
The Standing Joint Committee for the Scrutiny of Regulations

by Senator Normand Grimard

Regulations give form and substance to legislation. Departmental officials design regulations, also called delegated legislation, within the established limits of their authority and in accordance with other criteria set by Parliament. Scrutinizing individually the thousands of pages of federal regulations—a task essential in protecting any democracy—is the painstaking work of the members of the Standing Joint Committee for the Scrutiny of Regulations and the Committee's Legal Counsel. In this article Senator Normand Grimard, a member of this Committee for eight years and its Joint Chair for three, outlines the Committee's methods, criteria, and purposes.

Every other Thursday, the Standing Joint Committee for the Scrutiny of Regulations meets in the Parliament Buildings in Ottawa. If you happened by at that time, on the second floor of the Centre Block near the Senate Chamber you would notice there are no crowds of curious onlookers or flocks of reporters. Nor is there any need to lock the doors to prevent Senators, MPs and members of the public from storming the Committee room door. As its name states, this Joint Committee is a creature of both Houses of Parliament. Membership on this Committee may be the least desirable position on Parliament Hill, because the dry, legal subjects on its agendas rarely showcase parliamentarians. Nevertheless this Committee, misunderstood, ignored and even considered laughable is an essential watchdog in controlling bureaucracy and protecting democracy.

When I was appointed Senator eight years ago, my Whip gave me the task of making the views of the Pro-

gressive Conservative Party heard on this Committee. I have been a member ever since, studying its agendas and taking part in its decisions. From 1990 to 1993, I was Joint Chair of the Committee. It is for these reasons that I am endeavouring today to describe the factors that govern the Committee's work.

Legislation is written in general terms; regulations make the intent of Parliament more complete and specific. For example, it would be disastrous if legislation already passed were returned to the House of Commons every time a tariff was to be changed, a fee paid, or a means of implementation decided upon.

Administrative discretion requires that certain parameters be respected and each piece of legislation sets guidelines for its accompanying regulations, which departmental officials must not exceed. That is the basic rule in scrutinizing regulations. However, the Committee's Legal Counsel also take into consideration a great many other points: quality of language, accuracy of expressions, correspondence between French and English versions, and logical structure of provisions. The Committee's Legal Counsel painstakingly scrutinize every jot and tittle of all regulations, applying the fine-tooth comb

*A lawyer, Normand Grimard was appointed to the Senate in 1990. He is author of *L'indispensable Sénat : Défense d'une institution mal aimée*, Éditions vent d'ouest, Hull, 1995.*

of a set of uniform, defined criteria. While legislation and enabling provisions are given the greatest attention, the Committee's work does not stop there.

How does the Committee react to violations of the criteria that Parliament has made it responsible for applying?

It uses a step-by-step approach, not codified but based on experience. Some examples follow.

- The Committee takes into consideration the arrival of new Ministers, giving them time to become familiar with their departments before dealing harshly with them.
- The Committee deals with Designated Instruments Officers, who act as intermediaries between it and government departments, agencies, and Crown corporations. These officers are also given a reasonable period of time after being appointed to become familiar with their duties.
- Before writing to Ministers at the political level, the Committee, through the DIOs, exhausts all administrative remedies.
- The Committee deals less harshly with correspondents who demonstrate at least some desire to correct defects in their regulations.
- Often at the last minute, the spectre of the fearsome ordeal of being called to appear as witnesses generates a surprising desire to co-operate among departmental officials.
- The Committee does not treat departments' acting *ultra vires* in the same way as it does poorly translated expressions.
- The Committee's ultimate weapon is to disallow defective regulations, by means of a report to both Houses of Parliament and a sanction that the House of Commons (but not the Senate) must validate by confirming.

However, disallowing regulations is so drastic a move that, in order to maintain its credibility, the Committee has long used it only when strictly necessary. The Committee does not threaten to disallow regulations in response to a first violation or a minor skirmish. Disallowing regulations requires a combination of the following factors:

- disagreement over a major point;
- an impasse in correspondence;
- impossibility of mutual agreement;
- significant public interest;
- and a well-founded fear of being accused of complicity by tolerating injustice.

In order to avoid abusing its power or creating a legal vacuum, the Committee disallows only certain sections of regulations that are defective.

The Committee is intended to be apolitical, an ideal that is articulated in order to reinforce the corresponding reality. It may be more accurate to say that the Committee is less partisan and more objective than others in carrying out its duties. The composition of Parliament is a factor in the Committee's life: if a government with a majority in the House of Commons is bent on keeping certain regulations, they will be very difficult to disallow.

Theoretically, then, the Committee has broad sanctioning powers, up to and including disallowing regulations. Before exercising these powers, however, it makes use of exceptional diplomacy: no amount of correspondence, calls, assistance, arm-twisting, patience, persuasion or pressure is too much trouble before the ultimate weapon is used.

Voluminous Correspondence

This situation means that the Committee's Joint Chairs, members, and Legal Counsel have refined the art of letter-writing and exhaust all possible forms of persuasion.

In some cases, reaching agreement about required amendments to regulations takes five, ten or fifteen years of written and oral negotiation. The Committee recently emerged victorious from one case of twenty-two years' standing.

These negotiations involve asking, reminding, writing again, explaining further, convincing, gently reprimanding, and sometimes negotiating compromises with the parties concerned. One Committee member, Paul De Villers, MP, commented ironically in May 1998 that the Committee might be called the "Committee of Perpetuity".

Many factors affect the Committee's work, including the following.

- Although the Committee's Legal Counsel, under the direction of François Bernier do an admirable job, they could scrutinize old and new regulations more quickly if they had a larger staff.
- The Committee is at the mercy of inevitable changes in departmental Ministers and officials.
- Some subjects dealt with are highly technical, requiring detailed explanations and expert assistance. Pieces of legislation may be twenty-five pages long and their accompanying regulations may extend to 100 pages.
- The Committee's work is often a fastidious and thankless task.

-
- Not surprisingly, in a small number of cases where some or all of the purposes of regulations are suddenly irrelevant or it is known that new legislation or regulations are being considered, the Committee's work becomes outdated.

Essentially, the Committee must rely on a step-by-step, discerning approach in exercising its disciplinary role.

Where correspondence is concerned, Committee members thoroughly read and analyse all nuances of expressions used. They know that people can promise them anything, or nothing, make commitments to amend regulations "soon", or correctly point out that an amendment to the regulations requires an amendment to the legislation—something for which the Committee, too, may call. Whatever the case, the Committee wants to know when departments and agencies will make required and promised amendments. The legality of regulations is not a matter of tiresome whims.

Protecting Democracy

The Committee's scrutiny is constant, attentive, and painstaking. Some subjects, however are more sensitive than others. For example, when issues affecting aboriginal peoples arise, requiring delicate negotiations and involving a great many Band Councils, the Committee is extremely careful and considerate in raising questions. The Committee's work is particularly important since, regulations being little-known, there is not often a wave of public opinion calling for them to be disallowed. There are exceptions, however. Alcan gave up the idea of building a refinery in Kemano, British Columbia, probably in part as a result of the Committee's work. In a 1993 report the Committee had denounced the issuance of a permit in violation of the federal government's environmental protection rules.

Other examples are even more noteworthy. Certain regulations passed by the Progressive Conservatives had

banned demonstrations on Parliament Hill, but two years later, in December 1992, Parliament repealed these regulations because they had placed excessive limitations on public freedoms.

The 1982 *Canadian Charter of Rights and Freedoms* considerably broadened the guarantees to be respected in Canada. The Committee uses 13 criteria, based on 1986 legislation and governing the form and content of regulatory instruments, to scrutinize regulations.

Canada must implement its bilingualism policy. Under the Constitution and the Supreme Court decisions concerning *Blaikie (No.2)* in 1981 and the *Reference re Manitoba*, in 1992, regulations are to be passed in both French and English. Fortunately, departures from the bilingualism policy have been infrequent. The Committee insists that, where the official languages are concerned, Canadians be able to feel at home in all parts of the country and in their dealings with federal institutions.

It is important that all new regulations, regardless of subject matter, be registered within seven days. The regulations are then published so Canadians can read them.

Conclusion

Personally, I have learned a great deal from the Committee's work and am grateful for the opportunity to learn. Judging on the basis of the present year alone, when the Committee received a delegation from Vietnam in February and one from Australia in June, I am convinced that a number of countries in all parts of the world are interested in equipping themselves with oversight mechanisms similar to ours.

Unlike most Senate and House of Commons Committees, this Committee does not travel but holds all its meetings on Parliament Hill. Perhaps this explains why parliamentarians do not line up to become its members!

Not all worthwhile battles are won in front of the cameras.