

PART 2

THE REGULATORY PROCESS

1. INTRODUCTION

Delegated legislation, commonly referred to as “regulations”, is the manifestation of a legislative power conferred by Parliament on the executive branch. The most common forms of delegated legislation are regulations per se, orders in council and ministerial orders; other forms include rules, lists, tariffs, directions and guidelines.

As is pointed out by Professor Garant, there is nothing sacred about the word “regulations”;¹ the identifying label of the enactment may vary. Quoting from a decision by Justice MacGuigan of the Federal Court of Appeal, Garant adds

if there is one thing which is crystal clear in the confused microcosm of delegated legislation, it is that no conclusion should be drawn from terminology alone, since it has been remarkable for its inconsistency.²

Because delegated legislation is an extension of Acts, a special regime has been set up at the federal level to ensure that the delegated legislation is authorized, that the public has access to it, and that standards respecting its drafting and presentation are respected. That special regime is set out in the *Statutory Instruments Act*³ (referred to in this Part as “the SIA”).

The SIA generally governs the examination, registration and publication of regulations,⁴ and includes provisions for

- (a) 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 [s. 3(1)];
- (b) the examination of proposed regulations by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice [s. 3(2)];

¹ Patrice Garant, *Droit administratif*, vol. 1, 3rd ed. (Cowansville: Éditions Yvon Blais, 1991) at 344.

² *Canadian Pacific Ltd. v. Canadian Transport Commission*, [1985] 2 F.C. 136 at 148 (F.A.C.).

³ R.S., c. S-22. For a brief history of the *Statutory Instruments Act*, see René Dussault and Louis Borgeat, *Administrative Law: a Treatise*, vol. 1, 2nd ed. (Toronto: Carswell, 1990) at 311, and Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 37-38.

⁴ It should be noted that the definition “regulation” found in the Act is not exactly the same as the definition given by authorities and text books. The *Interpretation Act* also provides a definition of “regulation”. Further details regarding the meaning of “regulation” and its characteristics can be found in text books.

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- (c) the transmission of regulations to the Clerk of the Privy Council (s. 5);
- (d) the registration of regulations by the Clerk (s. 6);
- (e) the coming into force of regulations (s. 9);
- (f) the publication of regulations (s. 11); and
- (g) the scrutiny of regulations by the Standing Joint Committee for the Scrutiny of Regulations⁵ (s. 19).

The SIA and the Statutory Instruments Regulations, made under the authority of the SIA, exempt certain regulations from the requirements of examination, registration and publication. They also provide that certain instruments that are not regulations are subject to those requirements.

2. SCOPE OF THE *STATUTORY INSTRUMENTS ACT*

The SIA establishes three categories of instruments: regulations, statutory instruments and other documents. The distinction made between these categories is important because, although the Act is chiefly concerned with regulations, the procedural requirements also apply to certain statutory instruments that are not regulations and to certain other documents.

2.1 Definition “statutory instrument”

To determine whether the regulatory process established in the SIA applies to an instrument, it must be determined whether that instrument is subject to the SIA.

The first key provision in the SIA used to make that determination is the definition “statutory instrument” in subsection 2(1). The essential words of that definition are

“statutory instrument”

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution 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

Because the definition uses the words “expressly authorized”, the nature of the instrument must be specified in the enabling legislation.

⁵ For a list of the criteria applied by the Standing Joint Committee, see APPENDIX A. Note that statutory instruments that are not regulations are also subject to the scrutiny of the Committee.

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Example:

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

In this example, an instrument, i.e. the “order”, has been expressly authorized to be made and is therefore a statutory instrument.⁶

Also, in an example such as “The Minister shall establish a list of toxic substances . . .”, the list would be considered a statutory instrument because it is expressly authorized to be established.

In another example, if an Act provides that “the Governor in Council may fix [or regulate] the quantities of lead permitted to be released in the atmosphere . . .”, no instrument has been expressly authorized to be made. Although the Governor in Council in fixing such quantities would act by order in council,⁷ the order in council made in this case would not be a statutory instrument because there is no express mention of the instrument by which such quantities are to be prescribed. This is so despite the fact that the Governor in Council is clearly exercising a legislative power.

Note that subparagraph (a)(ii) of the definition incorporates certain instruments established under the royal prerogative.⁸

2.2 Instruments excluded from the definition “statutory instrument”

There are four exceptions to the definition “statutory instrument”, which are set out in subparagraphs (b)(i) to (iv) of that definition.

2.2.1 Subparagraph (b)(i)

This provision states that, with two exceptions, a statutory instrument does not include an instrument issued, made or established by a corporation incorporated by or under an Act of Parliament.

⁶ *Canadian Pacific Ltd. v. Canadian Transport Commission* (1988), 86 N.R. 360 (F.C.A.) and *National Revenue v. Liberty Home Products Corporation* (1990), 113 N.R. 51 (F.C.A.). See also Pierre Issalys and Denis Lemieux, *L'action gouvernementale : Précis de droit des institutions administratives* (Cowansville: Éditions Yvon Blais, 1997) at 402.

⁷ See **ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS** in Part 4.

⁸ It is unlikely that these instruments would qualify as “regulations”, since the power to legislate under the royal prerogative has all but disappeared in modern democratic societies. See R. Dussault and L. Borgeat, *op. cit.*, note 3, at 314-317; John Mark Keyes, *Executive Legislation* (Toronto: Butterworths, 1992) at 10; and P. Issalys and D. Lemieux, *op. cit.*, note 6, at 395.

The first of these exceptions, set out in clause (b)(i)(A), is an instrument that “is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs”.⁹ The second exception, set out in clause (b)(i)(B), is an instrument “for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament”.¹⁰ These instruments would therefore qualify as “statutory instruments”, provided, of course, that they meet the description set out in paragraph (a) of the definition.

2.2.2 Subparagraph (b)(ii)

This provision excludes instruments referred to in paragraph (a) that are issued, made or established by a judicial or quasi-judicial body, with one exception, namely, any instrument that is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body **established by or under an Act of Parliament**.¹¹ These instruments are statutory instruments.¹²

A literal interpretation of this subparagraph suggests that any instrument issued, made or established by a judicial or quasi-judicial body is not included in the definition “statutory instrument”. However, some hybrid bodies (for example, the Canadian Transportation Agency) perform both judicial or quasi-judicial functions and legislative functions. It would seem that the intention of Parliament was to exclude only instruments issued, made or established by these bodies in carrying out their judicial or quasi-judicial functions, and not all instruments.¹³

2.2.3 Subparagraph (b)(iii)

This provision excludes from the definition “statutory instrument” any instrument referred to in paragraph (a) and “in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or

⁹ It is surprising that the legislator uses the word “regulation” in the definition “statutory instrument”, since the normal procedure is to first determine whether an instrument is a statutory instrument before calling it a “regulation”. However, subsection 2(2) of the SIA clarifies this by assuming that all instruments referred to in subparagraph (b)(i) are statutory instruments.

¹⁰ Paragraph (b) of the definition “regulation” sets out the same condition.

¹¹ For example, the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, and the Canadian Transportation Agency. Not included are provincial bodies, which are not established by or under an Act of Parliament (for example, the B.C. Supreme Court).

¹² These instruments are referred to specifically at the end of the definition “regulation”.

¹³ See, however, Judge Marceau's dissent in *Canadian Pacific Ltd. v. Canadian Transport Commission*, *op. cit.*, note 6, in which he concludes that orders of the Canadian Transport Commission are excluded by subparagraph (b)(ii).

the determination of policy, or in the ascertainment of any matter necessarily incidental thereto”.

2.2.4 Subparagraph (b)(iv)

Under this provision, any ordinance of the Yukon Territory or the Northwest Territories and any instrument issued, made or established thereunder is excluded from the definition “statutory instrument”. This exclusion is justified, because in a way these instruments are equivalent to provincial laws and regulations.

2.3 Definition “regulation”

Once it is determined whether an instrument is a statutory instrument, the next step is to determine whether it is a regulation within the meaning of subsection 2(1) of the SIA.

To be a regulation, an instrument must be

- (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, fine or imprisonment is prescribed by or under an Act of Parliament;
- (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 important to note that only the first two categories require that the instrument first be a statutory instrument.

By far the most difficult task is determining whether a statutory instrument is made in the exercise of a legislative power, which is the criterion for the first category of regulations. An instrument that creates rules of conduct of general application and that has the force of law is considered to be made in the exercise of a legislative power.¹⁴ Other instruments, which may not meet these criteria, are also considered to be made in the exercise of a legislative power; they include

- (a) instruments that amend a schedule to an Act or any other provision of an Act;

¹⁴ In *Reference Re Manitoba Language Rights*, [1992] 1 S.C.R. 212 at 223-225, the Supreme Court of Canada characterized a legislative instrument as one embodying "a rule of conduct . . . which has the force of law for an undetermined number of persons".

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3. FORWARDING OF PROPOSED REGULATIONS FOR EXAMINATION

- (b) instruments that exempt a person from, or vary, the requirements of a legislative provision; and
- (c) lists of substances or goods established to complete the Act (e.g., a list of toxic substances the importation of which is prohibited by the Act).

In contrast, an example of an instrument made in the exercise of a non-legislative power would be

15. The Governor in Council may, by order, fix the salary of the Governor of the Bank of Canada.

Any order made pursuant to this section would be considered a statutory instrument because it is expressly authorized to be issued, made or established. However, it would be administrative in nature, not legislative, because it does not prescribe any rule of conduct of general application. For that reason, it would not be a regulation for the purposes of the SIA. 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 do not arise from the exercise of a legislative power.¹⁵

When there is doubt as to whether a proposed statutory instrument is a regulation, the regulation-making authority may forward a copy of the instrument to the Deputy Minister of Justice, who has the power, pursuant to section 4 of the SIA, to make that determination. In practice, the determination is referred to counsel in the Regulations Section, who make the determination on the Deputy Minister's behalf.

When an instrument is registered by the Clerk of the Privy Council, it receives an “SOR” designation if it is identified as a regulation, and an “SI” designation if it is identified as any other statutory instrument or document.¹⁶

3. FORWARDING OF PROPOSED REGULATIONS FOR EXAMINATION

Subsection 3(1) of the SIA provides that a regulation-making authority must forward to the Clerk of the Privy Council three copies of a proposed regulation in both official languages, to be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice.

¹⁵ For a discussion of the distinction between regulations and administrative directives, see R. Dussault and L. Borgeat, *op. cit.*, note 3, at 309-340, and J.M. Keyes, *op. cit.*, note 8, at 14-31.

¹⁶ See **TRANSMISSION AND REGISTRATION**, item 5 in this Part.

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3. FORWARDING OF PROPOSED REGULATIONS FOR EXAMINATION

In practice, the proposed regulations are forwarded to the Deputy Chief Legislative Counsel (Regulations), Regulations Section, Legislative Services Branch, Department of Justice.

The following documents must be sent to the Regulations Section with a request for examination of the proposed regulations:

- (a) three copies, in each official language, of the proposed regulations;
- (b) three copies, in each official language, of the order in council or other executive order,¹⁷ as the case may be, and, if the enabling legislation requires prepublication in the *Canada Gazette*, Part I, three copies of the notice of prepublication;¹⁸
- (c) two copies of the Regulatory Impact Analysis Statement (RIAS), if the regulations are subject to the Government's policy on prepublication, or two copies of an explanatory note, if the regulations are not subject to that policy; and¹⁹
- (d) two copies of any relevant correspondence with the Standing Joint Committee for the Scrutiny of Regulations and any other documents necessary for examination of the regulations.

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

- (a) point out 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 the Regulations Section or by another section of the Department of Justice;
- (c) make sure that the French and English versions of the Regulations are equivalent; and
- (d) follow the procedures outlined under **Publication — *Canada Gazette*, Part II**, item 6.2 in this Part, if the draft regulations have already been prepublished in the *Canada Gazette*, Part I.

¹⁷ See **ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS** in Part 4.

¹⁸ See **CONDITIONS PRECEDENT** in Part 4.

¹⁹ See **REGULATORY IMPACT ANALYSIS STATEMENT (RIAS)** and **EXPLANATORY NOTE** in Part 4. For more details concerning proposed regulations that are subject to the prepublication policy and the documents that must be forwarded to the Regulatory Affairs Division and the Privy Council Office, see the guide entitled *Federal Regulatory Process: Procedures for Submitting Regulations for Ministerial Approval*, published by the Treasury Board Secretariat.

4. EXAMINATION

4.1 Instruments that are regulations

Pursuant to subsection 3(2) of the SIA, a proposed regulation is required to be examined by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, 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 of the proposed regulation are in accordance with established standards.²⁰

In practice, this examination function is carried out by the legal counsel of the Regulations Section. In some cases, however, this function is performed by the legal counsel of the legal services of the regulatory department or agency, if it has been delegated to them.²¹

It should be noted that, under subsection 3(4) of the SIA, paragraph 3(2)(d) of that Act, which addresses the form and draftsmanship of regulations, does not apply to any proposed rule, order or regulation governing the practice or procedure in any proceedings before the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada or the Court Martial Appeal Court of Canada.

If, after examination of the proposed regulation, the Regulations Section is of the opinion that a provision does not satisfy the requirements of paragraphs 3(2)(a) to (d) of the SIA, it so advises the Clerk of the Privy Council. If the Clerk is of the same opinion, the Clerk is required, under subsection 3(3) of the SIA, to advise the regulation-making authority accordingly. In practice, this rarely occurs.

²⁰ Some of the rules governing the form and draftsmanship of regulations are set out in Part 4.

²¹ A list of instruments for which the examination function has been delegated is available at the Regulations Section. For more details concerning the delegation of the examination function under the SIA, please contact the Deputy Chief Legislative Counsel (Regulations).

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4. EXAMINATION

Certain regulations are exempted from examination. These are regulations

- (a) that are exempted from registration because registration is not reasonably practicable due to the number of regulations of that class required to be made (section 7 of the *Statutory Instruments Regulations*); or
- (b) that are exempted from publication because they affect or are likely to affect only a limited number of persons, and reasonable steps have been or will be taken to bring their purport to the notice of those persons (subsection 15(2), with the exception of paragraph (2)(d), of the *Statutory Instruments Regulations*).

Exemptions from registration and publication are set out in sections 3, 7 and 15 of the *Statutory Instruments Regulations*. Note that the regulations listed in section 7 are exempted from both registration (section 7) and publication [subsection 15(1)]. The regulations set out in subsection 15(2), with the exception of paragraph (2)(d), are exempted from publication. The regulations referred to in paragraph 15(2)(d) and in subsection 15(3), while exempted from publication, are subject to examination and registration.

At the end of the examination process, the Regulations Section issues two copies of the proposed regulation to the regulation-making authority; the Regulations Section stamp appears on each page of those copies.²²

4.2 Statutory instruments and other documents that are not regulations

The Regulations Section plays only a limited role in examining statutory instruments and other documents that are not regulations. Only those that are to be published in the *Canada Gazette*, Part II, are examined by the Regulations Section, in its capacity as legal adviser to the Privy Council Office. They are the following:

- (a) those listed in subsection 11(3) of the *Statutory Instruments Regulations*; and
- (b) those that have been directed or authorized 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, because the Clerk considers it is in the public interest to do so.²³

These statutory instruments and other documents are not required to be examined under the SIA because they are not regulations within the meaning of that Act. They are, however, subject to an examination by a legal adviser to the Privy Council Office. As that

²² The first copy is used for approval and prepublication in the *Canada Gazette*, Part I; the second copy is used for making the regulations and publishing them in the *Canada Gazette*, Part II. The stamp attests that the Regulations Section has examined the document.

²³ These instruments are on the "List of General Authorities to Publish", established by the Clerk of the Privy Council and reproduced in APPENDIX C.

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legal adviser, the Regulations Section examines such statutory instruments and documents using the same criteria as those set out in subsection 3(2) of the SIA.

As in the case of proposed regulations, at the end of the examination process the Regulations Section issues two copies of the proposed statutory instrument or other document to the regulation-making authority; the Regulations Section stamp appears on each page of those copies.

4.3 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 a Regulations Section lawyer, acting as legal adviser to the Privy Council Office. The examination is generally carried out at the Privy Council Office premises.

Because they are not regulations within the meaning of the SIA, those orders in council do not have to be examined pursuant to that Act. Rather, this review is done within the scope of the role of legal adviser to the Privy Council Office. The legal counsel verifies that the order is authorized under the enabling Act and makes any changes required to ensure that the form and draftmanship conform with established standards.

5. TRANSMISSION AND REGISTRATION

Under subsection 5(1) of the SIA, the regulation-making authority must, within seven days after making the regulation,²⁴ transmit copies of it in both official languages to the Clerk of the Privy Council for registration. However, the classes of regulations whose registration is not reasonably practicable in the opinion of the Governor in Council because of their number are exempt from this requirement. These classes of regulations are set out in section 7 of the *Statutory Instruments Regulations*.

Note that a regulation is “made” when it is officially established by the regulation-making authority. If the authority is the Governor in Council, the regulation is made when the Governor in Council signs the order in council. If the authority is a minister, the regulation is made when the minister signs the ministerial order. In the case of an agency or other body, a regulation is made by means of a resolution or other instrument, depending on its decision-making process.

Subsection 5(2) requires the regulation-making authority to certify that one copy of each of the English and French versions being transmitted is a true copy of the original.

²⁴ Failure to meet this deadline, however, does not invalidate the regulation. See *City of Melville v. Attorney General of Canada*, [1982] 2 F.C. 3 at 13; *Jasper Park Chamber of Commerce v. Governor General*, [1983] 2 F.C. 98 at 118-119.

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This ensures that the copies of the regulation transmitted for registration are exactly the same as the regulation enacted.

This requirement does not apply to regulations made or approved by the Governor in Council. Certification in this case is not necessary, because the regulation-making authority is the Governor in Council, and since the Clerk of the Privy Council, in his or her capacity as Secretary to the Cabinet,²⁵ manages the regulations to be signed by the Governor in Council, no transmission of such regulations takes place.

Pursuant to section 6 of the SIA, the Clerk of the Privy Council registers

- (a) every **regulation** transmitted to the Clerk of the Privy Council pursuant to subsection 5(1) of the SIA;
- (b) every **statutory instrument**, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published;²⁶ and
- (c) every **statutory instrument or other document** that, pursuant to section 14 of the *Statutory Instruments Regulations*, is directed or authorized by the Clerk of the Privy Council to be published in the *Canada Gazette*, Part II, because the Clerk is of the opinion that it is in the public interest to do so.²⁷

Sections 5 and 6 of the *Statutory Instruments Regulations* provide for the manner of registration.

In the case of a **regulation**, the Clerk of the Privy Council registers the regulation by

- (a) recording its name, the name of the regulation-making authority, the statutory or other authority pursuant to which it was made, the date on which it was made and the date on which it is registered; and
- (b) assigning to it the designation "SOR" followed by a distinctive number.²⁸

In the case of a **statutory instrument or other document**, the Clerk of the Privy Council registers it by

²⁵ The term "Clerk of the Privy Council" is defined as follows in subsection 35(1) of the *Interpretation Act*: "Clerk of the Privy Council" or "Clerk of the Queen's Privy Council" means the Clerk of the Privy Council and Secretary to the Cabinet.

²⁶ Unless it is expressly provided that those statutory instruments are to be published in the *Canada Gazette*, Part II, they are published in the *Canada Gazette*, Part I. This is why the SI numbers in the *Canada Gazette*, Part II, are sometimes not consecutive.

²⁷ See note 23.

²⁸ For example, SOR/96-213, in which "96" represents the registration year and "213" represents the order in which the registration is made. The abbreviation "SOR" stands for "Statutory Orders and Regulations".

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- (a) recording its name or the nature of its subject matter, the name of the authority that issued, made or established it, the statutory or other authority pursuant to which it was issued, made or established and the date on which it was published; and
- (b) assigning to it the designation "SI" followed by a distinctive number.²⁹

6. PUBLICATION

Under section 10 of the SIA, the *Canada Gazette* is the official gazette of Canada and is published by the Queen's Printer. It comprises three parts: Part III, which is reserved for public Acts of Parliament; Part II, which contains regulations as well as certain statutory instruments and other documents of public interest; and Part I, in which are generally found instruments that are required by the enabling Act to be published but that do not meet the criteria of Parts I and II.

6.1 Prepublication — *Canada Gazette*, Part I

Proposed regulations are "prepublished" mainly to enable the public to have a voice in the regulatory process.

Most draft regulations are prepublished in the *Canada Gazette*, Part I, which is published every Saturday.³⁰ Proposed regulations that are published in the *Canada Gazette*, Part I, are

- (a) those that are required by their enabling Act to be published in the *Canada Gazette* (**statutory prepublication**); and
- (b) those that are required to be published in accordance with the Government's policy on prepublication of proposed regulations (**administrative prepublication**).

This administrative prepublication policy was adopted in 1986 and implemented under the direction of the Regulatory Affairs Division of the Treasury Board Secretariat and the Policy Secretariat of the Privy Council Office.

The great majority of draft regulations are published in accordance with the administrative prepublication policy. In several cases, however, the prepublication requirement is set out in the enabling Acts.³¹ Generally speaking, these Acts have a significant impact on the public, and Parliament therefore considered it appropriate to

²⁹ For example, SI/97-102, in which "97" represents the registration year and "102" represents the order in which the registration is made. The abbreviation "SI" stands for "Statutory Instruments", although it is also used for documents that are not statutory instruments but are registered.

³⁰ Section 13 of the *Statutory Instruments Regulations*.

³¹ For example, the *Customs Act* [s. 164(3)] and the *Canadian Environmental Protection Act* (s. 48).

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make such a provision. The basic difference between administrative prepublication and statutory prepublication is that, in the latter case, there is no exemption from the requirement.

The administrative prepublication policy applies to regulations within the meaning of the SIA that are not exempted from publication under the *Statutory Instruments Regulations*; in other words, to instruments designated “SOR”. Excluded, however, are draft regulations from the Canadian Radio-television and Telecommunications Commission (CRTC) and the Copyright Board, although these agencies can comply with the policy if they wish. In special cases, particularly emergencies, the Special Committee of Council may grant an exemption from prepublication.³²

One important element of the prepublication policy is the Regulatory Impact Analysis Statement (RIAS), which summarizes the content of the proposed regulations and is published together with the regulations.³³ Regulations that are not subject to the prepublication policy are accompanied by an explanatory note instead of a RIAS.³⁴

6.1.1 Statutory prepublication

If prepublication is required by the enabling Act, the draft regulation submitted to the Regulations Section is accompanied by a notice of prepublication, which is examined by the Regulations Section along with the proposed regulation.³⁵

In such cases, the stamped copies prepared by the Regulations Section for prepublication in the *Canada Gazette*, Part I, bear, in the upper right corner, the designation “CG-I/GC-I”, instead of the designation “SOR/DORS”.

6.1.2 Administrative prepublication

Regulations that are subject to the administrative prepublication policy are submitted to the Regulations Section together with an order in council or other executive order. A draft notice of prepublication need not be sent to the Regulations Section for examination.

³² For further details on exemption from prepublication, please consult the guide entitled *Federal Regulatory Process: Procedures for Submitting Regulations for Ministerial Approval*, published by the Treasury Board Secretariat.

³³ See **REGULATORY IMPACT ANALYSIS STATEMENT** in Part 4.

³⁴ See **EXPLANATORY NOTE** in Part 4.

³⁵ See **CONDITIONS PRECEDENT** in Part 4.

6.2 Publication — *Canada Gazette*, Part II

The *Canada Gazette*, Part II, is published every second Wednesday.³⁶ It contains

- (a) all regulations, except those exempted from publication under section 15 of the *Statutory Instruments Regulations*;
- (b) the statutory instruments and other documents referred to in subsection 11(3) of those Regulations; and
- (c) any statutory instruments or other documents directed or authorized by the Clerk of the Privy Council, pursuant to section 14 of those Regulations, to be published in the *Canada Gazette*, Part II.³⁷

The above regulations and other instruments are first examined by the Regulations Section.³⁸ However, only regulations are required to be examined under the SIA. Statutory instruments and other documents are examined by the Regulations Section as part of an administrative process in which the Section acts as legal adviser to the Privy Council Office.

Subsection 11(1) of the SIA states that every regulation must be published in the *Canada Gazette* within twenty-three days after its registration. Subsection 11(2) stipulates that no regulation is invalid by reason only that it has not been published, but that no person shall be convicted of an offence for contravening a regulation that at the time of the alleged contravention was not published in the *Canada Gazette*, unless certain conditions are met.³⁹

6.2.1 Statutory prepublication

If proposed regulations have been prepublished in the *Canada Gazette*, Part I, pursuant to a statutory requirement and no changes to the regulations have been made after the consultation period, the regulations must be resubmitted to the Regulations Section for re-examination together with an order in council or other executive order which states that prepublication has already taken place. The proposed regulations are then published in the *Canada Gazette*, Part II.

If, however, changes have been made to the proposed regulations after the consultation period, the regulations must be resubmitted to the Regulations Section for re-examination and be

³⁶ Section 13 of the *Statutory Instruments Regulations*.

³⁷ See note 23.

³⁸ As mentioned earlier (see note 21), examination of the regulations has in some cases been delegated to a departmental legal services unit or to the legal services of the regulation-making authority.

³⁹ See item 7.2 in this Part.

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- (a) prepublished once again in the *Canada Gazette*, Part I, if the changes are substantive and do not result from consultation, or if the enabling Act requires further prepublication; or
- (b) published in the *Canada Gazette*, Part II, if the changes are not substantive or if the enabling Act exempts the proposed regulations from further prepublication, whether or not they have been amended.⁴⁰

6.2.2 Administrative prepublication

If proposed regulations have been prepublished in the *Canada Gazette*, Part I, in accordance with the administrative prepublication policy and no changes have been made to the regulations after the consultation period, the regulation-making authority need not obtain new stamped copies from the Regulations Section. It may submit the second set of copies (in both official languages) to the Privy Council Office for publication in the *Canada Gazette*, Part II.⁴¹

If changes are made to proposed regulations after prepublication in the *Canada Gazette*, Part I, the proposed regulations must be resubmitted to the Regulations Section for re-examination.

6.2.3 Re-examination

When proposed regulations are submitted to the Regulations Section for re-examination, all changes made further to prepublication should be clearly highlighted. Also, if 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 Regulations Section file number and the date of prepublication in the *Canada Gazette*, Part I.

Copies that were stamped more than six months earlier no longer have to be resubmitted to the Regulations Section for examination and restamping. However, resubmission is required either if the enabling provision has been amended since the date of stamping but before the regulations were made, or if another instrument that affects the regulations has been made in that period.

⁴⁰ For example, paragraph 164(4)(c) of the *Customs Act* states that "[n]o proposed regulation need be published under subsection (3) that . . . has been published . . . whether or not it has been altered or amended after such publication as a result of representations made by interested persons as provided in that subsection".

⁴¹ See note 22.

PART 2: The Regulatory Process
7. COMING INTO FORCE

6.2.4 Printing errors

Errors occasionally occur during publication of the regulations in the *Canada Gazette*, Part II, with the result that published regulations do not correspond to the stamped copies from the Regulations Section. In such cases, the Registrar of Statutory Instruments at the Privy Council Office should be advised of the errors so that an erratum can be published in a subsequent issue of the *Canada Gazette*, Part II.

In accordance with the Privy Council Office policy, no erratum is published after the six-month period following publication of the regulations.

7. COMING INTO FORCE

It is important to distinguish between, on one hand, regulations within the meaning of the SIA and, on the other hand, statutory instruments and other documents that are not regulations. As a general rule, regulations come into force on the day on which they are registered, and statutory instruments and other documents come into force at the time at which they are made.

7.1 Date of registration

If there is no mention in the regulations of a coming-into-force date, the regulations come into force on the expiration of the day immediately before the day on which the regulation is registered pursuant to section 6 of the SIA.⁴²

Since March 1996, however, the Regulations Section has adopted a policy requiring all proposed regulations to include at the end a coming-into-force provision.⁴³ If the proposed coming-into-force date is the date of registration, the coming-into-force provision should read as follows: “These Regulations come into force on < >”. The blank space will be filled in by the staff at the *Canada Gazette* at the time of printing. In the case of Part I, the staff at the Gazette will insert the expression “the date on which they are registered”. In the case of Part II, they will insert the actual date of registration. It should be noted that this practice applies only to regulations (instruments that have an “SOR” designation).

⁴² Subsection 9(1) of the SIA and paragraph 6(2)(b) of the *Interpretation Act*. Registration is usually done the same day the regulations are made in the case of regulations made by the Governor in Council; subsection 5(1) of the SIA requires that registration be done within seven days of the making of the regulations. This requirement has, however, been held to be directory only (see note 24).

⁴³ See **COMING-INTO-FORCE PROVISIONS** in Part 4.

7.2 Date preceding registration

A regulation may come into force on the day on which it is made, or on a later day that precedes 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 SIA, 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 registered, pursuant to paragraph 9(1)(a) of the SIA, within seven days after it is made.

This does not mean, however, that a regulation can be retroactive — i.e., that it can have effect before the day on which it is made — unless authorized by the enabling Act. The period referred to above is the period after which the regulation is made and before which the regulation is registered.

Subsection 11(2) of the SIA provides that no person shall be convicted of an offence consisting of a contravention of any regulation that was not published at the time of the alleged contravention. However, according to that subsection, this defence is not available if

- (a) the regulation was exempted from the publication requirement or expressly provides that it applies according to its terms before it is published in the *Canada Gazette*; and
- (b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.

Consequently, in order to allow for the successful prosecution of offences committed before the regulation was published, it is essential that the regulation include a provision stating expressly that it applies before its publication. That express provision is followed by the usual coming-into-force provision.

Example:

APPLICATION PRIOR TO PUBLICATION

18. For the purposes of paragraph 11(2)(a) of the *Statutory Instruments Act*, these Regulations shall apply according to their terms before they are published in the *Canada Gazette*.

COMING INTO FORCE

19. These Regulations come into force on (insert the date or the statement “the date on which they are made”).

A regulation that is exempted from registration comes into force on the day on which it is made.⁴⁴ The classes of regulations exempted from registration are found in section 7 of the *Statutory Instruments Regulations*.

A statutory instrument or other document that is not a regulation — including one that is registered under section 6 of the SIA — comes into force at the time at which it is made.⁴⁵

7.3 Date following registration

A regulation may come into force at a date later than the date of registration, in which case the later date is expressly stated in the coming-into-force provision.

7.4 Date provided for in the enabling Act

In certain Acts, Parliament has expressly provided for the coming into force of regulations made under those Acts.

For example, subsection 221(2) of the *Income Tax Act* states

(2) A regulation made under this Act **shall have effect from the date it is published** in the *Canada Gazette* or at such time thereafter as may be specified in the regulation **unless the regulation provides otherwise** . . .⁴⁶

In such cases, no coming-into-force provision is included in the regulations because the enabling Act expressly provides for the coming-into-force date, which is the date of publication in the *Canada Gazette*.

A coming-into-force provision is necessary if the regulations have a retroactive effect or if the date of coming into force follows the date of publication in the *Canada Gazette*.

Here are some examples of coming-into-force provisions that are used to give regulations a retroactive effect.

⁴⁴ See paragraph 9(1)(b) of the SIA and paragraph 6(2)(b) of the *Interpretation Act*.

⁴⁵ J.M. Keyes, *op. cit.*, note 8, at 130, and Gilles Pépin and Yves Ouellette, *Principes de contentieux administratif*, 2nd ed. (Cowansville: Éditions Yvon Blais, 1982) at 122.

⁴⁶ We have noted five other provisions in federal legislation where Parliament has provided as the effective date of regulations the date of publication in the *Canada Gazette*: s. 20(2) of the *Tax Court of Canada Act*, ss. 181(2) and 244(2) of the *National Defence Act*, s. 40(3) of the *Canada Pension Plan Act* and s. 277(2) of the *Excise Tax Act*.

PART 2: The Regulatory Process
8. PARLIAMENTARY SCRUTINY

5. These Regulations are deemed to have come into force on November 9, 1991.

26. These Regulations come into force or are deemed to have come into force on November 29, 1991.

This last wording is used if the proposed regulations are stamped before the date mentioned but might not actually be made until after that date.

In tax regulations, including regulations made under the *Income Tax Act* and the *Excise Tax Act*, it has long been the practice to draft the coming-into-force provisions as follows:

16. (1) Sections 1, 3 and 4 apply after October 8, 1986.

(2) Section 2 applies after 1979.

The same approach is used for deferred coming-into-force provisions.

(3) Section 12 applies after 1999.

It should be noted that, in these two Acts, the provision concerning the retroactive effect of regulations uses the words “come into force”, whereas in their regulations the coming-into-force provisions use the word “apply”.

8. PARLIAMENTARY SCRUTINY

Although Parliament has delegated a significant portion of its legislative power to the executive branch, it has retained responsibility for monitoring the way in which this delegated power is exercised. Under section 19 of the SIA, every statutory instrument, including regulations, is subject to review and scrutiny by a standing joint committee of the Senate and House of Commons, namely, the Standing Joint Committee for the Scrutiny of Regulations. Justification of this mechanism for reviewing the acts of government resides in the principle that legislative, executive and judicial functions must be exercised independently.

Exempt from such control are statutory instruments precluded under paragraph 20(d) of the SIA from being communicated by means of inspection or copying for reasons of national security or because such communication would result or be likely to result in injustice or undue hardship.

Similarly, the rules of practice and procedure of courts of law, such as the Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada, are not subject to such control. The Committee decided, in the interests of judicial independence, to stop examining them, even though they involve the exercise of a legislative rather than a judicial function. Conversely, the rules of practice of administrative tribunals, such as

PART 2: The Regulatory Process
8. PARLIAMENTARY SCRUTINY

the Canadian Transportation Agency and the Canada Labour Relations Board, whose members are appointed on a temporary basis, continue to be subject to review and scrutiny by the Committee.⁴⁷

To carry out its obligation, the Committee checks statutory instruments against various criteria approved by the Senate and the House of Commons at the beginning of each session of Parliament.⁴⁸ Several of these criteria match those set out in subsection 3(2) of the SIA.

Besides having the power to send for persons and documents and to report its findings,⁴⁹ the Committee may, under section 123 of the *Standing Orders of the House of Commons*, “make a report to the House containing only a resolution which, if the report is concurred in, would be an Order of this House to the Ministry to revoke a statutory instrument, or a portion thereof, which the Governor in Council or a Minister of the Crown has the authority to revoke”. The Committee has exercised this extraordinary power on a few occasions, when a department refused to amend or revoke a statutory instrument. It should be noted that this power may be used only in the case of statutory instruments that the Governor in Council or a minister has the power to revoke, and not in the case of statutory instruments made by an agency or other body.

* * * * *

⁴⁷ Parliament of Canada, Tenth Report of the Standing Joint Committee for the Scrutiny of Regulations, Second Session, Thirty-third Parliament, 1988.

⁴⁸ The criteria are listed in APPENDIX A.

⁴⁹ See section 108 of the *Standing Orders of the House of Commons*.

APPENDIX A

LIST OF EXAMINATION CRITERIA OF THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

Whether any Regulation or other statutory instrument within its terms of reference, in the judgment of the Committee:

1. is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;
2. is not in conformity with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*;
3. purports to have retroactive effect without express authority having been provided for in the enabling legislation;
4. imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;
5. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
6. tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;
7. has not complied with the *Statutory Instruments Act* with respect to transmission, registration or publication;
8. appears for any reason to infringe the rule of law;
9. trespasses unduly on rights and liberties;
10. makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
11. makes some unusual or unexpected use of the powers conferred by the enabling legislation;

12. amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment;
13. is defective in its drafting or for any other reason requires elucidation as to its form or purport.

* * * * *

APPENDIX B

LIST OF GENERAL AUTHORITIES TO PUBLISH *(Prepared pursuant to section 14 of the Statutory Instruments Regulations)* (Updated 15-09-2010)

ACCESS TO INFORMATION ACT

Heads of Government Institutions Designation Orders

APPROPRIATION ACTS

Diplomatic, Consular and International Organizations' Property Grants Orders

Eskimo Economic Development Guarantee Orders

Exported Dairy Products Assistance Payments Orders

Indian Economic Development Guarantee Orders

BROADCASTING ACT

Broadcasting Licences Orders (section 28)

CANADA ELECTIONS ACT

Orders Designating Judges of Her Majesty's Court of Queen's Bench to exercise all the functions and powers of a judge under the Act

Special Voting Rules General Elections Fees Tariff
(see *Referendum Act*)

Special Voting Rules Referendum Fees Tariff
(see *Referendum Act*)

CANADA SHIPPING ACT

Load Line Assignment Authorization Orders

Load Line Exemption Orders

Non-Canadian Ships Safety Orders

Ship's Tonnage Survey and Measurement Fees Regulations

CANADA STUDENT FINANCIAL ASSISTANCE ACT

Orders Designating the Appropriate Authority for a Province with Respect to the Act

CANADA WILDLIFE ACT

Assigning to the Minister of the Environment, the Administration, Management and Control of Certain Public Lands Orders

CANADIAN SECURITY INTELLIGENCE SERVICE ACT

Canadian Security Intelligence Service Act Deputy Heads of the Public Service of Canada Orders

CORRECTIONS AND CONDITIONAL RELEASE ACT

Order Fixing April 19, 2007 as the Date on Which Subsection 108(2) of the Act Applies in the Province of British Columbia

CRIMINAL CODE

Order Recommending that Each Entity Listed as of July 23, 2004, in the Regulations Establishing a List of Entities Remain a Listed Entity

DEPARTMENT OF AGRICULTURE AND AGRI-FOOD ACT

Certificates of Age and Origin for Distilled Spirits Produced or Packaged in Canada Order

DIVORCE ACT

Minister of Justice Authority to Prescribe Fees Orders

FEDERAL COURTS ACT

Canada Federal Court Reports Distribution Orders

FINANCIAL ADMINISTRATION ACT

Authorizing Ministers to Prescribe Fees Orders

Orders Directing that Certain Documents be Discontinued

Statutes of Canada Distribution Directions
(see also *Publication of Statutes Act*)

FISHERIES PRICES SUPPORT ACT

Fisheries Prices Support Orders

IDENTIFICATION OF CRIMINALS ACT

Fingerprinting, Palmprinting and Photography Orders

INDIAN ACT

Indian Band Revenue Moneys Orders

INSURANCE COMPANIES ACT

Compensation Association Designation Orders

JUDGES ACT

Judges Act (Removal Allowance) Orders

MINISTRIES AND MINISTERS OF STATE ACT

Assigning Ministers of State to Assist other Ministers Orders

MISCELLANEOUS STATUTE LAW AMENDMENT ACT, 1991

Statutes of Canada Loose-leaf Consolidation Updates Distribution Orders
(see *Statute Revision Act*)

NATIONAL DEFENCE ACT

Orders Placing Members of the Canadian Forces on Active Service

NORTHERN PIPELINE ACT

Northern Pipeline Socio-Economic and Environmental Terms and Conditions Orders

NUCLEAR FUEL WASTE ACT

Order Selecting an Approach for the Long-term Management of Nuclear Waste

OTHER THAN STATUTORY AUTHORITY

Agent Orange Testing at CFB Gagetown Ex Gratia Payments Order

Canadian Orders, Decorations and Medals Directives

Canadian Passport Orders
Canadian Volunteer Service Medal Orders
Controlled Access Zone Order (Halifax, Esquimalt and Nanoose Harbours)
European Community Monitor Mission Medal Orders
Gallantry Awards Orders
Memorial Cross Orders (World War I)
Memorial Cross Orders (World War II)
Operational Service Medal Order
Order Governing the Grant of the Memorial Cross
Order Respecting Ex-gratia Payments to Chinese Head Tax Payers
Order Respecting Ex-gratia Payments to Persons who were in Conjugal Relationships
with now Deceased Chinese Head Tax Payers or to Designated Beneficiaries
Order Respecting Ex-gratia Payments to Veterans Involved in Chemical Warfare Agent
Testing
Order Respecting Ex Gratia Payments to Veterans and Science and Technology
Workers Involved in Nuclear Weapons Testing or Nuclear Decontamination
Reproduction of Federal Law Order
Sacrifice Medal Order
Special Service Medal Bar or Clasp Orders
United Nations Medal Orders

PEST CONTROL PRODUCTS ACT

List of Pest Control Product Formulants and Contaminants of Health and
Environmental Concern

PRIVACY ACT

Heads of Government Institutions Designation Orders

PUBLICATION OF STATUTES ACT

Statutes of Canada Distribution Directions (see also *Financial Administration Act*)

PUBLIC SERVICE EMPLOYMENT ACT

Designation of Certain Portions of the Public Service Orders

Order Repealing Certain Exclusion Approval Orders
Public Service Exclusion Approval Orders
Public Service Official Languages Exclusion Approval Order

PUBLIC SERVICE MODERNIZATION ACT

Order Repealing the Public Service Employment Act

REFERENDUM ACT

Issuance of Writs of Referendum Authorization Order
Special Voting Rules General Elections Fees Tariff (see *Canada Elections Act*)
Special Voting Rules Referendum Fees Tariff (see *Canada Elections Act*)

REVISED STATUTES OF CANADA, 1985 ACT

Revised Statutes of Canada, 1985 Distribution Directions

ROYAL CANADIAN MINT ACT

Orders Authorizing the Issue of Non-circulation Coins

SPECIES AT RISK ACT

Orders Acknowledging Receipt of the Assessments Done Pursuant to Subsection 23(1)
of the Act
List of Wildlife Species at Risk (decision not to add or referral back to COSEWIC)
Orders

STANDARDS COUNCIL OF CANADA ACT

Designation of Countries (Standards Council of Canada) Orders

STATUTE REVISION ACT

Statutes of Canada Loose-leaf Consolidation Updates Distribution Orders (see
Miscellaneous Statute Law Amendment Act, 1991)

STATUTORY INSTRUMENTS ACT

Canada Gazette Publication Order

TERRITORIAL LANDS ACT

Orders made under section 23

Reservation to the Crown Waiver Orders (section 13)

Reservation to the Crown Waiver Orders (section 14)

TRANSPORT ACT (DEPARTMENT OF)

Designation of Airports Orders made pursuant to section 4 of the Government Airport
Concession Operations Regulations

TRANSPORTATION APPEAL TRIBUNAL OF CANADA ACT

Designation Orders made under section 22 of the Act

WEIGHTS AND MEASURES ACT

Establishment of Specifications Order

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PART 3

HOW TO GIVE DRAFTING INSTRUCTIONS

PART 3: How to Give Drafting Instructions

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PART 3

HOW TO GIVE DRAFTING INSTRUCTIONS

1. PLANNING THE REGULATIONS

Many of the steps in preparing drafting instructions are the same as in preparing draft regulations for examination. The process cannot begin until you have developed a clear, detailed policy. From this policy, you will develop either your draft regulations or a set of drafting instructions that will make it possible for the work to begin.

Here are some guidelines:

- Start with a clear, detailed policy.
- Set out the main themes (rules) of the policy.
- Set out the ideas logically — which sometimes means in chronological order or according to the sequence of events.
- Begin with the general, then move to the particular.
- State the most important first, the least important last.
- Set out the general rule clearly before moving on to the exceptions.
- Ensure that, for each element of the policy, you have answered the following questions: WHO? WHEN? WHERE? HOW?
- Note that WHY? belongs in the Regulatory Impact Analysis Statement (RIAS), not in the regulations.

KEEP IT SIMPLE — USE SHORT, UNCOMPLICATED PHRASES.

2. DETERMINING WHICH TYPE OF SUBMISSION IS APPROPRIATE

2. DETERMINING WHICH TYPE OF SUBMISSION IS APPROPRIATE

When to consider submitting instructions for drafting

Instructions for drafting should be considered when

1. the development of the policy to be implemented is reasonably advanced and will not be subject to substantial changes;
2. all the officials of the regulatory department or agency who will eventually have to sign off the regulation have been involved in the policy development;
3. the regulations or amendments to be made are legally complex;
4. the regulations or amendments to be made require complex drafting;
5. the department or agency has a limited time frame within which to implement the policy; or
6. the department or agency requires that priority be given to its regulation or amendment.

Note that drafting from instructions promotes team building and empowers all those involved in the development of the regulations, as each person is able to concentrate on his or her area of expertise.

When to consider submitting draft regulations

Draft regulations should be considered when

1. the above criteria for submitting drafting instructions cannot be met;
2. the subject matter of the regulation or amendment is technical in nature — for example, a list of geographic locations; or
3. the department or agency has expertise in the drafting of regulations, or can follow a model.

3. OBTAINING SIGN-OFF

Whether you decide to submit drafting instructions or draft regulations, you should ensure that the instructions or the draft are signed off by the senior official responsible for determining regulatory policy in the subject matter of the regulations. This ensures that there is departmental or agency support for the initiative.

4. GIVING INSTRUCTIONS FOR DRAFTING

Workable instructions

Instructions may be given as

1. a point-by-point explanation of the policy;
2. drafted provisions;
3. requests to include or exclude certain words or concepts from already drafted provisions (either in current regulations or in discussion drafts);
4. requests to mirror certain existing provisions in the drafting of additional requirements;
5. explanations of the aim of the provision, not accompanied by a proposed draft but including suggestions of where the provision might be placed or how the desired result might be achieved; or
6. elements required in a particular regulatory provision.

Instructions should not be given as

1. discourses on policy options; or
2. a jumble of comments received by the department or agency from its regional officials or from stakeholders. The comments should be carefully sifted, and proposals to be adopted as part of the revised policy should be clearly indicated. It is preferable to submit a digest of what is accepted and where resulting changes must be made.

Language

As both drafters must work in their own language, it is essential that at least the first set of instructions be provided in both official languages.

If the instructions pertain to the terminology or structure of one version only, it is acceptable to supply the information just in that language.

However, both versions are essential to the drafting lawyers if a drafted provision is being supplied or if the terminology used is technical and specific to some industry or trade.

Cut-off date for policy changes

It is important to realize that frequent changes to drafting instructions work against efficiency. Before requesting the drafting-from-instructions service, the department or agency should have finalized the major aspects of its policy. The instructions will then be based on a fixed policy. After requesting the drafting-from-instructions service, the department or agency should not initiate any major policy changes.

Presentation of instructions

1. All instructions should be clearly identified and should always be dated.
2. Each element of the instructions should be carefully identified (for example, by a number).
3. If the policy is long and complex, it may be appropriate to set out its elements not just point by point, but under headings that will identify the categories of regulatory provisions affected by the proposed change.
4. The use of redlining will draw attention to proposed changes or to wording that is particularly important.

5. OTHER USEFUL INFORMATION TO ACCOMPANY INSTRUCTIONS OR DRAFTS

Useful information includes the following:

1. Numerical references to the relevant statutory authorities.
2. A clear indication of where terms already defined in the Act or regulations are used, if applicable.
3. Incorporated documents and source material, such as international conventions and technical standards:
 - (a) a copy of the whole document in each official language or, if the document is published in one language only (for example, an American standard), one copy and a confirmation in writing that the document exists in one language only;
 - (b) a photocopy, in both official languages, of pages from technical dictionaries containing the terminology used in the trade being regulated;
 - (c) guidelines, policy directives, interpretation notes and manuals that may provide explanations of policy and appropriate terminology, in both official languages.

6. EXAMPLE OF DRAFTING INSTRUCTIONS

4. Explanations of reasons for requesting specific wording or rejecting certain wording, for example:

“The present wording has caused problems in the enforcement of the regulations because . . .”

“The present wording must be changed as a result of the interpretation placed on it by the XYZ Court in *ABC v. EFG*.” (If this is the case, give the citation of the decision, and, if the case is not available in one of the major law reports, please attach two copies of the decision.)

“We need to ensure that the situation . . . is clearly covered.”

“This is required to carry out the request of the Standing Joint Committee for the Scrutiny of Regulations.” (If this is the case, please attach copies of the relevant correspondence from the Committee and the response of the responsible authority.)

6. EXAMPLE OF DRAFTING INSTRUCTIONS

Vacation leave regulations for public servants

The following example shows the kind of point-by-point detail that is required in instructions for drafting regulations. It also demonstrates the logical, sequential thought process involved. The instructions are by no means complete or perfect. See, for example, the preliminary comments on page 8, which would probably be presented by the drafters before they even started to draft. Further issues would be raised and clarifications requested during the initial drafting and between discussion drafts.

General rules

1. Each employee is to have 20 paid vacation days per year.
2. The employee must be full-time and indeterminate.
3. The year is the fiscal year.
4. Every April 1, each employee will be credited with 20 vacation days.
5. The employee may take the vacation days at any time of the year.
6. The employee must have the manager's pre-approval to take vacation days.
7. The employee may not take more than 15 days consecutively.

6. EXAMPLE OF DRAFTING INSTRUCTIONS

8. If the employee does not use up all 20 days in a year, those remaining on March 31 will be converted into cash and paid to the employee.
9. Pay-out will be at the employee's salary level effective on the April 1 on which the vacation day entitlement was credited.
10. Pay-out will be at straight time.
11. With the manager's approval, the employee may carry over up to 10 days of vacation-day entitlement into the following fiscal year, instead of accepting pay-out.
12. Carry-over days must always be used up before the days advanced for the current fiscal year.

New employees

13. New employees will be credited with 1 2/3 vacation days per calendar month remaining in the year.
14. They will receive vacation credits for the month in which they join if they work at least 10 days in that month.

Departing employees

15. Employees leaving the department part way through the year will have their vacation entitlement for that year recalculated on the basis of 1 2/3 vacation days for each calendar month worked.
16. Departing employees will receive vacation credits for the month in which they depart if they have worked at least 10 days in that month.
17. Departing employees will be paid for unused vacation days at their salary level effective on April 1 of the year in which they depart.
18. Departing employees who have used more than their vacation entitlement for the year of departure will be required to pay back the excess at their salary level effective on April 1 of the year in which they depart.

Employees on leave

19. Employees who are on any type of leave with full pay will be credited with their normal vacation entitlement.

6. EXAMPLE OF DRAFTING INSTRUCTIONS

20. Employees who are on leave at a reduced rate of pay will be credited with vacation days on a prorated basis:

$$20 \text{ days per year} \times \frac{A}{B}$$

where A = the employee's reduced salary, and
B = the employee's normal salary.

21. Employees who are on leave without pay will not earn vacation days during the period of leave.
22. Vacation entitlement for the year in which an employee begins or returns from leave without pay or leave at a reduced rate of pay will be recalculated at the time the leave commences or ends.

Part-time indeterminate employees

23. Part-time indeterminate employees will earn vacation days on a prorated basis:

$$20 \times \frac{A \text{ (average number of hours worked per week)}}{37.5}$$

24. Part-time indeterminate employees will be credited with vacation days on April 1 based on their anticipated normal work schedule.
25. If the schedule changes during the year, entitlement will be recalculated at the end of the year using the actual number of hours worked in the year; the number of vacation days will be adjusted accordingly.

Term employees

26. Full-time term employees will be credited with 1 2/3 vacation days for each calendar month in which they work at least 10 days.
27. Part-time term employees will not be entitled to paid vacation days but will be paid an additional 6% of their salary for each pay period in lieu of vacation.

General

28. For the purposes of determining whether an employee has worked at least 10 days in a calendar month, a day of leave with pay will be considered a day of work.

Comments on vacation leave instructions

Item 13: Refers to a “calendar month”. When this provision is actually drafted, the drafters will drop the word “calendar”, as the *Interpretation Act* defines “month” to mean “calendar month”.

Item 15: Deals with an employee who leaves the department. Will this rule still apply if the employee goes to join another branch of the public service? Are the employee's entitlements transferable?

Item 22:

1. The interpretation of this instruction could be ambiguous.
2. Note the use of “commence”. In the drafting process, this will be changed to the simpler word “begin”.

Item 24: The term “anticipated normal work schedule” could be replaced in subsequent years by the average number of hours worked in the previous year.

Item 25: The term “adjusted accordingly” is not explained and is ambiguous. There are two possibilities:

1. The employee worked more hours than anticipated and therefore has more vacation time to his or her credit. If as many as 12 days are credited, do they count as “carry-over” vacation? Note that nothing is said about carry-over by part-time indeterminate employees. Will they get the same as the 10 days allotted to full-time employees or will their entitlement be prorated in accordance with the number of hours worked?
2. The employee worked less time than anticipated and is therefore entitled to fewer vacation days. Does this mean that the leave normally credited at the beginning of the year will be reduced by the number of extra days that the employee was credited with? If the vacation days have already been taken, will this employee be asked to reimburse the employer?

Items 14, 16 and 26: Set out a similar rule, that is, an employee who works 10 days in any month is entitled to vacation time for that month. When it is time to draft the vacation regulation, this rule may be expressed only once, under the heading “General”.

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PART 4

DRAFTING AND FORMAT RULES

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PART 4

DRAFTING AND FORMAT RULES

INTRODUCTION

Part 4 of this Manual set out the main rules for drafting and formatting delegated legislation at the federal level. Its aim is to help drafters prepare documents that are as clear, concise and uniform as possible.

The rules discussed in this Part apply primarily to regulations, statutory instruments and other documents subject to the examination, registration and publication requirements of the *Statutory Instruments Act*. They also apply to other instruments made under an Act of Parliament or under the royal prerogative. For the sake of simplicity, the term “regulations” is used, except where otherwise indicated, in its generic sense to denote regulations, statutory instruments and other documents made under an Act of Parliament or under the royal prerogative. For information on the difference between “regulations” and “statutory instruments” as defined in the *Statutory Instruments Act*, please refer to Part 2 of this Manual.

The rules are dealt with in separate articles presented in alphabetical order that provide models and practical solutions to the problems faced by legislative counsel when drafting or examining regulations. Numerous examples illustrate the principles explained.

However, readers should not expect these rules to provide solutions to every problem they may encounter in a given context or in the interpretation of a specific enabling authority, nor should they assume that systematic and slavish application of these rules will alone suffice to produce a flawless text.

Legislative counsel faced with a drafting problem should, in addition to consulting the articles in Part 4, consult the Legislation Deskbook, Legistics, Le Guide fédéral de jurilinguistique législative française and the other resources available on the Intranet site of the Legislative Services Branch.

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ABBREVIATIONS: INITIALISMS AND ACRONYMS

(SIGLES ET ACRONYMES)

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

Examples:

RCMP (Royal Canadian Mounted Police)

EEC (European Economic Community)

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

Examples:

NAFTA (North American Free Trade Agreement)

NATO (North American Treaty Organization)

FORTTRAN (formula translation)

GUIDELINES FOR USING ABBREVIATIONS

In regulations, abbreviations should be avoided and the term written out in full. However, if the term is to appear frequently, an abbreviation may be used, if it is defined in the regulation.

Example:

“ICAO” means the International Civil Aviation Organization. (*OACI*)

Furthermore, certain abbreviations may be used without being defined if the English and French versions of the abbreviation appear in standard dictionaries in each language.

Examples:

UN (O.N.U.)

GNP (P.N.B.)

SOS (S.O.S.)

FM (F.M.)

FOB (F.A.B.)

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ABBREVIATIONS: INITIALISMS AND ACRONYMS

FORMATION

In English, use capital letters only, without periods or spacing. Initialisms representing the names of organizations generally take the definite article, while those representing a substance, method or condition do not.

Examples:

The fugitive was apprehended by the RCMP.
We have become too reliant on EDP.

Acronyms are usually not preceded by the definite article.

Examples:

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

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ADAPTATION OF A STATUTE

(ADAPTATION DE LA LOI)

Parliament sometimes expressly grants to the executive branch, usually to the Governor in Council, the power to adapt an Act to a particular situation. Such cases can be found, for example, in the *Canadian Environmental Assessment Act*,⁵⁰ the *Referendum Act*,⁵¹ the *Firearms Act*,⁵² the *Employment Equity Act*,⁵³ the *Public Service Superannuation Act*,⁵⁴ the *Canadian Forces Superannuation Act*,⁵⁵ the *Royal Canadian Mounted Police Superannuation Act*,⁵⁶ the *Public Sector Pension Investment Board Act*⁵⁷ and the *Special Retirement Arrangements Act*.⁵⁸ Provisions that confer the power to adapt an Act also generally confer the power to adapt the regulations made under the Act. They may even confer the power to adapt an Act other than the Act in which the power is conferred.⁵⁹ The adaptation is generally accomplished by adding new provisions to existing regulations dealing with the same subject as the Act.⁶⁰ Sometimes new regulations are made specifically for the purposes of adapting the Act⁶¹ or the regulations or both.⁶² In all cases, the exercise of the power to adapt the Act raises drafting issues and legal issues.

⁵⁰ S.C. 1992, c. 37, paragraph 59(i). This provision illustrates a power to adapt that is not identified as one. The power that is conferred is the power to vary or exclude procedures and requirements of the environmental assessment process set out in the Act or its regulations for the purpose of adapting the process in respect of certain projects.

⁵¹ S.C. 1992, c. 30, subsection 7(3).

⁵² S.C. 1995, c. 39, paragraph 117(u).

⁵³ S.C. 1995, c. 44, subsection 41(5).

⁵⁴ R.S., c. P-36, paragraphs 42.1(1)(u), (v.2) and (v.7) and 71(1)(a).

⁵⁵ R.S., c. C-17, subsections 3.1(1) and (3) and paragraphs 80(1)(a) and (2)(a).

⁵⁶ R.S., c. R-11, paragraphs 26.1(1)(h.4) and (h.5) and 41(1)(a) and (2)(a) and subsection 42(1).

⁵⁷ S.C. 1999, c. 34, paragraph 50(b).

⁵⁸ S.C. 1992, c. 46, Sch. 1, paragraphs 28(1)(a) and (n).

⁵⁹ S.C. 1998, c. 10, paragraph 27(1)(a).

⁶⁰ For example, see sections 5.5, 5.6, 5.9, 17.1 and 17.4 to 17.6 of the *Royal Canadian Mounted Police Superannuation Regulations*, C.R.C., c. 1393, enacted by the *Regulations Amending the Royal Canadian Mounted Police Superannuation Regulations*, SOR/2006-134.

⁶¹ For example, see the *Regulations Adapting the Employment Equity Act in Respect of the Canadian Security Intelligence Service*, SOR/2002-423.

⁶² There only appear to be two regulations in the Consolidated Regulations that adapt an Act and its existing regulations at the same time, namely the *Aboriginal Peoples of Canada Adaptations Regulations (Firearms)*, SOR/98-205 and the *Employment Insurance (Fishing) Regulations*, SOR/96-445. S.C. 1992, c. 46, Sch. 1, paragraphs 28(1)(a) and (n).

Drafting Issues

The adaptation of an Act can be accomplished in several ways. This is illustrated below by reference to subsection 10(1) of the *Royal Canadian Mounted Police Superannuation Act*,⁶³ which reads as follows:

10. (1) The amount of any annuity to which a contributor may become entitled under this Part is an amount equal to the aggregate of

- (a) . . . , and
- (b)

The formula set out in subsection 10(1) for the calculation of annuities is not suitable for part-time members of the Royal Canadian Mounted Police. However, paragraph 26.1(1)(h.4)⁶³ gives the Governor in Council the power to make regulations adapting any provision of the Act for the purpose of applying it to those members.

The following options illustrate how subsection 10(1) could be adapted. Unless the context requires another approach, option 4 is recommended because its effect is clear.

Option 1

The adaptation of subsection 10(1) of the *Royal Canadian Mounted Police Superannuation Act*⁶³ could be drafted without expressly stating what the new provision is intended to accomplish. For example:

1. The *Royal Canadian Mounted Police Superannuation Regulations*¹ are amended by adding the following after section X:

X.1 The amount of any annuity to which a contributor *who has been a part-time member during the contributor's period of pensionable service* may become entitled under *Part I of the Act* is an amount equal to the aggregate of *the amounts calculated in accordance with the following formula for each segment of the period during which the weekly average of the hours of work for which the contributor was engaged changes:*

. . . .

⁶³ **26.1 (1)** The Governor in Council may make regulations. . .

(h.4) respecting the manner in which and extent to which any provision of this Act or any regulations made under this Act apply to a member of the Force who is engaged to work at least the number of hours per week or the number of days per year prescribed in regulations made under paragraph (c.1) and adapting any of those provisions for the purposes of that application;

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ADAPTATION OF A STATUTE

This new provision is an adaptation of subsection 10(1) of the Act, even though the text does not mention that it is an adaptation. But what of the legal issue of whether the new provision forms part of the regulations or the Act? Because it is inserted in numerical order in the amended regulations, one must probably conclude that it forms part of the regulations and that the calculation of the amount of the annuity of the contributor who has been a part-time member during his or her period of pensionable service is to be made under that provision of the regulations rather than under subsection 10(1) of the Act. However, “annuity” is defined in subsection 9(1) of the Act as “an annuity computed in accordance with section 10”. Does this form of adaptation have the effect of setting aside that definition as far as that contributor is concerned? How will one apply the other provisions of the Act and the regulations that depend for their operation on the calculations provided by subsection 10(1) of the Act?⁶⁴ One technique the drafter could use to avoid these questions would be to adapt the other provisions of the Act or regulations that refer to subsection 10(1) so that references to this subsection are read as references to the subsection as adapted.

Option 2

The drafter could also specify in the adapting provision that it is an adaptation of subsection 10(1) of the Act and also, of course, set out the new rule. For example:

1. The *Royal Canadian Mounted Police Superannuation Regulations*¹ are amended by adding the following after section X:

X.1 Subsection 10(1) of the Act is adapted so that the amount of any annuity to which a contributor *who has been a part-time member during the contributor's period of pensionable service* may become entitled under *Part I of the Act* is an amount equal to the aggregate of the amounts calculated in accordance with the following formula for each segment of the period during which the weekly average of the hours of work for which the contributor was engaged changes:

... .

This also raises the legal issue of whether the provision forms part of the regulations or the Act? Is the calculation of the amount of the annuity to be done under this provision or under subsection 10(1) of the Act? Again, the drafter could adapt the other provisions of the Act and regulations that refer to subsection 10(1).

⁶⁴ By way of example, subparagraph 22(2)(a)(ii) of the Act reads as follows:

(ii) an amount equal to five times the annuity to which the contributor was or would have been at the time of his death entitled determined in accordance with subsection 10(1).

Option 3

The drafter could also adapt subsection 10(1) of the Act by adding to or replacing certain parts of the regulations. For example:

1. The *Royal Canadian Mounted Police Superannuation Regulations*¹ are amended by adding the following after section X:

X.1 (1) With respect to a contributor who has been a part-time member during the contributor's period of pensionable service, subsection 10(1) of the Act is adapted by adding, after the word "contributor" in the portion before paragraph (a), the words "who has been a part-time member during the contributor's period of pensionable service" and after the word "aggregate" in the same portion, the words "for each segment of the period during which the weekly average of the hours of work for which the contributor was engaged changes,"

(2) With regard to the same contributor, subparagraphs 10(1)(a)(i) to (iii) and (b)(i) to (iii) of the Act are adapted by replacing the words . . . with the words

Because this provision only adds to subsection 10(1) of the Act and does not set out the rule that is to apply to the calculation of the amount of the contributor's annuity, there is no need to consider whether, from a legal point of view, it forms part of the Act or the regulations. This approach leaves no doubt that the adapted version of subsection 10(1) of the Act is the provision that is to be used in calculating this amount. However, the disadvantage of this approach is that the adapted provision is not set out in full. The reader would have to consult both the Act and the Regulations to arrive at the new adapted version of the provision. One advantage is that the change is set out clearly.

Section 724 of the *Bank Act*⁶⁵ illustrates another way to adapt a provision by replacing some of its parts. This method could also be used in regulations that adapt provisions of an Act.

724. Sections 81 to 135 apply in respect of bank holding companies, subject to the following:

- (a) references to "bank" in those sections are to be read as references to "bank holding company";
- (b) references to "this Act" in those sections are to be read as references to "this Part";
- (c) references to "Part VII" in those sections are to be read as references to "Division 7 of Part XV";

⁶⁵ S.C. 1991, c. 46.

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- (d) references to "this Part" in those sections are to be read as references to "this Division";
- (e) the reference to "subsections 137(5) to (7) and sections 138 to 141 and 145" in subsection 93(1) is to be read as a reference to "subsections 726(2) to (5) and sections 727 to 730 and 734"; and
- (f) the reference to "section 71 or 77" in subsection 97(3) is to be read as a reference to "section 715 or 720".

Option 4

To overcome the difficulties presented by options 1 to 3, the drafter could create a new provision of the same nature as the provision being adapted that states expressly what the new provision is intended to accomplish. For example:

1. The *Royal Canadian Mounted Police Superannuation Regulations*¹ are amended by adding the following after section X:

X.1 In respect of a contributor who has been a part-time member during the contributor's period of pensionable service, subsection 10(1) of the Act is adapted as follows:

10. (1) The amount of any annuity to which a contributor *who has been a part-time member during the contributor's period of pensionable service* may become entitled under this Part is an amount equal to the aggregate of *the amounts calculated in accordance with the following formula for each segment of the period during which the weekly average of the hours of work for which the contributor was engaged changes*:

...

B is the amount determined according to section 8.1 of the *Royal Canadian Mounted Police Superannuation Regulations*

When the new provision is given the same number in the Act as the one being adapted and states what it is to accomplish, there is no doubt as to which provision is to be used in calculating the amount of the annuity of a contributor who has been a part-time member. For that contributor, the adapted subsection 10(1) is substituted for the existing subsection 10(1). The annuity of that person will be calculated under subsection 10(1) of the Act as it is adapted and not under section X.1 of the *Royal Canadian Mounted Police Superannuation Regulations*.⁶⁶

⁶⁶ The words "under this Part" indicate that subsection 10(1) of the Act, as adapted by section X.1 of the Regulations, is conceptually part of the Act and not part of the Regulations. The reference to the *Royal Canadian Mounted Police Superannuation Regulations* in the description of B reinforces that conclusion; if

Legal Issues

The exercise of a power to adapt a statute also raises some legal issues.

1. The Scope of the Power to Adapt

General Limitation

The power to adapt is not absolute. It has an intrinsic limit. In contrast to the power to amend, which conveys an open-ended power, the power to adapt is limited because it does not permit a change to the nature of the scheme of the Act. This distinction was set out by Madame Justice L'Heureux-Dubé in *Haig v. Canada (Chief Electoral Officer)*:⁶⁷ “Though the Chief Electoral Officer is given a discretionary power to adapt the legislation, this power does not extend to authorize a fundamental departure from the scheme of the *Referendum Act* (Canada). In exercising his discretion, he must remain within the parameters of the legislative scheme.”⁶⁸

Power to Adapt the Enabling Provision

One issue to consider is whether, if the enabling provision grants the power to “adapt any provision of this Act”, it is possible to adapt the enabling provision itself.

Enabling authorities are generally not construed as allowing the making of regulations that expand the scope of the enabling authority. For example, if an Act allows the making of regulations relating to record keeping, the regulations made under that authority could not define “record” in a way that is broader than the meaning of that word as it is used in the Act. By extension of that line of reasoning, it would be prudent to assume that an enabling provision that says “adapt any provision of this Act” is not intended to include the

one were to consider the adapted provision as part of the Regulations, the reference to the Regulations would be unnecessary.

⁶⁷ [1993] 2 S.C.R. 995, p. 1025.

⁶⁸ On this issue, subsections 41(5) and (7) of the *Employment Equity Act*, which read as follows, are of interest:

(5) The Governor in Council may, taking into account the operational effectiveness of the appropriate portion of the public sector referred to in paragraph (a) or (b), make any regulation that the Governor in Council considers necessary to adapt this Act or the regulations or any provision of this Act or the regulations to accommodate

(a) the Canadian Security Intelligence Service; or

(b) where an order is made under paragraph 4(1)(d) in relation to the Canadian Forces or the Royal Canadian Mounted Police, the Canadian Forces or the Royal Canadian Mounted Police.

(7) The effect of a regulation made under subsection (5) with respect to any matter may differ from the effect of the Act or the regulations or of any provision of the Act or the regulations with respect to that matter.

authority to adapt that enabling provision. On the other hand, perhaps the authority could be used to adapt other enabling provisions in the Act.

Express Authority Required

A further issue to consider is whether the power to adapt an Act permits the conferral by regulation of certain powers that usually require explicit authority; for instance, a power to inspect.

If the Act itself includes a power to inspect, it probably would not be a significant departure from the scheme of the Act to adapt that power to inspect. However, if the Act does not include a power to inspect, the adaptation of the Act in order to create a power to inspect may be too much of a departure from the scheme of the Act, particularly as an explicit enabling authority is usually required for a power to inspect.

It should be noted that the Standing Joint Committee for the Scrutiny of Regulations challenged the authority of the Governor in Council to exclude the jurisdiction of the courts by means of a regulatory provision based on a power to adapt the Act.⁶⁹

2. The Nature of the Power to Adapt

Does the power to adapt an Act include the power to amend the Act? In other words, does the power to adapt have the same effect as a Henry VIII provision? The nature of a classic Henry VIII provision (“The Governor in Council may, by regulation, amend the schedule to this Act.”) is clear because the exercise of the power under the provision modifies the Act both in form and in effect.⁷⁰ The result is not quite the same in the case of the exercise of a power to adapt. One can imagine at least two situations in which the effect of the exercise of such a power would be different than the effect of the exercise of a power under a Henry VIII provision:

- One situation is where a provision permits the adaptation of an Act by regulation in order to create a parallel regime for circumstances that are not dealt with in the Act. The Act, as adapted by regulation, would apply only in those particular circumstances. In this situation, there would be two versions of the Act, with one version applying in general circumstances and the other applying in the particular circumstances. An example of this kind of a power to adapt can be found in the *Canadian Environmental*

⁶⁹ *Regulations Adapting the Employment Equity Act in Respect of the Canadian Security Intelligence Service*, SOR/2002-423, subsections 23(2.4), (6) and 24.2(3) and sections 28.2 and 29.2.

⁷⁰ On the power to amend an Act by regulation and Henry VIII provisions, see Blache, Pierre, *Du pouvoir de changer la loi par acte réglementaire statutaire*, (1977) 12 R.J.T. No 2, and Morris, Dennis, “Henry VIII clauses: Their birth, a late 20th century renaissance and a possible 21st century metamorphosis”, *The Loophole, Journal of the Commonwealth Association of Legislative Counsel*, Issue No. 1 of 2007, p. 14.

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Assessment Act,⁵⁰ which permits the adaptation of the environmental assessment process for certain projects.

- The other situation is where a provision permits the adaptation of an Act by regulation such that the provisions resulting from the adaptation supersede the provisions of the Act that are being adapted. In other words, the provisions of the Act that are adapted would be of no effect while the regulations remain in effect; they would be dormant. Unlike a classic Henry VIII provision, which permits the replacement of text in the Act with new text, the adapted provision does not make the text of the Act disappear.

In both of these situations, the Act is not formally amended.

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AGREEMENTS, CONVENTIONS, TREATIES AND SIMILAR DOCUMENTS

(ACCORDS, CONVENTIONS, TRAITÉS ET AUTRES DOCUMENTS SIMILAIRES)

When a proposed regulation contains an agreement, convention, treaty or similar document in a schedule, it is necessary for the document set out in 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 regulatory department or agency to provide the original document or an authentic copy of it to the appropriate regulations section for examination.

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

Note that the titles of agreements, conventions or treaties in a regulation are written in ordinary type, not in italics.

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