, but not in England. The work of the regulation-making authorities goes on all year and work of the Scrutiny Committee would be seriously hampered if it did not have the power to sit during prorogations of the House.

Beauchesne states that committees cannot be empowered to sit after prorogation (*Parliamentary Rules and Forms* 4th ed., 1958, p. 243). We are not convinced that this is sound parliamentary law, and we should like to deal with this point further in a later report.

**(8) It should have adequate staff.**

The Scrutiny Committee should be provided with adequate staff, including, in particular, counsel with appropriate legislative experience. In other jurisdictions which have scrutiny committees, the importance of the work of counsel is repeatedly stressed. Counsel should examine all regulations referred to the Committee, prepare reports thereon for the Committee, communicate with the various government departments and agencies on behalf of the Committee and assist the Committee in the preparation of its agenda. To emphasize his or their, as the case may be, objectivity, counsel should be appointed by Mr. Speaker, after consultation with the Committee, and not by the Government.

**(9) It should examine regulations on the basis of six criteria.**

The most important single question respecting the terms of reference of the Scrutiny Committee is whether or not it should be empowered to examine into and report upon matters of "policy". The avowed position in other jurisdictions having scrutiny committees is that such committees do not consider the policy or merits of a regulation—but only certain aspects which may loosely be referred to as matters of form relating to the *application* of policy. It is said that the avoidance of policy in the scrutiny of regulations results in a more objective and business-like review of regulations and enables the Committee to get through all of the regulations referred to it within a reasonable time after the referral thereof; if committees were to consider form *and* policy they would become hopelessly bogged down.

After some consideration, we have concluded that these observations are valid and we would recommend that the main thrust of the Scrutiny Committee's work should be with respect to certain criteria which would exclude policy matters from direct consideration. While it is difficult to define "policy", we understand it generally to mean something which relates directly to the substantive solutions embodied in regulations as a result of the content and purpose of the enabling statutes. Certainly that policy in a regulation which is a direct reflection of the guides set forth in the enabling legislation should not be debated by the Scrutiny Committee, since this would amount to a re-consideration of the statute itself. Also, since one of the chief purposes of conferring the power to make regulations is to enable the Administration, which is supposed to have certain first-hand expertise, to devise solutions to problems as they arise, it could strike at the root of this purpose if the Scrutiny Committee had a general power to second-guess the Administration.

Having come to this general conclusion with respect to matters of policy, we do not, by any means, wish to state that there is no proper scope for Parliamentary review of the policy content of regulations. Obviously there is. In our view, for the reasons given above and also, more significantly, because the Scrutiny Committee would lack the necessary substantive expertise, such review could not properly be carried out by it. Policy review should be conducted by the appropriate Standing Committee of the House, and the Scrutiny Committee should be empowered to refer questions of policy in regulations to them. We would hope and expect that the Scrutiny Committee would gradually develop an expertise in the expeditious handling of policy matters beyond its terms of reference.

In order to determine the proper scrutiny criteria, we have considered the various criteria used in other jurisdictions. It may be noted that our recommended criteria do not contain as many points as those in some jurisdictions. We would expect that the members of the Scrutiny Committee would adopt a common-sense approach to the standards to be applied, within the general framework of a non-policy approach, and it seems to us that there would be no advantage in a proliferation of scrutiny items,

such as has led to an over-lapping of criteria in some other jurisdictions (and we readily admit that there are some in our proposed list). Also many of the points covered in other jurisdictions appear to be questions relating to the terms of the statutory authority to make the regulation in question.

The Standing Committee on Regulations should therefore consider regulations referred to it with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds, which should be set out in the Standing Orders:

**(a) Whether they are authorized by the terms of the enabling statute.**

We recognize that the courts have the ultimate power to decide upon the legal validity of regulations, and that this criterion must not in any way interfere with judicial review. However, there are logical reasons why at the outset of the life of a regulation Parliament should review it to satisfy itself that is within the scope of the power granted. Private litigants should not have the sole responsibility for challenging unauthorized regulations.

**(b) Whether they make some unusual or unexpected use of the powers conferred by the statute under which it was made.**

It is obvious that this criterion would allow, to a certain degree, an examination of the policy contents of a regulation. It envisages that while a particular regulation may, from a logical point of view, be within the language of the enabling provision, it may nevertheless, from a practical point of view, contain a policy which is generally felt not to have been intended when the enabling statute was passed.

It may be observed that this is the most commonly used criterion in the United Kingdom. See John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960), page 170. See also M. P. Jain, "Parliamentary Control of Delegated Legislation in India", (1964) *Public Law* 152 at p. 152:

> Under this provision [unusual or unexpected use of rule-making powers], however, the Committee comes nearest to consideration and scrutiny of policy and merits of the rules, and this is regarded as the better way to approach the scrutiny of policy. This ingenious formula has been found to be quite useful in England; it has been used to catch cases of ultra vires, sub-delegation, cases of commission or omission by a department which, had it occurred in a Bill, would certainly have been pounced upon by the common sense of members of Parliament.

**(c) Whether they trespass unduly on personal rights and liberties.**

The basic idea behind this criterion is that, if personal rights and liberties are to be encroached upon, then this should be by statute and not by subordinate legislation. This criterion should be considered with (*b*) above, because it may be that the enabling legislation will expressly authorize regulations to be made which will, or may trespass unduly on personal rights and liberties. This, however, is particularly a matter to be taken into account when the statute is being framed and as to which reference should be made to Chapter 2 of this Report.

**(d) Whether they have complied with the provisions of the Regulations Act with respect to transmittal, certification, recording, numbering, publication or laying before Parliament.**

It may be noted that the general position is that non-compliance with these provisions in the *Regulations Act* does not result in the invalidity of a regulation. We have recommended that the operational effect of a regulation depend upon compliance with transmittal or publication requirements, depending on the nature of the regulation. We think that there is no useful purpose in treating a regulation as void for non-compliance with the Act. Such non-compliance would be kept to a minimum if it were the subject matter for scrutiny and report.

**(e) Whether they (i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or (ii) unjustifiably fail to provide that they shall not come into force until published or until some later date.**

The explanation for this criterion can be found in Chapters 4 and 6 of this Report.

**(f) Whether for any special reason their form or purport calls for elucidation.**

This is a further useful catch-all criterion which would be particularly relevant in the cases where the Committee is unable to obtain a satisfactory explanation of a regulation from the Department concerned.

**(10) It should have the usual investigative powers of a Standing Committee.**

The Committee should have the usual powers of Standing Committees to call for persons, papers and records. It should, further, have the power to request from regulation-making authorities memoranda supporting, explaining or otherwise clarifying regulations.

**(11) It should have the same power as other Standing Committees to report to the House.**

The Scrutiny Committee should have the same power as other committees to report to the House. Its reports should cover not only individual regulations scrutinized by it but also, from time to time, the regulation-making process generally—with an emphasis on constructive criticism. This type of report has been a useful feature of the British House of Commons Scrutiny Committee. See John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at pages 56-58. We would suggest that the reports of this Scrutiny Committee on regulations examined by it either draw the attention of the House to the regulations, where necessary, with some expression of opinion on them. The nature of the report is for the Committee to decide at the appropriate time, but will obviously be limited by the powers of the House itself, which we shall take up in the next Chapter.

We are of the opinion that no report adverse to a regulation should be made to the House unless the attention of the regulation-making authority has been drawn to the Committee's criticism and the authority has been given an opportunity to either explain, amend or withdraw the regulation, as the case may be.

5. *Policy Scrutiny.*

We have suggested that policy scrutiny is more appropriate for substantive Standing Committees than for the Scrutiny Committee. **Your Committee therefore recommends that the Scrutiny Committee should have the power, in its discretion, to refer regulations to other Standing Committees and that they should then stand referred to such committees for consideration.** This would require an amendment to the Standing Orders. Such a provision should not stand in the way of other means whereby Standing Committees could consider the policy contents of regulations. It is your Committee's view that the review of significant subordinate legislation by Standing Committees is one of the most important means of exercising parliamentary scrutiny and control. Such review would be exercized by appropriate committees whose members can be assumed to have acquired expert knowledge on the subject matter of the legislation in question.

Chapter 9

# Parliamentary Action Respecting Regulations

The matter of the various control procedures which Parliament may give itself over regulations is interrelated with issues respecting laying procedures and, much more importantly, with the procedures and institutions established by Parliament for the scrutiny of regulations, both of which we have considered.

In existing Canadian law there are relatively few statutory provisions empowering Parliament to affect, by way of annulment or affirmative resolution, the operation of a regulation. We shall refer to these. In the United Kingdom, Parliament has reserved to itself much more power over subordinate legislation. It has adopted the following variety of legislative controls: requiring a regulation to be laid before Parliament and made subject to annulment within 40 days; requiring a regulation to be laid and made subject to an affirmative resolution before it becomes effective; requiring a regulation to be laid in draft and made subject to an affirmative resolution to bring it into force; requiring a regulation to be laid in draft and made subject to annulment within 40 days; and, merely requiring a regulation to be laid before becoming operative. The negative resolution procedure is the most common.

In the Province of Saskatchewan the *Regulations Act,* R.S.S. 1965, ch. 420, s. 17, provides:

> 17. Where under the Standing Orders of the Legislative Assembly or in accordance with the procedure otherwise prescribed by the Legislative Assembly, a member of the Executive Council or other authority making a regulation, or, in the case of a regulation made by order in council, the member of the Executive Council recommending it, receives from the Clerk of the Legislative Assembly a copy of a resolution of the assembly showing that the assembly disapproves the regulation or any part thereof, or requires it to be amended, the member of the Executive Council or other authority or the Lieutenant Governor in Council, as the case may require, shall revoke the resolution in whole or in part or amend it as required by the resolution.

A virtually identical provision may be found in section 12 of the Manitoba *Regulations Act,* R.S.M. 1954, ch. 224.

It may be noted that these provincial rules subject *all* regulations, indiscriminately, to revocation or amendment, as the occasion may require. It is

of interest to note that Ontario Bill 125 (first reading, April 17th, 1969, second reading, May 2nd, 1969) which makes provision for appointment of a Special Committee on Regulations to scrutinize regulations referred to it, makes no provision for any type of legislative action respecting the operation of a regulation.

Returning to legislation of the Parliament of Canada respecting parliamentary action over regulations, we feel that it is of value to set forth verbatim provisions from eleven statutes which portray the variety of restrictive techniques which Parliament has seen fit to provide for, from time to time. Amongst other comparisons and contrasts which may be made respecting these provisions, it is of interest to note those which require the action of both Houses of Parliament and those which require the action of one only, and also to note those which guarantee a debate on a motion to annul a regulation:

The *Admiralty Act,* R.S.C. 1952, ch. 1, s. 31(4):

> Copies of all rules and orders made under this section shall be laid before both Houses of Parliament within ten days after the opening of the session next after the making thereof, and at any time within thirty days after they have been laid before Parliament they or any of them may, by joint resolution of both Houses of Parliament, be suspended or repealed, in which event during suspension or after repeal no suspended or repealed rule or order has any force or effect.

The *Defence Production Act,* R.S.C. 1952, ch. 62, s. 41(2):

> Where a regulation has been laid before Parliament pursuant to subsection (1), a Notice of Motion in either House signed by ten members thereof, and made in accordance with the rules of that House within seven days of the date the regulation was laid before that House, praying that the regulation be revoked or amended, shall be debated in that House at the first convenient oportunity within the four sitting days next after the day the motion in that House was made.

The *Exchequer Court Act,* R.S.C. 1952, ch. 98, s. 88(3):

> All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons is passed for the repeal of the same or any portion thereof, in which case the same or such portion shall be and become repealed; but the Governor in Council may, by proclamation, published in the *Canada Gazette* or either House of Parliament may, by any resolution passed at any time within thirty days after such rules and orders have been laid before Parliament, suspend any rule or order made under this Act; and such rule or order shall thereupon cease to have force and effect until the end of the then next session of Parliament.

*The Maintenance of railway Operation Act, 1966,* S.C. 1966-67, ch. 50, s. 11:

> (1) A regulation under Section 10 establishing a board of arbitrators shall be laid before the House of Commons not later than five days after the day the regulation is made or, if that House is not then sitting, within the first five days next thereafter that the House of Commons is sitting and the regulation becomes effective on the tenth sitting day of Parliament after the day the regulation is laid before the House of Commons unless the regulation is before that date revoked pursuant to subsection (2).
>
> (2) Where a regulation under Section 10 establishing a board of arbitrators has been laid before the House of Commons, a notice of motion in that House praying that the regulation be revoked, signed by ten members thereof, and made in

accordance with the rules of that House within five days of the day the regulation was laid before it shall be debated in that House at the first convenient opportunity within the three sitting days after the motion was made in that House; and if that House resolves that the regulation be revoked, the regulation is thereupon revoked and is of no force or effect.

The *Maritime Transportation Union's Trustees Act,* S.C. 1963, ch. 17, s. 24:

(1) This Act expires on the 31st day of December, 1966 unless before that date this Act is extended to a later date which may be fixed by proclamation of the Governor in Council.

(2) A proclamation under subsection (1) shall be laid before Parliament not later than 15 days after its issue, or, if Parliament is not then sitting, within the first 15 days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked shall be debated in that House at the first convenient oportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect and this Act shall cease to be in force but without prejudice to the previous operation of this Act or anything duly done or suffered thereunder or any offence committed or any punishment incurred.

The *National Energy Board Act,* S.C. 1959, ch. 46, s. 87(4):

A proclamation issued under this section shall be laid before both Houses of Parliament as soon as may be after it is issued, and a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within seven days of the day the proclamation was laid before that House, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made; and if both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect and the provisions of this Part shall thereupon cease to be applicable to oil.

The *United Nations Act,* R.S.C. 1952, ch. 275, s. 4:

Every order and regulation made under this Act shall be laid before the Parliament forthwith after it has been made if Parliament is then sitting, or if Parliament is not then sitting, forthwith after the commencement of the next ensuing session and if the Senate and the House of Commons within the period of forty days beginning with the day on which any such order or regulation is laid before Parliament and excluding any time during which Parliament is dissolved or prorogued or during which both the Senate and the House of Commons are adjourned for more than four days, resolve that it be annulled, it ceases to have effect, but without prejudice to its previous operation or anything duly done or suffered thereunder or any offence committed or any penalty or punishment incurred.

The *Export Act,* R.S.C. 1952, ch. 103, s. 5:

(2) Every regulation shall be laid before both Houses of Parliament within the first 15 days of the session next after the date thereof, and such regulation shall remain in force until the day immediately succeeding the date of prorogation of that session of Parliament and no longer unless during the session it is approved by resolution of both Houses of Parliament.

The *Customs Tariff Act,* R.S.C. 1952, ch. 60, s. 4(4):

(4) Where any order is made after the coming into force of this subsection under the authority of paragraph (*b*), (*d*) or (*f*) of subsection (1) [respecting the with-

drawal of tariff benefits] the order shall, subject to the provisions of this Act, cease to have any force or effect with respect to any period following the one hundred and eightieth day from the date of its making, unless not later than the one hundred and eightieth day from the date of its making the order is approved by Parliament; . . .

The *War Measures Act,* R.S.C. 1952, ch. 288, s. 6:

(1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred . . .

The *Atlantic Region Freight Assistance Act,* S.C. 1968-69, ch. 52, s. 5(4) and (5):

Where an order has been laid before Parliament pursuant to subsection (3), a notice of Motion in either House signed by ten members thereof and made in accordance with the rules of that House within fifteen days of the day the order was laid before Parliament, praying that the order be annulled, shall be debated in that House at the first convenient opportunity within the ten sitting days next after the day the motion in that House was made.

(5) If either House of Parliament resolves that the order be annulled, the order shall stand annulled and have no effect.

The foregoing provisions represent all of the provisions in federal legislation which we have been able to find respecting parliamentary power over the operation of a regulation. It will be noted that only the *Export Act* and the *Customs Tariff Act* require affirmative resolutions of Parliament and the other statutes provide for negative resolutions.

In this Committee's Questionnaire to Government Departments and Agencies the following questions were asked:

4. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that no regulations made under legislation administered by your Department or Agency would become law until approved by an affirmative resolution of the House of Commons within thirty days of being laid before the House—assuming, for the purpose of your answer, that the regulation is laid within fifteen days of being published?

5. What would be the administrative or regulatory effect (or what difficulties of any type would you envisage as far as the work of your Department or Agency is concerned) of a statutory requirement that regulations made under legislation administered by your Department or Agency would become law when made but

would be subject to being annulled by a resolution of the House of Commons within forty days of being laid before the House—assuming them to be laid within fifteen days of being made?

With respect to question 4, relating to affirmative resolutions, most of the answers indicated that such a procedure would not be satisfactory because it would have the effect of delaying the operation of laws carrying out useful policies. Many of the answers pointed out that if the House was not sitting at the time the regulation was laid this would further delay the operation of the regulation and some answers said that a regulation could well lapse if time were not found in the House to pass the required affirmative resolution. Practically all of the answers were critical of the annulment procedure referred to in question 5—primarily on the ground that such a procedure would cause intolerable uncertainty as to the state of the law. Some answers indicated that for all practical purposes the regulation would not become operative until the time for its annulment had gone by.

We are of the view that there is, on balance, a significant value in some forms of parliamentary control over subordinate legislation. We regard the following observations as stating the obvious:

> If Parliament is accepted as the sole legislative authority, and if by force of circumstances it must delegate some of its authority to others, then it stands to reason that the public will expect the Parliament to exercise something more than a merely nominal supervision over the work of those to whom law-making powers have been delegated. (*Report of the Delegated Legislation Committee,* New Zealand (1962), page 6).
>
> It is a primary function of the Legislature to make the laws, and it is responsible for all laws it makes or authorizes to be made. A failure by the Legislature to find some specific place in the legislative calendar for supervision of subordinate legislation is, in our view, a dereliction of duty on its part and a failure to protect the fundamental civil rights of the individual. (*Report of the Royal Commission—Inquiry into Civil Rights,* 1968, page 370).

As far as "control" is concerned we would agree with the insight expressed in Bernard Crick's *Reform of Parliament* (1964) at page 76 ff:

> Thus the phrase 'Parliamentary control', and talk about the 'decline of Parliamentary control', should not mislead anyone into asking for a situation in which Governments can have their legislation changed or defeated, or their life terminated.

A distinguished American scholar with considerable experience in government work, the late Dean J. M. Landis, has commented on the advantages, generally, of the United Kingdom techniques of Parliamentary control over subordinate legislation, as follows:

> These techniques have several virtues for one thing, they bring the legislative into close and constant contact with the administrative. Objections by individual members of the legislature to particular regulatory measures can easily and openly be made. With us [the United States], individual legislators who object to the particular administrative regulations, place their objections before the administrative . . . By giving the legislative a definitely recognized share in the exercise of the regulatory power of the administrative, a much more open responsibility of the administrative to the legislature is obtained.
>
> Again, the English technique permits the administrative to call upon the legislature to assume some of the responsibility attendant upon action. The legislative thus can help to overcome a hesitancy to take responsibility for action that sometimes

> makes the administrative process stagnant... It would be unwise, of course, to require the adoption of the English techniques in all cases. But when the anticipated administrative action is of large significance, value attaches to their employment... (*The Administrative Process, (1938)* pages 77-79).

We are of the view that the benefits of the English system, which has been resorted to infrequently in Canada, as indicated above, can be enjoyed without any substantial resort to provisions giving Parliament absolute control over the operation of a regulation. We would refer to the following observations which have been made on this issue by thoughtful students of the Parliamentary process and other responsible observers:

> In practice instruments are never annulled, because the Minister can count on the Government's majority. Even if the Government were 'caught napping' the Minister could introduce another instrument in identical terms. The procedure by negative resolution was seldom used before 1943. Its value has been questioned, but it has in recent years led to interesting and important debates. No amendment of the instrument is possible, although as a result of criticism the Minister may withdraw it and submit another in a modified form. A better procedure might be to allow motions that a Statutory Instrument be referred to the Government for consideration. (O. Hood Phillips, *Constitutional and Administrative Law* (4th ed., 1967) at pages 579-80).

> One common feature to all these procedures is that neither House has power to amend the statutory instrument. Although some feel that this should be possible, it might involve the House too closely in detailed consideration of matters which Parliament has already decided should be delegated to a Minister it might give rise to complications and delay if each House introduced different amendments. It seems better that if a House is not satisfied with an instrument as it stands, the Minister should withdraw it and start again. (Wade and Phillips, *Constitutional Law* (7th ed., 1965) at page 618). (This observation is relevant, in part, to the procedure obtaining in Manitoba and Saskatchewan where the Legislatures (which are unicameral) are empowered to require that regulations be amended).

> Motions for consideration seem *a priori* to be a realistic technique for gaining some Parliamentary influence over subordinate legislation. British prayers for annulment and Australian motions for disallowance seem on the surface to give Parliament more effective powers of control, but as we have seen, such motions have little chance of success in doing more than can be done by the New Zealand counterpart—the motion for consideration.... In New Zealand Members of Parliament can, if they are disposed, put their views and objections regarding sub-legislation just as forcefully and just as effectively to the Minister, and through him to the departmental officials who, of course, in practice, administer and amend subordinate laws. (John E. Kersell, *Parliamentary Supervision of Delegated Legislation* (1960) at page 110).

Dr. Kersell in the period of time between the publication of his book and his submissions to this Committee had not changed his views. He advised as follows:

> I am not in favour of the annulling procedure at all. I think it would be more meaningful and more realistic to have a procedure whereby instruments would be referred to the government for consideration, as is the term in New Zealand. You are not telling the government that it cannot have this regulation. It is going to put the whips on it and acquire it in any case. That is referring to experience. (*Minutes of Proceedings and Evidence,* page 96).

The Hon. James C. McRuer has expressed similar views:

> If all regulations were required to be laid before the Legislature in Ontario for approval before becoming effective, or to be subject to a resolution of the Legislature which could disapprove of them after they become effective, the exercise of

> subordinate legislative power would be destroyed for practical purposes. Frequently periods of six months or more elapse between sessions of the Legislature. Regulations passed between sessions of the Legislature would either have no effect until affirmed or would be temporarily effective but subject to disapproval. In the former case prompt action under regulations would be impossible, and in the latter case the risks of disapproval would attend any action taken under the regulations (*Report of the Royal Commission—Inquiry into Civil Rights*, February 1968, page 367).

Having given the matter due consideration, **your Committee recommends that normally Parliament should exercise its power of review by a resolution that a questionable regulation be referred to the Government for reconsideration.** We should like to give further consideration to the nature of the amendment to Standing Orders which we would recommend respecting the type of debate on Committee report respecting such a resolution. We should also like to give further consideration to the question of whether there should be some provision in Standing Orders for any group of at least ten members to have the right to require a short debate on a particular regulation provided that this did not interfere with the progress of Government business. The chief attribute of a resolution that a matter be referred to the Government for reconsideration, and to the debate on the motion preceding it, should be its persuasive influence on the Government.

**Your Committee also recommends that Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution, but we cannot lay down any definitive guidelines as to when it is "appropriate" for Parliament to require such restrictive controls.** However, reference might be made to the precedents which may have been established by the ten Canadian provisions quoted in full earlier in this chapter. It may be said, generally, that the more stringent controls should be resorted to when Parliament is enabling subordinate legislation to be made in new areas affecting matters of large consequence to the public. It would appear from most comments on the United Kingdom system that there is no systematic or clear pattern as to the type of controls selected with respect to different types of subordinate legislation. It is of some value to refer to the opinion of a Parliamentary Counsel in the United Kingdom—referred to at page 84 of Dr. Kersell's book, *op. cit,* as follows:

> According to the memorandum submitted by Sir Alan Ellis, then First Parliamentary Counsel to the Treasury, to the Select Committee on Delegated Legislation, the question whether the exercise of a particular power of delegated legislation is to be subject to affirmation, negation, or laying without further provision, is answered in the course of preparing the enabling Bill in the same way as other questions of policy, namely, 'on the responsibility of the Minister . . . subject to the ordinary processes of consultation with his colleagues. The level of the Government organization at which the question is decided on any particular Bill varies as in the case of other questions of policy; it can, however, be said that the question is one on which the draftsman regularly receives express instructions from the Department or asks for them if he does not.' Sir Alan went on to state his opinion that it is right there are no express rules for the decision of this question of the type of Parliamentary control to be provided in particular instances. 'Rules for the settlement of questions such as this, which must arise in circumstances of infinite variety, are nothing but an embarrassment tending

to encumber the task of arriving at the right answer in any particular case. The matter is, however, regulated in large measure by precedent.'

It is also of interest to note Dr. Kersell's own assessment of the state of English legislation on this issue. At page 85 he says:

> Contemporary practice, it is reasonably safe to say, is to provide controls according to the following scheme:
>
> For legislative statutory instruments having general effect—
> Affirmative procedure if the instruments,
> 1. alter the effect of the enabling Act,
> 2. make financial provisions,
> 3. put all the 'meat' on a statutory skeleton,
> 4. may prejudice persons or classes of persons or for some other reason are of special importance.
>
> Negative procedure for all the remainder.
>
> For legislative statutory instruments having local effect—
> Affirmative procedure if the instruments,
> 1. put all the 'meat' on a statutory skeleton,
> 2. may prejudice persons or classes of persons, or for some other reason are of special importance.
>
> Negative procedure for virtually all of the remainder.
>
> For administrative instruments having general effect—
> Affirmative procedure if they may prejudice persons or classes of persons or are of special importance for some other reason.
> Negative procedure or 'informative procedure' (requiring laying only) for most of the remainder.
>
> For administrative instruments having local effect—
> 'Informative procedure' in some important cases, but generally there is no laying requirement, the only safeguard being the requirements for publicity.

It would appear difficult to engraft such a complex formula on the Canadian scene, but after a certain amount of experience the new Scrutiny Committee might be able to make recommendations in this area. **Your Committee therefore recommends that the Scrutiny Committee should have the power to report at any time on general matters affecting the law or practice with respect to regulations.**

**Your Committee further recommends that it should be reconstituted in the next session to allow further consideration of certain matters referred to in this Report.**

Chapter 10

# Summary of Recommendations

The following is a summary of your Committee's recommendations:

1. Regulations made in the exercise of the prerogative power of the Governor in Council, insofar as they are of a legislative character, should be subject to the same procedures and requirements as other regulations of a legislative character. (Page 10).
2. Except in the interests of national security, there should be no exemptions from the requirements of the *Regulations Act* other than as to publication. (Page 20).
3. Rules governing practice or procedure in judicial proceedings should not be excluded from the requirements of the *Regulations Act*. (Page 21).
4. The *Regulations Act* should be amended to provide a more inclusive definition of the word "regulation". (Page 27).
5. The Minister of Justice should be charged with the responsibility of deciding for all regulation-making authorities which documents should be classified as regulations. (Page 29).
6. All departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny. (Page 29).
7. All enabling acts for regulation-making authorities should accord with the following principles: (Page 33).
   (*a*) The precise limits of the law-making power which Parliament intends to confer should be defined in clear language. (Page 33).
   (*b*) There should be no power to make regulations having a retrospective effect. (Page 33).
   (*c*) Statutes should not exempt regulations from judicial review. (Page 34).
   (*d*) Regulations made by independent bodies, which do not require governmental approval before they become effective, should be

subject to disallowance by the Governor in Council or a Minister. (Page 34).

(*e*) Only the Governor in Council should be given authority to make regulations having substantial policy implications. (Page 35).

(*f*) There should be no authority to amend statutes by regulation. (Page 37).

(*g*) There should be no authority to impose by regulation anything in the nature of a tax (as distinct from the fixing of the amount of a license fee or the like). Where the power to charge fees to be fixed by regulations is conferred, the purpose for which the fees are to be charged should be clearly expressed. (Page 38).

(*h*) The penalty for breach of a prohibitory regulation should be fixed, or at least limited by the statute authorizing the regulation. (Page 38).

(*i*) The authority to make regulations should not be granted in subjective terms. (Page 39).

(*j*) Judicial or administrative tribunals with powers of decision on policy grounds should not be established by regulations. (Page 40).

8. The Minister of Justice should, where he deems it appropriate, refer the enabling clauses in any Government bill to the proposed Standing Committee on Regulations at the same time as the bill is referred to the relevant Standing Committee for Committee consideration. (Page 42).

9. Before making regulations, regulation-making authorities should engage in the widest feasible consultation, not only with the most directly affected persons, but also with the public at large where this would be relevant. Where a large body of new regulations is contemplated, the Government should consider submitting a White Paper, stating its views as to the substance of the regulations, to the appropriate Standing Committee. When enabling provisions and statutes are being drawn, consideration should be given to providing some type of formalized hearings on consultation procedures where appropriate. (Page 47).

10. The Government should take all necessary steps to facilitate the expansion of the Legislative Section of the Department of Justice and to provide thorough training for legal officers in the Department, including those seconded to other departments, in the drafting of regulations. (Page 52).

11. The present examination of regulations by the Privy Council Office as to form and draftsmanship and by the Department of Justice as to conformity with the *Canadian Bill of Rights* should be continued, and the scrutiny by the Department of Justice should also take into account the other criteria for regulations proposed in this Report. (Page 53).

12. The *Regulations Act* should provide, as a general rule, that a regulation shall not come into force until the date on which it is transmitted to

the Clerk of the Privy Council. In cases of emergency a regulation might come into effect at the time of making. (Page 55, 56).

13. Section 9 of the *Regulations Act*, which allows exemptions from the provisions of that Act, should be amended to provide for exemptions from publication and time of publication only. (Page 58).
14. All regulations, regardless of the regulation-making authority, should be available for public inspection. (Page 59).
15. The statutes should resort more than they do now to the use of provisions stating that the regulations made thereunder, or under specified sections thereof, do not become effective until published on some specified period thereafter. (Page 61).
16. Regulations should be consolidated on a much more regular and frequent basis than has been the practice in the past, and at least once every five years. (Page 63).
17. The present quarterly consolidated index and table of Statutory Orders and Regulations should include reference to all regulations which have been exempted from publication. (Page 63).
18. All regulations should be laid before Parliament forthwith after their transmittal to the Clerk of the Privy Council and their recording and numbering by him. *Votes and Proceedings* should list under "Returns and Reports Deposited with the Clerk of the House" the title of each regulation (which should be as descriptive as possible) the Act under which it is made, its date and the date of its transmittal. (Page 66).
19. A new Committee on Regulations should be established, with the following particulars: (Page 74).
    (1) It should be a Standing Committee of the House of Commons. (Page 74).
    (2) All regulations should stand permanently referred to it. (Page 75).
    (3) It should strive to operate in an objective and non-partisan way. (Page 76).
    (4) It should have a small membership to enable it to operate effectively. (Page 76).
    (5) To make the objectivity of the Committee apparent, there should be some rotation among parties in the chairmanship. (Page 76).
    (6) It should normally sit in public session. (Page 77).
    (7) It should be empowered to sit while Parliament is not sitting. (Page 77).
    (8) It should have adequate staff. (Page 77).
    (9) It should examine regulations on the basis of six criteria: (Page 78).
        (*a*) Whether they are authorized by the terms of the enabling statute. (P. 79).
        (*b*) Whether they appear to make some unusual or unexpected use of the powers conferred by the statute under which it is made. (Page 79).

(*c*) Whether they trespass unduly on personal rights and liberties. (P. 79).

(*d*) Whether they have complied with the provisions of the *Regulations Act* with respect to transmittal, certification, recording, numbering, publication or laying before Parliament. (Page 79).

(*e*) Whether they

(i) represent an abuse of the power to provide that they shall come into force before they are transmitted to the Clerk of the Privy Council or

(ii) unjustifiably fail to provide that they shall not come into force until published or until some later date. (Page 80).

(*f*) Whether for any special reason their form or purport calls for elucidation. (Page 80).

(10) It should have the usual investigative powers of a Standing Committee. (Page 80).

(11) It should have the same power as other Standing Committees to report to the House. (Page 80).

20. The Scrutiny Committee should have the power, in its discretion, to refer regulations to other Standing Committees and that they should then stand referred to such Committees for consideration. (Page 81).

21. Normally Parliament should exercise its power to review by a resolution that a questionable regulation be referred to the Government for reconsideration but Parliament should continue to provide, where appropriate in individual statutes, for a procedure by way of affirmative or negative resolution. (Page 88).

22. The Scrutiny Committee should have the power to report at any time on general matters affecting the law or practice with respect to regulations. (Page 89).

23. Your Committee should be reconstituted in the next session to allow further consideration of certain matters referred to in this Report. (Page 89).

A copy of the relevant Minutes of Proceedings and Evidence (*Issues Nos. 1 to 10 inclusive*) is tabled.

Respectfully submitted,

MARK MACGUIGAN,
*Chairman*

HOUSE OF COMMONS

Special Committee on Statutory Instruments
28th Parliament 1st Session 1968/69

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