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IN BRIEF



The Standing Joint Committee for the Scrutiny of Regulations

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(In Brief)*

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THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

1 INTRODUCTION

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

Unlike committees whose expertise relates to one particular area under federal jurisdiction, the Joint Committee has a mandate that encompasses the entirety of federal regulation. The Committee reviews regulations on the basis of criteria relating to legality and procedure, however, 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 Joint Committee reviews regulations that have already become law. Finally, while the workload of other committees fluctuates depending on whether Parliament is sitting, the Joint Committee's workload is determined primarily by the volume of regulations made throughout the year, including over the summer and winter adjournments, and even when Parliament is dissolved or prorogued.

This paper is intended to provide an overview of the work of the Joint Committee, in light of its uniqueness and relative obscurity. 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

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 On the basis of this statutory authority, the Joint Committee was established and began its work in the early 1970s.

In addition to its statutory basis, the Joint Committee is empowered under the *Rules of the Senate* and the *Standing Orders of the House of Commons*.⁵ It is a matter of tradition for the joint chair from the Senate to be of the same party as the government, but the Standing Orders 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 was 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 jurisdiction to enquire into and report on most aspects of the federal regulatory process.”⁹

3 PROCESS FOR REVIEWING REGULATIONS

In general, after regulations and other statutory instruments have been published in the *Canada Gazette*,¹⁰ they are reviewed on the basis of criteria that are adopted by the Committee at the beginning of each session and then approved by both houses. These criteria range from whether an instrument is not authorized by the enabling legislation, to whether it makes the rights and liberties of the person unduly dependent on administrative discretion, to whether its drafting is defective.¹¹

In most instances, the instrument will be found to have complied with all of the Committee's criteria, in which case the file in relation to that instrument can be closed. If, however, it is determined that an instrument contravenes any of the scrutiny criteria or simply requires further explanation, then a letter will be written to the regulation-making authority (RMA) detailing those concerns.

Once a substantive response has been received from the RMA, the Committee will determine 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. If the Committee feels that the position taken by the RMA is not satisfactory, however, 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 to seek a reconsideration of a position taken by the RMA. Other options include reporting to Parliament on a matter,¹² and recommending disallowance.

4 DISALLOWANCE

The Committee has one special power, and that is the power to recommend disallowance. Although this power is infrequently used, it is significant and unique.

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.¹³

Although this mechanism was successfully resorted to on eight occasions, the Joint Committee recommended that it be replaced by a statutory procedure that would apply to all federal delegated legislation and would 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.¹⁴ 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 Standing Joint 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 o'clock on the next Wednesday to consider the motion. Section 19.1(7) of the 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 the 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.

Section 19.1(9) 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.¹⁵

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.¹⁶

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 can exercise that authority only if, when, and to the extent that Parliament has authorized.¹⁷ 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. For an overview of the regulatory process more generally, see Privy Council Office, [Guide to Making Federal Acts and Regulations: Part 3 – Making Regulations](#).
3. House of Commons, Special Committee on Statutory Instruments, *Third Report*, 1968–1969, Recommendation 19; and Audrey O'Brien and Marc Bosc, eds., “Delegated Legislation,” Chapter 17 in *House of Commons Procedure and Practice*, 2nd ed., House of Commons, Ottawa, 2009 (see “[Historical Perspective](#),” in particular).

4. [Statutory Instruments Act](#), R.S.C., 1985, c. S-22, s. 19. With respect to the statutory instruments referred to the Joint Committee, see also [Legislation Revision and Consolidation Act](#), R.S.C., 1985, c. S-20, s. 19(3).
5. See Senate, “[Committees](#),” Chapter 12 in *Rules of the Senate*, rule 12-4, and House of Commons, “[Committees](#),” Chapter 13 in *Standing Orders of the House of Commons* [*Standing Orders*], standing orders 104, 106 and 108, as well as provisions that apply to committees generally.
6. House of Commons, *Standing Orders*, standing order 106(2).
7. House of Commons, *Debates*, 3rd Session, 28th Parliament, 14 October 1971, pp. 8679–8681.
8. See, for example, Standing Joint Committee on Scrutiny of Regulations, [First Report](#), 2nd Session, 41st Parliament, adopted in the Senate (see Senate, [Debates](#), 2nd Session, 41st Parliament, 20 November 2013) and concurred in by the House of Commons (see House of Commons, [Debates](#), 2nd Session, 41st Parliament, 18 November 2013).
9. Standing Joint Committee on Scrutiny of Regulations, [About this Committee](#).
10. See “[Part II: Official Regulations](#),” *Canada Gazette*, published every other Wednesday. For the definitions of “regulation” and “statutory instrument,” see *Statutory Instruments Act*, s. 2. Note that the Joint Committee may review some instruments that are exempt from registration and publication (ss. 5(1) and 11(1) of the *Statutory Instruments Act*), and that the Committee has decided not to review instruments made by certain statutory courts (see Standing Joint Committee for the Scrutiny of Regulations, *Tenth Report (Report No. 44)*, 2nd Session, 33rd Parliament). Under rare circumstances, the Committee may review proposed regulations published in “[Part I: Notices and Proposed Regulations](#),” *Canada Gazette*, but regulations are generally only reviewed once they have already been made.
11. For the full list, see Standing Joint Committee on Scrutiny of Regulations, [About this Committee](#); or O’Brien and Bosc (2009), “[Standing Joint Committee for the Scrutiny of Regulations](#).”
12. For an example of a recent report to Parliament, see Standing Joint Committee on Scrutiny of Regulations, [Second Report \(Report No. 87 – Fees\)](#), 2nd Session, 41st Parliament.
13. O’Brien and Bosc (2009), “[Revocation of a Statutory Instrument](#)” [citation omitted].
14. [Bill C-205: An Act to amend the Statutory Instruments Act \(disallowance procedure for regulations\)](#), 2nd Session, 37th Parliament.
15. Standing Joint Committee on Scrutiny of Regulations, *About this Committee*. For a more detailed explanation, including references to the *Standing Orders of the House of Commons*, see O’Brien and Bosc (2009), “Revocation of a Statutory Instrument.”
16. Standing Joint Committee for the Scrutiny of Regulations, [Second Report \(Report No. 75 – Disallowance\)](#), 1st Session, 38th Parliament (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](#), 1st Session, 38th Parliament, 8 June 2005); and Standing Joint Committee on Scrutiny of Regulations, [Fourth Report \(Report No. 78 – Disallowance\)](#), 1st Session, 39th Parliament (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](#), 1st Session, 39th Parliament, 21 February 2007). Neither bill became law.
17. Paul Salembier and Peter Bernhardt, “[Understanding the Regulation Making Process](#),” *Canadian Parliamentary Review*, Vol. 25, No. 1, 2002.