COMMENTS

PARLIAMENTARY SCRUTINY OF STATUTORY INSTRUMENTS IN CANADA: A PROPOSAL*

*J. L. Mallory***

I. INTRODUCTION

Delegated legislation is a necessary consequence of modern government. Parliament cannot, and should not, attempt to consider in detail all of the great variety of regulations which are necessary in a modern, urban, and highly technological society. It has more important things to do. It must keep a constant and wary eye on the major policy questions which affect the public interest. In spite of the very large flow of legislation which is now necessary, parliamentary time must not be so taken up by the legislative process that opportunity is lacking for the other very necessary parliamentary function under responsible government, which is to keep under constant review the policy and actions of ministers of the Crown. Recent and sweeping changes in the procedure of the House of Commons have done much to improve the efficiency of Parliament as a legislative body, but it is possible that some of these changes, necessary as they were, in such matters as supply procedure have taken away opportunities which previously existed for the House to scrutinize carefully the activities of the departments. It is, therefore, important to provide new means for scrutiny over the executive.

At the time of Confederation, we were still living in the nightwatchman state, in which little regulation was thought necessary to protect the essential interests of the citizen. But this is no longer so. Most Canadians now live in complex urban environments in which a great deal of detailed regulation is necessary for our protection, and in which governments are now expected to take very much greater responsibility for our health, safety, and old age.

---

*On September 30, 1968, the Canadian House of Commons agreed to set up a Special Committee "to report on procedures for the review by this house of instruments made in virtue of any statute of the parliament of Canada." *See* H.C. DEB. at 577 (1968). This article is based on proposals made to the committee by the author on April 29, 1969. *See* MINUTES OF PROCEEDINGS AND EVIDENCE, SPECIAL COMMITTEE ON STATUTORY INSTRUMENTS 49-63 (No. 3 1969). This article was submitted for publication before the completion of the *Third Report of the Special Committee on Statutory Instruments* published in October 1969. The detailed recommendations in this *Report* encompass many of the author's suggestions. However, the recommendations in the Report have not been acted upon as of yet.

**B.A., 1937, University of New Brunswick; LL.B., 1940, University of Edinburgh; M.A., 1941, Dalhousie University; F.R.S.C., 1964. Professor of Political Science, McGill University.

From social security to aircraft safety, we expect government agencies to protect us from the hazards of life. Parliament, the traditional source of legislation, does not have the time to reconsider laws from year to year and to adjust their benefits and prohibitions to rapid changes in technology, prices, and social conditions. It must, therefore, enact legislation in rather general terms, and give wide powers to the Governor in Council, or a minister of the Crown, or a board or other public authority, to flesh out the bones of the law with detailed regulations which impose new prohibitions or confer a different mix of benefits on the public. Two examples of this will suffice: rapid changes in aircraft technology make it necessary to revise frequently the rules governing air and airport safety; the ingenuity of medical research is constantly providing new drugs, the handling of which must be regulated without delay. For Parliament itself to update the law in these matters from year to year would be impossible, and even if it were possible it would divert members of Parliament from necessary concern with important issues of policy.

Accordingly, the detailed regulations to make the law effective must be made by officials in the name of the government or some statutory public authority. These regulations are no doubt carefully considered. One can be sure that official committees will consider them carefully before they are promulgated. But, unlike acts of Parliament, they will not be publicly debated before they become part of the law. And after they become part of the law there is little chance for them to be reconsidered. In most cases, public debate would not help and is not necessary. What can Parliament say that is essential or constructive on the safe load of a commercial aircraft, or the safety precautions necessary for the use of a chemical pesticide, which the experts cannot say with greater authority? Not much. But the problem is as follows. Does the executive agency, which makes the regulations, stay within the authority provided by the statute? Does it lay down a regulation which unduly restricts the proper liberty of the subject? Does it interfere with the remedies normally provided by the courts? Who can say? In my view, it is the business of Parliament to act as a watchdog for the public interest. I have great confidence in the professional integrity of the public service. But I feel that no man should exercise power without public scrutiny.

II. Control over Statutory Instruments in Canada

Let me summarize briefly the history of the discussion of this matter in Canada.[1] We seem to have become aware of the problem a number of years after the matter had come to public attention in Britain. Since 1925 there has been a Special Orders Committee in the House of Lords, which has confined its attention to those orders which require parliamentary affirma-

[1] See J. Kersell, Parliamentary Supervision of Delegated Legislation (1960).

tion to become effective. The Donoughmore Committee report of 1932 is probably the document most familiar to students of delegated legislation.[2] It sought to lay down guidelines for the exercise of delegated legislative power by the executive so that subordinate legislation would not usurp the function of Parliament by altering taxation, legislating in principle, or amending statute law. In due course, a Select Committee of the British House of Commons was set up in 1944 to scrutinize delegated legislation and to report to the House if any such instrument offended against a number of prohibitions which were essentially those of the Donoughmore Committee in 1932. Even to this day, the committee has not been provided for in the Standing Orders of the House, but it has been invariably continued so that it can be deemed to be an established part of the machinery of the House. Two points should be noted about the work of this committee. In the first place, it cannot consider the policy implications of an order: it can criticize only the form to ensure that the order conforms to the norms of "good" subordinate legislation. The second point is that in its work the committee is assisted by the Parliamentary Counsel to the Speaker. In other words, its job is a technical one, so that it requires the support of an expert officer of the House whose office carries authority.

In Canada, the first important parliamentary initiative for a parliamentary scrutiny committee came from Mr. Brooke Claxton during the Throne Speech debate in 1943. He stated:

> 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 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.[3]

At a later date, this matter was raised again in the House, this time by Mr. Diefenbaker. In 1949, he secured an undertaking from the Prime Minister that the government would consider the matter and intimate its views in the next session. In 1950, the government introduced the Regulations Act. That act represented an important advance in a number of respects. It provided for the tabling of all orders, whether made by the Governor in Council, by ministers, or by other Crown agencies, in the House, and for their publication in Part II of the *Canada Gazette* and from time to time in consolidated form in *Statutory Orders and Regulations.* It provided, in a more systematic way, that the drafting of such orders be scrutinized by the

---

[2] REPORT OF THE COMMITTEE ON MINISTERS' POWERS, CMD. 4060 (1932).
[3] H.C. DEB. 296 (1943).

executive to improve the form in which they were to appear.

However, the setting up of a scrutiny committee of the House was rejected by the Prime Minister, Mr. St. Laurent, in these words:

> 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.[4]

Mr. St. Laurent was of course quite wrong in his description of how orders are made in the United Kingdom, for most are made by ministries and not by boards or other agencies. It is also not easy to share his belief that a scrutiny of orders within the executive is an adequate substitute for scrutiny by Parliament.[5] It is, I think, quite likely that a scrutiny procedure of the British type does not go far enough to be of the best use in Parliament of Canada. Indeed, the narrowness of the scope of the British Statutory Instruments Committee has been criticized in England. Mr. Claxton's proposal that the terms of such scrutiny be widened to include the ventilation of grievances and, by implication, the consideration of policy, is more suited to our present needs and the procedures and traditions of the House of Commons.

III. What Kind of Scrutiny—Form or Substance?

One of the most important questions to be settled is the kind of scrutiny which would be most useful to the House. The British Statutory Instruments Committee concerns itself with the form of orders, not their substance. This may appear to be a rather unrewarding exercise. It certainly is not one that can be expected, except in unlikely circumstances, to raise political issues of interest either to political parties or to the electorate. And yet it is important. Procedures do exist to ensure that orders are clearly drafted, are properly based on statutory authority, and do not employ such wide and sweeping powers that constitutional principles are offended. Officials of the Department of Justice, the Privy Council Office, and the departments concerned work closely together during the drafting stage. In addition, the Department of Justice has an obligation under the Bill of Rights to scrutinize orders to ensure that they conform to its principles.[6] Nevertheless, it would seem

[4] H.C. Deb. 3040 (1950).

[5] Mallory, *Delegated Legislation in Canada: Recent Changes in Machinery*, 19 Can. J. Ec. & Pol. Science 362-71 (1953).

[6] See the evidence of Hon. John Turner, Minister of Justice, before the committee, Minutes of Proceedings and Evidence 224 (No. 9 1969).

that an independent examination by an outside body of what in Britain is called the "merits" of an order, that is, whether it is a normal or an unusual and unexpected use of statutory authority, is still important.

A committee which did this would need the resources of expert officials through some such officer of the House as the Parliamentary Counsel, just as the Public Accounts Committee must rely on the guidance of the Auditor General. It would not be sufficient for the committee to be assisted by members of the legal staff of the Department of Justice, because it is important that the committee—as a servant of the House, not the Government —should have the services of a skilled and dedicated staff whose loyalties would be undivided. This is not to say that such parliamentary officers should be outside the public service altogether, for then it would be difficult to attract competent and promising officials into what might seem to be blind-alley careers. One must visualize a situation in which, under the benevolent eye of the Public Service Commission, there can be some rotation of staff between the two Houses of Parliament and the departments of government.

A committee of the House which confined its work to the consideration of the proper form and constitutional propriety of subordinate leglislation would do a useful, necessary, but unglamorous job. It would be rewarding work only to the most conscientious of members of the House, who have many other calls on their time and important responsibilities to their constituencies and to their parties. But this is not the only reason I have for regarding such a limited jurisdiction as insufficient.

It is in any event hard to distinguish the fine line between form and policy. While the opportunities for bringing before the House serious policy issues arising out of departmental subordinate legislation were never very clear-cut in the past, they did exist. The most useful time to bring them up was when departmental estimates were before the Committee of Supply. It would have been desirable to have more regular and formal occasions for debating such issues. This point was certainly recognized when the Emergency Powers Bill was before the House in 1951. At that time, the Minister of Justice gave an undertaking that the Government would find time for debate on the use of powers conferred under the bill if the Opposition requested it.[7] However, one cannot effectively protect the rights of the House over the long term by any such undertaking from a particular government. What is needed is a recognition that procedures exist under standing orders to bring such matters up.

To be effective, the actions of the committees of the House must lead to some further action in the House itself, if this becomes necessary. Recent changes in supply procedure have removed the very wide opportunities that used to exist for every member when departmental estimates were before the whole House in Committee of Supply. Now the estimates are dealt with in standing committees. While this procedure may improve the quality of the

[7] H.C. DEB. 796 (1951).

work of the House in detailed criticism of the estimates, it is quite likely that the House at the same time has lost an important opportunity to ventilate policy questions arising out of departmental legislation. It is likely that other opportunities exist under the new procedures, but they will need to be developed and exploited. To this question I shall return at a later point.

It would seem to be desirable that the scrutiny of subordinate legislation should not be narrowly confined to form, though the importance of this kind of scrutiny should not be underestimated. But somewhere there must be better opportunities to go beyond the mere form of an order, and bring public attention to bear on wider issues inherent in it. The original proposal by Brooke Claxton seems to be based on the assumption of such wider scrutiny, and, in Canadian conditions, it seems to be the right line to take.

IV. What Kind of Committee?

There are two possible solutions to the question of the most appropriate parliamentary machinery. One is to enlarge the range of activities of the existing standing committees so that they will also review the subordinate legislation of the departments whose estimates normally come before them. This is superficially attractive, since the members of these committees already have developed a familiarity with these departments. It has been further justified by some observers on the ground that the number of pieces of subordinate legislation is so vast that no one committee could deal with them. This seems to have been a misconception based on an estimate of the annual output of orders in council and like instruments, which is, of course, very large. However, only a small percentage of these have significant legislative effect. Most of them, like Treasury Board minutes, simply confirm some use of executive power. The Minister of Justice, in his evidence before the Special Committee, stated that the figures for draft regulations of the sort that would concern us here are 517 in 1967 and approximately 528 in 1968.

Furthermore, there are real difficulties in using the existing standing committees for this purpose. The evidence is mounting that these committees are already overloaded. To expect them, in addition to their present preoccupation with the estimates and legislation, to take on the further responsibility for systematic and serious review of the subordinate legislation of the departments within their jurisdiction is utopian. If they did so, it is highly likely that their performance would vary widely from one committee to another, depending both on their other preoccupations and on whether any of their members were prepared to devote the necessary energy to what is likely most of the time to be a politically unrewarding topic.

In addition to this, the scrutiny of subordinate legislation is, in the first instance, a highly technical affair. Any lawyer knows that the law is not written in plain language. For it to express with precision and clarity what is intended requires the use of highly technical language which will stand up to judicial interpretation. No one can be sure what such language means

except those with knowledge, training, and experience in legislative draftsmanship. That is why the effective scrutiny of statutory instruments depends so much on the professional staff of the scrutiny committee. While one would like to see a Canadian committee secure the services of a parliamentary officer with the knowledge and authority of Sir Cecil Carr, it is difficult to imagine such an officer effectively serving a battery of standing committees.

V. How to Make the Committee Effective

Since the best agency for the parliamentary scrutiny of subordinate legislation is a committee—probably a small one of about twelve members—the next matter to consider is the way in which its review can lead to effective action. Presumably, the committee will report from time to time to the House. It is possible that in most cases this will be sufficient. Once departmental officials have appeared before the committee, and noted its objections to the form of the orders which have been questioned, it is likely that they, or the officers in the Privy Council Office and the Department of Justice, will be persuaded to have the offending order modified and put in a more acceptable form. The committee is bound to develop a jurisprudence of its own which will act as guidelines to the draftsmen of subordinate legislation.

However, there will be times when this is not enough. It is possible that even a strongly worded committee report will have no effect. In that case, there must be some way of raising the matter under some form of parliamentary procedure which will secure additional publicity and exert additional pressure on the government.

One can also imagine a further difficulty. An order which is objectionable to some members may not secure the condemnation of the majority of the committee, who will of course be government supporters. Thus, there may be no committee report before the House to act upon. However, members of the committee do not work in a cocoon. They can carry the matter further themselves, or report it to their caucuses as a basis for further action by one of the parties.

One cannot foresee exactly how the matter could best be raised in the House, but there are several possibilities. If the reports of the committee were tabled from time to time in the House, it would be possible to have a short debate on one of the twenty-five allotted days, under Standing Order 58(5), which are open to the opposition parties to debate any matter which they wish. For this to happen, it would be necessary to persuade opposition parties, who must jealously allocate this time among a number of competing claims, that the issue is important enough to justify a full-dress debate.

A second opportunity might arise through a member seeking an emergency debate under Standing Order 26. Such a debate can be granted in the Speaker's discretion if he agrees that the matter is urgent, and that no other convenient opportunity is available to debate it.

A third possibility exists under Standing Order 39A. In this case, a member would first have to ask the minister a parliamentary question in the daily oral question period. If he were still dissatisfied with the answer, he could then give notice to the Speaker of his intention to raise it again under the short adjournment debates which are popularly known as the "late show." If this format were used the member could make a seven-minute speech and receive a three-minute reply from the minister or his parliamentary secretary.

All of these methods assume that success in having an order modified can be achieved by publicity. To be realistic, one must accept the fact that no stronger sanction is likely to exist except persuasion. The House of Commons functions in a complex web of arrangements which enable a government to get its way on any matter that it considers important. If it suffers defeat, it can only dissolve Parliament and appeal to the sovereign electorate for a verdict.

But the whole object of having a statutory instruments committee is not to frustrate the necessary operation of government, but to provide a safeguard through publicity and debate against an abuse of executive power, that is, the issue of regulations which may sometimes be unjust or represent an improper exercise of statutory authority.