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TO / DEST:

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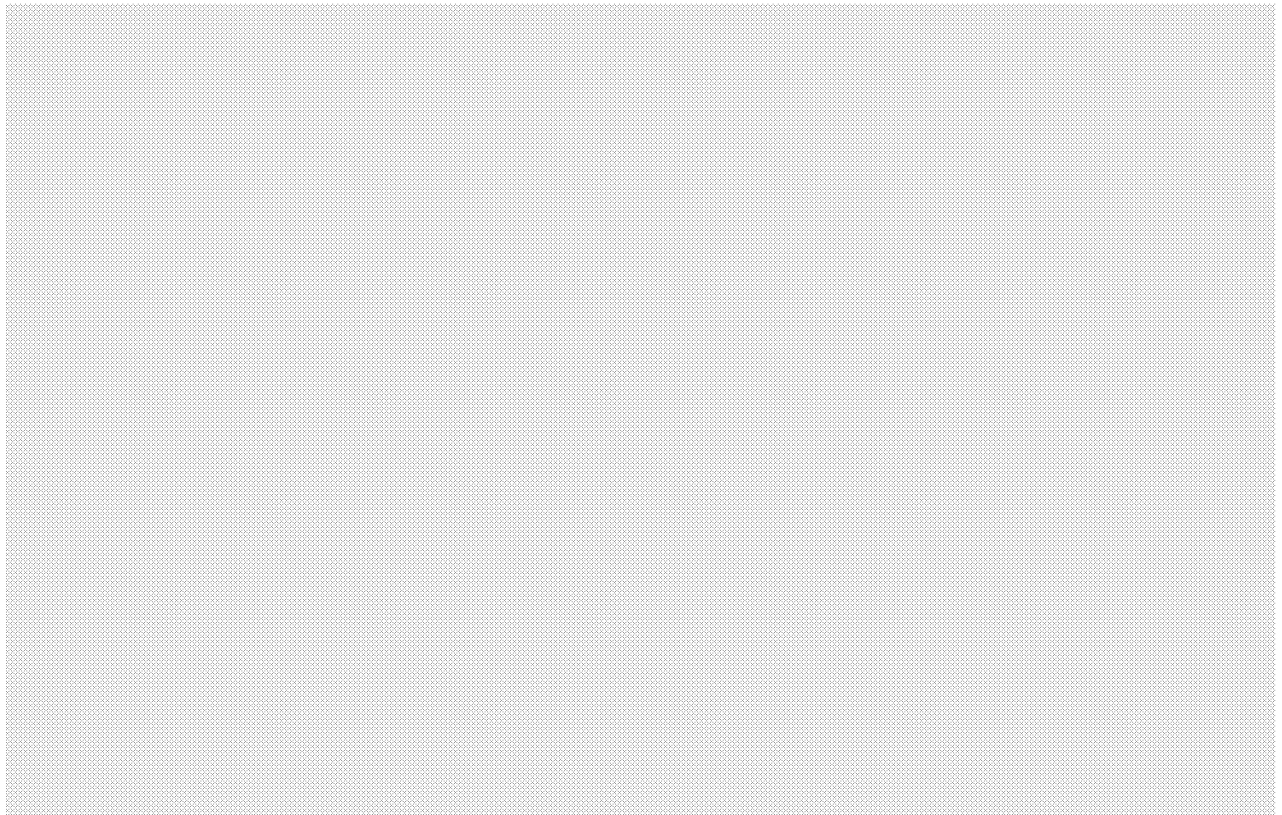
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MANUAL ON THE DRAFTING OF REGULATIONS IN ENGLISH

Prepared by the  
Privy Council Office Section  
of the  
Department of Justice  
(PCOJ)

JULY 1985  
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## MANUAL ON THE DRAFTING OF REGULATIONS IN ENGLISH

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#### AVAILABILITY OF FRENCH TEXT

Please note that there is a comparative index of titles in this manual and titles in the *Guide de rédaction française des règlements* at page 123.

Veuillez noter que le *Guide de rédaction française des règlements* est disponible sur demande.

## PREFACE TO THE FIRST REVISED EDITION

The present revision of the 1985 edition of the *Manual on the Drafting of Regulations in English* was undertaken in order to update, add and modify certain portions. The revised edition incorporates changes introduced in the *Revised Statutes of Canada, 1985* and other changes suggested by those who prepare subordinate legislation.

Revision of the Manual was carried out by the lawyers in PCOJ and by the revisors and editors who assist in the examination of subordinate legislation submitted to PCOJ for examination.

The revised Manual has been prepared in loose-leaf format to facilitate updating of the Manual on a page-by-page basis, as necessary. The Manual is available on diskette.

The 1985 revision of the Statutes brought many linguistic and terminological changes to the French version of some Acts. As a result of that revision, many regulations will require amendment to be consistent with the new language used in their enabling legislation. The *Manual on the Drafting of Regulations in English* has therefore been revised with a view to contributing to this task, as well as to serving the drafter of new subordinate legislation. The *Guide de traduction des règlements*, revised edition, published by the Translation Bureau, Secretary of State, is also a useful tool in this regard.

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## INTRODUCTION

This Manual is intended for those engaged in the preparation of regulations and other instruments made pursuant to an Act of Parliament to use as an aid in producing clear, concise and homogeneous texts. It was prepared by counsel in the Privy Council Office Section of the Department of Justice and draws on the works of Professors E.A. Driedger, P.-A. Côté and L.-P. Pigeon on the drafting and interpretation of legislation. The Manual includes rules and conventions of drafting followed by the Legislation Section of the Department of Justice, which rules and conventions also apply to the drafting of subordinate legislation.

The Manual attempts to deal with the basic problems encountered by counsel in PCOJ in the course of examining regulations and other statutory instruments. Problems considered to be too specific to a particular context and others found to relate to the interpretation of a particular enabling authority have not been included. There will not, however, be a solution in this Manual to every drafting problem and the rules are not to be taken as absolute prescriptions whose mechanical application will guarantee a perfect text.

A list of the various documents to be consulted when drafting regulations or other statutory instruments is provided under **CHECKLIST FOR DRAFTERS**.

To make the Manual easier to read, the word "regulations" is used in the Manual as a generic term that includes all regulations and other statutory instruments made pursuant to an Act of Parliament, except where the context requires the use of specific terms.

### *STATUTORY INSTRUMENTS ACT*

The *Statutory Instruments Act* governs the examination, registration and publication of regulations, as defined in that Act (see **DEFINITION OF "REGULATION" AND "STATUTORY INSTRUMENT" IN THE STATUTORY INSTRUMENTS ACT**). The Act includes provisions

- (a) in subsection 3(1), for the forwarding of three copies of a proposed regulation, in both official languages, by a regulation-making authority to the Clerk of the Privy Council;
- (b) in subsection 3(2), for the examination of proposed regulations by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice;
- (c) in section 5, for the transmission of regulations to the Clerk of the Privy Council and, in section 6, for the registration of regulations by the Clerk;
- (d) in section 9, for the coming into force of regulations;
- (e) in section 11, for the publication of regulations; and
- (f) in section 19, for the scrutiny of regulations by a Committee of Parliament.

#### **Examination of Proposed Regulations**

A proposed regulation is examined, pursuant to subsection 3(2) of the *Statutory Instruments Act*, "to ensure that

- (a) it is authorized by the statute pursuant to which it is to be made;
- (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
- (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
- (d) the form and draftsmanship with respect to the proposed regulation are in accordance with established standards."

*STATUTORY INSTRUMENTS ACT -- Concluded*

Some of the standards of form and draftsmanship with respect to regulations are set out under FORMALITIES.

Under subsection 3(3) of the *Statutory Instruments Act*, the Clerk of the Privy Council is required to draw to the attention of the regulation-making authority any provisions in a proposed regulation that do not meet the requirements set out in paragraphs 3(2)(a) to (d) of the Act.

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DEFINITION OF "REGULATION" AND "STATUTORY INSTRUMENT" IN  
THE *STATUTORY INSTRUMENTS ACT*

The key provision in the *Statutory Instruments Act* is the definition "statutory instrument" in subsection 2(1). The essential part of this definition reads as follows:

"statutory instrument"

(a) means any rule, order, regulation ... or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established..."

In other words, the nature of the instrument must be specified in the enabling legislation. For example, a provision in an Act might provide that:

"10. The Governor in Council may, by order, fix the fees to be charged..."

The making of an instrument, in the above case an "order", is expressly authorized in section 10 and the order is therefore a statutory instrument, subject to the rest of the definition of that term.

In another example, "The Governor in Council may fix the fees to be charged...", no instrument has been expressly authorized to be made. Although the Governor in Council can act only by order in council, an order in council made in such a case would not be a statutory instrument.

Subparagraph (a)(ii) of the definition "statutory instrument" refers to the royal prerogative and paragraph (b) sets out various instruments that are not statutory instruments.

Once it has been established that an instrument is a statutory instrument, it is necessary to determine whether it is also a regulation within the meaning of subsection 2(1) of the Act. To be a regulation, an instrument must be one of the following:

(a) a statutory instrument that is made in the exercise of a legislative power conferred by or under an Act of Parliament;

(b) a statutory instrument for the contravention of which a penalty, a fine or imprisonment is prescribed by or under an Act of Parliament;

DEFINITION OF "REGULATION" AND "STATUTORY INSTRUMENT" IN  
THE *STATUTORY INSTRUMENTS ACT* -- Continued

(c) a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament; or

(d) an instrument described as a regulation in any Act of Parliament.

It is often a difficult task to determine whether a statutory instrument is made in the exercise of a legislative power. Generally, an instrument that creates general and objective standards of conduct that are legally enforceable, have the force of law and are likely to apply to an indeterminate number of persons is a statutory instrument made in the exercise of a legislative power. On the other hand, an example of an instrument made in the exercise of a non-legislative power would be:

"15. The Governor in Council may, by order, remit any tax or penalty, where the Governor in Council considers that it is in the public interest to remit the tax or penalty."

Under subparagraph (a)(i) of the definition "statutory instrument" in subsection 2(1) of the *Statutory Instruments Act*, any order made pursuant to section 15 would be considered to be a statutory instrument. However, where the order applies only to one or more named persons, the order would not be considered to be a regulation because it would not prescribe any general or objective standard of conduct. These types of orders fall within the same category as contracts, licences, leases, appointments, certificates and other documents that are issued by the government and its agencies pursuant to an Act of Parliament but are not based on the exercise of a legislative power. For a discussion of the distinction between regulations and administrative directives, see Dussault and Borgeat, *Administrative Law: a Treatise*, Vol. I, 2nd ed., 1985, p. 329 to 340.

Where there is doubt as to whether a proposed statutory instrument is a regulation, the Deputy Minister of Justice has the power, pursuant to section 4 of the *Statutory Instruments Act*, to make that determination. In practice, it is counsel in PCOJ that generally makes the determination on the Deputy Minister's behalf.

DEFINITION OF "REGULATION" AND "STATUTORY INSTRUMENT" IN  
THE *STATUTORY INSTRUMENTS ACT* -- Continued

1. Instruments that are regulations

An instrument that is a regulation within the meaning of the *Statutory Instruments Act* is examined by PCOJ pursuant to section 3 of the Act to ensure that it meets the four criteria set out in subsection 3(2) of the Act.

The only regulations that are exempt from examination are those that are also exempt from

(a) registration, owing to the fact that registration is not reasonably practicable due to the number of regulations; or

(b) publication, owing to the fact that they affect only a limited number of persons and that reasonable steps have been or will be taken to bring their purport to the notice of those persons.

These exemptions are set out in the *Statutory Instruments Regulations*.

2. Statutory instruments that are not regulations and documents that are not statutory instruments

PCOJ has only a limited role in examining statutory instruments that are not regulations and documents that are not statutory instruments.

These statutory instruments and documents are examined by PCOJ, in its capacity as legal advisor to the Privy Council Office, only if the instrument or document is to be published in the *Canada Gazette* Part II. Statutory instruments and other documents that are published in the *Canada Gazette* Part II are those that are

(a) listed in subsection 11(3) of the *Statutory Instruments Regulations*; or

(b) authorized or ordered by the Clerk of the Privy Council, pursuant to section 14 of the *Statutory Instruments Regulations*, to be published in the *Canada Gazette* Part II, where the Clerk considers it is in the public interest to do so.

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DEFINITION OF "REGULATION" AND "STATUTORY INSTRUMENT" IN  
THE *STATUTORY INSTRUMENTS ACT* -- *Concluded*

PCOJ examines statutory instruments that are not regulations and documents that are not statutory instruments to ensure that they, also, meet the criteria set out in subsection 3(2) of the *Statutory Instruments Act*.

3. Orders in council not published in the *Canada Gazette Part II*

Orders in council that are not required to be published in the *Canada Gazette Part II* are reviewed by PCOJ, in its capacity as legal advisor to the Privy Council Office.

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### COMING INTO FORCE OF REGULATIONS

As a general rule, a regulation comes into force on the expiration of the day immediately before the day on which the regulation is registered pursuant to section 6 of the *Statutory Instruments Act*. (See subsection 9(1) of the *Statutory Instruments Act* and paragraph 6(2)(b) of the *Interpretation Act*.)

A regulation may come into force at a date later than the date of registration if the regulation expressly states that it comes into force on a day later than the date of registration.

A regulation may come into force on the day on which it is made or a later day where that day is before the day on which the regulation is registered if

(a) the regulation expressly states that it comes into force on a day earlier than the date of registration;

(b) the Clerk of the Privy Council is advised in writing by the regulation-making authority, pursuant to subsection 9(2) of the *Statutory Instruments Act*, of the reasons why it is not practical for the regulation to come into force on the day on which it is registered; and

(c) the regulation is, pursuant to paragraph 9(1)(a) of that Act, registered within seven days after it is made.

A regulation that is exempted from registration comes into force on the day on which it is made (see paragraph 9(1)(b) of the *Statutory Instruments Act* and paragraph 6(2)(b) of the *Interpretation Act*). The classes of regulations exempted from registration are found in section 7 of the *Statutory Instruments Regulations*.

## ORDERS IN COUNCIL FIXING DATE OF COMING INTO FORCE OF ACTS

A provision in an Act authorizing the issuance of an order in council fixing the day of the commencement of the Act comes into force on the day on which the Act receives Royal Assent. (See subsection 5(2) of the *Interpretation Act*.)

An order in council cannot provide for the coming into force of an Act or a provision of an Act on a day before the day the order in council is made unless there is a specific authority to do so.

Where an order in council states that an Act or any provision thereof is to come into force on a particular day, the Act or provision comes into force on the expiration of the previous day. (See subsection 6(1) of the *Interpretation Act*.)

Where an order in council has issued to bring an Act or a provision thereof into force on a particular day and that day has passed, the order in council cannot be repealed or amended so as to fix another day as the day of commencement. The power in the Act authorizing the issuance of such an order in council is spent and only an Act of Parliament can change the commencement day.

Where an order in council has issued to bring an Act or a provision thereof into force on a particular day and that day has not yet arrived, the order in council can be amended or repealed.

It should be noted that coming into force provisions in older statutes generally state that the "Act or any provision thereof shall come into force on a day to be fixed by proclamation", rather than by order in council.

An order in council is required to authorize the issuance of every proclamation bringing an Act or a provision thereof into force on a particular day. The order in council may be repealed or amended at any time before the proclamation is issued. Where the proclamation has already issued, there must be a new order in council recommending that a proclamation do issue repealing or amending the former proclamation and not an order in council amending the earlier order in council.

A proclamation cannot provide for the coming into force of an Act or a provision of an Act on a day before the day the order in council authorizing its issuance is made unless there is specific statutory authority to do so. The proclamation can provide that an Act or a provision thereof shall come into force on the same day as the order in council authorizing its issuance even though the proclamation actually is issued on a later day. (See subsection 18(3) of the *Interpretation Act*.)

ORDERS IN COUNCIL FIXING DATE OF COMING INTO FORCE  
OF ACTS -- *Concluded*

Where an Act provides that it shall cease to be in force, expire or be repealed on a day to be fixed by order in council, the above provisions apply except that the Act ceases to have effect, etc., on the commencement of the day following the day stated in the order in council.

## PREPUBLICATION - CANADA GAZETTE PART I

Proposed regulations are "prepublished" chiefly to enable the public to have a direct voice in the regulatory process. Most draft regulations are prepublished in the *Canada Gazette* Part I, which is published every Saturday. Proposed regulations that are published in the *Canada Gazette* Part I are those that are required by their enabling Act to be published in the *Canada Gazette* (statutory prepublication), as well as those which must be published in accordance with the Federal regulatory process (administrative prepublication).

The Federal regulatory process is a set of government guidelines governing all regulations to be published in the *Canada Gazette* Part II that are made or approved by the Governor in Council or by ministerial Order. Regulations made by independent regulatory agencies such as the CRTC are exempt from the Federal regulatory process but may, if an agency desires, follow the process. The Regulatory Affairs Directorate of the Treasury Board Secretariat and Privy Council Office Policy Secretariat are responsible for the implementation of the process. One important element of the process is the Regulatory Impact Analysis Statement (RIAS) that summarizes the contents of the proposed regulations and is published with the proposed regulations. The process also permits the Regulatory Affairs Directorate to grant an exemption from prepublication. (For more information on the Federal regulatory process, refer to *The Federal Regulatory Process - An Interim Procedures Manual for Departments and Agencies, 1991*, published by the Treasury Board of Canada Secretariat.) Regulations that are not subject to the Federal regulatory process are accompanied by an explanatory note instead of a RIAS.

*Administrative Prepublication:* Regulations that are subject to the Federal regulatory process are submitted to PCOJ with an order in council or other executive order. A draft notice of prepublication need not be sent to PCOJ for approval.

*Statutory Prepublication:* Where prepublication is required by the enabling Act, the draft regulation submitted to PCOJ is accompanied by a notice of prepublication, which is examined along with the proposed regulations.

PREPUBLICATION - CANADA GAZETTE PART I -- Continued

The following are examples of notices of prepublication from the *Canada Gazette* Part I. In these examples, prepublication was required by the enabling Act.

*Example 1: Amendment of a regulation*

Notice is hereby given, pursuant to subsection 20(1) of the Canada Post Corporation Act, that the Canada Post Corporation, pursuant to paragraph 19(1)(s) of that Act, proposes to amend the Special Services and Fees Regulations, C.R.C., c. 1296, in accordance with the schedule hereto.

The proposed effective date of the amendment is June 24, 1991.

Any interested person may make representations concerning the proposed amendments not later than 60 days after the date of publication of this notice. All such representations must be addressed to the Minister of National Revenue, Minister responsible for the Canada Post Corporation, Sir Alexander Campbell Building, Ottawa K1A 0B1.

*Example 2: New regulations*

Notice is hereby given, pursuant to subsection 34(3) of the Canadian Transportation Accident Investigation and Safety Board Act, that the Canadian Transportation Accident Investigation and Safety Board, pursuant to sections 31 and 34 of that Act, proposes to make the annexed Regulations respecting the Canadian Transportation Accident Investigation and Safety Board.

All interested persons may make representations concerning the proposed Regulations to the Canadian Transportation Accident Investigation and Safety Board within 90 days after the date of publication of this notice. All such representations must be addressed to the Chairman, Canadian Transportation Accident Investigation and Safety Board, P.O. Box 9120, Alta Vista Terminal, Ottawa, Ontario K1G 3T8, and cite *Canada Gazette* Part I and the date of this notice.

PREPUBLICATION - CANADA GAZETTE PART I -- *Concluded*

*Example 3:* Reference to the *Access to Information Act* - where required by the policy of the regulation-making authority

Notice is hereby given, pursuant to section 9 of the Motor Vehicle Safety Act, that the Governor in Council, pursuant to section 4 of that Act, proposes to amend the Motor Vehicle Safety Regulations, C.R.C., c. 1038, in accordance with the schedule hereto.

The proposed effective date of the amendments is the date of registration thereof by the Clerk of the Privy Council.

Any manufacturer, distributor, importer or other interested person may make representations concerning the proposed amendments to the Minister of Transport within 60 days after the date of publication of this notice. All such representations must cite *Canada Gazette* Part I and the date of publication of this notice. The representations should also stipulate those parts of the representations that should not be disclosed pursuant to the Access to Information Act and, in particular, pursuant to sections 19 and 20 of that Act, the reason why those parts should not be disclosed and the period during which those parts should remain undisclosed. The representations should also stipulate those parts of the representations in respect of which there is no objection to disclosure pursuant to the Access to Information Act.

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## PUBLICATION - CANADA GAZETTE PART II

The *Canada Gazette* Part II contains regulations, as well as those statutory instruments and other documents that are referred to in subsection 11(3) of the *Statutory Instruments Regulations* or that the Clerk of the Privy Council has ordered or authorized, pursuant to section 14 of those Regulations, to be published in the *Canada Gazette* Part II.

Regulations that are to be published in the *Canada Gazette* Part II must be examined by PCOJ.

### Statutory Prepublication

Where proposed regulations are prepublished in the *Canada Gazette* Part I pursuant to a statutory requirement and no changes to the regulations are proposed at the end of the consultation period, the regulations must be resubmitted to PCOJ for re-examination prior to publication in the *Canada Gazette* Part II along with an order in council or other executive order reciting the fact of prepublication.

Where proposed regulations are published in the *Canada Gazette* Part I pursuant to a statutory requirement and changes are proposed at the end of the consultation period, the regulations must be resubmitted to PCOJ for re-examination prior to

(a) prepublication again in the *Canada Gazette* Part I where the changes are substantive or the enabling Act requires a further prepublication; or

(b) publication in the *Canada Gazette* Part II where the changes are not substantive or the enabling Act expressly states that further prepublication is not required.

### Administrative Prepublication

Where proposed regulations are not required by the enabling Act to be prepublished and are not altered after prepublication, the regulation-making authority need not obtain new stamped copies from PCOJ. It submits the copies it already has to the Privy Council Office for publication in the *Canada Gazette* Part II.

Where changes are made to proposed regulations after administrative prepublication, the regulations must be resubmitted to PCOJ for re-examination.

PUBLICATION - CANADA GAZETTE PART II --- *Concluded*

Resubmission to PCOJ

All changes made to proposed regulations after prepublication should be highlighted prior to resubmission of the regulations to PCOJ. Also, where the covering letter is not sent directly to the lawyers who examined the proposed regulations for publication in the *Canada Gazette* Part I, the covering letter should state the names of those lawyers, the PCOJ file number and the date of prepublication and reference in the *Canada Gazette* Part I.

Correction of Errors

Unfortunately errors occasionally occur during publication of the regulations in the *Canada Gazette* Part II resulting in published regulations that do not correspond to the stamped copies from PCOJ. Where such errors occur, the Registrar of Statutory Instruments at the Privy Council Office may publish an *Erratum* in a subsequent issue of the *Canada Gazette* Part II.

## ENABLING STATUTE

A regulation-making authority does not have the power to make regulations unless that power has first been delegated to it by Parliament in an enabling statute. Moreover, the power to make regulations exists only on the terms and conditions set out by Parliament and within the limits defined by it in the enabling statute. It is through the enabling provision in a statute that Parliament provides for the delegation of powers to make regulations, identifies the delegatee and outlines the scope and nature of the powers granted and the terms and conditions governing their exercise.

Generally, enabling provisions are drafted clearly and precisely so that the nature and scope of the powers granted are immediately apparent. In practice, however, the principles of statutory interpretation may be needed to resolve any lack of clarity in the enabling authority and to assist in applying that authority in specific cases. Since the scope of and limits on regulation-making powers are given in the enabling provision, it is important for the regulation-making authority acting thereunder that the provision be correctly interpreted and strictly complied with. If a court finds that a provision in a regulation exceeds the limits of the power granted by the enabling statute, the provision will be declared *ultra vires* and rendered inoperative (see, for example, *Toronto Corporation v. York Corporation*, [1938] A.C. 415) or, if it is essential to the regulation as a whole, the court will strike down the regulation in its entirety (see *Attorney General of Alberta v. Attorney General of Canada*, [1947] A.C. 503).

Any enabling provision that is contrary to an established principle of law, or one that gives a regulatory power to abrogate such a principle, must be interpreted restrictively. This would apply, for example, where the enabling provision permits the making of regulations restricting an owner's right to enjoy his property freely, since the exercise of such a power may result in exceptions to the principles of common law.

The courts may refuse to give effect to any provision in a regulation that might be perceived as an unusual or unexpected use of the regulation-making power.

Good drafting follows from an understanding of the limits on the regulation-making power granted as well as a thorough familiarity with the policy objectives of the regulation-making authority. The objectives must be clearly defined before the regulations are drafted.

### ENABLING STATUTE --- Continued

In drafting regulations, any conditions that may have been imposed by the enabling provision must be taken into account. Where a provision permits the making of regulations for the issuance of licences in circumstances and on conditions to be specified, it is obvious that the regulations will have to specify the circumstances under which licences will be issued and the conditions with which applicants will have to comply. Any time limit for making regulations specified in the enabling statute will also have to be taken into account.

The enabling statute may set out certain formal or procedural requirements for regulations applicable to a given sector. Thus, where the enabling statute requires prepublication of proposed regulations in the *Canada Gazette* Part I (so that those concerned can make representations on the proposal), this requirement must be followed. Failure to observe the formal and procedural requirements of the enabling statute may lead the courts to declare the regulations void. The courts tend to deal harshly with failure to observe a formal requirement for regulations concerning expropriation, the creation of tax obligations or the imposition of penal sanctions.

Regulations must constitute an exercise of the regulation-making power contained in the enabling provision and must not merely repeat that power without adding anything to it, which would result in transforming a legislative power into an administrative power (see *Brant Dairy Co. Ltd. v. Milk Commission of Ontario*, [1973] SCR 131). For example, where the regulation-making authority is "to fix the fees to be charged for a permit", a regulation that provided that the fees for a permit are those "fixed by the Minister" would be *ultra vires*.

Unless a contrary intention is shown in the enabling statute or in the regulations, words used in the regulations have the same meaning as the words in the enabling statute (see section 16, *Interpretation Act*) and even in other enactments relating to the same subject-matter (see paragraph 15(2)(b), *Interpretation Act*). Terms used in the enabling statute may be defined in the regulations if the enabling statute expressly authorizes such definition or the terms are to be given a more restricted meaning in the regulations than they have in the enabling statute. However, a regulation may never define a term in such a way that it alters the scope and application of the enabling statute (*Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694, p. 704-705).

ENABLING STATUTE -- *Concluded*

The *Interpretation Act* applies to both the enabling statute and the regulations (see section 3, *Interpretation Act*), unless there is a contrary intention expressed in the enabling statute or the regulations.

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## RETROACTIVITY

A regulation has retroactive effect if it applies in respect of a period prior to the date on which it comes into force.

Regulations may be made to have retroactive effect only where there is express authority in the enabling statute for the making of retroactive regulations. Very few statutes authorize regulations to have retroactive effect.

The following are examples of statutory provisions containing authority to make regulations with retroactive effect:

1. *Labour Adjustment Benefits Act*, R.S., c. L-1, subsection 5(1):

"5. (1) Subject to subsection (2), the Governor in Council may, in any order made under section 3 or 4, declare

(a) that the designation of the industry in the order is retroactive in effect and applies as of such day, before the date of the order, as is specified in the order; and

(b) that this Act applies in respect of layoffs from a Canadian establishment in the industry designated in the order occurring on or after the day specified pursuant to paragraph (a)."

2. *Canada-Nova Scotia Oil and Gas Agreement Act*, S.C. 1984, c. 29, subsection 59(1):

"59.(1) Any regulation made under this Part for the purpose of the implementation of a provision of this Part shall, if the regulation so provides, have retroactive effect and be deemed to have come into force

(a) on the date the provision comes into force; or

(b) on any date thereafter as specified in the regulation."

3. *Income Tax Act*, S.C. 1970-71-72, c. 63, subsection 221(2):

"(2) No regulation made under this Act has effect until it has been published in the *Canada Gazette* but, when so published, a regulation shall, if it so provides, be effective with reference to a period before it was published."

For further information respecting retroactivity, see Côté, P.A., *Interpretation of Legislation*, 2d ed., p. 99.

## INCORPORATION OF DOCUMENTS BY REFERENCE

In drafting regulations that incorporate a document by reference, the drafter must

- (a) verify that the document was validly made when it was established;
- (b) use the exact title of the document as well as its reference and the name of the publisher;
- (c) give the date of publication of the document or specify that the document is incorporated as amended from time to time, as the case may be;
- (d) ensure that, wherever possible, the document to be incorporated is available in, and is incorporated in, both official languages. It is essential that documents produced by a federal government department or agency be available in both official languages;
- (e) ensure that the document is published and easily accessible to those who will have to comply with it. Verification of the availability of the document is particularly important in the case of documents produced in another country. If the document is difficult to find, indicate some sources from which the document may be obtained;
- (f) ensure that the contents of the document are within the legal framework of the regulation-making authority pursuant to which it is incorporated; and
- (g) use the same terminology in the regulation as is used in the document if it is not incompatible with the terminology used in the regulations and the enabling statute.

Where a document exists in both official languages, the English and French versions of the document must be incorporated in the English and French versions of the regulations respectively.

Where a document is incorporated in both official languages, it is essential that the content of the document be the same in both languages. In other words, both language versions must include the same amendments, even though their dates of publication may be different. Where there is a difference in the dates of publication, each version should cite its own date of publication.

# INCORPORATION OF DOCUMENTS BY REFERENCE -- *Concluded*

In *Reference re Manitoba Language Rights (No.2)* (S.C.C. January 23, 1992), the Supreme Court of Canada held that the technique of incorporation by reference may be used, even when the reference is to a unilingual document, but its use must be for a *bona fide* purpose. In light of that decision, it is our view that there is a risk that the courts may find that there is no *bona fide* purpose in incorporating by reference the substance of a document that is created for the sole purpose of being referred to in the regulations, as such an incorporation may be viewed as a way to get around the procedural requirements of the *Statutory Instruments Act*. In addition, where such a document (that is, one created for the sole purpose of being referred to in the regulations) is referred to "as amended from time to time", the courts may hold the incorporation to be an illegal subdelegation of the regulation-making power.

A copy of the title page of the English and French versions of every document incorporated by reference in a regulation must be sent to PCOJ with a letter from the departmental Legal Services Unit confirming that a member of those services has verified the document and is satisfied that none of the parts incorporated by reference is *ultra vires*, and indicating

- (a) that the document exists;
- (b) whether the document was established for any purpose other than the purpose of being incorporated in the regulation;
- (c) pursuant to what authority the document was made; and
- (d) whether the document is accessible to the public.

## SUBDELEGATION AND ADMINISTRATIVE DISCRETION

### Subdelegation

One of the most important rules to be kept in mind when drafting regulations is the rule against subdelegation: a person who has a delegated regulation-making power may not redelegate it to someone else, not even to himself, unless specifically authorized to do so by the enabling statute. For example, where Parliament grants a power to the Governor in Council to establish certain standards by regulation and the Governor in Council in turn grants the power to establish the standards to the Minister, this is a subdelegation. As a result of this subdelegation, it is the Minister and not the Governor in Council who would exercise the power to establish the standards, contrary to the provision of the Act.

### Administrative Discretion

An administrative discretion is a discretion granted by the regulations to a person for the purpose of applying the regulations on a case-by-case basis.

A regulation-making power may not be transformed into administrative discretion. It may not be used to confer on an official, not even a minister, the authority to substitute that official's discretion, assessment or directives for standards that are required to be established by regulations. The regulation-making authority must exercise its powers by fixing objective standards. The persons to whom a regulation applies must be able to know their rights and obligations under the regulations.

This is not to say that there is never any room for administrative discretion in regulations. Where the enabling provision is sufficiently broad, for example, when the words "the Governor in Council may make regulations respecting ..." are used, a limited administrative discretion may be granted to an official for the purpose of applying the regulations. The regulations must in this case set out sufficient criteria to guide the official in exercising his discretion on a case by case basis.

## CONFLICT BETWEEN STATUTES AND REGULATIONS

If a regulation is in conflict with its enabling statute or any other statute enacted by Parliament, it is *ultra vires*.

There are at least four basic types of conflict. These occur where regulations purport to

- (a) require or permit something that is prohibited by statute;
- (b) prohibit something that is required or permitted by statute;
- (c) define a term used in the enabling statute so as to alter the scope and application of that statute (except where there is a specific provision in the enabling statute authorizing the definition of the term); and
- (d) impose additional requirements or restrictions on something that is exhaustively regulated by statute.

The fourth type of conflict can be difficult to identify. As a general rule, when the enabling statute imposes requirements or restrictions on a subject, the imposition of additional requirements or restrictions with respect to that subject in regulations is not permitted. However, in some instances an analysis of the relevant statutory scheme may lead to the conclusion that Parliament contemplated the promulgation of additional requirements or restrictions in the form of regulations.

When trying to resolve this fourth type of conflict it is useful to consult the case law respecting the rule that "special legislation overrides general legislation".

The following is a list of useful texts on the subject of conflicts between statutes and regulations:

Dussault, René and Borgeat, Louis, *Traité de droit administratif*, Vol. I, 2nd ed., Québec, 1984, pp. 519-529.

Dussault, René and Borgeat, Louis, (translation of: *Traité de droit administratif*) *Administrative Law: a Treatise*, Vol. I, 2nd ed., Toronto, Calgary, Vancouver, 1985, pp. 406-414.

Garant, Patrice, *Droit administratif*, 3rd ed., Cowansville, 1991, p. 379.

Holland, Denys and McGowan, John, *Delegated Legislation in Canada*, Toronto, 1989, pp. 181-191.

CONFLICT BETWEEN STATUTES AND REGULATIONS -- *Concluded*

Mullan, David, *Administrative Law*, 2nd ed., Toronto, 1979, pp. 3-188 to 3-189.

Pearce, Dennis, *Delegated Legislation in Australia and New Zealand*, Sydney, 1977, pp. 174-189.

Pepin, Gilles and Ouellette, Yves, *Précis de contentieux administratif*, 2nd ed., Montreal, 1982, p. 135.

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## CONDITIONS PRECEDENT

Regulations may be subject to certain procedural conditions precedent. For example, the regulation-making authority may have to consult with others or obtain the approval of others before making the particular regulations. Failure to adhere to these procedural conditions precedent may lead to a court declaring that the regulations are invalid (see *Brown v. Caledonia, Williams v. Caledonia*, (1972) 4 WWR 303 (Sask.): failure to secure unanimous vote on third reading as prescribed invalidated a by-law).

There may also be other statutory conditions precedent. In drafting regulations it is most important to examine the enabling statute carefully, for "if the statute prescribes conditions precedent to the exercise of the power, then it follows that the conditions must be satisfied before the power exists." For a more detailed account of cases on this subject, see E.A. Driedger *Construction of Statutes*, 2nd ed., at pp. 309-313.

Examples of draft orders in council and other executive orders that set out certain statutory conditions precedent follow. The fact that the condition precedent has been satisfied is usually recited in a paragraph introduced by the word "whereas".

1. The first example illustrates the requirement to consult all interested persons before making a regulation.

WHEREAS, pursuant to section 9 of the Motor Vehicle Safety Act, a copy of a proposed amendment to the Motor Vehicle Safety Regulations, substantially in the form set out in the schedule hereto, was published in the *Canada Gazette* Part I on September 2, 1989 and a reasonable opportunity was thereby afforded to manufacturers, distributors, importers and other interested persons to make representations to the Minister of Transport with respect thereto;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Transport, pursuant to sections 4 and 7 of the Motor Vehicle Safety Act, is pleased hereby to amend the Motor Vehicle Safety Regulations, C.R.C., c. 1038, in accordance with the schedule hereto, marked Schedule No. 238.

CONDITIONS PRECEDENT -- Continued

2. In some cases, the regulation-making authority may exercise its delegated power only after obtaining the approval of another authority and the fact that the approval was obtained must be set out in the order in council or other executive order. As an example, paragraph 22(1)(f) of the *Farm Products Marketing Agencies Act* requires that all orders and regulations proposed by agencies must be approved by the National Farm Products Marketing Council:

"22. (1) Subject to the proclamation by which it is established and any subsequent proclamation altering its powers, an Agency may

...

(f) where it is empowered to implement a marketing plan, make such orders and regulations as it considers necessary in connection therewith, but all such orders and regulations shall, in the case of orders and regulations that are of a class to which paragraph 7(1)(d)<sup>1</sup> is made applicable, be submitted to the Council before the making thereof, and in any other case, be submitted to the Council either before or after the making thereof and

(i) any order or regulation that is submitted to the Council before the making thereof and that is thereafter made before the Council approves the order or regulation, is of no force or effect, and

(ii) any order or regulation that is submitted to the Council after the making thereof and that is set aside by order of the Council thereupon ceases to be of any force or effect;"

The Council must also be satisfied, pursuant to paragraph 7(1)(d)<sup>1</sup> of that Act, that the making of the regulation is necessary. The Act requires that certain other

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<sup>1</sup> "7(1) In order to fulfil its duties, the Council

...  
(d) shall review all orders and regulations that are proposed to be made by agencies and that are of a class of orders or regulations to which the Council, by order, provides that this paragraph is applicable and, where it is satisfied that the orders and regulations are necessary for the implementation of the marketing plan that the agency proposing to make the orders or regulations is authorized to implement, the Council shall approve the orders and regulations;"

CONDITIONS PRECEDENT -- *Continued*

conditions exist and apply before the Council may approve a regulation or an order. One condition is that the order or regulation must be of a class of orders or regulations to which the Council, by the *Agencies' Orders and Regulations Approval Order*, has provided that paragraph 7(1)(d) applies. Accordingly, the draft order in council setting out these statutory conditions precedent would, in the case of an amendment to the *Canadian Egg Marketing Levies Order*, read as follows:

WHEREAS the Governor in Council has, by the Canadian Egg Marketing Agency Proclamation, C.R.C., c. 646, established the Canadian Egg Marketing Agency pursuant to subsection 16(1) of the Farm Products Marketing Agencies Act;

WHEREAS the Canadian Egg Marketing Agency has been empowered to implement a marketing plan pursuant to the Canadian Egg Marketing Agency Proclamation;

WHEREAS the proposed order amending the Canadian Egg Marketing Levies Order, set out in the schedule hereto, is an order of a class to which paragraph 7(1)(d) of the said Act applies by reason of section 2 of the *Agencies' Orders and Regulations Approval Order*, C.R.C., c. 648 and has been submitted to the National Farm Products Marketing Council pursuant to paragraph 22(1)(f) of the said Act;

AND WHEREAS pursuant to paragraph 7(1)(d) of the said Act, the National Farm Products Marketing Council is satisfied that the making of the proposed order is necessary for the implementation of the marketing plan that the Canadian Egg Marketing Agency is authorized to implement and has approved the proposed order on June 25, 1990;

THEREFORE, the Canadian Egg Marketing Agency, pursuant to paragraph 22(1)(f) of the Farm Products Marketing Agencies Act and section 10 of Part II of the schedule to the Canadian Egg Marketing Agency Proclamation, C.R.C., c. 646, hereby amends the Canadian Egg Marketing Levies Order, made on October 27, 1983, in accordance with the schedule hereto.

CONDITIONS PRECEDENT -- *Continued*

3. Certain statutes conferring legislative power require that the regulation-making authority be satisfied that certain facts exist before making a regulation. The following is an example of an order in council that makes a regulation when the authority "is satisfied":

WHEREAS the orders, notices and warrants referred to in the schedule hereto are statutory instruments the inspection or the making of copies of which is not otherwise provided for by law;

AND WHEREAS the Governor in Council is satisfied that the inspection of the orders, notices and warrants referred to in the schedule hereto as provided for in section 17 or the making of copies of those orders, notices and warrants as provided for in section 18 of the Statutory Instruments Act would result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Justice, pursuant to subparagraph 20(d)(iii) of the Statutory Instruments Act, is pleased hereby to amend the Statutory Instruments Regulations, C.R.C., c. 1509, in accordance with the schedule hereto.

It is clear from the foregoing examples that the entire Act must be read carefully, not just the provisions dealing with the making of regulations, in order to be certain that all the conditions attached to the regulation-making power are fulfilled and spelled out, step by step, in the order in council or other executive order.

The recital of the fulfillment of a condition precedent in an order in council or other executive order is important as the recital constitutes, in the absence of evidence to the contrary, proof in a court of law that the condition precedent was, in fact, fulfilled.

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### CONDITIONS PRECEDENT -- *Concluded*

Where an enabling provision contains a subjective element as in example 2 above or, for example, where the regulation-making authority is given the power to make regulations where it considers the regulations to be necessary for the purposes of the Act, the courts are reluctant to substitute their judgment for the judgment of the regulation-making authority. However, as David Mullan states, "where the regulations do not fall within the four corners of the enabling statute and are not reasonably capable of being related to any genuine prescribed purpose set out in the legislation .... [The] establishment of an absence of evidentiary support for the necessity of the regulation in issue may lead to the conclusion that the regulation-making authority could not reasonably have reached the conclusion that such a regulation was necessary."<sup>2</sup>

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<sup>2</sup> Mullan, David, "Administrative Law", *Ontario Encyclopedic Digest*, 1973, Title 3, p. 3-117

### REPEAL OR LAPSING OF ENABLING STATUTE

A new statute that is adopted in substitution for a statute that is repealed often contains transitional provisions. These provisions must be studied carefully to determine their effect, if any, on the regulations made under the old statute.

If a statute or a provision of a statute is repealed or lapses, the legal result is the repeal or lapsing of any regulations made under the statute, unless there are special statutory provisions providing for the continuation of the regulations.

However, paragraph 44(g) of the *Interpretation Act* provides that, where an enactment is repealed and another substituted for it, "all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead". In *Badger v. Canada*, [1991] 1 F.C. 191, the Court considered an amendment to subsection 73(1) of the *Indian Act*. The amendment substituted the Minister for the Governor in Council, empowering the Minister to make certain declarations. The Federal Court held that the substitution of the Minister for the Governor in Council was not inconsistent with the previous enactment and that the Minister could, therefore, repeal a declaration made by the Governor in Council under the previous enactment.

If the regulation-making power under the new Act is not broad enough to authorize the regulations made under the old Act, or if the regulations are in conflict with the provisions of the new Act, the regulations made under the old Act are implicitly repealed. However, where it is possible under the new enactment to repeal regulations made under the repealed enactment and where new regulations are made under the new enactment to replace the regulations made under the repealed enactment, it is good practice to formally repeal the regulations made under the repealed enactment rather than rely on their implicit repeal.

The ceasing of effect of an enactment is addressed in subsection 2(2) of the *Interpretation Act* as follows:

"(2) For the purposes of this Act, an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed."

### CHECKLIST FOR DRAFTERS

When preparing regulations, the drafter should

(a) consider the following:

- (i) the enabling statute,
- (ii) the *Canadian Charter of Rights and Freedoms* as well as all Constitution Acts,
- (iii) the *Canadian Bill of Rights* and the *Canadian Human Rights Act*,
- (iv) the *Statutory Instruments Act* and the *Statutory Instruments Regulations*,
- (v) the *Interpretation Act*, unless it is intended that the *Interpretation Act* not apply,
- (vi) the *Official Languages Act*, and
- (vii) the *Privacy Act* and the *Access to Information Act*;

(b) avoid sexist language;

(c) consult the following with respect to matters of drafting or interpretation, namely,

- (i) Côté, P.-A., *Interpretation of Legislation*, 2nd ed., Cowansville, Yvon Blais, 1991. French version: *Interprétation des lois*. 2ième édition. Cowansville, Yvon Blais, 1990,
- (ii) Driedger, E. A., *The Composition of Legislation -- Legislative Forms and Precedents*, Ottawa, Department of Justice, 1976,
- (iii) Driedger, E. A., *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983,
- (iv) Holland, D.C. and McGowan, J.P., *Delegated Legislation in Canada*, Toronto, Carswell, 1989,
- (v) Pigeon, L.-P. *Rédaction et interprétation des lois*, Quebec, Les publications du Québec, 1986, and
- (vi) Secretary of State Translation Bureau, *Guide de traduction des règlements*, revised ed., Ottawa;

**CHECKLIST FOR DRAFTERS --- Concluded**

(d) consult the *Directives on Submissions to the Governor in Council and Statutory Instruments* (issued by the Clerk of the Privy Council);

(e) consult the *Federal Regulatory Process - An Interim Procedures Manual for Departments and Agencies, 1991* (issued by the Treasury Board of Canada Secretariat); and

(f) consult the *Document Concerning Format Requirements with Respect to Regulations and Orders sent to the Privy Council Office Section (Justice)*, February 1988, for information on format (it is essential that this document be made available to all secretaries preparing regulations).

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FORWARDING OF PROPOSED REGULATIONS TO  
THE PRIVY COUNCIL OFFICE SECTION (JUSTICE)

Proposed regulations that are to be examined by PCOJ are addressed to:

Senior General Counsel  
Privy Council Office Section (Justice)  
Room 601  
222 Queen Street  
Ottawa, Ontario  
K1A 0H8

The documents that are to be sent to PCOJ with a request for examination of proposed regulations are the following:

- (a) three copies, in both official languages, of the proposed regulations (in the case of new regulations) or the schedule (in the case of an amendment to existing regulations), and of an Explanatory Note in cases where the regulations are exempt from the Federal regulatory process;
- (b) three copies, in both official languages, of the order in council or other executive order and, where the enabling legislation requires prepublication in the *Canada Gazette* Part I, the Notice of Prepublication; and
- (c) two copies of all documents necessary for examination of the regulations or schedule, including the RIAS statement and any relevant correspondence with the Standing Joint Committee for the Scrutiny of Regulations.

Where the proposed regulations incorporate some other document by reference, follow the procedures outlined under **INCORPORATION BY REFERENCE**.

As well, when submitting regulatory proposals to PCOJ for examination, legal counsel to the regulation-making authority should

- (a) indicate any legal problem in connection with the proposed regulations, citing the relevant case law;
- (b) mention any legal opinion regarding the file, provided either by PCOJ or by another representative of the Department of Justice;

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FORWARDING OF PROPOSED REGULATIONS TO  
THE PRIVY COUNCIL OFFICE SECTION (JUSTICE) -- *Concluded*

(c) make sure that the French and English versions of the Regulations have the same effect in law;

(d) follow the procedures outlined under PUBLICATION - CANADA GAZETTE PART II if the draft regulations have already been prepublished in the *Canada Gazette* Part I.

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## FORMALITIES

### ABBREVIATIONS: INITIALISMS AND ACRONYMS

An initialism is an abbreviation that is composed of the initial letters of a series of words and pronounced letter by letter.

e.g. RCMP (Royal Canadian Mounted Police)  
EEC (European Economic Community)

An acronym is an abbreviation that is formed from the initial letters or syllables of a series of words and pronounced as a word.

e.g. NATO (North American Treaty Organization)  
FORTRAN (formula translation)

Abbreviations should be avoided in regulations and the longer form of a term used. Where a term is to appear frequently in the body of regulations, however, an abbreviation may be used if the abbreviation is defined in the interpretation section in the regulations.

e.g. "ICAO" means the International Civil Aviation Organization; (*OACI*)

### Guidelines for Using Abbreviations

1. Use capital letters only, without periods or spacing.

*Exception:* Where there is a strong precedent for doing so or where an undesired word might otherwise result, add periods.

e.g. U.S.; C.O.D.

2. Initialisms representing the names of organizations generally take the definite article, while those representing a substance, method or condition do not.

e.g. The fugitive was apprehended by the RCMP.

Acronyms are usually not preceded by the definite article.

e.g. The members of NATO rejected the idea.  
CIDA provides grants, loans and lines of credit.

FORMALITIES

ABBREVIATIONS: INITIALISMS AND ACRONYMS -- *Concluded*

3. When using initialisms or acronyms, do not repeat the last initialled word.

e.g. RCMP or Royal Canadian Mounted Police  
NOT RCMP police

NORAD or North American Aerospace Defence  
NOT NORAD defence

NDP or New Democratic Party  
NOT NDP Party

## FORMALITIES

### AGREEMENTS, TREATIES AND OTHER SIMILAR DOCUMENTS

Where a proposed regulation contains an agreement, treaty or other similar document in a schedule, it is necessary for the schedule to be checked against the original document or, if the original document is not available, against an authentic copy, such as a certified copy. It is the responsibility of the regulation-making authority to provide the original document or an authentic copy of it to PCOJ for examination.

The content of the English and French versions must be exactly the same as in the original document, except that obvious typographical errors may be corrected. It is not necessary to follow the layout and style of type of the original document.

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## FORMALITIES

### ARRANGEMENT OF PROVISIONS WITHIN REGULATIONS

The structure of a regulation depends largely on its content. The arrangement of its provisions should be logical and in the correct time sequence. For example, provisions creating a board should precede provisions setting out the powers and duties of the board. Similarly, a statement of the effect of filing a document should follow the provisions for filing.

The usual arrangement of provisions within regulations is as follows:

1. Long title
2. Short title (section 1)
3. Interpretation (section 2)
4. Application
5. General provisions
6. Coming into force provisions
7. Schedule(s)

See also "DIVISION OF REGULATIONS".

## FORMALITIES

### CAPITAL LETTERS

The long title of a regulation is written entirely in capital letters, but, where a regulation is cited by its long title in an order in council or other executive order, only the first letter of the first word of the title and any proper names are capitalized.

A reference to a named part of a regulation is capitalized.

Example:

"Part I of the Regulations"

A reference to a schedule is not capitalized unless it is a numbered schedule.

Example:

"in accordance with the schedule hereto" but  
"item 2 of Schedule I"

A reference to a section, paragraph, subparagraph, etc. is not capitalized.

Example:

"as set out in section 1 of Schedule X"

## FORMALITIES

### CITATION OF STATUTES

The manner in which the Revised Statutes may be cited is set out in section 9 of the *Revised Statutes of Canada, 1985 Act* (R.S., c. 40 (3rd Supp.)):

"9. A chapter of the Revised Statutes may be cited and referred to in any Act, regulation, proceeding, instrument or document either by its short or long title as an Act or by using the expression "Revised Statutes, 1985, chapter ...", or "chapter ... of the Revised Statutes", or the abbreviation "R.S.C., 1985, c. ..." or "R.S., c. ...", adding in each case the number of the particular chapter."

Although section 9 provides for a variety of acceptable forms, the short title is always used in the body of regulations and the following abbreviations are used for all footnotes cited in regulations: "R.S., c. ..." or, in the case of a Supplement, "R.S., c. ... (... Supp.)".

Although paragraph 40(1)(a) of the *Interpretation Act* also provides for a variety of acceptable forms in which statutes enacted subsequent to December 12, 1985 (i.e. after the revision) may be referred to, the wording used in all federal legislation is "S.C. 19..., c. ...". Note that the chapter numbers assigned by the Statute Revision Commission in the loose-leaf office consolidation of the Canada Statutes are not to be used because the consolidation has no official sanction.

Statutes that were enacted before the 1985 revision but that do not appear in the Revised Statutes of Canada, 1985 are cited, as applicable, as follows:

"S.C. 1980-81-82, c. ..." or "R.S.C. 1970, c. ..."

FORMALITIES

DATES

The current practice is to write "April 30, 1990" rather than "the 30th day of April, 1990" or "April the 30th, 1990".

As a rule, "after March 31 in each year" is preferable to "after March 31st in each year".

## FORMALITIES

### DEFINITIONS

The general definition section in regulations, which applies to the regulations as a whole or to any part of them, appears in section 2 or at the beginning of the part and should follow the following format:

#### *Interpretation*

2. In these Regulations,

"Act" means the *ABC Act*; (*Loi*)

"agricultural product" includes honey ...; (*produit agricole*)

"Minister" means the Minister of Finance. (*ministre*)

Note that the equivalent French term must be set out within parentheses and in italics or underlined, at the end of each definition (*after* the punctuation).

An isolated definition that applies only to a section or a number of sections in a regulation should be drafted as follows:

Example:

24. For the purposes of this section, "court" means ....

Note that no other language equivalent is required in this situation.

When regulations are divided into Parts, care should be taken to see that definitions are not confined to one Part when they are intended to apply to other Parts or to the regulations as a whole. In that case, the definitions should be placed in the "Interpretation" section before Part I.

## DEFINITIONS -- *Continued*

Definitions are used for purposes of brevity and clarity. They may be used to avoid the repetition of lengthy expressions, such as the title of statutes or the names of organizations. In addition, they may be used to eliminate ambiguities where the defined term is intended to have a narrower or broader meaning than the dictionary meaning of the term or the usual meaning assigned to it in a particular industry or trade.

Words defined in the enabling statute need not be defined in the regulations (see section 16 of the *Interpretation Act*).

A word that is defined in the enabling statute may be redefined in the regulations if the word is to be given a narrower meaning than the one in the enabling statute and if that meaning will not alter the scope and application of the enabling statute.

A word used but not defined in the enabling statute should not, as a general rule, be defined in the regulations as this would risk modifying the meaning that the word has in the enabling statute and as a result alter the scope and application of the enabling statute.

A regulation cannot define a word for the purposes of the enabling statute, unless the statute expressly provides for it. See, for example, *Farm Credit Act*, R.S., c. F-2, paragraph 20(b).

A definition must not include any rule of law or any substantive provision.

A definition must not merely reiterate a dictionary definition, as words that are not defined are to be given their ordinary meaning.

A definition should not give a word an unduly artificial meaning.

Before a term is defined in a regulation, all other Acts or regulations relating to the same subject-matter should be consulted to ensure consistency, where possible, in the use of the term (see paragraph 15(2)(b) of the *Interpretation Act*).

## FORMALITIES

### DEFINITIONS -- *Concluded*

A term in a regulation may be defined by reference to a definition in another regulation or Act. A disadvantage of defining a term in this manner, however, is that the user of the regulations will have to consult other enactments. On the other hand, an advantage of defining a term in this manner is that it ensures consistency with the definition of the term in the enactment referred to without the term having to be amended each time the term in the enactment referred to is amended. (See subsection 40(2) of the *Interpretation Act* and INCORPORATION BY REFERENCE)

## FORMALITIES

### DIVISION OF REGULATIONS

Regulations may be divided into parts, divisions, subdivisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules and tables. Headings are used to indicate the subject-matter of particular sections or series of sections.

All provisions, i.e., paragraphs, subparagraphs, etc. must correspond in the English and French versions of the regulations.

#### Parts

When regulations are divided into Parts, care should be taken to see that definitions and general provisions are not confined to one Part when they are intended to apply to other Parts or to the regulations as a whole. In that case, the definitions should be placed in the "Interpretation" section before Part I.

Parts are numbered using upper-case Roman numerals and the word "PART" is written in upper-case letters. However, where reference is made to a part in the body of the regulations, it is written "Part".

Example:

"PART I"

"10. For the purposes of Part VI, ..."

Parts are used only where two or more separate matters are being dealt with in one regulation.

#### Divisions and Subdivisions

Parts may be divided into divisions and subdivisions.

Example:

"Division I"

Subdivision a"

#### Headings

Headings are used to assist the reader.

Only those provisions that relate to a heading should be placed under it.

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## FORMALITIES

### DIVISION OF REGULATIONS -- *Continued*

A primary heading is generally italicized using upper- and lower- case letters. Secondary headings are not italicized.

Example:

*Short Title*

1. ...  
...

*Labelling*

Explosives

5. ...

A heading is a part of the regulation for the purposes of its interpretation.

### Sections and Subsections

Sections are numbered using Arabic numerals followed by periods: 1., 2., 3., ... Subsections are numbered using Arabic numerals within parentheses: (1), (2), ...

Example:

"5. (1) A duty of \$88 is payable ... .

(2) In addition to the duty prescribed ... ."

Sections and subsections should be short and concise. They must be limited to one complete sentence (in contrast to the French), although they may be divided into paragraphs, subparagraphs, clauses and subclauses.

### Paragraphs and Subparagraphs

Paragraphs are indicated by lower-case letters in parentheses:

(a), (b), (c), ...

Subparagraphs are indicated by lower-case Roman numerals in parentheses: (i), (ii), (iii), ...

## FORMALITIES

### DIVISION OF REGULATIONS -- *Concluded*

Example:

"5. (1) For the purpose of calculating the charges referred to in section 4, a period of pilotage services

(a) begins at the earlier of

(i) the time for which the pilot is ordered, and

(ii) the time the pilot commences a bridge watch; and

(b) ends when the pilot is able to disembark ship."

### Clauses and Subclauses

Clauses and subclauses are further divisions of a subparagraph. Clauses are indicated by upper case letters in parentheses: (A), (B), (C), ... . Subclauses are indicated by upper-case Roman numerals: (I), (II), (III), ... .

Clauses and subclauses are used infrequently. Where it appears necessary to use them, the possibility of beginning another section or subsection instead should be considered.

### Schedules

(see SCHEDULES TO REGULATIONS)

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### Nomenclature

	PART I
	<u>Division I</u>
	Subdivision a
	Heading
12.	section 12
(1)	subsection 12(1)
(a)	paragraph 12(1)(a)
(i)	subparagraph 12(1)(a)(i)
(A)	clause 12(1)(a)(i)(B)
(I)	subclause 12(1)(a)(i)(B)(VI)
	schedule SCHEDULE I

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FORMALITIES

"DUE TO"

"Due to" should not be used as a preposition. It is a participle and must be accompanied by a form of the verb "to be", either expressed or understood.

Thus "due to the rain, the game was postponed" is not correct. It should be "owing to the rain" or "because of the rain".

The expression "the postponement of the game was due to the rain" is correct.

## FORMALITIES

### ELLIPSES

The nature of the English language is such that elliptical expressions cannot be completely avoided, but in drafting legislation ellipses should be kept to an absolute minimum, for the reason that readers will not all supply the same missing words. A drafter who relies on absent words to convey his meaning is inviting ambiguity. Pronouns and verbs that are frequently omitted in ordinary speech or writing should be written into legislation.

#### Examples:

a person eligible to apply (elliptical)

a person who is eligible to apply (complete)

## FORMALITIES

### ENACTING AND AMENDING FORMULAS

Certain conventions are followed in amending regulations to ensure consistency and clarity. The examples given illustrate the accepted wording and should be followed as appropriate.

The first amending clause cites the short title of the regulation. In subsequent clauses, the words "the said Regulations" are used instead.

#### I - REVOKING

##### 1. Revoking a section

1. Section 5 of the *ABC Regulations* is revoked.

#### II - REVOKING AND RE-ENACTING

##### 1. Revoking and re-enacting a section

X. Section 9 of the said Regulations is revoked and the following substituted therefor:

"9. ..."

##### 2. Revoking and re-enacting two consecutive sections

X. Sections 8 and 9 of the said Regulations are revoked and the following substituted therefor:

"8. ...	or	"8. ...
9. ..."		8.1 ...
		8.2 ...
		9. ..."

##### 3. Revoking and re-enacting more than two consecutive sections

X. Sections 8 to 12 of the said Regulations are revoked and the following substituted therefor:

"8. ...	or	"8. ...
9. ...		9. ...
10. ...		10. ..."
11. ...		
12. ..."		

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FORMALITIES

ENACTING AND AMENDING FORMULAS -- *Continued*

II - REVOKING AND RE-ENACTING -- *Continued*

*Note:* Any intervening headings that occur between sections 8 and 12 will also be revoked. To be retained, they must be re-enacted.

4. Revoking and re-enacting a subsection of a section and further amending the same section

Generally, one amending clause, subdivided into two or more subclauses as necessary, is used for each amended section of the regulation. For example:

1. (1) Subsection 3(2) of the *ABC Regulations* is revoked and the following substituted therefor:

"(2) ... ."

(2) Section 3 of the said Regulations is further amended by adding thereto, immediately after subsection (4) thereof, the following subsection:

"(4.1) ... ."

(3) Section 3 of the said Regulations is further amended by adding thereto the following subsection:

"(8) ... ."

*Note:* This last formula (i.e. where the words "immediately after subsection (x)" are omitted) is used only where the new subsection follows the last subsection of the existing section.

5. Revoking the last paragraph of a subsection, re-enacting it and adding a new paragraph

X. Subsection 10(1) of the said Regulations is amended by deleting the word "or" (or "and") at the end of paragraph (c) thereof and by revoking paragraph (d) thereof and substituting the following therefor:

"(d) ...; or [or "and"]

(e) ... ."

FORMALITIES

ENACTING AND AMENDING FORMULAS -- *Continued*

II - REVOKING AND RE-ENACTING -- *Continued*

6. Revoking the last subparagraph of a paragraph, re-enacting it and adding another as the final subparagraph

X. Paragraph 4(6)(a) of the said Regulations is amended by deleting the word "or" (or "and") at the end of subparagraph (ii) thereof and by revoking subparagraph (iii) thereof and substituting the following therefor:

"(iii) ..., or [or "and"]

(iv) ...;"

7. Amending a portion of a subsection

(1) Preceding a paragraph: (opening words amended)

1.(1) All that portion of subsection 30(1) of the *ABC Regulations* preceding paragraph (b) thereof is revoked and the following substituted therefor:

"30. (1) ...

(a) .....;"

(2) Following a paragraph: (closing words amended)

(2) All that portion of subsection 30(1) of the said Regulations following paragraph (e) thereof is revoked and the following substituted therefor:

"(f) ...,  
....."

(3) Following one paragraph and preceding the next paragraph:

X. All that portion of subsection 19(1) of the said Regulations following paragraph (b) thereof and preceding paragraph (c) thereof is revoked and the following substituted therefor:

"...  
....."

FORMALITIES

ENACTING AND AMENDING FORMULAS -- *Continued*

II - REVOKING AND RE-ENACTING -- *Continued*

*Note 1:* This amending formula is only used where a provision is set up as follows:

"19. (1) ...  
.....

(a) ...  
.....

(b) ...  
.....

.....  
.....

(c) ...  
.....

(d) ... ."

As this method of drafting a subsection is not recommended, it would be better to revoke the entire subsection and re-enact a redrafted one without the middle words that go back to the margin.

*Note 2:* A separate amending clause is required for each portion of a subsection to be amended, whether the portion follows or precedes another portion of the subsection that is being revoked or replaced.

8. Revoking and re-enacting a heading (when there is only one heading preceding the section)

X. The heading preceding section 2 of the said Regulations is revoked and following substituted therefor:

*"Interpretation"*