

REGULATORY REFORM IN MANITOBA: A BLUEPRINT FOR CHANGE

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Introduction

Since 1980, there have been almost five times as many regulations passed in Manitoba as there have been public statutes.¹ No single feature is more striking in a review of *The Manitoba Gazette* than the variety of subjects on which regulations have been passed. Whereas some regulations are concerned with specialized matters of local interest,² others deal with much broader issues such as social assistance³ and even child abuse.⁴ And just as regulations cover a variety of subjects, they also vary greatly in their scope between substantive and procedural matters. Some regulations merely recite administrative detail, while others deal with substantive policy. A few even attempt to amend legislation.⁵

Regulations are known by a variety of other expressions — delegated or subordinate legislation, rules, by-laws, ordinances — none of which has a precise or generally accepted meaning.⁶ Collectively, however, these words describe those laws generally made by the executive branch of government pursuant to certain legislative powers delegated to that branch by the Legislature.⁷ A majority of Manitoba statutes provide for some form of delegated legislation. When such provision is made, the power is normally delegated to the Lieutenant Governor in Council (i.e., 'Cabinet'), although delegation to an administrative agency is not uncommon.⁸ And occasionally, when an agency is authorized to make regulations, that authority will be made conditional upon Cabinet approval.⁹

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1. Since 1980, there have been 356 general public statutes passed by the Legislative Assembly compared with 1,525 regulations published in *The Manitoba Gazette* in accordance with *The Regulations Act*, R.S.M. 1970, c. R60 for that same time period. The number of general public statutes for each session of the Legislative Assembly since 1980 is as follows: 81 (1980); 41 (1980-81); 53 (1982); 94 (1982-83-84); 28 (1984-85); 59 (1985). The annual figures for published regulations are: 262 (1980); 249 (1981); 271 (1982); 276 (1983); 279 (1984); 188 (January 1 — September 7, 1985).
2. There are several hundred regulations under *The Mines Act*, R.S.M. 1970, c. M160, for example, which define certain lands that are withdrawn from prospecting.
3. Regulations under *The Social Allowances Act*, R.S.M. 1970, c. S160 set forth the monthly amount of social assistance available to a successful applicant; see, for example, A Regulation Under *The Social Allowances Act* to Amend Manitoba Regulation 202/77, Man. Reg. 262/84.
4. See, A Regulation Under *The Child Welfare Act* Respecting Child Abuse, Man. Reg. 150/79, which establishes the procedure to be followed by a child care agency once it is notified of an alleged abuse and which sets forth the forms to be used under the legislation.
5. For example, A Regulation Under *The Farm Lands Ownership Act*, Man. Reg. 212/84, while not expressly purporting to amend the primary legislation, does, in fact, alter the definition of 'farmer' in that legislation.
6. This point was made by Elmer A. Driedger in "Subordinate Legislation" (1960), 38 Can. B. Rev. 1 at 2. The term 'regulation' may be defined broadly as including not only legislative rules, but also administrative rules, such as the policy statements or interpretive rulings of administrative agencies. An example of a broad construction is contained in the definition of 'rule' under subsection 551(4) of the American *Administrative Procedure Act*, 5 U.S.C. Conversely, subsection 2(1)(f) of *The Regulations Act*, R.S.M. 1970, c. R60 of Manitoba gives a narrow definition of the term, for it only includes some orders "of a legislative nature."
7. There is one limited exception to the statement that regulations are made by the executive branch. This pertains to the rules of court which are made by the judiciary rather than the executive: see, *The Court of Queen's Bench Act*, R.S.M. 1970, c. C280, s. 103(1), and *The Provincial Court Act*, S.M. 1982-83-84, c. 52, s. 26(1) (C275).
8. See, for example, section 16 of *The Horse Racing Commission Act*, R.S.M. 1970, c. H90, which authorizes the administrative agency to make certain regulations.
9. This normally occurs where an administrative agency is authorized to make regulations on matters which are likely to involve serious policy considerations. For example, section 17 of *The Horse Racing Commission Act*, R.S.M. 1970, c. H90, requires that the Commission obtain the approval of Cabinet with respect to regulations fixing and allocating the number of days during which horse racing will be held in the province. The practice also occurs where Cabinet wishes to exercise general control over a professional body; see for example, *The Chiropractic Act*, S.M. 1984-85, c. 23, s. 26 (C100).

No one can seriously dispute the need for regulations. Members of the Legislative Assembly have neither the time nor the expertise to prescribe the intricate details required to administer government programmes. The Legislature's role, instead, is better suited to addressing general policy issues, such as the need for, and the desirability of, particular proposals. Flexibility, too, is enhanced when changes in administrative details can be accomplished promptly by the executive branch without the need for statutory amendment. This is particularly desirable when a programme is in its initial and perhaps experimental stage. Regulations, accordingly, perform a fundamental role when they are used to elaborate upon the rudiments set forth in legislation.

Regulations, however, are not made as openly as the laws which the Legislature enacts. Nor are they made directly by the Legislature, which collectively comprises all elected representatives of the province. The fact that laws made by the executive branch impose legally enforceable rights and obligations on Manitobans strikes at the heart of our constitutional system of parliamentary democracy. Does the procedure surrounding the passing of regulations in Manitoba ensure that the executive is accountable to the Legislature for these laws and that both, in turn, are responsible to the electorate? Is the level of that accountability adequate, or can — and should — it be improved upon? If so, what are the solutions? While a great deal of ink has been spilled elsewhere in addressing these questions, there has been little, if any, discursive response in Manitoba.¹⁰

This article focuses upon the degree of scrutiny to which Manitoba regulations are now subjected, both preceding and succeeding their enactment. The analysis begins with a brief summary of the review of regulations by the courts. A description is then given of the means by which regulations are made into law and, in particular, the roles of the Legislature and the executive under *The Regulations Act*¹¹ of Manitoba. This is followed by a brief overall assessment of that process. The article concludes with some general proposals for reform.

Judicial Review of Regulations

Regulations may be challenged in the courts on both substantive and procedural grounds.¹² There are two major grounds for a substantive attack. First, a regulation will be declared invalid if the statute upon which it derives its authority is itself found *ultra vires*. Secondly, a regulation can be successfully challenged if a court is satisfied that the authority conferred by the statute was exceeded by the agency exercising the authority. In essence, both grounds pertain to an excess of authority: in the first instance,

10. See, for example, Canada, Parliament, House of Commons, Special Committee on Statutory Instruments, *Third Report* (Ottawa: Queen's Printer, 1969) (Mark MacGuigan, Chairman) (hereinafter referred to as the "MacGuigan Report"); Canada, Parliament, House of Commons, Special Committee on Regulatory Reform, *Report* (Ottawa: Minister of Supply and Services Canada, 1981) (James S. Peterson, Chairman) (hereinafter referred to as "the Peterson Report"); David Mullan, *Rule-Making Hearings: A General Statute for Ontario?*, Research Publication 9 (Toronto: Commission on Freedom of Information and Individual Privacy, 1979).

11. *The Regulations Act*, R.S.M. 1970, c. R60.

12. For a more comprehensive review of the successful grounds of challenge to regulations the reader is referred to Elmer A. Driedger's article, *supra* n. 6.

however, the Legislature is the 'culprit', while in the second, it is the executive. Although the first ground often provides some basis for judicial review, the second is seldom successful. This is principally due to the fact that often the statutory provisions authorizing the executive to pass regulations are very broadly worded. Of particular consequence are those provisions which grant the power to make regulations in subjective terms. *The Landlord and Tenant Act*, for example, confers upon the Lieutenant Governor in Council the authority to make regulations "respecting such other matters as he may deem necessary for the carrying out of the provisions of this Act and the regulations".¹³ The MacGuigan Report, in referring to such subjective grants of power, described any judicial review thereof as being "virtually impossible".¹⁴

The procedural grounds for challenging regulations include such matters as bad faith¹⁵ and, in certain instances, a breach of the principles of natural justice and fairness. Traditionally, the principles of natural justice and fairness were not required to be followed in the exercise of any delegated legislative power. Accordingly, there was no duty to give notice to persons potentially affected by a proposed regulation, nor was there a requirement that they be given the opportunity to be heard. The process was simply classified as 'legislative', 'administrative' or 'executive' and, *ipso facto*, was construed as being outside the realm of these protections. However, although the principles of natural justice and fairness are generally still not applicable to the regulation-making process, it no longer follows that simply because a power is legislative in form that these principles are excluded. The most notable development has been with respect to municipal zoning decisions carried into effect by by-law.¹⁶ In this area, Canadian courts have generally stated that those persons whose property rights are potentially affected by a proposed by-law concerning particular property are entitled to notice of the hearing and to an opportunity to make some representations. In England, the rules of natural justice have also been applied to a regulation regarding licensing.¹⁷ Attempts to challenge regulations for an abuse of natural justice in other cases have, however, generally failed.¹⁸ If a principle can be deduced from these cases, it is that the rules of natural justice may apply to the regulation-making process if there is something akin to a *lis* or dispute *inter partes* arising therefrom, making an adjudicatory-type hearing appropriate. This will normally arise when a regulation is specific rather than general in ambit such that the persons

13. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 122 (e).

14. *Supra* n. 10, at 40.

15. See *Re Buhler and Rural Municipality of Stanley* (1977), 72 D.L.R. (3d) 447 (Man. C.A.).

16. See *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, 51 D.L.R. (2d) 754; *Raes v. Township of Plympton* (1971), 20 D.L.R. (3d) 645, [1971] 3 O.R. 445 (C.A.); *Re Bouque and Township of Richmond* (1978), 87 D.L.R. (3d) 349, 6 B.C.L.R. 130 (C.A.).

17. See *R. v. Liverpool Corporation, Ex. p. Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299, [1972] 2 W.L.R. 1262, (sub nom. *Re Liverpool Taxi Owners' Association*), [1972] 2 All E.R. 589 (C.A.).

18. See, for example, *Re Rothmans of Pall Mall Canada Ltd. and Minister of National Revenue*, [1976] 2 F.C. 500, 10 N.R. 153, 67 D.L.R. (3d) 505 (F.C.A.); *A.-G. Canada v. Inuit Tapirisat of Canada and The National Anti-Poverty Organization*, [1980] 2 S.C.R. 735, 33 N.R. 304, 115 D.L.R. (3d) 1; *Bates v. Lord Hailsham of St. Marglebone*, [1972] 3 All E.R. 1019, [1972] 1 W.L.R. 1373 (Ch. D.); *Re The Queen in Right of Alberta and County of Beaver No. 9* (1982), 136 D.L.R. (3d) 144, (sub nom. *R. in Right of Alberta v. Beaver*), [1982] 4 W.W.R. 344 (Alta Q.B.).

challenging the regulation can prove that they would be directly and distinctively affected by its adoption.¹⁹

It is difficult to assess what impact the *Canadian Charter of Rights and Freedoms*²⁰ will have upon judicial challenges to delegated legislation. Three basic points can, however, be made. First, it is clear from *Operation Dismantle Inc. v. The Queen* that “cabinet decisions fall under s. 32(1)(a) of the *Charter* and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution”.²¹ Accordingly, it does not follow that simply because a regulation is made by Cabinet that it will not be subject to judicial review. Secondly, the courts have construed the final phrase in section 7 of the *Charter* — i.e. “the principles of fundamental justice” — as giving the rules of natural justice and fairness constitutional effect.²² This means that the courts need no longer confine these rules to those instances where the legislation is silent regarding procedure. Finally, although it is difficult to speculate as to whether the *Charter* will expand the application of the rules of natural justice and fairness within the regulation-making process, the American experience with due process suggests that the courts may exercise caution. In the United States, Congress and not the courts has had the primary role in imposing procedural requirements in ‘rulemaking’ (the American term). The courts have refused to impose further procedural protections except in “extraordinary circumstances”.²³

“The Regulations Act” of Manitoba

The Regulations Act was passed in Manitoba forty years ago to make available to the public a mechanism by which regulations of general application could be ascertained.²⁴ The *Act* also provides for a method of subjecting regulations to some scrutiny by both the executive and the legislative branches. The former is represented by the Registrar of Regulations who is responsible for the filing and publication of regulations. The latter is represented by the Legislative Assembly, as a whole, and the Standing

19. Estey J., in *A.-G. Canada v. Inuit Tapirisat of Canada and The National Anti-Poverty Organization* stated:

The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, “or administrative and legislative” on the other. It may be said that the use of the fairness principle . . . will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* . . . Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise.

Supra n. 18, S.C.R. at 758. See also, *Re Braeside Farms Ltd. and Treasurer of Ontario* (1978), 20 O.R. (2d) 541, 88 D.L.R. (3d) 267 (Div. Ct.), at D.L.R. 272, *per* Griffiths J.

20. *Canadian Charter of Rights and Freedoms*, being Part I of *Constitution Act, 1982*, s. 10(b), being Schedule B to *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the “*Charter*”).

21. [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, (sub nom. *Operation Dismantle Inc. v. Canada*) 59 N.R. 1, S.C.R. at 455.

22. See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 58 N.R. 1, (sub nom. *Re Singh and Minister of Employment and Immigration*) 17 D.L.R. (4th) 422. The Court left open the question as to whether section 7 also includes the notion of substantive fairness.

23. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defence Council Inc.*, 435 U.S. 519, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978); *Chrysler Corp. v. Brown, Secretary of Defence*, 441 U.S. 281 (1979). Also see B. Schwartz, “Cost-Benefit Analysis in Administrative Law: Does It Make Priceless Procedural Rights Worthless?” (1985), 37 Admin. L.R. 1 at 10.

24. *The Regulations Act*, R.S.M. 1970, c. R60. The *Act* was passed in 1945 and was based upon uniform legislation adopted by the Uniform Law Conference of Canada in 1943: see *The Regulations Act*, S.M. 1945, c. 56.

Committee on Statutory Regulations and Orders, in particular, both of which have a duty to review regulations. Section 10 of the *Act* states that every regulation (as defined in the *Act*) stands permanently referred to that Standing Committee while sections 11 and 12 respectively provide for the laying of regulations before the Assembly and the power of the Assembly to cause the amendment or revocation of any regulation so considered.²⁵

Manitoba was one of the first jurisdictions in Canada to provide for some legislative scrutiny of regulations via the creation of a Legislative Standing Committee.²⁶ Indeed, when the Clement Committee in Alberta reported to their Legislative Assembly in 1965, it recommended the establishment of a similar standing committee.²⁷ The concept of a legislative standing committee was first proposed in 1932 by the English Committee on Ministers' Powers (the Donoughmore Committee).²⁸ That Committee was concerned with the continued growth in the amount of delegated legislation in England and recommended, *inter alia*, that each House of Parliament establish a small standing committee to review and report generally on all rules laid before the House.²⁹ Their recommendation led to the establishment of the House of Commons Statutory Instruments Committee (The Scrutiny Committee) in 1944.³⁰

The rules of the Legislative Assembly of Manitoba require the Standing Committee on Statutory Regulations and Orders to be governed by eight principles in examining regulations.³¹ These principles were adapted from those developed by the Donoughmore Committee and have not been revised since their creation in 1960. They are as follows:

- (a) The Regulations should not contain substantive legislation that should be enacted by the Legislature, but should be confined to administrative matters.
- (b) The Regulations should be in strict accord with the statute conferring the power and, unless so authorized by the statute, should not have any retroactive effect.
- (c) The Regulations should not exclude the jurisdiction of the courts.
- (d) The Regulations should not impose a fine, imprisonment, or other penalty, or shift the onus of proof of innocence onto a person accused of an offence.
- (e) A Regulation in respect of personal liberties should be strictly confined to things authorized by statute.
- (f) The Regulations should not impose anything in the way of a tax (as distinct from the fixing of the amount of a licence fee or the like).
- (g) The Regulations should not make any unusual or unexpected use of the delegated power.

25. All regulations filed subsequent to the filing of the latest regulations previously laid before the Assembly must be tabled within the first fifteen days of each session of the Legislature, unless otherwise directed by resolution of the Assembly.

26. The Standing Committee was established in 1960: see *An Act to Amend The Regulations Act*, S.M. 1960, c. 62.

27. Alberta, Legislative Assembly, Special Committee on Boards and Tribunals, *Report* (Edmonton: The Committee, 1965) (Carlton W. Clement, Chairman) (hereinafter referred to as the "Clement Committee").

28. Great Britain, Committee on Ministers' Powers, *Report, Cmd. 4060* (London: Her Majesty's Stationery Office, Rep. 1962) (Leslie Scott, Chairman) (hereinafter referred to as the "Donoughmore Committee").

29. *Ibid.*, at 62-64.

30. See J. Beatson, "Legislative Control of Administrative Rulemaking: Lessons From the British Experience?" (1979), 12 *Cornell Int. L.J.* 199 at 206.

31. See *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba*, (adopted April 5, 1972, as am. June 17, 1977), s. 71(2).

- (h) The Regulations should be precise and unambiguous in all parts.

These principles essentially direct the Standing Committee to examine matters of drafting and of scope, but not to scrutinize the substance of each regulation. To paraphrase, their jurisdiction is restricted to "technical scrutiny" and not to the "scrutiny of merits".³² The role of the Committee is further confined in that it can merely recommend to the Legislative Assembly the revocation or amendment of regulations. That is, its role is simply advisory. Moreover, it is only regulations, as defined in *The Regulations Act*³³, which are subject to its review. That term is statutorily defined as follows: "regulation" means any regulation, rule, order, or by-law, of a legislative nature made or approved under the authority of an Act of the Legislature".³⁴ There are two key phrases in this definition. The first is the requirement that the regulation be "of a legislative nature". A "legislative" regulation can be distinguished from an "administrative" one in that the former is of general application while the latter speaks to a particular case.³⁵ The expression is commonly employed in regulation statutes across Canada and has been criticized at the federal level for its obscurity.³⁶ The second key phrase in the definition is the requirement that the regulation be made or approved under the authority of an Act. This means that many rules, such as government manuals and policy statements, which are not created pursuant to any particular statutory provision are outside the scope of the definition and, hence, beyond the mandate of the Standing Committee.

The Standing Committee has not actively pursued its authority to review regulations. This may be due to the limited, technical role which it has been authorized to fulfil. But, for whatever reason, the Committee has only met once on the subject of regulatory review since the Manitoba regulations were consolidated in 1970.³⁷ The Committee's original role to oversee the technical aspects of regulations has essentially fallen into disuse, meaning that there is no systematic review of regulations by members of the Legislative Assembly.³⁸

What scrutiny of regulations exists within the executive branch? Reference was previously made to the Registrar of Regulations who is appointed pursuant to *The Regulations Act* and who is responsible for the filing and publication of regulations.³⁹ There is, however, no express requirement for the Registrar of Regulations to scrutinize the substance of draft regulations

32. These expressions were borrowed from Beatson's article, *supra* n. 30.

33. *The Regulations Act*, R.S.M. 1970, c. R60.

34. *The Regulations Act*, R.S.M. 1970, c. R60, s. 2(1)(f).

35. See the MacGuigan Report, *supra* n. 10, at 13.

36. See, Canada, Parliament, Standing Joint Committee of the Senate and House of Commons on Regulations and other Statutory Instruments, *Second Report* (Ottawa: Supply and Services Canada, 1977), para. 45 (ii) (Eugene A. Forsey and Robert McCleare, Joint Chairmen).

37. See Manitoba, Legislative Assembly, Standing Committee on Statutory Regulations and Orders, *Hearings*, 4th sess. 31st Leg. (November 26, 1979). This document was tabled in the Legislative Assembly on Monday, February 25, 1980: see Man. Leg. Debates and Proceedings, 4th sess. 31st Leg. (Feb. 25, 1980).

38. The Committee has been relatively active in other respects. One of its functions in 1982, for example, was to entertain submissions on constitutional reform from members of the public in view of the advent of the *Charter*.

39. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 8(1).

to determine their suitability for filing under the *Act*.⁴⁰ Subsection 7(1) of the regulations to the *Act* merely requires that draft regulations be submitted to the Registrar for approval as to phraseology and form.⁴¹ The scope for such review is as follows:

Form and arrangement of regulations.

7(1) The form of regulations, amendments thereto, consolidations, and revocations thereof, including subtitling, punctuation, capitalization, spelling, and other matters of style, shall conform to the practice of the office of the Legislative Counsel pertaining to the preparation of statutes.⁴²

These provisions for scrutiny of regulations by the executive branch in *The Regulations Act*⁴³ are only further evidence that regulations are subject to few statutory guidelines or controls. The key feature of *The Regulations Act*⁴⁴ relates not to the concept of prior scrutiny but, instead, to the concept of publication. Publication has been described as "the first step in controlling or supervising the exercise of delegated powers".⁴⁵ *The Regulations Act*⁴⁶ imposes two requirements in this regard, that of filing with the Registrar, and secondly, publication of the regulation in *The Manitoba Gazette*. In particular, subsection 3(1) of the *Act* provides that "every regulation . . . shall be filed" (s. 3(i)) and further states that "in no case does such a regulation come into force before the day of filing" (s. 3(2)).⁴⁷ The effect of these subsections is to render unenforceable a regulation that is not filed.⁴⁸ Subsection 4(1) also requires the Registrar to publish every regulation in the *Gazette* within one month from the date of its filing.⁴⁹ This provision extends the concept of publication beyond access to the central depository in the Registrar's office and, in this respect, helps to ensure the openness of the regulation-making process.

These requirements of filing and publication are, however, subject to several exclusions. With respect to the filing requirement, there are provisions contained in other statutes which attempt to override the principle that regulations are only effective from the date of filing. Most of these provisions state that the regulations are effective from the date made, rather than from the date of filing,⁵⁰ but others go beyond this to give their reg-

40. Subsection 6(1) of the *Act* does not require, but merely authorizes the Registrar to scrutinize draft regulations to determine their suitability for filing. A procedure is provided in subsection 4(1) of A Regulation Respecting the Form and Filing of Regulations and Administrative Procedures under *The Regulations Act*, Man. Rev. Reg. 1971, R60-61, whereby any doubt about the authority for the proposed regulation may suspend the Registrar's obligation to file. The Attorney General is designated as the final arbiter in any resulting dispute.

41. A Regulation Respecting the Form and Filing of Regulations and Administrative Procedures under *The Regulations Act*, Man. Rev. Reg. 1971, R60-61.

42. A Regulation Respecting the Form and Filing of Regulations and Administrative Procedures under *The Regulations Act*, Man. Rev. Reg. 1971, R60-61, s. 7(1).

43. *The Regulations Act*, R.S.M. 1970, c. R60.

44. *The Regulations Act*, R.S.M. 1970, c. R60.

45. J. Rutherford, "Control of Regulations," [1961] Papers Presented at the Annual Meeting of the Canadian Bar Association, August 28 — September 2, 1961, 17.

46. *The Regulations Act*, R.S.M. 1970, c. R60.

47. *The Regulations Act*, R.S.M. 1970, c. R60, s. 3(1)(2).

48. This view is also shared by members of the Uniform Law Conference of Canada: see *Proceedings of the Sixty-Third Annual Meeting* (1981), 176.

49. This obligation is subject to a proviso set forth in subsection 4(2) which authorizes the Minister, by order, to extend the time for publication.

50. See, for example, subsection 51(2) of *The Corporation Capital Tax Act*, S.M. 1976, c. 68 (C226); subsection 35(3) of *The Natural Products Marketing Act*, R.S.M. 1970, c. N20; section 11 of *The Milk Prices Review Act*, S.M. 1980, c. 63 (M130); subsection 320(2) of *The Highway Traffic Act*, R.S.M. 1970, c. H60.

ulations retroactive effect.⁵¹ Insofar as publication is concerned, *The Regulations Act*⁵² provides for the dispensation with publication where the regulation is, in the opinion of Cabinet, so lengthy that such publication is rendered "unnecessary or undesirable" (s. 4(3)(a))⁵³ and the regulation "is or will be available to all persons who are likely to be interested therein" (s. 4(3)(b)).⁵⁴ The dispensation is given by order-in-council and the Registrar is required to publish the order or a notice thereof in *The Manitoba Gazette* (s. 4(4)) along with a statement that a copy of the regulation may be obtained from the Queen's Printer or from the office of the department concerned as the case may be (s. 4(6)).⁵⁵

The necessity for this exclusion from publication is certainly debatable. First, it seems difficult to comprehend why length in itself should justify a regulation's exclusion from publication. The arbitrariness of this exception is shown by the inclusion of some regulations comprising in excess of 100 pages⁵⁶ and the exclusion of others comprising about 75 pages.⁵⁷ The exclusion is also questionable given that the definition of 'regulation' in the *Act* is confined to laws of general, as opposed to specific, application.⁵⁸ How can it really be shown that all persons who are likely to be interested in a law of general application will have access to a copy thereof? Furthermore, the legislation frames exclusion in subjective terms making it dependant on "the opinion of the Lieutenant Governor in Council" so that any challenge to the dispensation of publication is effectively precluded.⁵⁹

There is one final issue to address with respect to publication. This pertains to whether a person can be adversely affected by a regulation prior to its publication. Subsection 4(5) merely provides that, upon publication in the *Gazette*, a regulation is generally "valid as against all persons".⁶⁰ This amounts to constructive notice of published regulations. The subsection thus implies that a person is not bound by a regulation unless there is actual or constructive notice, but this point could be made more explicit. Alberta's legislation, for example, specifically provides that "a regulation that is not published is not valid as against a person who has not had actual notice thereof".⁶¹ The inclusion of a similar provision in Manitoba's legislation would be an improvement.

Assessment

Having described the respective roles of the judicial, legislative and executive branches of government in reviewing regulations, it would be appropriate at this juncture to respond to the primary question posed at the outset of this article. That is, does the procedure surrounding the passing

51. See, for example, subsection 4(3) of *The Education Administration Act*, S.M. 1980, c. 31 (E10).

52. *The Regulations Act*, R.S.M. 1970, c. R60.

53. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(3)(a).

54. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(3)(b).

55. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(4)(b).

56. See, for example, A Regulation Under *The Queen's Bench Act* to amend The Queen's Bench Rules, Man. Reg. 137/84.

57. See, for example, A Regulation Under *The Horse Racing Commission Act* Being The Rules of Standardbred Racing, Man. Reg. 228/83. Although this regulation was not published, amendments to it were: see, A Regulation Under *The Horse Racing Commission Act* to Amend Manitoba Regulation 228/85 Being The Rules of Standardbred Racing, Man. Reg. 158/85.

58. See *supra* n. 35, and the appurtenant discussion in the text.

59. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(3). The conferment of the power in subjective terms would not, however, preclude a constitutional challenge to the legislation.

60. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(5).

61. *The Regulations Act*, R.S.M. 1980, c. R-13, ss. 3(5).

of regulations in Manitoba ensure that the executive is accountable to the Legislature for these laws and that both, in turn, are responsible to the electorate? This question can be divided into two parts, the first dealing with the accountability of the executive to the Legislature while the second with the accountability of both to the electorate.

First then, does this procedure ensure the accountability of the executive to the Legislature? This is the simpler part of the question. It is fairly clear that the procedure established for the review of regulations provides no assurance of the executive's accountability to the Legislature. This statement can be supported by three observations. First, it has been shown that there is no systematic review of regulations by members of the Legislative Assembly succeeding the filing and publication of the regulations. This lack of any systematic review by the Legislature applies to both the merit and technical level of scrutiny, although *The Regulations Act*⁶² does contemplate a review at the technical level which is no longer practised. Secondly, insofar as the executive branch is concerned, *The Regulations Act*⁶³ requires little substantive scrutiny by the Registrar of Regulations. Instead, it is only mandatory that there be a review for the form and phraseology of each regulation submitted for filing and publication. Finally, it is the officials who put provisions forward for filing who are determining on a day-to-day basis which rules, orders and policies come within the scope of the term 'regulation' under *The Regulations Act*.⁶⁴ Accordingly, it is not the Registrar of Regulations or the Legislature which determines what documents will be subject to their scrutiny but, rather, the executive branch at large. This undermines and circumvents whatever scrutiny and control measures are in place.

Turning now to the second part of the question, does the procedure for the review of regulations ensure that the Legislature and the executive are both accountable to the electorate? This raises similar issues to those covered in response to the first part of the question. But, the question also requires an analysis of the regulation-making process in light of the fundamental principle that those who may be affected by an act or decision should be entitled to participate in its outcome. This concept finds expression in the judicial branch via the principles of natural justice and fairness. However, in the legislative branch, it is rooted within our system of participatory democracy. Essentially then, this question requires an assessment of whether the electorate has any opportunity to participate in the regulation-making process, either directly or indirectly.

Formally, there is no opportunity for the electorate to participate directly in the regulation-making process. There is only the opportunity on an informal basis through any consultative process which might be initiated by whoever within the executive branch is responsible for a particular regulation. Indirectly, the electorate could have some input into the regulation-making process if there were a systematic review of regulations by its elected

62. *The Regulations Act*, R.S.M. 1970, c. R60.

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representatives on a merit level as well as a technical one. However, no such system is in place. There is some authority at the judicial level which gives legal recognition to the right of the electorate to participate in the regulation-making process. As was pointed out earlier, however, this authority has a limited scope, both presently and potentially. Accordingly, the second part of the question must be also answered in the negative.

A Blueprint for Change

The intention in this concluding part of the article is not to prepare a comprehensive overview for change, but merely to summarize six proposals which might improve the level of accountability of the executive to the Legislature and both, in turn, to the electorate. These suggestions flow from the foregoing analysis:

- (1) The level of scrutiny of regulations by members of the Legislative Assembly should be heightened. In particular, it is suggested that the members consider the establishment of a standing committee to examine the merits of regulations. Such a committee was established in England in 1973 and is viewed there as a successful reform.⁶⁵
- (2) The role of the Standing Committee on Statutory Regulations and Orders in scrutinizing the technical aspects of regulations should be re-activated. It is suggested that the Committee consider revising the eight principles which govern its review.⁶⁶ It is also proposed that the role of this Standing Committee expressly include the review of enabling powers to guard against such powers which are broad or vague. Elsewhere, it has been suggested that:

[T]he construction and interpretation of enabling powers in Bills is a subject which lies at the heart of any effective parliamentary control of delegated legislation. Parliament must see to it that it understands and approves the precise powers to make delegated legislation granted to the executive. Too often the enabling powers in Bills are passed without examination.⁶⁷

- (3) The scrutiny of regulations by members of the Legislative Assembly could be improved if draft regulations were tabled along with the Bill under which they are made. This would allow the members to consider the entire legislative scheme intended to be created. This recommendation received strong support at the Second Commonwealth Conference on Delegated Legislation held in 1983.⁶⁸ It would be particularly desirable in Manitoba given the incidence of Bills which provide merely a skeleton outline of the legislative intent.⁶⁹

65. This Standing Committee is called 'The Merits Committee' and it reviews and reports to Parliament on the merits of any rule: see Beatson, *supra* n. 30, at 208.

66. One obvious omission is conformity with the *Charter*.

67. Canada, Second Commonwealth Conference on Delegated Legislation, *Report, vol. 1*, (Ottawa: The Conference, April 11-14, 1983) at 13.

68. *Ibid.*, at 10.

69. See, for example, *An Act to Amend The Amusements Act*, S.M. 1985, c. 35, which was passed to establish a licensing and classification on system for retail video cassette businesses.

- (4) It is proposed that there be more adequate staffing in the executive branch to scrutinize regulations. One of the major problems earlier identified is the fact that the process for publication and scrutiny established under *The Regulations Act*⁷⁰ only applies to those documents forwarded to the Registrar by the executive branch at large. The danger of this has been documented elsewhere:

Just as there has been a slide from legislating by statute to legislating by regulation, so there is the danger of a slide from the use of detailed regulations to governments achieving their policy ends by issuing directions as to how officials shall carry out their functions and exercise their discretions granted by statute or by delegated legislation. Unless these directions are subject to parliamentary control and scrutiny, a large body of the rules actually applied to citizens will pass under the unfettered power of the executive.⁷¹

An obvious solution to this problem is to require members of the executive branch to forward all regulations to the office of the Registrar of Regulations. The selection process could then be undertaken by more experienced staff. A more modest proposal would involve the implementation of a scheme recommended by the Uniform Law Conference of Canada. In 1982, the Conference proposed that each jurisdiction adopt a 'keyword regulation identifier'.⁷² This 'keyword identifier' would be set forth in a jurisdiction's Regulation Act as well as in every appropriate enabling provision from that jurisdiction for which it had been predetermined that any regulation made thereunder should be filed.⁷³

Although the Uniform Law Conference proposal would be an improvement to the present review system, it still would not alleviate the problem of ensuring some scrutiny of departmental directives and other documents which are not made under statutory authority. *The Freedom of Information Act*⁷⁴ answers this concern in part, but it would be preferable for the definition of 'regulation' in *The Regulations Act*⁷⁵ to be broadened to subject 'non-statutory documents' to the scrutiny of the office of the Registrar of Regulations and, in turn, to the Legislative Standing Committee(s).

- (5) It is suggested that the principles of a participatory democracy should be used as guidelines within the executive branch when legislation is passed pursuant to delegated powers. This means that there should be a concerted effort in the executive branch to con-

70. *The Regulations Act*, R.S.M. 1970, c. R60.

71. *Supra* n. 67, at 15.

72. For further details concerning the key word regulation identifier system, see *supra* n. 48, at 167 ff.

73. An example might help to clarify the concept. Suppose that this proposal was implemented in Manitoba and that the term 'regulation' was chosen as the 'key word identifier' in *The Regulations Act*, R.S.M. 1970, c. R60. The enabling provisions of all of the public statutes would need to be reviewed to determine whether regulations made pursuant to each provision should be forwarded for filing. Only those regulations passed pursuant to an enabling provision which contained the key word 'regulation' would be automatically forwarded to the Registrar for filing.

74. *The Freedom of Information Act*, S.M. 1984-85, c. 6 (F175) (not yet proclaimed).

75. *The Regulations Act*, R.S.M. 1970, c. R60.

sult with all persons who may be interested in a proposed regulation. One method of achieving this goal would be to provide for a 'notice and comment' procedure where all proposed regulations would be published publicly in advance giving interested persons an opportunity to comment thereon. Further study of the desirability and feasibility of such a reform for Manitoba is required before it can be recommended. Its implementation has, however, been recommended at the federal level by the Economic Council of Canada⁷⁶ and the Standing Joint Committee on Regulations and Other Statutory Instruments.⁷⁷ It has been operating in the United States since 1946 pursuant to section 553 of the *Administrative Procedure Act*.⁷⁸ In a study paper prepared for the Ontario Commission on Freedom of Information and Individual Privacy, Professor David Mullan concluded that a strong case could be made in that province for the adoption of general legislation along the lines of the American prototype.⁷⁹

- (6) Finally, it is suggested that the publication of regulations be improved. First, for the reasons cited earlier in this article, it is proposed that there be no dispensation with publication as is now provided for under subsection 4(3) of *The Regulations Act*.⁸⁰ Secondly, it is suggested that an updated looseleaf consolidation of regulations, similar to the Continuing Consolidation of Statutes, would facilitate access to regulations. Access to information is, after all, the most important prerequisite to public involvement. As the MacGuigan Committee observed: "In political matters knowledge is the beginning of power, and its lack, impotence".⁸¹

76. See Economic Council of Canada, *Responsible Regulation, An Interim Report* (1979). This recommendation was endorsed in 1980 by the Canadian Bar Association in its submission to the Parliamentary Task Force on Regulatory Reform: see Canadian Bar Association, *Submission in Regard to Discussion Paper, August, 1980 of the Parliamentary Task Force on Regulatory Reform* (1980).

77. See Canada, Parliament, Standing Committee of the Senate and House of Commons on Regulations and Other Statutory Instrument, *Fourth Report* (Ottawa: Queen's Printer for Canada, 1980), 7:21 (John M. Godfrey, Q.C. and Perrin Beatty, Joint Chairmen). See also Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper 25 (Ottawa: The Commission, 1980) 144 ff.

78. *Administrative Procedure Act*, 5 U.S.C., s. 553.

79. *Supra* n. 10.

80. *The Regulations Act*, R.S.M. 1970, c. R60, ss. 4(3).

81. *Supra* n. 10, at vii.