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THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

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The Standing Joint Committee for the Scrutiny of Regulations
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EXECUTIVE SUMMARY

The Standing Joint Committee for the Scrutiny of Regulations (the committee) plays a vital role in the parliamentary oversight of federal regulations. Whenever Parliament delegates legislative authority to the executive branch or other regulation-making bodies, the committee ensures that this delegated authority is exercised lawfully and appropriately.

In practice, the committee's work begins after a regulation has been made and published in Part II of the *Canada Gazette*. Once published, the regulation is reviewed against criteria that range from questions of validity and legal effect to matters of drafting and clarity. Generally, the committee does not challenge the merits or underlying policy of a regulation. If a regulation is found to contravene any of the criteria, correspondence is exchanged with the regulation-making authority to resolve the matter.

Depending on how a file progresses, measures beyond correspondence may be considered. In addition to all the powers common to other standing committees, the committee possesses the unique ability to recommend the disallowance (repeal) of a regulation, a powerful tool for holding the regulation-making authorities accountable for their use of delegated law-making powers.

THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

1 INTRODUCTION

The Standing Joint Committee for the Scrutiny of Regulations (the committee) is perhaps not as well known as it might be, given the importance of its work. One of only two permanent committees with members from both the Senate and the House of Commons,¹ the committee is responsible for ensuring that whenever Parliament delegates legislative authority to another body, the delegated authority is exercised lawfully and appropriately.

Unlike committees whose expertise relates to one particular area under federal jurisdiction, the committee's mandate encompasses the entirety of federal regulation. The committee reviews regulations and other statutory instruments² on the basis of criteria that relate to legality and procedure, rather than focusing on the substance of the regulations or on the policy behind them. Another notable difference is that, unlike committees that study bills that may become law after Parliament has approved them, the committee reviews regulations that have already become law. Finally, while the workload of other committees fluctuates depending on whether Parliament is sitting, the committee's workload is determined primarily by the volume of regulations made throughout the year, including over the summer and winter adjournments, even when Parliament is dissolved or prorogued.

This HillStudy provides an overview of the work of the committee, given its unique role. First, the history and mandate of the committee are summarized. Then, the basic process for reviewing regulations is described. Finally, the committee's power to recommend disallowance is discussed.

2 HISTORY AND MANDATE OF THE COMMITTEE

In 1968, the House of Commons Special Committee on Statutory Instruments recommended that a parliamentary committee be established to scrutinize delegated legislation.³ The government subsequently introduced the *Statutory Instruments Act*, which provides for either or both houses of Parliament to establish a committee for the purpose of reviewing and scrutinizing statutory instruments.⁴ The committee was established on the basis of this statutory authority and began its work in the early 1970s.

In addition to its statutory basis, the committee is empowered under the *Rules of the Senate* and the *Standing Orders of the House of Commons*.⁵ While it has been a matter of tradition for the joint chair from the Senate to be drawn from the same party

as the government, the *Standing Orders of the House of Commons* specifically require the joint chair from the House of Commons to be a member of the Official Opposition, the first vice-chair to be from the government party and the second vice-chair to be from an opposition party other than the Official Opposition.⁶ This type of arrangement is intended to encourage objectivity and non-partisanship in the operation of the committee.⁷

In addition to its statutory mandate to review regulations, the committee's mandate has traditionally also included the power

to study the means by which Parliament can better oversee the government regulatory process, and in particular, to enquire into and report upon:

1. the appropriate principles and practices to be observed
 - (a) in the drafting of powers enabling delegates of Parliament to make subordinate laws;
 - (b) in the enactment of statutory instruments;
 - (c) in the use of executive regulation – including delegated powers and subordinate laws;and the manner in which Parliamentary control should be effected in respect of the same; [and]
2. the role, functions and powers of the Standing Joint Committee for the Scrutiny of Regulations.⁸

As a result, the committee has “a broad power to enquire into and report on most aspects of the federal regulatory process.”⁹

3 PROCESS FOR REVIEWING REGULATIONS

The regulatory process begins when the regulation-making authority (RMA) develops the policy that underlies a regulation.¹⁰ A draft of the instrument is then prepared by the Department of Justice, after which it is reviewed and approved by either the relevant minister or the Governor in Council, depending on the type of instrument being made. The draft instrument is then pre-published in Part I of the *Canada Gazette*, and after any subsequent revisions, it is finally published in Part II of the *Canada Gazette*.¹¹ Only after the instrument's publication in Part II does the committee review the instrument against the committee's criteria.

At the beginning of each session, the committee adopts its criteria which are then approved by both houses. These criteria have remained largely consistent since they

were first proposed in 1969, with some small changes. The criteria range from the highly substantive, for example, whether an instrument is unlawful or invalid or whether it unduly interferes with the rights and liberties of individuals, to the less substantive, such as whether the drafting of a regulation is defective.¹²

In many instances, the instrument is found to have complied with all of the committee's criteria, in which case the file in relation to that instrument can be closed. However, if it is determined that an instrument contravenes any of the scrutiny criteria or requires further explanation for any other reason, a letter is written to the RMA detailing those concerns.

Once the committee has received a substantive response from the RMA, the committee determines how to proceed. If, for example, the RMA has provided a satisfactory explanation for all issues raised, the file may be closed. If the RMA has agreed to make changes, the committee may ask for a projected timeline and monitor the file until the necessary amendments are made. However, if the committee feels that the position taken by the RMA is not satisfactory, further correspondence may be exchanged in an attempt to reach a resolution.

Depending on how a file progresses, measures beyond correspondence with the RMA may be considered. For example, if the committee is unsatisfied with the RMA's subsequent responses, or if the committee considers the delay in making promised amendments to be excessive, it may invite officials from the RMA to appear before it to answer questions. The committee may also decide to write to the responsible minister seeking the reconsideration of a position taken by the RMA. Other options include reporting to Parliament on a matter¹³ and recommending disallowance.

4 DISALLOWANCE

The committee has one special power: the ability to recommend the disallowance of a regulation or a portion thereof. Although this power is infrequently used, it is significant and unique in the history of Parliament.

The committee did not have the power to recommend disallowance until 1986, when a procedure was put in place through amendments to the *Standing Orders of the House of Commons*. This approach had two important consequences:

The first was that the Senate had no say in the matter, and the second was that [the disallowance procedure] only applied to statutory instruments made by the Governor in Council or by a Minister of the Crown. This was because the procedure relied on resolutions and orders, which are not by their nature binding on those outside the House. Regulations made by bodies with regulatory authority delegated by Parliament (such as the Canadian Radio-television and

Telecommunications Commission, the National Energy Board, the Canadian Institutes of Health Research, the Canadian Transportation Agency and the Canadian Nuclear Safety Commission) were therefore not subject to disallowance.¹⁴

Although this mechanism was successfully resorted to on eight occasions, the committee recommended that it be replaced by a statutory procedure that would apply to all federal delegated legislation and give an equal role to both houses of Parliament. In 2003, Parliament enacted a private member's bill to that effect, sponsored by one of the joint chairs of the committee.¹⁵ This bill added section 19.1 to the *Statutory Instruments Act*, such that the power to recommend disallowance now applies to all regulations that stand referred to the committee, and both houses must agree to a disallowance resolution for it to be effective.

The procedure set out in section 19.1 of the *Statutory Instruments Act* is as follows:

Only the Committee can initiate disallowance. In any case where the Committee is of the view that a regulation, or part of a regulation, should be revoked, it can make a report to the two Houses containing a resolution to this effect. Before doing so, however, the Committee must notify the regulation-making authority of its intent to propose the disallowance of a regulation at least 30 days prior to adopting the disallowance report. The Committee only recommends disallowance. That recommendation must then be accepted by both Houses.

Within 15 sitting days of the tabling of a disallowance report, a Minister may file a motion that the disallowance resolution contained in the report not be adopted. If such a motion is filed in either or both Houses, the appropriate House meets at 1:00 p.m. on the next Wednesday to consider the motion. Subsection 19.1(7) of the *Statutory Instruments Act* allows a debate of a maximum duration of one hour, with a 10-minute limit on interventions by members. At the conclusion of the debate, a vote is taken on the motion. If the House defeats the motion, the resolution is considered to have been adopted by the appropriate House. If, on the other hand, the motion filed by the Minister is supported by the House, the resolution set out in the Committee's report is considered to have been rejected by that House. A resolution is either deemed adopted on the fifteenth sitting day following the tabling of the disallowance report if no motion is filed within those fifteen sitting days by a Minister – or it is considered to be adopted on the day that such a motion is defeated by a vote of the appropriate House. For disallowance to take effect, a resolution must be adopted by both the Senate and the House of Commons.

Subsection 19.1(9) of the *Statutory Instruments Act* imposes a legal duty on a regulation-making authority to repeal a disallowed regulation within 30 days – or such longer period of time as may be specified in the resolution – following the day on which both the Senate and the

House of Commons have adopted or are deemed to have adopted the resolution.¹⁶

To date, two disallowance reports have been tabled under section 19.1 of the *Statutory Instruments Act*, both concerning the same regulatory provision. In each instance, the report was deemed adopted in the Senate, but the House of Commons voted not to proceed with disallowance on the ground that legislation had been introduced that would address the committee's concern.¹⁷

In many cases where the committee had begun to consider disallowance, the committee's concerns about the regulation in question were resolved after a notice of the committee's intent to propose disallowance was issued to an RMA. As such, it is often not necessary to proceed any further with adopting a disallowance report.

5 CONCLUSION

Two core constitutional principles in a parliamentary democracy are the rule of law and parliamentary supremacy. Parliament is the source of federal regulation-making authority, and so the body to which legislative authority is delegated may only exercise that authority if, when and to the extent that Parliament has authorized.¹⁸ By reviewing regulations and other statutory instruments for compliance with that delegated authority, the Standing Joint Committee for the Scrutiny of Regulations plays an essential role in ensuring parliamentary oversight of the laws that govern all Canadians.

NOTES

1. The other is the Standing Joint Committee on the Library of Parliament.
2. While there is a distinction between a "regulation" and the broader category of "statutory instruments," for the purposes of this paper, "regulation" and "instrument" are used interchangeably.
3. House of Commons, Special Committee on Statutory Instruments, *Third Report*, 1969, Recommendation 19; and Audrey O'Brien and Marc Bosc, eds., "[Chapter 17: Delegated Legislation – Historical Perspective](#)," *House of Commons Procedure and Practice*, 2nd ed., 2009.
4. [Statutory Instruments Act](#), R.S.C. 1985, c. S-22, s. 19; and [Legislation Revision and Consolidation Act](#), R.S.C. 1985, c. S-20, s. 19(3).
5. See Senate, *Rules of the Senate of Canada*, October 2020, [Rule 12-4](#); and House of Commons, *Standing Orders of the House of Commons*, consolidated version as of 2 December 2021, [ss. 104, 106 and 108](#). See also provisions in both documents that apply to committees generally.
6. House of Commons, *Standing Orders of the House of Commons*, consolidated version as of 2 December 2021, [s. 106\(2\)](#).
7. Library of Parliament, "[House of Commons Debates, 28th Parliament, 3rd Session: Vol. 8](#)," Canadian Parliamentary Historical Resources, Database, 14 October 1971, pp. 8679–8680.
8. See, for example, Parliament of Canada, Standing Joint Committee on Scrutiny of Regulations (REGS), [Review of Statutory Instruments](#), First report, 22 March 2021.
9. Parliament of Canada, REGS, "Mandate," [About](#).

10. For a general overview of the regulatory process, see Government of Canada, [How new laws and regulations are created](#). For a more detailed overview, see Government of Canada, “[Part 3 – Making Regulations](#),” *Guide to Making Federal Acts and Regulations*, 2nd ed., 2001.
11. See Government of Canada, “[Canada Gazette, Part II: Official regulations](#),” *Canada Gazette publications*; regular editions are published every second Wednesday. For the definitions of “regulation” and “statutory instrument,” see [Statutory Instruments Act](#), R.S.C. 1985, c. S-22, s. 2. Note that the committee may review some instruments that are exempt from registration and publication (ss. 5(1) and 7(1) of the *Statutory Instruments Act*), and that the committee has decided not to review instruments made by certain statutory courts (see Library of Parliament, [Joint Committees, 33rd Parliament, 2nd Session: Standing Joint Committee on Regulatory Scrutiny \(Formerly the Standing Joint Committee on Regulations and other Statutory Instruments\)](#), vol. 2, Canadian Parliamentary Historical Resources, Database, 23 June 1988, pp. 28:9 and 28:10). Although in rare circumstances, the committee may review proposed regulations published in Part I of the *Canada Gazette*, regulations are generally only reviewed once they have already been made. See “[Canada Gazette, Part I: Notices and proposed regulations](#),” *Canada Gazette publications*.
12. For the full list, see Parliament of Canada, REGS, [Review of Statutory Instruments](#), First report, 22 March 2021. Note that in March of 2021, the committee amended item 7 of its review criteria with respect to the relevant requirements of the *Statutory Instruments Act*. This change broadened item 7 of the review criteria, making it more inclusive of all relevant requirements in the Act. See Parliament of Canada, REGS, [Evidence](#), 2 March 2021 (Tanya Dupuis, General Counsel to REGS).
13. For an example of a recent report to Parliament, see Parliament of Canada, REGS, [Report No. 91 – Marginal Notes](#), Third report, 23 March 2017.
14. Audrey O'Brien and Marc Bosc, eds., “[Chapter 17: Delegated Legislation – Revocation of a Statutory Instrument](#),” *House of Commons Procedure and Practice*, 2nd ed., 2009.
15. [Bill C-205, An Act to amend the Statutory Instruments Act \(disallowance procedure for regulations\)](#), 37th Parliament, 2nd Session, (S.C. 2003, c. 18).
16. Parliament of Canada, REGS, “Additional Information,” [About](#). For a more detailed explanation, including references to the *Standing Orders of the House of Commons*, see Audrey O'Brien and Marc Bosc, eds., “[Chapter 17: Delegated Legislation – Revocation of a Statutory Instrument](#),” *House of Commons Procedure and Practice*, 2nd ed., 2009.
17. Parliament of Canada, REGS, [Report No. 75 – Disallowance](#), Second report, May 2005. For the vote in favour of the Minister's motion that the disallowance resolution not be adopted and that the matter be referred back to the committee for further study, see House of Commons, [Debates](#), 8 June 2005; and Parliament of Canada, REGS, [Report No. 78 – Disallowance](#), Fourth report, 7 February 2007. For the vote in favour of the Minister's motion that the disallowance resolution not be adopted and that the matter be referred back to the committee for further review, see House of Commons, [Debates](#), 21 February 2007. Neither bill became law.
18. Peter Bernhardt and Paul Salembier, “[Understanding the Regulation Making Process](#),” *Canadian Parliamentary Review*, Vol. 25, No. 1, Spring 2002.