



Recent Publications and Documents

Report of the Standing Joint Committee on Regulations and other Statutory Instruments, Document tabled in the Senate and House of Commons, July 17, 1980

Probably no parliamentary committee works harder and gets less publicity than the Standing Joint Committee on Regulations and Other Statutory Instruments. Unlike other committees its workload is unrelated to the parliamentary timetable since the government continues to make regulations and orders-in-council whether Parliament is sitting or not. Most of these regulations are studied by the committee and its staff to make sure they are in keeping with criteria established for the scrutiny of delegated legislation. From time to time the Committee draws the attention of the House to a regulation which violates one or more of its criteria. On two occasions the Committee has presented extensive reports on the whole issue of parliamentary scrutiny of subordinate legislation. The first was presented in February 1977. This report covers much of the same ground and while it is perhaps repetitive for experts in the area it does give an overall view of the issues involved. This will be useful to the many new parliamentarians elected since the publication of the last report.

There are also some notable differences compared to the 1977 report. This report emphasizes that delegated legislation is not abnormal or confined to matter of detail. It is the ordinary and indispensable way of making the bulk of the non-common law of the land. Starting from this premise the report argues convincingly that procedures for making and controlling subordinate law must be regularized and brought into harmony with constitutional practices. The report gives more attention to questions that were merely touched upon in 1977 such as the need to scrutinize the merits of statutory instruments in addition to their form and legality. The report argues, at some length, that disallowance of subordinate legislation that has already been made and the affirmation of draft subordinate laws (commonly called negative and affirmative vote procedures) be established as regular and invariable parts of the Canadian system of subordinate law. The rules of both the Senate and the House of Commons should be amended to facilitate these procedures.

The Committee also expanded on certain issues fundamental to the problem of scrutinizing delegated legislation. It supported an Economic Council of Canada idea for a sixty-day notice and comment procedure for all new regulations which have a significant impact in terms of cost or impact on the distribution of income and are susceptible to cost-benefit analyses. In fact the Committee would extend the use of notice and comment to all new regulations. The Committee noted certain drafting practices which it claimed are inimicable to parliamentary scrutiny. This is ironic because Canada has a deservedly high reputation in the Commonwealth for the clarity of its parliamentary drafting and its advances in the skill or art of

drafting. Nevertheless it was apparent to the Committee that:

clarity of drafting and the relative ease with which a Canadian statute can be read have not been achieved without a price. Far too many statutes contain little or no indication of legislative policy and are neutral documents the object of which is merely to confer powers on the executive to act in certain vaguely defined fields. Moreover, these powers are granted in very broad terms so that little or no detail is given as to the content or type of delegated legislation that can be made.

As far as its own procedures are concerned the Committee concluded that in future it will report instruments to the House not merely to illustrate or draw attention to specific orders-in-council but also to instances where Ministers, Departments or Agencies have failed to honour an undertaking to amend or revoke a statutory instrument as requested by the Committee. Similarly promises by Departments to refrain from certain actions in the future will be scrutinized more carefully by the Committee.

The report contains many other interesting observations and recommendations. It concludes with an appendix showing the disposition of recommendations made in its landmark 1977 report. Unfortunately only a small percentage of those recommendations have been acted upon and not necessarily the most important ones. It remains to be seen if this report will fare any better.

The Editor