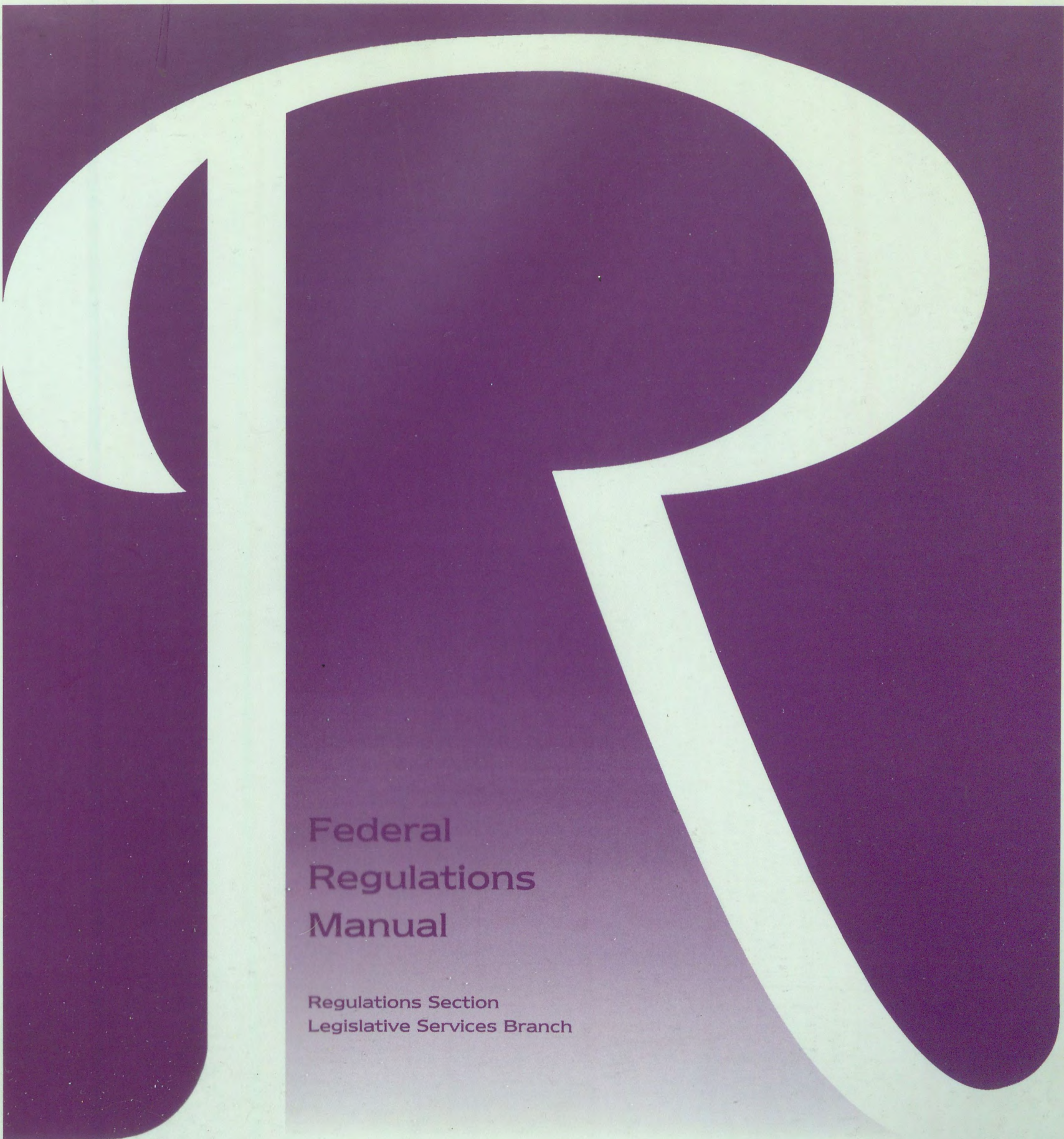




Department of Justice
Canada

Ministère de la Justice
Canada

Canada



**Federal
Regulations
Manual**

Regulations Section
Legislative Services Branch

FEDERAL REGULATIONS
MANUAL

Regulations Section
Legislative Services Branch
Department of Justice Canada

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For convenience, the masculine pronoun is used in this document to refer to either male or female persons, where the context does not clearly indicate one or the other.

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INTRODUCTION

This manual is intended for everyone involved to a greater or lesser extent in developing regulatory texts within the framework of federal legislation, whether this involvement consists in developing policy, drafting a text, examining a text as a lawyer of a regulatory department or agency, or conducting the final review. It covers all aspects of the process whereby federal regulations are developed.

The manual has been prepared by members of the Regulations Section, Legislative Services Branch, Department of Justice. In particular, we would like to acknowledge the contribution made by the legislative editors and jurilinguistic revisors of the Section in sharing their linguistic and drafting expertise with respect to regulations.

The manual is divided into five parts:

- PART 1:** Federal Regulations and the Regulations Section — An Overview
- PART 2:** The Regulatory Process
- PART 3:** How to Give Drafting Instructions
- PART 4:** Drafting and Format Rules
- PART 5:** Developing Regulations: The Basic Steps and the Plain Language Approach

Part 1 discusses federal regulation-making in the context of federal legislation, and explains the role played by the Regulations Section in this regard. It also lists the services that the Section provides to regulatory departments and agencies.

Part 2 discusses the regulatory process as it was established by the *Statutory Instruments Act*. This Act, which came into force in 1972, is the framework legislation that makes the examination, registration and publication of regulations mandatory. The various stages of the process are reviewed, and practical examples and explanations of exceptions are provided.

The information in Part 3 is for regulatory departments and agencies that choose to give instructions to Regulations Section drafters instead of drafting regulations themselves. On the basis of such instructions, drafters can draw up texts that will have the desired effect.

For anyone drafting a regulation or reviewing it at any stage in the process, Part 4 is a practical tool that sets out the applicable federal drafting conventions. Headings are listed in alphabetical order for ease of consultation, and a number of examples are given.

Part 5 consists of a text that was written in co-operation with the Regulatory Affairs

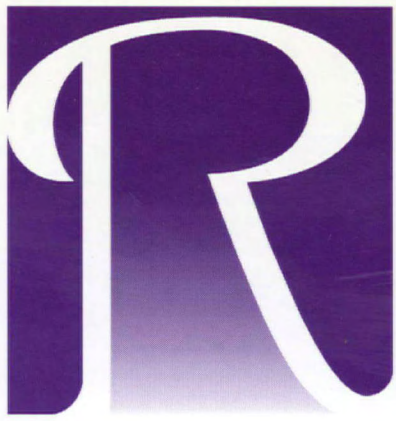
INTRODUCTION

Division of Treasury Board as part of a pilot project on plain language. It highlights all the phases in the development of a regulation, from its conception to its making. It also provides information on usability tests and on new trends in plain language, and references to more specialized texts.

We hope you will find the manual to be a most helpful tool, and we invite you to send your comments and suggestions to the following address:

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Federal Regulations Manual

Part 1

Part

1

PART 1

**FEDERAL REGULATIONS
AND THE REGULATIONS
SECTION — AN
OVERVIEW**

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PART 1

FEDERAL REGULATIONS AND THE REGULATIONS SECTION — AN OVERVIEW

1. INTRODUCTION

Legislation in Canada consists of statutes and regulations, as interpreted by the courts. For Canadian citizens, statutes and regulations have the same effect: citizens must comply with both and are liable to penalties if they do not. In the event of a court challenge, the same rules of interpretation apply to both regulations and statutes.

To understand the importance of federal regulations, we must consider their legal framework, the reasons for the requirements of the regulatory process and the parties involved in this process. After noting the proliferation of regulations, we will see how the Regulations Section has adapted its services to better carry out its mandate, which is to ensure that federal regulations are legally sound and that their draftsmanship, in both official languages, is of the highest quality. At the same time, the Regulations Section must take into account the needs and roles of regulatory departments and agencies as well as its own.

2. LEGAL FRAMEWORK FOR REGULATIONS

Federal statutes are the expression of policies established by Parliament, whose members have been elected by the people to govern. They create standards of general application with binding legal effect on all Canadians.

The matters to which elected representatives must turn their attention are so numerous and so specialized that, for obvious reasons of efficiency, members of Parliament must delegate to the executive branch the power to deal with these matters. Thus Parliament, whenever it considers it necessary, delegates to the executive the legislative power to complete, through regulations, the policies set out in a statute or to establish, also through regulations, policies that are within the scope of the statute. Just as Parliament does through the enactment of bills, the executive, when exercising the regulatory power delegated to it by Parliament, creates general standards that have binding legal effect.

Although the legislative power exercised by the executive is of the same nature as

that exercised by Parliament, its scope is different. Parliament's legislative power is an independent power, constrained only by the Constitution, in particular, the *Canadian Charter of Rights and Freedoms*, whereas the executive, when exercising its regulation-making power, must also observe the limits established by the enabling Act.

3. FORMALITIES OF THE REGULATORY PROCESS

The creation of laws, whether by statutes or regulations, is subject to certain requirements of the Canadian Constitution, which is based on the fundamental principle of the "rule of law". The two ideas that define this principle are, first, that everyone is subject to the law and must obey it and, second, that the law must be such that it can serve as a guide to those it governs. Acts and regulations must be written and communicated in such a way that members of the public clearly know what their rights and obligations are, failing which these rules risk being declared unenforceable by the courts. Regulations, furthermore, must stay within the legal framework of the authority delegated by Parliament.

In the late 1960s, the issue of creating rules of law by means of regulations was the subject of a study conducted by the Special Committee on Statutory Instruments, which tabled its report (known as the MacGuigan Report) in 1969. Its recommendations sought chiefly to reassure Canadians that federal regulations would respect the principle of the rule of law.

Several of the recommendations in the MacGuigan Report were enshrined in the *Statutory Instruments Act* of 1972. This Act put in place the formalities of the process for creating rules of law through regulations, that is, the examination by the Department of Justice of the legality and draftsmanship of proposed regulations, the registration of regulations by the Clerk of the Privy Council, their publication in the *Canada Gazette*, and their examination by the Standing Joint Committee for the Scrutiny of Regulations.

4. STAKEHOLDERS

After the *Statutory Instruments Act* came into force, the groups responsible for carrying out the formalities of the regulatory process took steps to ensure that they could execute their mandate under the Act:

- The Department of Justice established the Privy Council Office Section, now known as the Regulations Section, whose role is to review the legality and draftsmanship of all proposed regulations.
- The Office of the Clerk of the Privy Council appointed a registrar to register

regulations and established a team of editors to coordinate their publication in the *Canada Gazette*.

- The Standing Joint Committee for the Scrutiny of Regulations hired legal advisors to assist in the execution of its mandate, namely, the examination of the legality and draftsmanship of regulations after their publication in the *Canada Gazette*.

5. PROLIFERATION OF REGULATIONS

In recent years the government's regulatory activity has grown by leaps and bounds. Prior to the 1970s, most rules of law were contained in the statutes, while regulations only set out the details of legislative policies. Since then, as was observed by the House of Commons Standing Committee on Finance in 1993, "[t]he tendency to enact 'framework' or 'shell' legislation, leaving not only details but substantive provisions and policy to regulations, has increased."

There are, at the federal level alone, approximately 3,000 regulations comprising over 30,000 pages, compared with some 450 statutes comprising about 13,000 pages. Furthermore, departments and agencies submit to the Regulations Section on average about 1,000 draft regulations each year, whereas Parliament enacts about 80 bills during the same period. The executive thus plays a major role in setting rules of law that apply to Canadian citizens.

The proliferation of regulations reflects the practical reality that creating rules of law through regulations offers greater flexibility than creating them through statutes. Because the regulatory process is not as lengthy or as formal as the legislative process, it allows rules of law to be changed much more quickly, and this has advantages both for Canadian citizens and for the government.

6. THE REGULATIONS SECTION AND ITS MANDATE

It is the mandate of the Regulations Section to examine, under the *Statutory Instruments Act*, all draft regulations to ensure that they are legally valid, that they take both of Canada's legal systems into account, and that the rules of law which they contain are clearly conveyed in both official languages while meeting the standards for form and draftsmanship. To ensure the legal validity of draft regulations, the Section must determine that the regulations are consistent with the powers delegated by Parliament, do not constitute an unusual or unexpected use of those powers, do not trespass unduly on existing rights and freedoms, and are consistent with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.

At present, the services of more than 40 Department of Justice lawyers specializing in delegated legislation are dedicated to this mandate. About half of these lawyers are responsible for examining the English version of draft regulations, and the other half, the French version. A technical and linguistic support unit is at the disposal of the lawyers to help ensure that the quality of both versions is high and that they convey the same meaning.

In the early 1980s, the Section came under considerable criticism from regulatory departments and agencies, especially regarding the slow pace at which files were processed and the fact that problems were pointed out at the last minute with no suggestion as to how they might be resolved. Other criticisms were that the Section was too concerned with details of language and punctuation and that there was a lack of consistency in the legal opinions given. In defence of the Section, it should be stated that it had only about 12 lawyers on staff during that period, each of whom had, at any given time, a workload of 100 to 150 active files.

Since then, the Department of Justice has worked hard to improve the service it provides as part of the regulatory process, by making changes in its structure and, more particularly, in the Regulations Section.

► **Creation of the Legislative Services Branch**

To harmonize the drafting of bills and regulations, the Department created the Legislative Services Branch, consisting of the Regulations Section, the Legislation Section, and a technical and linguistic support unit. The Branch is headed by the Chief Legislative Counsel, whose mandate includes promoting communication and exchanges between the two sections so that there will be, to the extent possible, a uniform approach to the creation of rules of law, whether by means of statutes or regulations.

Several committees comprising members of both sections have been formed to harmonize standards for drafting statutes and regulations. As well, the Chief Legislative Counsel has established a legal training program for all Branch lawyers to standardize the approach used in the legal opinions they give to clients. To harmonize the practices of both sections, the Chief Legislative Counsel also encourages exchanges of personnel between them. Such exchanges make for greater flexibility in constituting teams of drafters, and improve service to clients by making it possible to assign the same drafting team to a bill and to its regulations.

More recently, a committee co-chaired by the Chief Legislative Counsel and a senior Privy Council official was created to study the possibility of improving the legislative and regulatory processes. The committee will consider the efficiency of these processes and the manner in which they can be better integrated. The committee

includes representatives of Treasury Board, the Privy Council Office and a number of regulatory departments and agencies.

► **Regulations Section — an improved approach**

To better carry out its mandate, the Regulations Section has made several changes, particularly with respect to its resources, the services it provides, and the mechanisms it uses to determine the needs of its clients.

• *Resources of the Section*

It became clear over the years that the Section's resources were inadequate. To better meet the needs of its clients — regulatory departments and agencies — the Section has adopted a cost-recovery policy (*see APPENDIX A*) under which some services are funded solely by the Section's budget, some partly by the Section and partly by the client or its legal services unit, and some entirely by the client. Consequently, the resources used to examine the legal validity and draftsmanship of regulations have increased markedly.

The cost-recovery policy makes it possible for the Regulations Section to provide regulatory departments and agencies with a made-to-measure service that can take several forms, for example:

- the creation of satellite units for clients wishing to have a team of lawyers working exclusively for them on all their draft regulations;
- the creation of temporary teams of lawyers to work directly on site with the client on a particular project;
- the creation of teams of lawyers that will give priority to certain draft regulations.

• *Services provided by the Section*

The Section carries out its mandate in a variety of ways. Instead of confining itself to examining draft regulations at the end of the process, the Section encourages regulatory departments and agencies to communicate with it at the beginning of the process so that drafters can be assigned to work with them as a team and guide them throughout the process. In this way, there are no last-minute surprises and the whole process is much more effective.

As a point of convergence for all federal regulations except those exempt from examination, the Regulations Section is in a strategic position to serve as a "one-stop shop", providing clients with a wide range of made-to-measure services on request. For example, the Section can

- provide legal opinions on the scope of the regulation-making authority (clients find this service particularly useful in determining which approach to adopt when they are uncertain as to what is authorized by their enabling Act);
- determine whether a document is subject to the regulatory process, including a determination under section 4 of the *Statutory Instruments Act* on whether a document is a regulation (*see PART 2* of this Manual for additional information on the regulatory process);
- draft the regulations from instructions received from clients (*see PART 3* of this Manual, which contains guidelines for clients who choose this type of service);
- examine proposed regulations drafted by clients (*see PART 4* of this Manual for standards governing the form and draftsmanship of federal regulations);
- together with the Legislation Section, assist clients, as they develop a legislative scheme, in distinguishing between what should be dealt with in the statute, what should form part of the regulations, and what should be considered an administrative matter;
- work in partnership with clients throughout the consultation process to ensure that the proposed regulations reflect the concerns expressed during the consultations;
- examine any legislative instrument that is exempt from the regulatory process to ensure its legality and readability, or provide advice on or draft models for these instruments;
- ensure that proposed regulations are consistent with government-wide and departmental policies;
- help clients in their dealings with the Standing Joint Committee for the Scrutiny of Regulations regarding legal and drafting issues; and
- coordinate the translation of drafting instructions or draft regulations prepared by clients.

• *Mechanisms for determining client needs*

The Regulations Section has put in place several mechanisms for determining clients' needs so that it can respond appropriately to them:

- It has developed service standards (*see APPENDIX B*) that it is committed to observing and that will be revised regularly to take into account the constant changes that clients face.
- Since April 1997, the Section has been sending out a quality-of-service questionnaire with all draft regulations once their legal and drafting examination is completed. To date, the results of the questionnaires indicate a client satisfaction rate of 92% with the services provided by the Regulations Section.
- The Section surveyed the managers of regulatory programs in various regulatory departments and agencies to see if the services provided by the Section were meeting their needs. The results show an average satisfaction rate of about 80%.

The Section has compiled the comments from the quality-of-service questionnaires and the survey, and will adapt its services as much as possible to better meet the expectations of clients.

7. WORKING TOGETHER

Despite the many changes that the Regulations Section has made to meet the needs of its clients, the Section cannot hope to meet their expectations without their help, in consultation with their legal services unit. To ensure the most efficient use of the services provided by the Regulations Section, it is important to understand the roles of both the clients and the Section, and the process in place within the Section. The roles differ somewhat depending on the service requested.

Given their distinct roles, it is only by working together that the client, the legal services unit and the Regulations Section will be able to produce the highest quality regulations in the most efficient manner:

► **Role of clients**

Regulations Section lawyers look to the client and its legal services unit for expertise in the subject matter of the regulations and the policy on that subject matter. The instructing officer for a regulation is the official of the regulatory department or agency, or the legal services lawyer, responsible for conveying policy instructions to the

drafters and answering any questions that may arise during the drafting and examination of the proposed regulations. The instructing officer is an expert in his or her field, just as the drafters are in the field of legislative drafting. Although more than one person may be responsible for the development of policy, the drafting and examination process progresses most smoothly when only one instructing officer is identified. To fulfil this role adequately, the instructing officer must be

- (a) knowledgeable in the policy area that is the subject matter of the regulations;
- (b) knowledgeable in respect of the enabling Act, any regulations to be amended and any other Acts or regulations that have an impact on the proposed policy;
- (c) knowledgeable about any international agreements to which Canada is a signatory that may have a bearing on the policy area in question;
- (d) at a sufficiently senior level to be able to
 - (i) make policy decisions that will not be overruled, or
 - (ii) where appropriate, obtain decisions from key people in the regulatory department or agency, such as the Deputy Minister;
- (e) either personally competent to verify that both official language versions of the instructions and draft accurately reflect the policy, or able to ensure that a resource person is available to do it;
- (f) able to ensure that a resource person is available to answer questions as to terminology in the two official languages; and
- (g) knowledgeable as to which officials in the regulatory department or agency must be consulted on the draft regulations — for example, the technical experts who give advice on matters such as appropriate test methods or standards, the department's own regulatory affairs group and the enforcement specialists.

► **Role of the Regulations Section**

The lawyers of the Regulations Section are specialists in the area of delegated legislation (for example, regulations and orders made by ministers, boards and agencies). They are experts in administrative law, legislative drafting and statutory interpretation who make an objective assessment of a proposed regulation using the criteria set out in the *Statutory Instruments Act*.

► **When drafting instructions are submitted**

The regulatory department or agency may choose to submit drafting instructions rather than draft regulations. The instructions must set out, in both official languages, the policy that the department or agency intends to implement in the proposed regulations, as well as such matters as exceptions to the proposed regulatory requirements and international obligations that must be respected. Using this information, a team of drafters gives advice on the legal authority for the regulatory proposals, assists in the process of developing the regulations, and produces drafts that conform to the criteria of the *Statutory Instruments Act*, including government standards for the presentation of legislation (for example, the numbering system and amending formulas). The client is then asked to verify these drafts to ensure that the policy set out therein is the policy that is intended.

► **When draft regulations are submitted**

The regulatory department or agency may choose to submit draft regulations for examination of their conformity to the criteria set out in the *Statutory Instruments Act*. If this option is chosen, the draft regulations must be submitted to the Regulations Section in both official languages. A team of drafters is assigned to the file, and in most cases, they will require additional information to facilitate the examination. They will give advice as to the legal authority for the various provisions of the regulations and, where needed, will redraft provisions that do not meet accepted drafting standards. They will draw legal and drafting problems to the attention of the instructing officer, and suggest solution to these problems. They will submit the redrafted regulations to the client for verification, to ensure that the policy set out in the redraft is the policy intended by the client.

► **Process within the Regulations Section**

When the Regulations Section receives a request to examine proposed regulations or to draft regulations from instructions, it usually assigns two lawyers to the file, one who drafts in English and one who drafts in French. The drafting team discusses the legal and drafting problems in the file. Usually, they will also meet with the client's officials and with legal services lawyers to obtain clarification of certain matters and ensure their own correct understanding of the policy to be set out in the proposed regulations.

As the examination or drafting advances, the drafting team may issue one or more discussion drafts of the regulations. A discussion draft is not the final product; on the contrary, it may be just the beginning. Its purpose is to give the client's officials an

opportunity to verify that their instructions as to policy have been understood and carried out by the drafters.

The draft regulations also undergo verification by the legislative editors and linguistic revisors of the Regulations Section. When a regulation is being planned, it is important to allow sufficient time for these verifications to be carried out. As a rule, one third of the overall time allotted to the examination of the regulation should be allowed for editing and revising. It may be necessary to have texts edited and revised more than once, depending on the extent of changes made to each draft.

A legislative editor reviews a regulation in one language only. There are therefore always two editors, one who edits the English version and one who edits the French. Among other things, they verify the logic, grammar, consistency, punctuation, format, citations and references.

The linguistic revisors compare the two language versions to ensure that they have the same meaning. They also provide other services, such as documentary and terminological research and writing assistance.

The wording of the regulations is not finalized until the client's officials and, where applicable, the legal service lawyers involved are satisfied that the policies of the client are correctly reflected in the regulations, and until both members of the drafting team are satisfied that the criteria set out in the *Statutory Instruments Act* are met.

8. CONCLUSION

The quality of regulations must remain high because of their impact on Canadian citizens and because of the high cost of legal challenges. The formalities of the regulatory process help to ensure this high quality. However, the Regulations Section also acknowledges its responsibility to review regulations quickly and at the lowest cost.

The Regulations Section has made many changes over the past few years in an effort to better meet the needs of regulatory departments and agencies. Although a great deal of work remains to be done, the Section's objective is clear: to provide a flexible service, tailor-made to clients' needs, whenever possible.

* * * * *

APPENDIX A

COST RECOVERY POLICY

1. Services funded solely by the budget that the Department of Justice allocates to the Regulations Section

- ▶ Examination, and drafting from instructions, of proposed regulations that are not especially urgent.
- ▶ Examination, and drafting from instructions, of proposed regulations that the Regulatory Affairs Division, Treasury Board Secretariat, classifies as files having priority over the other files that are funded solely by the Regulations Section's budget.
- ▶ The consultations, held in connection with most files, that are preparatory to the drafting of proposed regulations. They may take place in writing, by telephone or in person, and include consultations on bills at the drafting stage.
- ▶ Examination of all orders in council and advice to the staff of the Assistant Clerk of the Privy Council.
- ▶ Participation in client training.

2. Services funded in part by the budget that the Department of Justice allocates to the Regulations Section and in part by resources provided by the client's Departmental Legal Services Unit (DLSU) or by the client itself

- ▶ Exclusivity of service from teams of lawyers who work on the examination and the drafting from instructions of all proposed regulations from a particular client. In these cases, the Section calculates the resources that it will provide to the client free of charge by taking the average resources that the Section has allocated to that client over the past five years.
- ▶ The services of a Regulations Section lawyer who is teamed up with a DLSU counsel, a lawyer working for the client or a lawyer in private practice who is retained by the client.

3. Services funded wholly by the client

- ▶ The services provided to a client who wants its file to have priority over the files funded only by the Regulations Section budget, when the file has not been classified as a priority by the Director, Regulatory Affairs Division — in other words, when the file is a priority for the client but not necessarily for the Government.

- ▶ Services relating to projects for which Treasury Board has allocated regulatory drafting resources to the client.

* * * * *

March 31, 1996

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: EXAMINATION AND DRAFTING OF REGULATIONS				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
<p>1. We ensure a thorough legal examination of proposed regulations that is comprehensive and responsive to the needs of the client.</p> <p>2. We draft regulations that are legally sound, clear, comprehensive and responsive to the needs of the client.</p>	<ul style="list-style-type: none"> - Governor in Council - Clerk of PCO - regulatory authorities - lawyers of regulatory authorities, including Department of Justice lawyers - public at large 	<p>The following practice guide applies to both standards</p> <ul style="list-style-type: none"> - meet with clients to <ul style="list-style-type: none"> * receive instructions * clarify policies and instructions - evaluate the legal risks of making certain provisions in regulations - propose solutions to legal and drafting issues in draft regulations, and instructions for the drafting of regulations - examine draft regulations and instructions for the drafting of regulations as well as draft regulations from instructions, all in light of the legal requirements of the <i>Statutory Instruments Act</i> that regulations <ul style="list-style-type: none"> * be authorized by the statute under which they are made * not constitute an unusual or unexpected use of the authority pursuant to which they are made * not trespass unduly on existing rights and freedoms and not, in any case, be inconsistent with the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i> and the <i>Canadian Bill of Rights</i> 	<ul style="list-style-type: none"> - feedback from clients - comments of the Standing Joint Committee for the Scrutiny of Regulations - comments and decisions of courts and tribunals - clients' approval of drafts for stamping 	<ul style="list-style-type: none"> - comments and letters from clients - discussions with clients - regular consultation meetings with clients - number of positive comments and number of negative comments received on the client comment hotline - client satisfaction questionnaires and surveys - comments received as a result of prepublication of proposed regulations in <i>Canada Gazette</i> Part I - minutes and reports of the Standing Joint Committee for the Scrutiny of Regulations and Committee letters to clients - decisions of courts and tribunals - Work in Progress data - documents such as memos and discussion drafts maintained on each file - post mortem meetings with clients on particular files

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: EXAMINATION AND DRAFTING OF REGULATIONS				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
		<ul style="list-style-type: none"> - examine draft regulations and instructions for the drafting of regulations as well as draft regulations from instructions, all taking into account <ul style="list-style-type: none"> * the effect on the consistency of federal regulations * government policies, both legal and political - advise and assist the client in the development of legislative schemes - examine and draft regulations to ensure that the two language versions have the same legal effect, taking into account that Canada is a bijural country - in units constituted to provide one-stop shopping, examine documents incorporated by reference in regulations to determine whether they are within the regulation-making authority and are consistent with the provisions of the regulations - examine and draft regulations <ul style="list-style-type: none"> * in light of the drafting requirements of the <i>Statutory Instruments Act</i>, taking into account drafting practices in amending formulae, format and styles * taking into account the plain language policies of the government 		

March 31, 1996

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: EXAMINATION AND DRAFTING OF REGULATIONS				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
		<ul style="list-style-type: none"> - taking into account that Canada has two official languages and that each language version has equal force of law, examine and draft each language version of regulations to ensure that <ul style="list-style-type: none"> * it is clear and consistent within itself * it is consistent with the other language version - where a bill and its regulations are developed at the same time, we will try, where possible, to assign the same drafters to both - carry out jurisprudential, doctrinal and legislative research - maintain a library of up-to-date materials on <ul style="list-style-type: none"> * the law in relation to regulations and statutory interpretation * grammar and terminology - maintain up-to-date manuals of drafting practices and procedures - through linguistic specialists <ul style="list-style-type: none"> * conduct documentary and grammatical research * give linguistic opinions * act as a resource centre for information on language matters * consult with specialists, in particular specialists in the Department of Justice, the Translation Bureau and the Canadian Permanent Committee on Geographical Names 		

March 31, 1996

APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: LEGAL ADVICE				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
		<ul style="list-style-type: none">- use computer technology in drafting and conducting research - take an active role in<ul style="list-style-type: none">* Access to the Law Committee* Plain Language Committees		

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: LEGAL ADVICE				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
<p>3. We ensure that the legal advice that we give is legally sound, clear, comprehensive and responsive to the needs of the client, in particular:</p> <p>* advice on issues pertaining to regulations</p> <p>* advice pertaining to our corporate counsel role</p>	<ul style="list-style-type: none"> - Privy Council Office * Senior Personnel * Machinery of Government * Clerk of Privy Council * Assistant Clerk to the Privy Council (Orders in Council) - Government House, including the Chief Herald - regulatory authorities - sections of the Department of Justice 	<ul style="list-style-type: none"> - provide a specialist service in the field of regulations - work together with specialist sections of the Department of Justice and other specialist services of the Public Service, where necessary - evaluate the risks in pursuing certain actions and propose alternate solutions - on request of the client or the Legislation Section, advise on the drafting of enabling provisions in draft bills - examine and advise on Orders in Council - advise the Registrar of the <i>Canada Gazette</i> on matters pertaining to the <i>Statutory Instruments Act</i> - advise and assist the client in the development of legislative schemes - monitor the quality and consistency of opinions by means of an internal opinion review committee - maintain a data base of opinions given 	<ul style="list-style-type: none"> - requests from clients - feedback from clients - number of opinions given - frequency of consultation by other sections of the Department of Justice of opinions given - comments and decisions of courts and tribunals 	<ul style="list-style-type: none"> - comments and letters from clients - discussions with clients - regular consultation meetings with clients - number of positive comments and number of negative comments received on the client comment hotline - client satisfaction questionnaires and surveys - Work in Progress data - documents such as memos maintained on file for each opinion - decisions of courts and tribunals

March 31, 1996

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: LEGAL ADVICE				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
		<ul style="list-style-type: none"> - maintain a library of up-to-date materials on <ul style="list-style-type: none"> * the law in relation to regulations and statutory interpretation * grammar and terminology - carry out jurisprudential, doctrinal and legislative research - through linguistic specialists, <ul style="list-style-type: none"> * conduct documentary and grammatical research * give linguistic opinions * act as a resource centre for information on language matters * consult with specialists, in particular specialists in the Department of Justice, the Translation Bureau and the Canadian Permanent Committee on Geographical Names - take into account the effect of our opinions on the body of federal legislation - take into account government policies, both legal and political - determine whether a particular text is subject to the regulatory process 		

March 31, 1996

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
QUALITY: SUB-ACTIVITY: TRAINING				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
<p>4. We provide, on request, training in</p> <ul style="list-style-type: none"> * the law respecting regulations * the interpretation of legislation * the drafting of regulations * the regulatory process 	<ul style="list-style-type: none"> - officials of regulatory authorities - Canadian Centre for Management Development - Department of Justice lawyers 	<ul style="list-style-type: none"> - develop training modules appropriate to the work of the client - negotiate with clients the content and timing of training - explain our role to clients 	<ul style="list-style-type: none"> - feedback from clients - demand for training - number of requests for training - number of training sessions - quality of drafts and instructions submitted 	<ul style="list-style-type: none"> - comments and letters from clients - discussions with clients - regular consultation meetings with clients - number of positive comments and number of negative comments received on the client comment hotline - client satisfaction questionnaires and surveys - feedback from drafters

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
TIMELINESS: SUB-ACTIVITY: ALL				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
<p>We strive to provide a timely service that accommodates governmental and departmental priorities and urgencies.</p>	<ul style="list-style-type: none"> - Privy Council Office * Senior Personnel * Machinery of Government * Clerk of Privy Council * Assistant Clerk to the Privy Council (Orders in Council) - Government House, including the Chief Herald - regulatory authorities - lawyers of regulatory authorities, including Department of Justice lawyers - officials of the <i>Canada Gazette</i> - regulatees - public at large 	<ul style="list-style-type: none"> - on request, provide assistance to clients in determining realistic time frames as early as possible in the client's planning process - establish mutually acceptable deadlines with clients - re-evaluate deadlines with clients when they introduce policy changes - ensure that regulations are examined and drafted within deadlines agreed on with the client - ensure that the advice we give is given within the time frame agreed on with the client - follow government priorities set by Regulatory Affairs - verify and confirm priorities with clients - carry out the work in accordance with a portfolio system that identifies the lawyers responsible for the regulations of each regulatory authority 	<ul style="list-style-type: none"> - extent to which negotiated deadlines are met - feedback from clients - average turn-around time per file stamped in a year is less than the Cabinet-mandated 90 days - average turn-around time per opinion given in a year 	<ul style="list-style-type: none"> - comments and letters from clients - discussions with clients - regular consultation meetings with clients - number of positive comments and number of negative comments received on the client comment hotline - client satisfaction questionnaires and surveys - Work in Progress data that shows turn-around time per file, per department and over all - timekeeping data

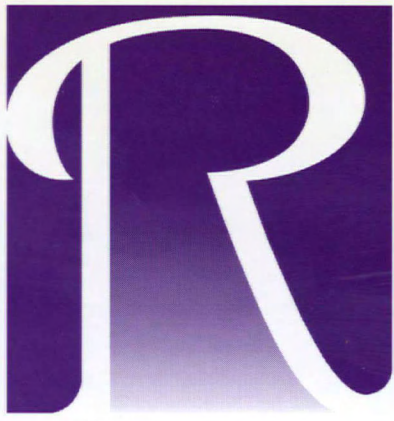
March 31, 1996

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
COMMUNICATION AND ACCESSIBILITY: SUB-ACTIVITY: ALL				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
<p>We treat our clients in a professional and business-like manner and aim to create a cooperative venture type of environment in our relations with our clients.</p>	<ul style="list-style-type: none"> - officials of the Privy Council Office <ul style="list-style-type: none"> * Senior Personnel * Machinery of Government * Clerk of Privy Council * Assistant Clerk to the Privy Council (Orders in Council) - officials of <ul style="list-style-type: none"> * Government House, including the Chief Herald * <i>Canada Gazette</i> - regulatory authorities - lawyers of regulatory authorities, including Department of Justice lawyers 	<ul style="list-style-type: none"> - inform clients of the services provided by the Regulations Section and be flexible in the arrangements for the provision of those services to meet the clients' needs - inform clients as to the names of the lawyers assigned responsibility for their files, and notify them promptly of any change in responsibility - avoid, as far as possible, changing the lawyers responsible for a file - where a bill and its regulations are developed at the same time, we will try, where possible, to assign the same drafters to both - carry out the work in accordance with a portfolio system that identifies the lawyers responsible for the regulations of each regulatory authority - keep clients informed of the status of the file - explain the process internal to the Regulations Section: <ul style="list-style-type: none"> * co-drafting * equal attention to, and scrutiny of, both language versions * meetings to receive and clarify instructions and give advice * issuance of discussion drafts 	<ul style="list-style-type: none"> - feedback from clients 	<ul style="list-style-type: none"> - comments and letters from clients - discussions with clients - regular consultation meetings with clients - number of positive comments and number of negative comments received on the client comment hotline - client satisfaction questionnaires and surveys

**APPENDIX B
REGULATIONS SECTION SERVICE STANDARDS**

ACTIVITY: LEGISLATIVE SERVICES				
COMMUNICATION:				
STANDARD	CLIENT	PRACTICE GUIDE	PERFORMANCE INDICATORS	INFORMATION SOURCE/ MEASUREMENT TOOLS
		<ul style="list-style-type: none"> * editing * linguistic revision and comparison of English and French versions * stamping * opinion committee * consultation with specialist sections of the Department of Justice and other specialist services of the Public Service, where necessary - maintain a co-operative attitude in working with clients and be open-minded to clients' suggestions and ideas - explain changes to drafts and reasons for them - keep clients informed of changes in priorities, drafting practices and regulatory procedures - provide, where possible, a tracking system integrated with that of the client - encourage the use of electronic transmission of instructions, drafts and memos - take an active role in regulatory coordinators' meetings - be courteous and helpful - be accessible in person and by E-mail and voice mail during business hours and at other times by arrangement 		



Federal Regulations Manual

Part 2

Part
2

PART 2

THE REGULATORY PROCESS

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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

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.

- [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)];
 - (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

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.

"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.

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

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.

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.

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

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".

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 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

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).

- 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;
- (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

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".

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.

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.

The Regulations Section has compiled a list entitled "SOR/SI Determinations"¹⁶ that specifies the nature of instruments made under certain legislative provisions. The list is not exhaustive, however. 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.¹⁷

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.

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,¹⁸ 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;¹⁹
- (c) two copies of the Regulatory Impact Analysis Statement (RIAS), if the regulations are subject to the Government's policy on prepublication, or two

¹⁶ The list is reproduced in APPENDIX B.

¹⁷ See **TRANSMISSION AND REGISTRATION**, item 5 in this Part.

¹⁸ See **ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS** in Part 4.

¹⁹ See **CONDITIONS PRECEDENT** in Part 4.

copies of an explanatory note, if the regulations are not subject to that policy.²⁰

- (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.

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;

²⁰ 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.

- (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.²¹

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.²²

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.

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

²¹ Some of the rules governing the form and draftsmanship of regulations are set out in Part 4.

²² 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).

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.²³

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.²⁴

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 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.

²³ 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.

²⁴ These instruments are on the "List of General Authorities to Publish", established by the Clerk of the Privy Council and reproduced in APPENDIX C.

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,²⁵ 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. 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

²⁵ 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.

authority is the Governor in Council, and since the Clerk of the Privy Council, in his or her capacity as Secretary to the Cabinet,²⁶ 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;²⁷ 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.²⁸

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.²⁹

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

²⁶ 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.

²⁷ 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.

²⁸ See note 24.

²⁹ 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".

- (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.³⁰

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.³¹ 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.

³⁰ 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.

³¹ Section 13 of the *Statutory Instruments Regulations*.

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.³² Generally speaking, these Acts have a significant impact on the public, and Parliament therefore considered it appropriate to 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.³³

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.³⁴ Regulations that are not subject to the prepublication policy are accompanied by an explanatory note instead of a RIAS.³⁵

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.³⁶

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".

³² For example, the *Customs Act* [s. 164(3)] and the *Canadian Environmental Protection Act* (s. 48).

³³ 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.

³⁴ See **REGULATORY IMPACT ANALYSIS STATEMENT** in Part 4.

³⁵ See **EXPLANATORY NOTE** in Part 4.

³⁶ See **CONDITIONS PRECEDENT** in Part 4.

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.

6.2 Publication — *Canada Gazette, Part II*

The *Canada Gazette, Part II*, is published every second Wednesday.³⁷ 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*.³⁸

The above regulations and other instruments are first examined by the Regulations Section.³⁹ 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.⁴⁰

³⁷ Section 13 of the *Statutory Instruments Regulations*.

³⁸ See note 24.

³⁹ As mentioned earlier (see note 22), 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.

⁴⁰ See item 7.2 in this Part.

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

- (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.⁴¹

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.⁴²

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.

⁴¹ 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".

⁴² See note 23.

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.

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.⁴³

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.⁴⁴ 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).

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

⁴³ 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 25).

⁴⁴ See **COMING-INTO-FORCE PROVISIONS** in Part 4.

time of the alleged contravention. However, according to that subsection, this defense 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.⁴⁵ 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.⁴⁶

⁴⁵ See paragraph 9(1)(b) of the SIA and paragraph 6(2)(b) of the *Interpretation Act*.

⁴⁶ 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.

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 . . .⁴⁷

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.

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:

⁴⁷ 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*.

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 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.⁴⁸

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

⁴⁸ Parliament of Canada, Tenth Report of the Standing Joint Committee for the Scrutiny of Regulations, Second Session, Thirty-third Parliament, 1988.

of each session of Parliament.⁴⁹ 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,⁵⁰ 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.

* * * * *

⁴⁹ The criteria are listed in APPENDIX A.

⁵⁰ 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 judgement 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

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
<p>Aeronautics Act, R.S., c. A-2 Air Regulations, C.R.C., c. 2</p>	<p>s. 4.3(2) s. 600 (directions)</p>	<p>SOR</p>	<p>The directions are made in the execution of a power conferred by regulations made under an Act of Parliament and are expressly authorized to be made by those regulations. The directions are legally binding rules of conduct applying to an undetermined number of people. (File O/93-096)</p> <p>Is is to be noted that the wording in the predecessor of s. 4.3(2) of the Act authorized the Minister to make regulations that could further authorize the Minister to make "orders or directions". After the 1985 amendments to the Act, only the term "order" was used. But there was no intent to bring about a substantial change in meaning. Only the terminology referring to that type of instrument was changed.</p>
<p>Aeronautics Act</p>	<p>s. 4.7(4) (regulations)</p>	<p>SOR</p>	<p>This subsection empowers the Minister to institute, maintain and carry out security measures prescribed by s. 4.7(2) AND such other security measures as the Governor in Council may prescribe. As well, s. 4.7(3) speaks of "security measures that are equivalent to those instituted by regulations made under subsection (4), thereby indicating the intent to confer regulation-making authority. (File O/92-40)</p>
<p>Atomic Energy Control Act, R.S., c. A-16</p>			

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
Uranium and Thorium Mining Regulations, SOR/88-243	ss. 57, 58 (directive)	SOR	An inspector is authorized by s. 57(1) to issue a written directive. The instrument is therefore expressly authorized to be issued. By virtue of s. 58, the person to whom it is issued must comply immediately. Moreover, non-compliance is punishable by a fine under s. 20 of the Act. The directive is thus a regulation as defined in para. (b) of the definition "regulation" in s. 2(1) of the <i>Statutory Instruments Act</i> . (File O/92-79)
Broadcasting Act, S.C. 1991, c. 11	s. 26 (direction)	SOR	The instrument is expressly authorized to be issued, made or established. It is legislative in nature in that it establishes a rule of conduct of general application i.e., the classes of persons who are ineligible to hold a broadcasting licence. The direction is addressed to a legislative entity (the CRTC) which is bound by subsection 22(1) of the Act to apply the direction. (File O/97-086)
Canada Business Corporations Act, R.S., c. C-44	s. 258.2 (order)	SOR	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. It is therefore a statutory instrument. It provides an exemption from a statutory rule of conduct of general application, i.e., a rule that is legislative in nature. It, too, is therefore legislative in nature. (File O/95-148)
Canada Labour Code, R.S., c. L-2	s. 253(1) (notice)	SOR	The instrument is expressly authorized to be issued, made or established, "by notice". Penalty for contravention. (File O/92-269)
Canadian Environmental Protection Act, R.S., c. 16 (4th Supp.)	para. 2(c)	not SI	No instrument is expressly authorized to be issued, made or established. (File O/92-190)
	para. 7(1)(e)	not SI	Whether "plans", "designs" and "programs" are instruments is not entirely clear. (File O/92-190)
	para. 7(2)(b)	not SI	No instrument is expressly authorized to be issued, made or established. (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	para. 8(1)(a) (objectives)	not SI	No instrument is expressly authorized to be issued, made or established. (File O/92-190)
	para. 8(1)(b) (guidelines)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. No penalty for contravention. Not legislative – recommends only. (File O/92-190)
	para. 8(1)(c) (guidelines)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. No penalty for contravention. Not legislative – recommends only. (File O/92-190)
	para. 8(1)(d) (codes of practice)	SI, maybe SOR	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. No penalty for contravention. Must be examined on a case-by-case basis to establish whether they are legislative or not. (File O/92-190)
	s. 9(1) (objectives)	not SI	No instrument is expressly authorized to be issued, made or established.
	(guidelines, codes of practice)	SI, maybe SOR	The instrument is expressly authorized to be issued, <u>but</u> there is no penalty for contravention. Must be examined on a case-by-case basis to establish whether it is legislative or not. (File O/92-190)
	s. 12(1) (list)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. No penalty for contravention. Not legislative – specifies substances to which priority should be given in assessing whether they are toxic – informative only. (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 16(1) (notice)	not SI	No instrument is expressly authorized to be issued. Provision concerns publication only. Penalty, para. 112(a). (File O/92-190)
	para. 18(1)(a) (notice)	not SI	No instrument is expressly authorized to be issued. Provision concerns publication only. Penalty, para. 112(b). (File O/92-190)
	para. 18(1)(b) (notice)	not SI	No instrument is expressly authorized to be issued. Provision concerns publication only. Penalty, para. 112(a). (File O/92-190)
	para. 18(1)(c) (notice)	not SI	No instrument is expressly authorized to be issued. Provision concerns publication only. Penalty, paras. 112(c) and 113(b). (File O/92-190)
	s. 20(7) (notice)	not SI	No instrument is expressly authorized to be issued. "The Minister shall give notice." (File O/92-190)
	s. 25(1) (list)	SOR	The list is an instrument expressly authorized to be issued. It triggers application of s. 26(1). (File O/92-190) Penalty for contravening s. 26 in ss. 112 and 113. Legislative – rule of conduct for anyone who manufactures or imports a substance that is not on the List.
	s. 25(2) (list)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. No penalty. (File O/92-190) Not legislative – appears to be informative, i.e., means substance is <i>not</i> on the <i>Domestic Substances List</i> .

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 26(5) (notice)	not SI	No instrument is expressly authorized to be issued – is informative only. The effect of s. 26(4) is legislative in that it relieves persons of a statutory obligation to provide information to the Minister. S. 26(5) informs public of this decision. (File O/92-190)
	s. 27(4) (notice)	not SI	No instrument is expressly authorized to be issued – is informative only. The effect of s. 27(3) is legislative in that it relieves persons of the statutory obligation to provide information to the Minister. S. 27(4) informs public of this decision. (File O/92-190)
	para. 29(1)(a)	not SI	No instrument is expressly authorized to be issued. (File O/94-73)
	s. 29(4) (notice)	not SI	No instrument is expressly authorized to be issued. Provision concerns publication only. (File O/92-190)
	s. 29(5) (notice)	not SI	No instrument is expressly authorized to be issued. Paras. 113(d) and (e) provide penalties for manufacturing in contravention of a condition or prohibition set by the Minister under s. 29(1) or (3). S. 29(5) informs the public of the condition or prohibition. (File O/92-190)
	s. 30(1) (list)	SOR	Addition to DSL; compare "compile", s. 25(1). (File O/92-190)
		SI	Deletion from NDSL; compare "compile", s. 25(2). (File O/92-190)
	s. 30(2) (list)	SOR	Deletion from DSL; compare "compile", s. 25(1). (File O/92-190)
		SI	Addition to NDSL; compare "compile", s. 25(2). (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 33(1) (order)	SOR	The instrument is expressly authorized to be issued. Toxic substances are regulated under s. 34. Penalty for contravening regulations, para. 113(f). Legislative; lists the substances that are regulated. (File O/92-190)
	para. 33(3)(a) (order)	SOR	The instrument is expressly authorized to be issued. Penalty for contravening regulations in respect of toxic substances, para. 113(f). Legislative; lists the substances that are regulated and the type of regulations applicable. (File O/92-190)
	para. 33(3)(b) (order)	SOR	The instrument is expressly authorized to be issued. Penalty for contravening regulations in respect of toxic substances, para. 113(f). Legislative; revokes regulations. (File O/92-190)
	s. 34(6) (order)	SOR	The instrument is expressly authorized to be issued. Legislative; suspends the application of the regulations in a province. (File O/92-190)
	s. 34(9) (order)	SOR	The instrument is expressly authorized to be issued. Legislative; makes the regulations once more applicable in a province. (File O/92-190)
	s. 35(1) (order)	exempt	Para. 35(6)(a) specifically provides that an interim order is exempt from the application of sections 3, 5 and 11 of the <i>Statutory Instruments Act</i> . (File O/92-190)
	ss. 36(5), (6) (direction)	SOR if in writing	If the direction is in writing, there is an instrument authorized to be issued. Penalty for contravention, para. 113(h). No requirement that "direct" be in writing. "Direction" may therefore <i>not</i> be an instrument but rather the action or function of directing. (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 39(8) (document)	not SI	The instrument is not expressly authorized to be issued by this subsection. The word "issued" is merely descriptive of the instrument. (File O/92-190)
	s. 40 (direct)	SOR if in writing	If the direction is in writing, there is an instrument authorized to be issued. Para. 113(i) makes it an offence to contravene a <i>direction</i> made under s. 40. (File O/92-190)
	s. 41(1) (order)	SOR	The instrument is expressly authorized to be issued. Penalty, s. 116.
	s. 42(1) (order)	SOR	Legislative; s. 41(2) provides that no person shall export any toxic substance specified on the List. (File O/92-190)
	s. 42(1) (order)	SOR	The instrument is expressly authorized to be issued. Penalty, para. 113(j).
	s. 42(2) (list)	SOR	Legislative; s. 42(3) requires the giving of notice when these substances are to be exported. (File O/92-190)
	s. 42(2) (list)	SOR	The instrument is expressly authorized to be issued, made or established. Penalty, para. 113(j).
	s. 43(1) (order)	SOR	Legislative; s. 42(3) requires the giving of notice if the export is to a country on this List. (File O/92-190)
	s. 43(1) (order)	SOR	The instrument is expressly authorized to be issued, made or established. Penalty, para. 113(j).
	s. 43(2) (list)	SOR	Legislative; s. 43(3) requires the giving of notice if hazardous waste is to be exported or imported. (File O/92-190)
			The instrument is expressly authorized to be issued, made or established. Penalty, para. 113(j). Legislative; s. 43(3) requires the giving of notice if hazardous waste is exported to or imported from one of the countries on the List. (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	ss. 45(2), (2.1) (publish) s. 53 (guidelines) ss. 57(4), (5) (direct, direction) s. 63(3) (order) s. 63(6) (order) s. 68(4) (order)	not SI SI, maybe SOR SOR if in writing SOR SOR SI	<p>No instrument is expressly authorized to be issued, made or established. (File O/92-190)</p> <p>The instrument is expressly authorized to be issued, made or established. No penalty for contravention. Must be examined on a case-by-case basis to establish whether they are legislative or not.</p> <p>NOTE: Wording parallels s. 6 of the <i>Department of the Environment Act</i>, at issue in <i>Oldman River Society</i> case at S.C.C. – Court found "shall" in guidelines – concluded that there was <i>nothing</i> in the guidelines to indicate that they were not mandatory, that there were rights enforceable under the Order and therefore that the guidelines were legislative. (File O/92-190)</p> <p>If the direction is in writing, there is an instrument authorized to be issued. Penalty for contravention, para. 113(h). No requirement that "direct" be in writing – "direction" may therefore <i>not</i> be an instrument, but rather the action or function of directing. (File O/92-190)</p> <p>The instrument is expressly authorized to be issued. Legislative – the order declares that the provisions of the regulations <i>do not</i> apply in a province. (File O/92-190)</p> <p>The instrument is expressly authorized to be issued. Legislative – the order cancels the exemption given under s. 63(3) and brings the province back into the régime of the Act. (File O/92-190)</p> <p>The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. Administrative – the subsection is a requirement to report to an inspector or to this designated person. (File O/92-190)</p>

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 71(1) (permit)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. Administrative – permits named persons to dump things into the ocean. (File O/92-190)
	s. 72(4) (permit)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. Administrative – takes away the permission to dump into the ocean. (File O/92-190)
	ss. 78(1), (2) (order)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. Administrative – the order is made to detain a ship where the inspector has reasonable grounds to believe that the owner or master of the ship has committed an offence. (File O/92-190)
	s. 86(2) (orders)	SOR	The instrument is expressly authorized to be issued. Legislative – determines which substances may be dumped and which factors must be taken into consideration by the Minister in determining whether to issue a permit. (File O/92-190)
	paras. 97(a), (b), (d), (e) (rules)	SOR	The instrument is expressly authorized to be issued. Legislative – (a) regulates proceedings and (b) the conduct of hearings, before a Board of Review; (d) prescribes criteria re costs ("prescribed" is defined to mean by regulation; in contrast, French uses only "établir les modalités"); and (e) generally, for regulating the conduct and work of the boards (French: "régir"). (File O/92-190)
	para. 97(c) (rules)	SI	The instrument is expressly authorized to be issued. Administrative – fixes the remuneration and travel expenses of board members. (File O/92-190)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
Copyright Act, R.S., c. C-42	s. 98(1) (agreement)	not SI	No instrument is expressly authorized to be issued, made or established. Administrative – Feds. agree with provs. re administration of Act. (File O/92-190)
	s. 99(1) (designate)	not SI	No instrument is expressly authorized to be issued, made or established. (File O/92-190)
	s. 5(2) (notice)	SOR	The notice is expressly authorized to be made. The Minister certifies "by notice". It is legislative in nature. It is of general application and is not limited to individual cases. (File O/92-014)
Criminal Code, R.S., c. C-46	s. 254(1) (order)	SOR	"Approved instrument", "approved screening device", "approved container". The order is expressly authorized to be made. These devices are approved for the purposes of section 258 of the Code, which creates a rebuttable presumption. Essentially, where a breath sample is taken in an approved container within a certain period of time and is analyzed by means of an approved instrument, the result is proof of the concentration of alcohol in the blood of the accused at the time at which the offence was alleged to have been committed. Approval of the devices is therefore part of the legislative scheme that may give rise to a conviction. The order is therefore legislative in nature. (File O/95-44)
Currency Act, R.S., c. C-52	s. 11(1) (licence)	SOR	The licence is expressly authorized to be issued (granted) and is therefore a statutory instrument. It is also a regulation because the contravention of its conditions results in a fine or imprisonment [s. 11(2)].
Customs Tariff, R.S., c. 41 (3rd Supp.)	s. 75.1(3) (list)	SOR	The list is expressly authorized to be made. It has force of law for an undetermined number of persons. It is a rule of conduct in that it has the effect of determining the manner in which the rights of persons importing goods will be determined. It is therefore legislative in nature. (File O/94-70).

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SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	s. 101 (remission orders)	SOR	This section expressly authorizes the Governor in Council to make remission orders. Moreover, a remission order, because it achieves the same end result as a legislative amendment (i.e., the instrument), is legislative in nature. (File O/92-215)
Farm Income Protection Act, S.C. 1991, c. 22	s. 4(1) (order)	SI	The order is expressly authorized to be made and is therefore a statutory instrument. Since it is purely administrative in nature, it is <i>not</i> a regulation. (File O/92-215)
Financial Administration Act, R.S., c. F-11	s. 3(1.1) (order)	SOR	This instrument is expressly authorized to be made. It is an amendment to Sch. I.1 of the FAA. Additions and deletions made by order to the schedule of any Act are legislative, because the text being amended is of a legislative nature. (File M-SCHED.FAA)
(as amended by S.C. 1991, c. 24)	s. 91 (authorizations)	not SI	Recent amendments to the FAA deleted the words "by order". Thus, Governor in Council authorizations are no longer "expressly authorized to be made" and are <i>not</i> statutory instruments.
Financial Administration Act, R.S.C. 1970, c. F-10	para. 13(b) (Order in Council P.C. 1972-724, ministerial fees)	not SI	No instrument is expressly authorized to be issued. The nature of a statutory instrument must be specified in the enabling legislation. An order in council made under a provision that does not specify the instrument would not be considered a statutory instrument. "Prescribe" in para. 13(b) of the 1970 FAA has no special meaning, such as "prescribe by regulations". It simply means "to fix". (File O/93-095)
Fisheries Act, R.S., c. F-14	s. 36(6) s. 37(2) (order)	not SI SOR	No instrument is expressly authorized to be made. (No file) The order is expressly authorized to be made. Contravention of the order is an offence under paragraph 40(3)(d). The order is therefore a regulation. (No file)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
	ss. 38(6), (7) (direct, direction)	SOR if in writing	If the direction is in writing, there is an instrument expressly authorized to be made. There is a penalty for contravention under paragraph 113(<i>h</i>). The written direction is therefore a regulation. (No file)
Indian Act, R.S., c. I-5	s. 69(1) (order)	SI	There is no requirement that the direction be in writing. "Direction" may therefore <u>not</u> be an instrument but rather the action or function of directing. The order is expressly authorized to be made and is, therefore, a statutory instrument. Since it is directed specifically to one Indian Band, it is <i>not</i> made in the exercise of a <i>legislative</i> power and is not, therefore, a regulation. (File O/90-117)
Indian Act, R.S., c. I-5 Indian Band Revenue Moneys Order, C.R.C., c. 952	s. 69(1) (order)	SI	The instrument is expressly authorized to be issued, made or established. It is not legislative in nature. The order delegates to an Indian band an administrative function that would otherwise be carried out by the Department of Indian Affairs or its Minister. (File O/95-114)
Insurance Companies Act, S.C. 1991, c. 47	s. 449(1) (order)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. (File O/92-262)
	s. 591(1) (order)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. (File O/92-262)
Motor Vehicle Safety Act, R.S., c. M-10	s. 10(1) (order)	SOR	The order is expressly authorized to be made and is, therefore, a statutory instrument. Although it is directed at one particular company, it is an exemption from a regulation that is a code of conduct. It therefore defines the ambit of the regulation and is legislative in nature. (File O/94-81)
National Transportation Act, 1987, R.S., c. 28 (3rd Supp.)	s. 64(1) (order)	some are SI some are not SI	An order varying or rescinding any "decision, order, rule or regulation of the Agency" under this provision should be given the same classification as the decision, order, rule or regulation that is being rescinded. (File O/NTA-87.S64)

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
<p>Northern Pipeline Act, R.S., c. N-26</p> <p>Pension Act, R.S., c. P-6 (as amended by S.C. 1990, c. 43)</p> <p>Pilotage Act, R.S., c. P-14</p> <p>Privileges and Immunities, Diplomatic and Consular Act, R.S., c. P-22 (repealed by L.C. 1991, c. 41, s. 14)</p> <p>Public Sector Compensation Act, S.C. 1991, c. 30</p>	s. 73 (exemption orders)	SI but not SOR	<p>The orders are expressly authorized to be made. However, they apply only to specific situations and individual companies. They are not regulations because they are administrative, not legislative, in nature. (File O/93-13)</p>
	s. 86	SI or SOR	<p>A direction by the Minister is <i>expressly</i> authorized to be issued and is, therefore, a statutory instrument as defined. Whether it is a regulation will depend on its content (see definition "regulation").</p>
	s. 21(4)	not SI	<p>No instrument is expressly authorized to be issued, made or established. It is therefore not an SI.</p>
	s. 14(3) (order)	SI	<p>The order is expressly authorized to be made and is, therefore, a statutory instrument. Since it is administrative in nature, it is not a regulation.</p>
	s. 21(4) (order)	SOR	<p>The instrument is expressly authorized to be issued, made or established. It is legislative in nature, as the pilotage authority is required to follow the order. The Minister therefore effectively usurps the legislative power of the pilotage authority. (File 97-007)</p>
	s. 5 (order)	SI	<p>The order is expressly authorized to be made and is, therefore, a statutory instrument. Since the order is directed to only one body, it is <i>not</i> a regulation.</p>
s. 22 (order)	SOR	<p>The order is "expressly authorized to be made". It is a regulation because it is made in the exercise of a legislative power. (File O/92-40)</p>	

APPENDIX B

SOR/SI DETERMINATIONS

UPDATED January 14, 1998

ACT	PROVISION	DETERMINATION	REASON
Statistics Act, R.S., c. S-19	s. 7 (order)	SI, maybe SOR	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. There is no penalty for contravention. Must be examined on a case-by-case basis to establish whether they are legislative or not. (File O/95-125)
Territorial Lands Act, R.S., c. T-7	s. 8 (order)	SI	The instrument is expressly authorized to be issued, made or established by or under an Act of Parliament. As the information is supplied on a voluntary basis, the order is not made in the exercise of a legislative power. A voluntary order cannot be contravened. (File O/95-125)
The Toronto Harbour Commissioners' Act, 1911	s. 28 (forms)	SI	The instrument is expressly authorized to be issued, made or established. The forms are therefore statutory instruments. They are not regulations, however, as the power in section 28 is not legislative in nature. Section 28 empowers the Minister to require the provision of routine information only, and not to include (legislative) standards of conduct. (File O/97-82)
Yukon Act, R.S., c. Y-2	para. 21(k) (by-laws)	SI	The instrument is expressly authorized to be issued, made or established, but may fall within the exception in subparagraph (b)(iii) of the definition "statutory instrument", i.e., it may be "intended only for use or assistance in the making of a decision or a determination of policy, or in the ascertainment of any matter necessarily incidental thereto". Even if the instructions do not fall within the exception, they are still not regulations, because they are not legislative and do not embody norms or standards of conduct of general application. (File O/97-92)

APPENDIX C

LIST OF GENERAL AUTHORITIES TO PUBLISH (Prepared pursuant to section 14 of the Statutory Instruments Regulations) (Updated 97-01-20)

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 Referendum Fees Tariff
(see *Referendum Act*)

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

CANADA SHIPPING ACT

Designation of Ports Where Certain Persons May be Appointed Orders

Load Line Assignment Authorization Orders

Load Line Exemption Orders

Marking of Ships Exemption Orders [subsection 12(2)]

Non-Canadian Ships Safety Orders

Pleasure Yachts Marking Orders

Ship's Tonnage Survey and Measurement Fees Regulations

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

DIVORCE ACT

Minister of Justice Authority to Prescribe Fees Orders

FEDERAL COURT 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

OTHER THAN STATUTORY AUTHORITY

Canadian Orders, Decorations and Medals Directives

Canadian Passport Orders

Canadian Volunteer Service Medal Orders

European Community Monitor Mission Medal Orders

Gallantry Awards Orders

Memorial Cross Orders (World War I)

Memorial Cross Orders (World War II)

Reproduction of Federal Law Order

Special Service Medal Bar or Clasp Orders

United Nations Medal Orders

PRIVACY ACT

Heads of Government Institutions Designation Orders

PUBLIC SERVICE EMPLOYMENT ACT

Designation of Certain Portions of the Public Service Orders

Public Service Exclusion Approval Orders

PUBLICATION OF STATUTES ACT

Statutes of Canada Distribution Directions
(see also *Financial Administration 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

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*)

TERRITORIAL LANDS ACT

Orders made under section 23

Reservation to the Crown Waiver Orders (section 13)

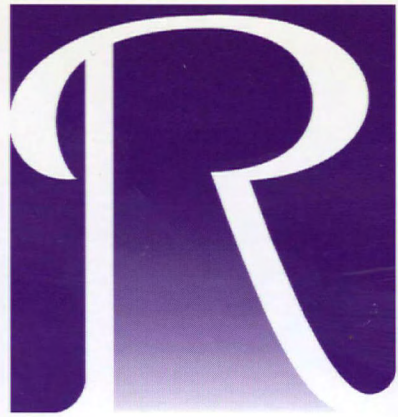
TRANSPORT ACT (DEPARTMENT OF)

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

WEIGHTS AND MEASURES ACT

Establishment of Specifications Orders

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Federal
Regulations
Manual

Part 3

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3

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

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.

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.
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.
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".

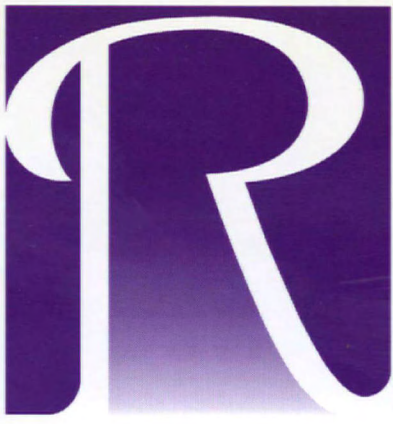
Item 24: The term "anticipated normal work schedule" could be replaced in subsequent years by the average number of hours worked in the previous year.

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".

* * * * *



Federal Regulations Manual

Part 4

Part

4

PART 4

DRAFTING AND FORMAT RULES

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* * * * *

INTRODUCTION

Part 4 of this Manual sets 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 concern primarily texts (regulations, statutory instruments and other documents) subject to the examination, registration and publication requirements of the *Statutory Instruments Act*, but apply also to other instruments made under an Act of Parliament or under the royal prerogative.

The rules are dealt with in separate items presented in alphabetical order that provide models and practical solutions to the problems faced by Regulations Section lawyers while 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.

Except where otherwise indicated, the term "regulations" has been used in its generic sense, for the sake of simplicity, 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.

At the end of Part 4, you will find a cross-reference table showing the titles of the items dealt with in this Part and their French equivalents, where applicable.

* * * * *


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ABBREVIATIONS: INITIALISMS AND ACRONYMS

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)
FORTRAN (formula translation)

Guidelines for using abbreviations

Abbreviations should be avoided in regulations and the term written out in full. If the term is to appear frequently in the body of regulations, however, an abbreviation may be used, if it is defined in the interpretation section of the regulations.

Examples:

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

Use capital letters only, without periods or spacing.

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

Examples:

U.S.; C.O.D.

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.

* * * * *

ADAPTATION OF A STATUTE

On rare occasions, Parliament expressly grants to the executive branch, usually to the Governor in Council, the power to amend an Act for the purpose of adapting it to a particular situation. Such cases can be found, for example, in the *Canadian Environmental Assessment Act*¹ and the *Referendum Act*.²

For instance, subsection 15(1) of the *Canadian Environmental Assessment Act*, which must be adapted by regulation, reads as follows:

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

If the Act had to be adapted to change "after consulting with the responsible authority" to "after consulting with the Minister of External Affairs", the drafter could take a minimalist approach and amend only those words that had to be adapted. This could be done by using a provision similar to an amending formula, such as the following:

2. Paragraph 15(1)(b) of the *Canadian Environmental Assessment Act* is adapted [varied for the purpose of adapting] by replacing the words "after consulting with the responsible authority" with the words "after consulting the Minister of External Affairs".

This approach does not give the user any information about the content of the

¹ 59. The Governor in Council may make regulations

...

(i) varying or excluding, in the prescribed circumstances, any procedure or requirement of the environmental assessment process set out in this Act or the regulations for the purpose of **adapting** the process in respect of

(i) projects to be carried out on reserves, surrendered lands or other lands that are vested in Her Majesty and subject to the *Indian Act*,

(ii) projects to be carried out outside Canada and any federal lands,

(iii) projects to be carried out under international agreements or arrangements entered into by the Government of Canada or a federal authority . . .

² 7. . . .

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, **adapt** the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

provision being adapted. The user would have to consult both the Act and the Regulations to arrive at the new adapted version of subsection 15(1) of the Act. On the positive side, the change is set out clearly.

Another approach, which may be viewed as more user-friendly, would be to reproduce subsection 15(1) of the Act, as adapted, by using an amending formula stating that the Act is being adapted:

4. Subsection 15(1) of the Act is adapted as follows:

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the Minister of External Affairs.

If a part of an Act or a series of sections of an Act are to be adapted, the drafter may choose to reproduce all the provisions as a block, including the provisions that are not modified. A general provision is then used to introduce the adaptation of that portion of the Act. This approach was taken in subsection 3(1) of the *Projects Outside Canada Environmental Assessment Regulations*:³

3. (1) Certain procedures and requirements of the environmental assessment process set out in sections 14 to 45 of the Act are varied, and portions thereof are excluded, such that the environmental assessment process for projects is the process described in the schedule.

The schedule reproduced, with the necessary adaptations, all of sections 14 to 45 of the Act. When a provision was excluded, a statement to that effect followed the provision number, as follows:

22. [Section 22 of the Act is excluded.]

* * * * *

³ SOR/92-491. See also the *Regulation Adapting the Canada Elections Act* (SOR/92-430), made under the *Canada Elections Act*.

AGREEMENTS, CONVENTIONS, TREATIES AND SIMILAR DOCUMENTS

When a proposed regulation contains an agreement, convention, treaty or similar document in a schedule, it is necessary for the schedule to be checked against the original document or, if the original document is not available, against an authentic copy, such as a certified copy. It is the responsibility of the regulatory department or agency to provide the original document or an authentic copy of it to the Regulations Section for examination.

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

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

* * * * *

AMENDING REGULATIONS

Statutes that delegate to competent authorities the power to make regulations are generally silent on the power to amend, repeal or replace the regulations. Unless otherwise specified in the enabling statute, the power to make regulations implicitly includes the power to repeal, amend or vary them or make others. This principle is confirmed by subsection 31(4) of the *Interpretation Act*, which states

(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

According to this rule of interpretation, the power to repeal, amend or vary regulations or make others is exercisable in the same manner and is subject to the same consent and conditions as the original regulations. Therefore, if certain regulations are subject to conditions precedent, those conditions must be met before the regulation-making authority can validly repeal, amend or vary the regulations or make others, whether in addition to or in place of the old ones (*see* **CONDITIONS PRECEDENT**).

In some cases, such as those involving a power to amend an Act or a schedule to an Act, Parliament expressly sets aside the above-mentioned rule of interpretation by conferring a specific power to the regulation-making authority. Subsections 33(1) and (3) of the *Canadian Environmental Protection Act* provide an example of this:

33. (1) Subject to subsection (4), the Governor in Council may, if satisfied that a substance is toxic, on the recommendation of the Ministers, make an order **adding** the substance to the List of Toxic Substances in Schedule I.

...
(3) Subject to subsection (4), the Governor in Council may, if satisfied that the inclusion of a substance specified on the List of Toxic Substances in Schedule I is no longer necessary, on the recommendation of the Ministers, make an order

(a) **deleting** the substance from the List and deleting the type of regulations specified in the List as being applicable with respect to the substance; and

(b) **revoking** the regulations made under section 34 with respect to the substance.

In view of these enabling provisions, the regulation-making authority may not delete a substance from the list using the power set out in subsection 33(1), because the power to delete is expressly provided for in paragraph 33(3)(a).

Format

Amending regulations (including those repealing or varying existing regulations) follow the same format as the regulations being amended, except that they contain amending formulas. Only the original regulation-making authority may amend, repeal or vary regulations. If new regulations are being made to replace the old ones, a provision to repeal the old regulations is inserted in the new regulations. It is usually placed before the coming-into-force provision, and the title of the old regulations is footnoted.

Since April 1996, amendments are no longer contained in a schedule to the order in council or other executive order (*see* old issues of the *Canada Gazette*, Part II). Under the Regulations Section's new policy, all amending regulations are now given a specific title instead of the general heading "SCHEDULE". This new procedure makes for a clearer distinction between the order and the regulations (*see* **ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS**).

Amendments to two or more regulations

Although an amending regulation usually amends only one regulation, it can sometimes amend two or more, as is the case in Miscellaneous Amendment Regulations.

To modify two or more regulations by means of a single amending regulation, the regulation-making authority (Governor in Council, minister, etc.) must be the same for all the regulations to be amended. The instruments to be amended must also bear the same designation, that is, "SOR" or "SI". In others words, an amending regulation cannot amend, at the same time, instruments designated "SOR" and others designated "SI".

An amending regulation that amends two or more regulations has the same format as Miscellaneous Amendment Regulations, except that the title does not include the words "Miscellaneous Program" at the end (*see* **MISCELLANEOUS AMENDMENT REGULATIONS** and **TITLE OF REGULATIONS**).

Note that a regulation amending two or more regulations may be made under more than one enabling statute.

Example 1: Amending regulation

His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment and the Treasury Board, pursuant to subsection 12(1) of the *Migratory Birds Convention Act, 1994*, hereby makes the annexed *Regulations Amending the Migratory Birds Regulations*.

REGULATIONS AMENDING THE MIGRATORY BIRDS REGULATIONS

AMENDMENTS

1. Subsection 15.1(2) of the *Migratory Birds Regulations* is replaced by the following:

(2) Every person who hunts a migratory game bird referred to in Schedule I in a non-toxic shot hunting zone set out in that Schedule shall use non-toxic shot.

2. Section 22 of the Regulations is repealed.

COMING INTO FORCE

3. These Regulations come into force on < . . . >.

Example 2: Regulation replacing an old regulation

His Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to subsections 3(3), 30(1) and 37(1) of the *Food and Drug Act*, hereby makes the annexed *Medical Devices Regulations*.

MEDICAL DEVICES REGULATIONS

INTERPRETATION

1. The following definitions apply to these Regulations.

...

2. . . .

...

REPEAL

92. The *Medical Devices Regulations*¹ are repealed.

COMING INTO FORCE

93. These Regulations come into force on July 1, 1998.

¹ C.R.C., c. 871

Example 3: Regulation repealing a single regulation

His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subsection 45(3) of the *Canadian Environmental Protection Act*, hereby makes the annexed *Regulations Repealing the Export and Import of Hazardous Wastes Regulations*.

REGULATIONS REPEALING THE EXPORT AND IMPORT OF
HAZARDOUS WASTES REGULATIONS

REPEAL

1. The *Export and Import of Hazardous Wastes Regulations*¹ are repealed.

COMING INTO FORCE

2. These Regulations come into force on < >.

¹ SOR/92-637

Example 4: Regulation repealing two or more regulations

If two or more regulations are to be repealed, the amending regulation may contain a schedule listing these regulations in order of publication.

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section . . . of the *Financial Administration Act*, hereby makes the annexed *Regulations Repealing Certain Regulations made under the Financial Administration Act*.

REGULATIONS REPEALING CERTAIN REGULATIONS MADE UNDER
THE FINANCIAL ADMINISTRATION ACT

REPEALS

1. The Regulations listed in the schedule are repealed.

COMING INTO FORCE

2. These Regulations come into force on January 1, 1998.

SCHEDULE
(Section 1)

Item	Column 1 Title	Column 2 Reference
1.	<i>Assignment of Crown Debt Regulations</i>	C.R.C., c. 675
2.	<i>Search, Reproduction and Certification of Documents Regulations</i>	C.R.C., c. 732
3.	<i>Destruction of Securities Regulations</i>	SOR/80-324
4.	<i>Security for Debts Due to Her Majesty Regulations</i>	SOR/87-505

Example 5: Order amending a schedule to an Act

Whereas, pursuant to subsection 48(1) of the *Canadian Environmental Protection Act*, the Minister of the Environment published in the *Canada Gazette*, Part I, on September 30, 1995 a copy of the proposed *Order Adding a Toxic Substance to Schedules I and II to the Canadian Environmental Protection Act*, in the form attached hereto, and persons were given an opportunity to file a notice of objection requesting that a board of review be established and stating the reasons for the objection;

And whereas, pursuant to subsection 33(1) of that Act, the Governor in Council is satisfied that the substance set out in the Order is a toxic substance;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment and the Minister of Health, pursuant to subsections 33(1) and 41(1) of the *Canadian Environmental Protection Act*, hereby makes the annexed *Order Adding a Toxic Substance to Schedules I and II to the Canadian Environmental Protection Act*.

ORDER ADDING A TOXIC SUBSTANCE TO SCHEDULES I AND II TO THE
CANADIAN ENVIRONMENTAL PROTECTION ACT

AMENDMENTS

1. Schedule I to the *Canadian Environmental Protection Act* is amended by adding the following after item 26:

Column I	
Item	Name or Description of Substance
27.	(4-Chlorophenyl)cyclopropylmethanone, O-[(4-nitrophenyl)methyl]oxime that has the molecular formula $C_{17}H_{15}ClN_2O_3$

2. Part I of Schedule II to the Act is amended by adding the following after item 10:

11. (4-Chlorophenyl)cyclopropylmethanone, O-[(4-nitrophenyl)methyl]oxime that has the molecular formula $C_{17}H_{15}ClN_2O_3$

COMING INTO FORCE

3. This Order comes into force on < >.

* * * * *

"BUT"

But is used to introduce a contrast to what precedes it or to introduce information that is unexpected. Its meaning is roughly "and in contrast", "and yet" or "except that", depending on the situation; in most instances, it can be used as a concise expression of these notions. In legislative drafting, it is particularly useful for describing scope and exceptions. Thus it is found primarily in definitions ("but does not include"), calculations ("but not more than", "but if the amount"), qualifying rules ("but in no case shall it", "that would, but for this section, be") and provisos.

It is the use of *but* as a conjunction — that is, as a link between two clauses¹ — that is most relevant to legislative drafting. (A clause has a verb, or an implied verb in cases of ellipsis).

Examples:

The Committee shall keep a record of its deliberations *but may do so* in whatever form it chooses.

A person may walk their dog, *but not* without a baggie.

The award recipients who reside in Canada shall be contacted by mail, *but* those who reside outside the country shall be contacted by telephone.

The types of clauses that *but* can link are as follows:

- two main clauses
- one main clause and one subordinate clause
- two subordinate clauses

¹ As a conjunction, *but* can link two consecutive clauses only. In this it differs from *and* and *or*, which can link a series. Thus:

A and B and C and D

A or B or C or D

Not: A but B but C but D

When a combination of conjunctions is used in a sentence, commas will make the sentence structure clear, distinguishing main ideas from subordinate ones. Thus:

A and B, but not C

A but B

A, and B or C, but not D

A and B, but not C or D

Examples:

Linking main clauses:

The police officer *shall report* to the Chief *but* the dog handler *shall report* to the Director.

(A but B)

The investigator *shall test* the chicken feed *but shall not test* the turkey feed.

(A but not B)

The applicant *may mail* the form in or hand-deliver it, *but shall not/may not* otherwise contact the officer.

(A but not B)

Introducing subordinate clauses:

The investigator shall close the barn door *after* the horse escapes *but before* the chickens do.

The sponsor may file a complaint at any time *before* the applicant arrives, *but not after* the applicant becomes a citizen.

The applicant may refer to a record that does not exist *but* [that] can be produced.

This Part applies to applicants who are present in Canada *but* who are not Canadian citizens.

Had *and* been used in place of *but* in these examples, a nuance of meaning and a signal of the intended relation between two parts of the sentence would have been lost.

* * * * *

CAPITAL LETTERS

The title at the beginning of a regulation and the headings of parts, divisions and subdivisions are written entirely in capital letters (*see* DIVISION OF REGULATIONS).

A reference to the title or a named part of a regulation is capitalized.

Examples:

- ... as set out in the *Hazardous Products Regulations*
- ... in Part 1 of the Regulations

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

Examples:

- ... in column I if an item of the schedule
- ... item 2 of Schedule 1

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

Examples:

- ... as set out in section 1 of Schedule 4
- ... in subparagraph 15(b)(i)

In a definition provision, although the opening sentence and all definitions are followed by a period, a defined term is not capitalized unless it normally begins with a capital letter.

Example:

1. The definitions in this section apply in these Regulations.

"Act" means the *Canadian Transportation Act. (Loi)*

"applicant" means a person who makes an application to the Agency for a certificate of fitness. (*demandeur*)

* * * * *

CITATION OF STATUTES

FEDERAL STATUTES

Revised Statutes of Canada, 1985

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

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

Although section 9 provides for a variety of acceptable forms, the following abbreviations are used in regulations: "R.S., c. . . ." and, in the case of a Supplement, "R.S., c. . . . (. . . Supp.)".

Note that the chapter numbers assigned by the Statute Revision Commission in the loose-leaf office consolidation of the Statutes of Canada are not to be used, because the consolidation has no official sanction.

Other statutes

Paragraph 40(1)(a) of the *Interpretation Act* provides for a variety of acceptable forms for citing statutes that are not part of the Revised Statutes of Canada, 1985 or that were enacted after December 12, 1988 (i.e., after the revision):

40. (1) In an enactment or document,

(a) an Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted or by reference to its long title or short title, with or without reference to its chapter number; . . .

The abbreviation used for statutes enacted after the revision is "S.C. 19 . . . , c. . . ."

Statutes that were enacted before the 1985 revision but that do not appear in the Revised Statutes of Canada, 1985 are cited as "S.C. 1980-81-82-83, c. . . ." or, in a statute revision year, as "R.S.C. 1970, c. . . .".

Title of statute

The short title is always used in the body of a regulation and in an order in council or other executive order. Even if an Act is not yet in force, we recommend using the short title in orders in council or other executive orders, including coming-into-force orders,¹ and in coming-into-force provisions that refer to the Act to determine when the regulations come into force.²

PROVINCIAL STATUTES

If a regulation refers to a provincial statute, the citation method should be the one used in the province.

* * * * *

¹ See **COMING-INTO-FORCE ORDERS**.

² See **COMING-INTO-FORCE PROVISIONS**, point 4, entitled "Date related to an event".

COMING-INTO-FORCE ORDERS

Most statutes delegate to the Governor in Council the power to fix their coming-into-force date. The provision of an Act authorizing the issuance of an order in council fixing the day of the commencement of the Act comes into force on the day on which the Act receives Royal Assent.¹ Such a provision is usually worded as follows:

74. This Act or any of its provisions² comes into force on a day or days to be fixed by order of the Governor in Council.

A more detailed formulation is sometimes used in an amending Act to provide for the coming into force of certain provisions enacted by a provision of the amending Act. It generally reads as follows:

221. (1) This Act or any provision thereof, or any provision of any Act, as enacted by this Act, shall come into force on a day or days to be fixed by order of the Governor in Council.

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

If an order in council states that an Act or a provision of an Act is to come into force on a particular day, the Act or provision comes into force on the expiration of the previous day.³

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

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

¹ Subsection 5(3) of the *Interpretation Act*.

² For a discussion on the meaning of "provisions", see *Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act*, [1970] S.C.R. 777.

³ Subsection 6(1) of the *Interpretation Act*.

If an Act provides that it shall expire, lapse or otherwise cease to have effect on a day to be fixed by order in council, the above rules apply, except that the Act ceases to have effect on the commencement of the day following the day stated in the order in council.⁴

Coming-into-force orders are not "regulations" within the meaning of the *Statutory Instruments Act*. However, they are statutory instruments. Paragraph 6(b) of that Act requires that they be registered by the Clerk of the Privy Council, and paragraph 11(3)(g) of the *Statutory Instruments Regulations* requires that they be published in the *Canada Gazette*, Part II. Such orders are designated "SI". Because they are to be published in the *Canada Gazette*, Part II, the Privy Council Office requires that they be examined by the Regulations Section. The examination proceeds from an administrative practice and not from a requirement of the Act. The coming-into-force orders are accompanied by an explanatory note that is published with the order (*see EXPLANATORY NOTE*).

Example: Coming into force of a statute as a whole

His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 43 of *An Act to amend the Young Offenders Act and the Criminal Code*, assented to on June 22, 1995, being chapter 19 of the Statutes of Canada, 1995, hereby fixes December 1, 1995 as the day on which that Act comes into force.

Example: Coming into force of a portion of a statute

His Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 14 of *An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts* (hereinafter referred to as "the Act"), assented to on June 15, 1995, being chapter 12 of the Statutes of Canada, 1995, hereby fixes January 31, 1996 as the day on which subsection 1(1) and sections 2 to 4 of the Act, sections 9, 10 and 10.3 to 10.6 of the *Lobbyists Registration Act*, as enacted by section 5 of the Act, and sections 6, 7, 9, 10, 12 and 13 of the Act come into force.

⁴ Subsection 6(1) of the *Interpretation Act*.

Example: Order amending a coming-into-force order

His Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 61 of *An Act to amend the Copyright Act*, assented to on April 25, 1997, being chapter 24 of the Statutes of Canada, 1997, hereby amends Order in Council P.C. 1997-1065 of July 25, 1997^a by replacing paragraph (b) with the following:

"(b) September 1, 1997 as the day on which subsection 67.1(2) of the *Copyright Act*, as enacted by section 45 of *An Act to amend the Copyright Act*, shall come into force;

(c) January 1, 1998 as the day on which section 67 and subsection 67.1(1) of the *Copyright Act*, as enacted by section 45 of *An Act to amend the Copyright Act*, shall come into force."

^a SI/97-94

Note that, if the Act has a short and a long title, the use of the short title is recommended.⁵

Older statutes

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

An order in council is required to authorize the issuance of every proclamation bringing an Act or a provision of an Act into force on a particular day.⁶ The order in council may be repealed or amended at any time before the proclamation is issued. If the proclamation has been issued and the coming-into-force date has not passed, there must be a new order in council recommending that a proclamation be issued repealing or amending the former proclamation, and not an order in council amending the earlier order in council.

A proclamation cannot provide for the coming into force of an Act or a provision of an Act on a day before the day on which the order in council authorizing its issuance is made, unless there is specific statutory authority to do so. The proclamation can provide that an Act or a provision of an Act shall come into force on the same

⁵ See **CITATION OF STATUTES**.

⁶ Subsection 18(2) of the *Interpretation Act*.

day as the order in council authorizing its issuance, even though the proclamation is actually issued on a later day.⁷

* * * * *

⁷ Subsection 18(3) of the *Interpretation Act*.

43. These Regulations come into force on January 1, 1998.

4. Date related to an event

In some cases, the coming into force of a regulation is conditional on another event, such as the coming into force of an Act or one of its provisions.

12. These Regulations come into force on the day on which section 43 of the *Canada-Israel Free Trade Agreement Implementation Act*, being chapter 33 of the Statutes of Canada, 1996, comes into force.

It should be noted that, when an Act is cited, the use of the short title of the Act, if there is one, is recommended, even if the Act is not in force.

5. Multiple dates

In other cases, it is provided that the regulations come into force in stages.

Example 1:

9. (1) These Regulations, except subsections 3(2) and 4(2), come into force on < >.

(2) Subsections 3(2) and 4(2) come into force on December 1, 1998.

Example 2:

21. (1) These Regulations, except section 10, come into force on June 1, 1997.

(2) Section 10 comes into force on December 1, 1997.

Example 3:

13. (1) Subject to subsections (2) and (3), these Regulations come into force on March 1, 1997.

(2) Items 2.3, 2.4 and 3.2 of Part 2 of Schedule 3 to the *Contraventions Regulations*, enacted by section 6 of these Regulations, come into force on June 1, 1997.

(3) Item 8.3 of Part 2 of Schedule 3 to the *Contraventions Regulations*, enacted by section 7 of these Regulations, comes into force on September 1, 1997.

Example 4:

4. These Regulations come into force

(a) in respect of passenger cars, on September 1, 1999; and

(b) in respect of multipurpose passenger vehicles and trucks, on September 1, 2000.

6. Retroactivity

Some Acts provide for the making of regulations with retroactive effect. The coming-into-force provision of the Regulations would then use the verb "deem" to express the fiction of going back in time for the coming into force.

Example 1:

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

Example 2:

22. 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 fiscal regulations, such as those made under the *Income Tax Act* and the *Excise Tax Act*, there is a well-established practice of drafting coming-into-force provisions as follows:

APPLICATION

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

(2) Section 2 applies after 1979.

The same approach is used when the coming into force occurs at a later date.

(3) Section 12 applies after 1999.

* * * * *

CONDITIONS PRECEDENT

Regulations may be subject to certain procedural conditions precedent. For example, the regulation-making authority may be required to consult with others or obtain the approval of others before making the regulations. In other cases, the Act may require that the regulation-making authority be satisfied that a certain fact or situation exists before exercising its regulation-making power.

Conditions precedent are prescribed in the enabling Act. It is therefore extremely important for the drafter to examine the enabling statute carefully, for if the statute prescribes conditions precedent to the exercise of the power and these are not fulfilled, the regulation-making authority cannot legally exercise its power.¹

Below are examples of orders in council and other executive orders in respect of regulations made under Acts that provide for conditions precedent. The fact that the condition precedent has been satisfied is recited in a paragraph introduced by the word "whereas". The wording of the "whereas" clause follows the wording of the provision in the Act setting out the condition precedent. If the condition precedent is the prepublication of the proposed regulations, the "whereas" clause is usually worded as follows: "Whereas . . . a copy of the proposed regulations . . . , **substantially in the form set out in the annexed regulations**, was published . . . ". If the regulations were not modified as a result of prepublication, the word "**substantially**" should be dropped.

Example 1: Consultation with interested persons

Whereas, pursuant to subsection 11(3) of the *Motor Vehicle Safety Act*, a copy of a proposed amendment to the *Motor Vehicle Safety Regulations (Occupant Restraint Systems)*, substantially in the form set out in the annexed regulations, was published in the *Canada Gazette*, Part I, on September 2, 1997 and a reasonable opportunity was thereby afforded to manufacturers, distributors, importers and other interested persons to make representations to the Minister of Transport with respect to the proposed regulations;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to section 11 of the *Motor Vehicle Safety Act*, hereby makes the annexed *Regulations Amending the Motor Vehicle Safety Regulations (Occupant Restraint Systems)*.

¹ John Mark Keyes, *Executive Legislation* (Toronto: Butterworths, 1992) at 72-73, and Elmer A. Driedger, *Construction of Statutes*, 2nd ed., (Toronto: Butterworths, 1983) at 309-313.

Example 2: The regulation-making authority must be "satisfied" of certain facts

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

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

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

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to subparagraph 20(d)(iii) of the *Statutory Instruments Act*, hereby makes the annexed *Regulations Amending the Statutory Instruments Regulations*.

Example 3: The regulation-making authority must be "of the opinion that . . ."

Whereas, pursuant to subsection 48(1) of the *Canadian Environmental Protection Act*, the Minister of the Environment published in the *Canada Gazette*, Part I, on September 28, 1997 a copy of the proposed *Diesel Fuel Regulations*, substantially in the form set out in the annexed regulations;

And whereas, in the opinion of the Governor in Council, the concentration of sulphur in diesel fuel prescribed in the proposed Regulations, if exceeded, would, on the combustion of the diesel fuel in ordinary circumstances, result in a significant contribution to air pollution;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 47 and subsection 87(1) of the *Canadian Environmental Protection Act*, hereby makes the annexed *Diesel Fuel Regulations*.

Example 4: Canadian farm products marketing agencies

In some cases, the regulation-making authority may exercise its delegated power only after obtaining the approval of another authority, and the fact that the approval

was obtained must be set out in the order in council or other executive order.

For example, paragraph 22(1)(f)² of the *Farm Products Agencies Act* requires that all orders and regulations proposed by agencies be approved by the National Farm Products Council. The Council must also be satisfied, pursuant to paragraph 7(1)(d) of that Act, that the regulation is necessary. The Act further requires that certain other conditions apply before the Council may approve a regulation or an order. One condition is that the order or regulation be of a class of orders or regulations to which paragraph 7(1)(d) applies. Below is an example of an executive order setting out these conditions precedent (we have included the footnotes because of the complexity of the order — see also FOOTNOTES).

Whereas the Governor in Council has, by the *Canadian Chicken Marketing Agency Proclamation*^a, established the Canadian Chicken Marketing Agency pursuant to subsection 16(1)^b of the *Farm Products Agencies Act*^c;

Whereas the Canadian Chicken Marketing Agency has been empowered to implement a marketing plan pursuant to the *Canadian Chicken Marketing Agency Proclamation*^a;

Whereas the Canadian Chicken Marketing Agency has taken into account the factors set out in paragraphs 7(a) to (e) of the schedule to the *Canadian Chicken Marketing Agency Proclamation*^a;

Whereas the proposed regulation entitled *Regulations Amending the Canadian Chicken Marketing Quota Regulations, 1990*, annexed hereto, is a regulation of a class to which paragraph 7(1)(d)^d of that Act applies by reason of section 2 of the *Agencies' Orders and Regulations Approval Order*^e, and has been submitted to the National Farm Products Council pursuant to paragraph 22(1)(f) of that Act;

And whereas, pursuant to paragraph 7(1)(d)^d of that Act, the National Farm Products Council is satisfied that the proposed regulation is necessary

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

...

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

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

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

for the implementation of the marketing plan that the Canadian Chicken Marketing Agency is authorized to implement, and has approved the proposed regulation;

Therefore, the Canadian Chicken Marketing Agency, pursuant to paragraph 22(1)(f) of the *Farm Products Agencies Act*^c and subsection 6(1)^f of the schedule to the *Canadian Chicken Marketing Agency Proclamation*^a, hereby makes the annexed *Regulations Amending the Canadian Chicken Marketing Quota Regulations, 1990*.

Ottawa, Ontario,

1998

^a SOR/79-158

^b S.C. 1993, c. 3, para. 13(b)

^c S.C. 1993, c. 3, s. 2

^d S.C. 1993, c. 3, s. 7(2)

^e C.R.C., c. 648

^f SOR/91-139

Example 5: Repeal of provisions whose enactment was subject to a condition precedent

In some cases, the repeal of a provision whose enactment was subject to a positive fact situation may have to be preceded by a "whereas" clause worded in the negative. In the following example, the Governor in Council enacted the provision because he was of the opinion that registration of the documents was not reasonably practical given their number. Consequently, the provision may be repealed only if the Governor in Council is now of the opposite opinion:³

Whereas the Governor in Council is of the opinion that the registration of standing orders made by the Commissioner of the Royal Canadian Mounted Police under subsection 21(2) of the *Royal Canadian Mounted Police Act* is no longer not reasonably practicable due to their number;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to paragraphs 20(a) to (c) of the *Statutory Instruments Act*, hereby makes the annexed *Regulations Amending the Statutory Instruments Regulations (Miscellaneous Program)*.

Example 6: Regulations made under the *Customs Act* that are exempted from the republication requirement

Whereas the proposed *NAFTA and CCFTA Verification of Origin*

³ See subsection 31(4) of the *Interpretation Act*, which provides that the power to repeal, amend or vary regulations is subject to the same conditions as the power to make them.

Regulations implement provisions of free trade agreements (NAFTA and CCFTA) and otherwise make no material substantive change in an existing regulation and are therefore, by virtue of paragraphs 164(4)(a.01) and (d) of the *Customs Act*, not required to be published under subsection 164(3) of that Act;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of National Revenue, pursuant to section 42.1, subsection 42.4(2), paragraph 164(1)(i) and subsections 164(1.1) and (1.2) of the *Customs Act*, hereby makes the annexed *NAFTA and CCFTA Verification of Origin Regulations*.

Conclusion

The recital of the fulfilment of a condition precedent in an order in council or other executive order is important, as the recital constitutes, in the absence of evidence to the contrary, proof that the condition precedent was, in fact, fulfilled. The foregoing examples clearly show that the entire Act, not just the provisions dealing with the making of regulations, must be read carefully to ensure that all the conditions attached to the regulation-making power are fulfilled and spelled out, step by step, in the order in council or other executive order.

In the case of an enabling provision that contains a subjective element, for example, "the Governor in Council may make any regulations that the Governor in Council considers necessary to carry out the purposes and provisions of this Act . . ." (or as in example 2 above), the courts are reluctant to substitute their judgment for the judgment of the regulation-making authority as to the appropriateness of the regulations. However, as David Mullan states, ". . . the courts have been prepared to intervene in situations where the subordinate legislation does not fall within the four corners of the empowering statute and is not reasonably capable of being related to any genuine prescribed purpose set out in the legislation. . . [the] establishment of an absence of evidentiary support for the necessity of the subordinate legislation in issue may lead to the conclusion that the subordinate legislation making authority could not reasonably have reached the conclusion that such subordinate legislation was necessary."⁴

* * * * *

⁴ David J. Mullan, *Administrative Law* (Being Title 3 from Volume 1 of the *Canadian Encyclopedic Digest* (Ontario) Third Edition), 2nd ed. (Agincourt: Carswell, 1979) at 147. See also Pierre Issaly and Denis Lemieux, *L'action gouvernementale : Précis de droit des institutions administratives* (Cowansville: Éditions Yvon Blais, 1997) at 426.

CONTEXTUAL INFORMATION

In order to reduce the need for secondary materials, contextual information may precede regulations. This information

- (a) is placed before the table of contents;
- (b) is provided by the client, in both official languages;
- (c) contains a statement that the information is not part of the regulations; and
- (d) is not included in the database of federal regulations.

Example:

IMPORTANT INFORMATION

(This note is for information purposes and is not part of the Consumer Fireworks Regulations.)

The *Consumer Fireworks Regulations* establish safety standards related to consumer fireworks, commonly known as "family fireworks". The *Consumer Fireworks Regulations* are part of a larger regulatory scheme that includes other regulations made under the *Explosives Act* to protect the safety of the public.

EXPLOSIVES

Consumer fireworks are explosives as defined in the *Explosives Act*. You must comply with the requirements in that Act.

BASIC REQUIREMENTS

You must also comply with the *Explosives General Regulations*, which set out the basic requirements for activities relating to all explosives, as well as information on importing and transporting explosives, including consumer fireworks.

The following term is defined in the *Explosives Act* and is used in the *Consumer Fireworks Regulations*:

OPERATOR

"operator" includes the owner, manager or person in charge;

ACT, REGULATIONS AND LIST OF AUTHORIZED EXPLOSIVES

To obtain the *Explosives Act*, any regulations made under the Act or the *List of Authorized Explosives*, or any other related information, contact the Department of Natural Resources at the following address:

Chief Inspector of Explosives
Explosives Branch
Department of Natural Resources
580 Booth Street
Ottawa, Ontario
K1A 0E4
(613) 995-8415
FAX: (613) 995-0480

* * * * *

CROSS-REFERENCES

LIMITING THE USE OF CROSS-REFERENCES

The tradition in English drafting is to regard each section and subsection as an independent thought that must stand on its own. The same applies to paragraphs and other subsidiary units of text. As a result, a specific cross-reference is usually inserted whenever a reference is made in one provision (section, subsection, paragraph, etc.) to something in another provision.

This approach is based on the need to avoid ambiguity. It also recognizes that many people read legislative texts, particularly lengthy ones, piecemeal, looking for an answer to a particular question. They skim the text or the marginal notes until they find a provision that appears to provide the answer. If the provision refers to something of interest but fails to provide a cross-reference, they must read the accompanying provisions to find the reference.

Although cross-references play a useful role, they also have disadvantages. When legislative texts are amended or renumbered, cross-references must be corrected. Moreover, cross-references interrupt the flow of a text by referring the reader to a numbered provision, which must then be consulted. The interruption is particularly bothersome when the cross-reference is quite detailed. Although the current convention on compound cross-references is much simpler than it was in the past (we now say "suparagraph 2(2)(a)(i)" rather than "subparagraph (i) of paragraph (a) of . . ."), convoluted cross-references still exist, for example, references to paragraphs or subparagraphs of a definition ("paragraph (a) of the definition "Federal land" in section 2 . . .").

Drafters should rely on context when a provision refers to something in a neighbouring provision. Readers can be expected to read the provisions together. Having read the first, they can carry forward its ideas into subsequent provisions, as long as there are no intervening provisions to disrupt the flow of ideas or introduce ambiguity.

The assumption that a series of provisions will be read together is particularly justified when they constitute subsections of a single section. By numbering them as subsections, the drafter indicates that they are closely linked and should be read as a group.

This assumption also applies when a heading is used to group together a series of sections. The heading indicates that the sections have a common theme and should be read together.

WAYS TO LINK IDEAS WITHOUT CROSS-REFERENCES

Definite articles

The simplest way to connect ideas is by using the definite article in a series of provisions.

Example:

4. (1) A person who is at least 18 years of age may apply to the Minister for a licence to fish on a recreational basis.

(2) **The** application must be in the prescribed form and be accompanied by the prescribed fee.

(3) On receiving **the** application, the Minister may issue a licence in the prescribed form authorizing the person to fish on a recreational basis and may specify any prescribed terms and conditions in the licence.

(4) The Minister may make regulations prescribing **the** fee, the form of **the** licence and any terms and conditions that may be specified in it.

The definite article can also be used to link ideas among paragraphs:

Example:

5. A disposal permit may specify, or impose requirements respecting,

(a) the quantity or concentration of **any substance that** may be released into the environment, either alone or in combination with any other substance from any source or type of source;

(b) the places or areas where **the** substance may be released;

(c) the commercial, manufacturing or processing activity in the course of which **the** substance may be released;

(d) the manner in which and conditions under which **the** substance may be released into the environment, either alone or in combination with any other substance; . . .

Specific words and phrases

Another way of connecting ideas without cross-references is to express them using specific words or phrases that differentiate them from similar ideas. For example, in the licence provision above, the licence could be referred to as a "recreational fishing licence", rather than more generically as a "licence". Similarly, the "fee" in subsection

(4) could be referred to as the "application fee".

Definition and application provisions

Even further precision is possible by using a definition. For example, if an administrative body is established in section 4, a definition can be included to tie references to the name of the body back to section 4. However, the defined word or phrase should be as informative as possible so that the reader will know that it is a specific body (for example, the "Trade Tribunal") and not a generic reference ("tribunal").

Alternatively, an application provision can be included to say that particular provisions apply to the administrative body.

Definitions and application provisions should be used only when there are many references throughout the legislative text. They are unnecessary when the object of the definition or application provision is mentioned only in a few provisions that are grouped together. In these cases, the proximity of the references should remove any ambiguity.

WHEN CROSS-REFERENCES ARE NECESSARY

In regulations, internal and external cross-references are indicated using the name of the provision followed by its number (or letter).

Examples:

Subsection 6(3) does not apply . . .
. . . the conditions referred to in paragraph 3(a) of the Act . . .
The document mentioned in subparagraph 4(2)(a)(ii) is not required . . .

In internal cross-references, there is no need to add "of these Regulations" (*see* subsection 41(2) of the *Interpretation Act*). However, if an internal reference is located near a reference to another enactment, the drafter should include that phrase to avoid confusion.

Example:

For the purposes of section 5 of the Act and subsection 4(2) of these Regulations,
. . .

Complete references are not used within a section to refer to other portions of the

section; within a subsection to refer to other portions of the subsection; etc. (*see* subsection 41(3) of the *Interpretation Act*).

Example:

4. (1) . . .
- (2) Notwithstanding subsection (1), . . .

When a provision, statute or regulation has already been cited in a section or subsection, it is recommended that, if there is no possibility of confusion, the definite article or a demonstrative pronoun (the, that, those) be used to refer to the provision, statute or regulation within that same section or subsection. The terms "preceding", "following" or "hereafter" are not to be used.

As a rule, two provisions of a regulation should not refer to each other; the reference that is less useful to the comprehension of the text should be deleted (*see* "NOTWITHSTANDING" CLAUSES).

Subsection 40(2) of the *Interpretation Act* provides that "a citation of or reference to an enactment is deemed to be a citation of or reference to the enactment as amended". Therefore, a reference to an earlier version of the enactment should be identified as such.

Example:

7. (1) Payments authorized under section 28 of the Act, as **that section read on March 31, 1996**, in respect of the established programs, shall be made at the times and in the manner provided for in section 6.

It may sometimes be necessary to state that the referenced provision is to be read taking into account certain specified rules of interpretation. However, this practice should be used with caution, because of the uncertainties and imprecisions that it can generate. The following two examples indicate the degree of precision required.

Example 1:

10. For the purposes of the *Aircraft Operating Regulations*,
 - (a) the word "Minister" shall be read for the word "Administrator" wherever it appears in the *Federal Aviation Regulations* (U.S.) . . .

Example 2:

3. Subject to section 6, an eligible exploration expense in relation to a mineral resource or hydrocarbons is

(a) any expense referred to in paragraph (1)(a) or paragraphs (2)(a) to (d), read without reference to the words "before February 20, 1990" . . .

As a rule, regulations and Acts are referred to by their title (*see* subsection 40(1) of the *Interpretation Act*). The most frequent exception to this rule is the reference to "the Act" in regulations in which the word "Act" has been defined (generally to mean the enabling Act).

* * * * *

DATES

The current practice is to write "April 30, 1999" rather than "the 30th day of April, 1999" or "April the 30th, 1999".

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

* * * * *

DEFINITIONS

General principles

Definitions are used for brevity and clarity. They make it possible to avoid the repetition of lengthy expressions, such as the title of a statute or the name of an organization, and eliminate ambiguity where the defined term is intended to have a narrower or broader meaning than the one provided by dictionaries or the one customarily assigned to it.

Definitions should be used sparingly, and only when dictionary definitions are inadequate. Since words have the same meaning in legislation as they have in ordinary language, the definitions included in regulations must not simply reiterate the content of a dictionary. Drafters should systematically avoid defining terms which do not depart from their ordinary meaning.

Words defined in the enabling statute need not be defined in the regulations, because section 16 of the *Interpretation Act* states that "[e]xpressions used in the regulations have the same respective meanings as in the enactment conferring the power". A word that is defined in the enabling statute may be given a narrower meaning in the regulations if that meaning does not alter the scope of the enabling statute.

A word used but not defined in the enabling statute should not, as a rule, be defined in the regulations. This would risk narrowing or broadening the scope of the enabling statute and thus exceed the authority it confers.

A regulation cannot define a word for the purposes of the enabling statute, unless the statute expressly provides for it.

Example: *Energy Administration Act*, R.S., c. E-6

19. The Governor in Council may, by regulation,

(a) designate any fuel as being fuel for use by an aircraft or vessel;

(b) **define** the expression "last port of landing" for the purposes of subsection 16(2); and

(c) provide for such other matters or things as may be necessary to carry out the provisions of this Part.

A definition must not include any substantive provision. Also, it should not be used

to establish the scope of the regulation, since this is the role of the application sections. For purposes of clarity and readability, moreover, a definition should not give a word an unduly artificial meaning.

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

A term used in a regulation may be defined by reference to a definition in another regulation or statute. The disadvantage of defining a term in this manner is that the user will have to consult the other enactment. However, the advantage is that the definition does not have to be amended each time the term in the enactment referred to is amended, if consistency between the two is desired (*see* subsection 40(2) of the *Interpretation Act*).

Form of definitions

A general definition section that applies to the regulations as a whole usually appears in section 1 and should have the following format:

INTERPRETATION

1. The definitions in this section apply in these Regulations.

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

"aerosol" means any non-refillable receptacle that

- (a) is made of metal, glass or plastic;
- (b) contains a gas that is compressed, liquefied or dissolved under pressure; and
- (c) is fitted with a self-closing release device. (*aerosol*)

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

"bus" means a vehicle having a designated seating capacity of more than 10, but does not include a trailer. (*autobus*)

"diesel engine" means a type of engine that has operating characteristics significantly similar to those of the theoretical Diesel combustion cycle. The non-use of a throttle during normal operation is indicative of a diesel engine. (*moteur diesel*)

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

If the definition section contains only one definition, the introduction and the equivalent French term are omitted.

Example:

1. In these Regulations, "Minister" means the Minister of Canadian Heritage.

In the English version of regulations, the heading "Interpretation" is generally used, whether or not interpretative provisions are included.

When regulations are divided into parts, care should be taken to ensure that definitions are not confined to one part if they are intended to apply to other parts or to the regulations as a whole. In that case, the definitions should be placed before Part 1.

A defined term is placed inside quotation marks. It is capitalized only if that is how it will appear throughout the regulations.

If a definition applies to two alternative defined terms, each alternative is placed within quotation marks.

Example:

"*in vitro* diagnostic device" or "IVDD" means a medical device intended to be used
. . . . (*instrument diagnostique in vitro ou IDIV*)

Note that the equivalent French terms, including the word "ou", are in italics.

Isolated definitions

An isolated definition is a definition that applies only to a provision or to a number of provisions in a regulation; it should be drafted as follows:

24. In this section (and section 25), "court" means the Federal Court of Appeal.

Note that the equivalent French term is not required in this situation.

The same rule may be applied to two short definitions.

Example:

12. In sections 13 to 24, "Minister" means the Minister of Agriculture and "Board" means the Canada Wheat Board.

Term defined in one language version only

In certain instances, a term may need to be defined in one language but not in the other. In this case, the statement "*(Version anglaise seulement)*" is placed at the end of the definition instead of the French equivalent.

Example:

"consignee" means a person to whom a consignment is being or is intended to be transported. *(Version anglaise seulement)*

* * * * *

DIVISION OF REGULATIONS

Regulations may be divided into parts, sections, subsections, paragraphs, subparagraphs, clauses and subclauses. Often they also include schedules, tables and forms. In complex regulations, parts may be separated into divisions and subdivisions. Headings are used to indicate the subject matter of each part, division or subdivision, series of sections or even a single section.

The breakdown of a section into subsections, paragraphs, subparagraphs, etc. must be identical in the English and French versions.

PARTS

Arabic numerals are now used instead of Roman numerals to designate parts. In amendments to existing regulations, however, Roman numerals should continue to be used for internal consistency, unless all the Roman numerals in the regulations are being changed to Arabic numerals. The same rule applies to schedules, tables and forms (*see SCHEDULES TO REGULATIONS*).

Example:

PART 1

Parts are used only when two or more separate matters are being dealt with in the regulation. In such cases, defined terms and general provisions that apply throughout the regulation should not be placed in one of the parts, but rather at the beginning of the regulation, before the parts. Alternatively, they can be placed in Part 1, which must then clearly state that it contains definitions and general provisions applicable to the whole regulation. Definitions that apply only to one part may be placed at the beginning of that part.

When a part is referred to in a provision, it is capitalized ("Part") and followed by a Roman or Arabic numeral, as the case may be.

Example:

8. For the purposes of Part 6 . . .

DIVISIONS AND SUBDIVISIONS

Parts may be separated into divisions and subdivisions. These are used rarely, when

the Regulations have a very complex structure, as is the case, for example, with the *Income Tax Regulations* and the *Export and Import of Hazardous Wastes Regulations*. Divisions are designated using Arabic numerals or capital letters (e.g., Division 1, Division A), while subdivisions are identified by lower-case roman letters (e.g., Subdivision a).

SECTIONS AND SUBSECTIONS

Sections are the building blocks of regulations. Each section should express a complete idea.

Sections are numbered using Arabic numerals. They may be divided into subsections, which are also numbered using Arabic numerals, but in parentheses.

Example:

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

(2) In addition to the charge, . . .

Sections and subsections should be short and should normally consist of a single sentence. However, they may contain more than one sentence if

- (a) the additional sentence is subordinate to the first or deals with the same idea;
- (b) making a separate subsection of the additional sentence would put undue emphasis on it; and
- (c) the section or subsection does not become too long.

Sections and subsections may in turn be divided into paragraphs, subparagraphs, clauses and subclauses.

PARAGRAPHS AND SUBPARAGRAPHS

Paragraphs are indicated by lower-case italic letters within parentheses: (a), (b), (c), etc. (In contrast, the French version has only closing parentheses: a), b), c), etc.).

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

Paragraphs and subparagraphs do not form complete sentences in themselves. They

are only part of an existing sentence that begins at the section or subsection in which they are placed, and add elements to that sentence.

Example:

602. When there is a two-way radiocommunication failure between the controlling air traffic control unit and a VFR aircraft while operating in Class B, Class C or Class D airspace, the pilot-in-command shall

(a) leave the airspace

(i) when the airspace is a control zone, by landing at the aerodrome for which the control zone is established, and

(ii) in any other case, by the shortest route;

(b) when the aircraft is equipped with a transponder, set the transponder to code 7600; and

(c) inform an air traffic control unit as soon as possible of the actions taken pursuant to paragraph (a).

(For a discussion of the use of "and" and "or" between paragraphs, subparagraphs, clauses and subclauses, *see* **PARAGRAPHING CONJUNCTIONS.**)

CLAUSES AND SUBCLAUSES

Clauses and subclauses are further divisions of a subparagraph. They are used infrequently. If it is necessary to use them, consideration should be given, in the interests of readability, to dividing the section into more sections or subsections instead.

Clauses are indicated by upper-case letters within parentheses: (A), (B), (C), etc. Subclauses are indicated by upper-case Roman numerals within parentheses: (I), (II), (III), etc. Like paragraphs and subparagraphs, clauses and subclauses are not complete sentences in themselves.

HEADINGS

Headings help the reader navigate through the various topics dealt with in a regulation. Only those provisions that relate to a heading should be placed under it.

Headings, unlike marginal notes,¹ are considered part of the regulations and may be used in interpreting them.

If a regulation is not divided into parts, the primary headings are in small capitals and the secondary headings are in italics. Third-level headings are in upper- and lower-case roman type. It may be necessary in some cases to add a fourth-level heading, which would be in upper- and lower-case roman type and begin at the left margin.

Example:

OIL AND GAS

Procedures for Applying For and Issuing Licences and Orders

Application

Exemption

If a regulation is divided into parts, the primary heading is in full capitals, or upper case, and the secondary heading is in upper- and lower-case italics. A third-level heading would be in upper- and lower- case roman type, and, if a fourth level were required, it would also be in upper- and lower-case roman type, but placed at the left hand side of the page.

Example 1: Regulation divided into parts

PART 1

OIL AND GAS

Gas Other than Propane, Butanes and Ethane

Procedures for Applying For and Issuing Licences and Orders

Application

¹ See section 14 of the *Interpretation Act*.

Example 2: Regulation divided into parts, divisions and subdivisions

PART 1
OIL AND GAS
DIVISION 1
GAS OTHER THAN PROPANE, BUTANES AND ETHANE
Subdivision a
Application

NOMENCLATURE

<i>English name</i>	<i>Numerical/Alphabetical designation</i>	<i>French equivalent</i>
Part	1	<i>partie</i>
Division	1 or A	<i>section</i>
Subdivision	a	<i>sous-section</i>
section	12	<i>article</i>
subsection	12(1)	<i>paragraphe</i>
paragraph	12(1)(a)	<i>alinéa</i>
subparagraph	12(1)(a)(i)	<i>sous-alinéa</i>
clause	12(1)(a)(i)(A)	<i>division</i>
subclause	12(1)(a)(i)(A)(I)	<i>sous-division</i>
Schedule	1	<i>annexe</i>

* * * * *

"DUE TO"

"Due to" should not be used as an adverbial prepositional phrase. The adjective "due" should be accompanied by a form of the verb "to be", either expressed or understood.

Thus, the following sentence should be avoided: "Due to the rain, the game was postponed." The opening words should read: "Owing to the rain" or "Because of the rain".

The following sentence is correct: "The postponement of the game was due to the rain."

* * * * *

ELLIPSES

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

Examples:

"a person eligible to apply" (elliptical)

"a person who is eligible to apply" (complete)

* * * * *

EM DASHES

Long dashes (— or --), known as "em dashes", are distinguished from short dashes, known as "en dashes", and from hyphens (-). Drafters can use em dashes to clarify matters for readers.

The Canadian Style summarizes the purpose of dashes as follows:

In most of its uses the em dash ("long dash") is a substitute for the colon, semicolon or comma

Dashes give greater emphasis to parenthetical material than do commas or parentheses. If the parenthetical material contains internal punctuation or forms a complete sentence, the commas that might have been used to enclose it should be replaced by dashes or parentheses, depending on the degree of emphasis desired or the closeness of the relationship to the rest of the sentence. Parentheses are generally used to enclose material more remote from the main thrust of the sentence, dashes for material more closely related[.]¹

In standard English, mid-sentence punctuation is not restricted to commas. Both dashes and parentheses are useful in structuring sentences visually for the reader.

The degree of emphasis that these punctuation marks give to the material they enclose is roughly the following:

- dashes: strong;
- parentheses: somewhat weaker, with less of an interruption of thought;
- commas: weaker yet.

Although in English the accepted typographic practice is to leave no space between a dash and the words next to it, the manner in which our software products treat the dash makes it advisable to separate it from its neighbours with a space — as is, in fact, the custom in French.

*The Elements of Legal Writing*² offers the Rules set out below for the use of dashes in legal drafting. Note that the examples (which are our own) are given in illustration of the point being made, not of the heights of fine drafting to which one might aspire. In some of them, especially those in which a long string of information separates

¹ Translation Bureau (PWGSC), *The Canadian Style: A Guide to Writing and Editing*, rev. ed. (Toronto: Dundurn Press, 1997) at 136-137.

² M. Faulk and I.M. Mehler, *The Elements of Legal Writing* (Toronto: Maxwell Macmillan Canada, 1994) at 76-77.

subject from verb, the dashes make acceptable a section that should really be redrafted as two subsections.

Rule 92. Use a dash to denote a sudden break in thought.

Example:

The Director may — or, if petitioned, shall — open the books to the public.

Rule 93. Use a dash to mean "namely," "that is," "in other words," and similar expressions that precede explanations or elaborations.

In such instances, the dash is followed by an exhaustive list of the possibilities.

Example:

If the Minister decides to cancel a document because a person involved — the document holder, the owner or operator (or owner-operator) of any aircraft or airport for which the document was issued, or an employee of any of the above — has contravened a provision of this Act, the Minister shall send that person a notice.

Rule 94. Use a dash to enclose parenthetical material containing commas.

Example:

The officer shall make copies of the form — in duplicate in the case of yellow files, in triplicate in the case of green files and in quadruplicate in the case of blue files — and return the original, and all copies but one, to the Office of the Commissioner, storing the retained copy for six months.

Rule 95. Use a dash to precede a final summarizing clause in sentences having several elements as subject of the main clause.

Example:

A-Level officers who fail Test 16 or 17, B-Level officers who fail Test 21, C-Level officers who fail Test 25 and officers at any level who fail the St. John's Ambulance test appropriate to their level — these officers shall take the course again.

Rule 96. Use a dash to show an addition or insertion that defines or enumerates a preceding word or phrase.

This last use is expanded on by Gowers in *The Complete Plain Words*,³ who explains that the dash is used

[t]o introduce an explanation, amplification, paraphrase, particularisation, or correction of what immediately precedes it."

Example:

The zoo-keeper shall keep all deadly fish — piranhas, sharks, stingrays and eels — at a safe distance.

* * * * *

³ E. Gowers, *The Complete Plain Words*, rev. ed. (Boston: David R. Godine, 1988) at 165.

ENACTING AND AMENDING FORMULAS

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

Amending formulas must be printed in bold type; the amended provisions and the new text are printed in regular type without quotation marks.

The title of the regulation or order being amended is specified in the first amending clause. In subsequent clauses, a reference is made to "the Regulations" or "the Order".

A. REPEAL

1. Repeal of one section or several consecutive sections

X. Section 5 of the *ABC Regulations* is repealed.

Y. Sections 7 to 9 of the Regulations are repealed.

Note: In the case of the repeal of consecutive provisions, the headings between those provisions are implicitly repealed.

2. Repeal of regulations

X. The *Meat Inspection Regulations* are repealed.

B. REPLACEMENT

1. Replacement of a section

X. Section 9 of the Regulations is replaced by the following:

9. . . .	or	9. . . .	or	8.1 . . .
		9.1 . . .		9. . . .
		9.2 . . .		9.1 . . .

2. Replacement of two consecutive sections

X. Sections 8 and 9 of the Regulations are replaced by the following:

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

3. Replacement of more than two consecutive sections

X. Sections 8 to 12 of the Regulations are replaced by the following:

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

Note: In 2 and 3 above, any headings that occur between the provisions that are replaced would be implicitly repealed or replaced, as the case may be.

4. Replacement of a subsection and further amendments to the same section

Generally, one amending clause (subdivided into two or more subclauses, if necessary) is used for each amended section of the regulations.

X. (1) Subsection 3(3) of the Regulations is replaced by the following:

(3) . . .

(2) Section 3 of the Regulations is amended by adding the following after subsection (4):

(4.1) . . .

(3) Section 3 of the Regulations is amended by adding the following after subsection (7):

(8) . . .

5. Replacement of the last paragraph of a subsection and addition of another as the new final paragraph

X. Section 10 of the Regulations is amended by deleting the word "or" [or "and"] at the end of paragraph (c) and by replacing paragraph (d) with the following:

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

(e) . . .

6. *Replacement of the last subparagraph of a paragraph and addition of another as the new final subparagraph*

X. Paragraph 4(6)(a) of the Regulations is amended by deleting the word "or" [or "and"] at the end of subparagraph (ii) and by replacing subparagraph (iii) with the following:

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

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

7. *Amendment of a portion of a subsection*

(1) *Before a paragraph*

X. The portion of subsection 30(1) of the Regulations before paragraph (b) is replaced by the following:

30. (1) . . .

(a) . . . ;

(2) *After the last paragraph*

X. The portion of subsection 30(1) of the Regulations after paragraph (e) is replaced by the following:

(f) . . . ,

. . .

(3) *After one paragraph and before the next*

X. The portion of subsection 19(1) of the Regulations after paragraph (b) and before paragraph (c) is replaced by the following:

. . .

Note: The above amending formula is used where a provision contains intervening words (between two paragraphs) that begin at the section margin, as follows:

19. (1) . . .

(a) . . . , or [and]

(b) . . . ,

. . .

(c) . . . , and [or]

(d)

An alternative method is to redraft the entire subsection without any intervening words.

8. Replacement of a heading

X. The heading before section 5 of the Regulations is replaced by the following:

TRAVEL ALLOWANCES

Note: A heading should always be amended by a separate amending clause, unless the section (or sections) before or after the heading are also being amended (see additional examples below).

9. Replacement of a heading and the section that follows

X. Section 8 of the Regulations and the heading before it are replaced by the following:

QUOTAS

8. . . .

10. Replacement of a heading and the subsection that follows

X. The heading before section 5 of the Regulations is replaced by the following:

REGISTRATION

Y. Subsection 5(1) of the Regulations is replaced by the following:

5. (1) . . .

11. Replacement of a heading and more than one section

X. The heading before section 7 and sections 7 to 10 of the Regulations are replaced by the following:

QUOTAS

7. . . .

CONDITIONS

8. . . .

9. . . .

REVIEW

10. . . .

Note: All headings within the block of sections described in the amending clause are implicitly included in the block being replaced.

12. Replacement of a series of consecutive headings

X. The headings before section 5 of the Regulations are replaced by the following:

PART 1

GENERAL

Application

13. Replacement of one heading in a consecutive series of headings

X. The heading "REQUIREMENTS" before section 14 of the Regulations is replaced by the following:

SAFETY AND EFFECTIVENESS REQUIREMENTS

14. Replacement of the heading of a part, schedule, division, table or formula

X. The heading of Part 5 of the Regulations is replaced by the following:

TARIFFS

15. Substitution of a term in part of or throughout the regulations

X. In the English version of the Regulations, the word "official" and the words "registered institution" are replaced by the word "delegate" and the words "certified

institution", respectively (, with such modifications as the circumstances require).

X. In section 18 of the *Duties Relief Regulations*, the expression "tariff item No. 9973.00.20" is replaced by the expression "tariff item No. 9973.00.60".

X. Wherever the expression "Part 1" occurs in sections 2 to 5 of the Regulations, it shall in every case be replaced by the expression "Parts 1 to 5" (, with such modifications as the circumstances require).

X. The Regulations are amended by replacing the expression "Schedule XIII" with the expression "Schedule 13" wherever it occurs in the following provisions:

- (a) paragraph 18(1)(a);
- (b) paragraph 18(1)(c);
- (c) section 25;
- (d) section 27; and
- (e) subsection 40(1).

Notes: If the term being replaced has been defined, be sure to repeal the old definition and add the definition of the new term (*see D., AMENDMENTS TO DEFINITIONS*).

These formulas are generally used if the amendments are technical in nature and are being made for reasons such as a change in the terminology of the enabling Act, a renumbering of that Act (i.e., sections of the Act, tariff item numbers, etc.), or the replacement of an obsolete term. If the amending formula applies to several provisions, it is inserted at the end of the regulations, before the coming-into-force provision.

In this type of amendment, several provisions containing the word to be substituted can be combined in one paragraph if the provisions could be dealt with in the same amending clause. For example, "subsections 3(2) and (7)" could not be combined because one amending clause would not be used to deal with these two subsections; they would be dealt with in two amending subclauses. However, "subsections 3(2) and (3)" could be combined.

The provisions listed in this type of amending clause must be the same in both the French and English versions. If the substitution affects provisions in one language version only, a separate amending clause dealing with that version must be used. (For an example, see S.C. 1996, c. 11, s. 97.)

16. Replacement of an element in a mathematical formula: $[A \times (B-C)]$

X. The descriptions of "A" and "B" in subsection 253(1) of the Regulations are replaced by the following:

A is the total of the amounts each of which . . .

B is the total of . . .

17. Replacement of preamble

X. The preamble before Code 6170 of the schedule to the Regulations is replaced by the following:

All parts . . .

18. Replacement of a provision requiring a reference to the order in council and registration number (SOR)

X. Subsection 6.5(3) of the Regulations, as enacted by Order in Council P.C. 1991-2404 of December 5, 1991¹, is replaced by the following:

(3) . . .

¹ SOR/92-12

C. ADDITION

The following amending formulas are to be used for the addition of all provisions, including those inserted at the end of the regulations. Always state where the provision is to be added, e.g., "after section . . .".

1. Addition of a new section

(1) At the end of the regulations

X. The Regulations are amended by adding the following after section 17:

18. . . .

(2) Between two sections

X. The Regulations are amended by adding the following after section 29:

29.1 . . . (see NUMBERING for information about the use of decimal numbers.)

2. Addition a new subsection

(1) At the end of a section

X. Section 11 of the Regulations is amended by adding the following after subsection (2):

(3) . . .

(2) Between two subsections

X. Section 12 of the Regulations is amended by adding the following after subsection (1):

(1.1) . . .

(3) To a section that is not divided into subsections

X. Section 11 of the Regulations is renumbered as subsection 11(1) and is amended by adding the following:

(2) Despite subsection (1), . . .

Notes: For accuracy and logic, all cross-references to section 11 should be amended to refer to subsection 11(1) where appropriate.

If a paragraph of section 11 is to be amended and a new subsection (2) added, three amending subclauses are required: one renumbering section 11 as 11(1); one amending paragraph 11(1)(x); and one adding subsection 11(2).

3. Addition of a paragraph

(1) To a subsection

X. Subsection 39(1) of the Regulations is amended by striking out the word "or" [or "and"] at the end of paragraph (a), by adding the word "or" [or "and"] at the end of paragraph (b) and by adding the following after paragraph (b):

(c) . . .

(2) Between two paragraphs

X. Subsection 40(2) of the Regulations is amended by adding the following after paragraph (b):

(b.1) . . . ;

D. AMENDMENTS TO DEFINITIONS

The following amending formulas are to be used to repeal, replace or add definitions.

As a rule, similar amendments are grouped together in the same amending clause. Repeals of definitions in both languages are set out first, followed by those in one language only; next are replacements in both languages, then replacements in one language only; finally, additions in both languages, then additions in one language.

When amendments are being made to one language only, the amending clauses are set out in accordance with the alphabetical order of the defined words.

These rules have been established to ensure that, as far as possible, amendments to definitions respect the alphabetical order of each language version.

1. *Repeal*

(1) One definition

X. The definition "Minister" in section 2 of the *ABC Regulations* is repealed.

(2) Two or more definitions

X. The definitions "animal", "mineral", "produce" and "vegetable" in section 2 of the Regulations are repealed.

2. *Replacement*

(1) One definition

X. The definition "animal" in section 2 of the Regulations is replaced by the following:

"animal" means . . .

(2) Two or more definitions

X. The definitions "animal", "mineral", "produce" and "vegetable" in section 2 of the Regulations are replaced by the following:

"animal" means . . .

"mineral" means . . .

"produce" means . . .

"vegetable" means . . .

Note: This formula is used only when the same terms are given new definitions. However, if the term "animal" were to be replaced by "livestock", for example, two separate amending formulas would be required, to respect the alphabetical order of the regulations: one to repeal the definition "animal", and one to add the definition "livestock".

3. *Addition*

X. Section 2 of the Regulations is amended by adding the following in alphabetical order:

"algae" means . . .

"fungus" means . . .

"plant" means . . .

4. *One language only*

If a definition is amended in one language version only, the amending clause follows the standard wording, except that it states which language version is being amended. Note that English quotation marks are used in amending formulas, even when a French term is being amended.

X. The definition "enfant" in section 2 of the French version of the *ABC Regulations* is replaced by the following:

« enfant » . . .

5. Replacement of the equivalent French or English term at the end of a definition

X. The expression "(*substances aromatisantes*)" at the end of the definition "flavouring" in section 2 of the English version of the Regulations is replaced by the expression "(*substances aromatiques*)".

SUMMARY

Definitions in a definition section should be amended in the following order.

1. Repeals (both versions)
2. Repeals (one version only, in alphabetical order)
3. Replacements — complete definitions (both versions)
4. Replacements — complete definitions (one version only, in alphabetical order)
5. Replacements of portions (both versions)
6. Replacements of portions (one version only, in alphabetical order)
7. Additions (both versions)
8. Additions (one version only, in alphabetical order)

Example:

1. (1) The definitions "application" and "ship" in section 2 of the Regulations are repealed.

(2) The definition "package" in section 2 of the English version of the Regulations is repealed.

(3) The definitions "agent" and "officer" in section 2 of the Regulations are replaced by the following:

"agent" means . . .

"officer" means . . .

(4) The definition "analyste" in section 2 of the French version of the Regulations is replaced by the following:

« *analyste* » . . .

(5) The definition "patent" in section 2 of the English version of the Regulations is replaced by the following:

1. (1) Les définitions de « demande » et « navire », à l'article 2 du même règlement, sont abrogées.

(2) La définition de « package », à l'article 2 de la version anglaise du même règlement, est abrogée.

(3) Les définitions de « agent » et « autorité compétente », à l'article 2 du même règlement, sont remplacées par ce qui suit :

« agent » . . .

« autorité compétente » . . .

(4) La définition de « *analyste* », à l'article 2 de la version française du même règlement, est remplacée par ce qui suit :

« *analyste* » . . .

(5) La définition de « patent », à l'article 2 de la version anglaise du même règlement, est remplacée par ce

"patent" means . . .

(6) The word "*(package)*" at the end of the definition "contenant" in section 2 of the French version of the Regulations is replaced by the word "*(container)*".

(7) Section 2 of the Regulations is amended by adding the following in alphabetical order:

"motion" means . . .

(8) Section 2 of the English version of the Regulations is amended by adding the following in alphabetical order:

"container" means . . .

(9) Section 2 of the French version of the Regulations is amended by adding the following in alphabetical order:

« directeur » . . .

qui suit :

"patent" means . . .

(6) La mention « *(package)* » qui figure à la fin de la définition de « contenant », à l'article 2 de la version française du même règlement, est remplacée par « *(container)* ».

(7) L'article 2 du même règlement est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

« requête » . . .

(8) L'article 2 de la version anglaise du même règlement est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

"container" means . . .

(9) L'article 2 de la version française du même règlement est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

« directeur » . . .

Note: In (4) and (9) above, the French quotation marks are used because they are part of the provision being amended, not of the amending formula.

E. AMENDMENTS TO ONE LANGUAGE VERSION ONLY

1. English version only

X. Subsections 136(1) and (2) of the English version of the Regulations are replaced by the following:

136. (1) . . .

(2) . . .

2. French version only

X. Subsections 157(1) and (2) of the French version of the Regulations are replaced by the following:

157. (1) [French text]

(2) [French text]

Y. Part 1 of the schedule to the French version of the Regulations is replaced by the following:

[French text]

F. AMENDMENTS TO SCHEDULES

Generally, the rules that apply to amendments within the body of the regulations apply to sections or items of a schedule, hence a new amending clause is required for each section or item being amended.

1. Replacement of schedules

X. Schedules 1 and 2 to the Regulations are replaced by the following:

SCHEDULE 1
(Section 10)

...

SCHEDULE 2
(Section 21)

...

2. Replacement of sections or items of a schedule

X. Sections 4 and 5 of the schedule to the Regulations are replaced by the following:

4. . . .

5. . . .

Note: Generally, if provisions in a schedule are written in sentence form, they are called "sections". If they are not in sentence form, particularly when the

schedule consists of a list or contains columns, they are referred to as "items".

3. Replacement of provisions in a column of a schedule

X. The portion of items 1 and 2 of the schedule to the Regulations in column II is replaced by the following:

Item	Column II Rate (\$)
1. (1) (a)	47
(b)	52
(c)	67
(2)	98
2. (1)	26
(2)	75

Note: The numbers of amended items, as well as column headings, must be set out in bold type, but columns that are not being amended are not reproduced.

4. Addition to a schedule

X. Schedule I to the Regulations is amended by adding the following after Part III:

PART IV

FAUNA

...

X. Schedule 1 to the Regulations is amended by adding the following after the heading "SCHEDULE/(Section 2)":

PART 1

FLORA

...

X. The schedule to the Regulations is amended by adding the following in alphabetical order (or "in numerical order"):

Germany
Italy
Japan

5. *Addition of schedules in regulations that contain only one schedule*

(1) After the existing schedule

X. The schedule to the Regulations is renumbered as Schedule 1.

Y. The Regulations are amended by adding the following after Schedule 1:

SCHEDULE 2

...

SCHEDULE 3

...

(2) Before the existing schedule

X. The heading "SCHEDULE" in the schedule to the Regulations is replaced by the following:

SCHEDULE 1

[content of new schedule]

SCHEDULE 2

6. *Replacement of section reference*

X. Schedule II to the Regulations is amended by replacing the reference "(Section 23)" after the heading "SCHEDULE II" with the reference "(Section 20)".

7. *Amendment of a column heading*

X. The heading "Rate" of column 3 of Schedule 1 to the Regulations is replaced by "General Tariff".

8. *Replacement of notes or asterisks at the end of a schedule*

(1) One of a series of notes

X. Note 3 of the schedule to the Regulations is replaced by the following:

3. . . . or Note 3: . . .

(2) If there is only one note or asterisk

X. The asterisk at the end of Schedule 2 to the Regulations is replaced by the following:

* . . .

9. *Amendment of an unnumbered portion of a schedule*

X. Schedule 3 to the *ABC Regulations* is amended by deleting (or "by replacing") the symbol "X" in the column entitled "EFG" opposite the country "Denmark" (or "with the following:").

* * * * *

"EXPIRY", "EXPIRATION" AND "END"

The word "expiration" is used consistently in the Revised Statutes of Canada. The apparent reasons for this are that the Statute Revision Commission preferred this word to the word "expiry" and that this is the term defined in *Black's Law Dictionary*. In regulations, both terms are used ("expiration" 450 times and "expiry" 139 times).

"Expiration" is generally defined as "the coming to an end, termination". "Expiry" is also defined in this manner, but the dictionaries go on to state that it is used especially to mean the termination of a time or period fixed by law, contract or agreement. According to *Garner's Dictionary of Modern Legal Usage*, "expiration" is the preferred word in American legal English, while "expiry" is the preferred word in British legal English.

Proponents of plain language drafting include the word "expiration" in their lists of inflated and unusual words; see, for example, Susan Krongold, "Writing Laws: Making Them Easier to Understand" (1992), 24 *Ottawa L. Rev.* 495, and the Law Reform Commission of Victoria, *Plain English and the Law — Drafting Manual*. After "end", the word "expiry" is the word that is most familiar and used most in everyday speech.

Recommendations

(1) Whenever possible, the word "end" should be used instead of the word "expiration".

Examples:

All accounts required to be maintained under subsection (2) shall be retained until the **end** of one year after leave to abandon operation of the pipeline has been granted by the Board.

When a demand is made by the Minister for payment of an amount and that amount is paid in full before the **end** of 30 days after the date of the demand, interest is not payable.

On goods on which wharfage is due and payable within a 30-day period and has not been paid at the **end** of that period, an additional charge may be levied . . .

(2) When the word "end" is not appropriate, the word "expiry" should be used. For example, "expiry" is preferable to "end" in the case of documents such as permits and licences.

Examples:

A person to whom a permit is issued under this section shall, within 15 days after its expiry or cancellation, return the permit to the game officer who issued it.

A member of the Tribunal is eligible to be re-appointed on the expiry of a first or subsequent term of office.

The notification referred to in subsection (1) shall be signed and shall include the results of tests carried out to determine the expiry date of the new human milk substitute.

Note: When a starting date is given, the use of "expiration" and "expiry" might not be necessary when expressing the end of a period.

Example:

If the application is made after the two-year period following the coming into force of this Convention, the rights that are not subject to forfeiture shall be acquired from the date of application.

* * * * *

EXPLANATORY NOTE

The purpose of the explanatory note that accompanies a statutory instrument is to help the reader grasp the main points of the instrument by disclosing its subject matter and principal features. If an existing instrument is being amended, the explanatory note should indicate how the existing regime is being altered (e.g., whether fees are being increased or whether limits are being extended).

The note must not discuss the policy that prompted the instrument. It must confine itself to summarizing what the instrument accomplishes rather than state why it is being made, unless the explanation relates solely to mechanics and not to policy (e.g., the instrument is intended to correct an error).

When published in the *Canada Gazette*, the explanatory note appears after the instrument. In most cases, it comprises only one or two paragraphs, and its heading is in bold type.

An explanatory note is included only with instruments that are not subject to the Government's policy on the prepublication of draft regulations¹ [i.e., that do not require a Regulatory Impact Analysis Statement (RIAS)].² Those instruments are the following:

- (a) statutory instruments and other documents that are designated "SI"; and
- (b) regulations ("SOR") made by the Canadian Radio-Television and Telecommunications Commission (CRTC) and the Copyright Board.

These bodies may, however, choose to abide by the Government's policy on the prepublication of draft regulations, in which case the explanatory note is replaced by a RIAS.

An explanatory note is not included if the instrument is self-explanatory, such as an order designating a minister for the purposes of an Act or an order transferring responsibility for the administration of an Act. However, an order fixing the date on which an Act comes into force is an exception. In this case, the note should set out what the Act accomplishes, thus informing the public of the type of measure coming into effect. We recommend using the summary of the Act for this purpose.

¹ For details on this policy, see **PUBLICATION**, item 6 in Part 2.

² For details on the RIAS, see **REGULATORY IMPACT ANALYSIS STATEMENT (RIAS)**.

The explanatory note is not part of the instrument and includes a mention to this effect. Nevertheless, it is examined by the Regulations Section together with the instrument to which it relates, and is stamped at the end of the examination process.

Below are some examples of explanatory notes:

Example 1: Remission order

EXPLANATORY NOTE

(This note is not part of the Order.)

This Order remits the amount of \$439,263, which represents the ascertained forfeiture demanded from Provincial Airlines Ltd. pursuant to paragraph 133(1)(c) of the *Customs Act* on June 20, 1996.

Example 2: Amending order

EXPLANATORY NOTE

(This note is not part of the Order.)

The *Gallantry Awards Order* provides gratuities and annuities to members of the armed forces who have been personally decorated with the Victoria Cross, the Military Cross and other important medals for gallantry or heroism in war.

These amendments

(a) increase the annuity payable to holders of the Victoria Cross or the George Cross from \$300 to \$3,000, in line with a recent similar increase passed by the Government of Great Britain;

(b) transfer the responsibility for paying the benefits to the Minister of Veterans Affairs from the Canadian Pension Commission.

Example 3: Order fixing the coming into force of an Act

EXPLANATORY NOTE

(This note is not part of the Order.)

The amending Act requires the incorporation of a detection agent into most plastic explosives and enables the Governor in Council to make regulations for the control of unmarked plastic explosives. As well, it enables Canada to ratify the Convention on the Marking of Plastic Explosives for the Purpose of Detection which was concluded in Montreal on March 1, 1991.

Example 4: Amending order

EXPLANATORY NOTE

(This note is not part of the Order.)

This amendment sets out December 31, 1997 as the date on which the Order ceases to have effect.

* * * * *

FINES AND IMPRISONMENT

Regulations that provide for fines or imprisonment for a breach of their provisions are invalid unless there is express authority in the enabling Act to enact provisions respecting fines or imprisonment.

"Punishment" is the generic word that should be used to denote all forms of punishment imposed or recoverable by criminal proceedings, e.g., fines, penalties, imprisonment or forfeiture.

Headings with respect to offence provisions should read "Offence and Punishment". ("Penalties" or "Offence and Penalties" should not be used.)

For pecuniary punishments recoverable by criminal proceedings, the word "fine", not "penalty", should be used.

"Penalty" should not be used with respect to pecuniary punishment unless it is in addition to a fine (i.e., the words "fine" and "penalty" are used together) or recoverable by civil proceedings.

* * * * *

FOOTNOTES

The following titles and provisions of legislative instruments are footnoted when cited in prepublication notices, in orders in council or other executive orders, and in the amending formulas of amending regulations:

- (a) **titles** of statutes that are not part of Volumes I to VIII of the Revised Statutes of Canada, 1985;
- (b) **titles** of statutes that are included in the Supplements to the Revised Statutes of Canada, 1985;
- (c) **titles** of regulations (orders, rules, etc.);
- (d) the last amendment to a **provision** (section, subsection, paragraph, etc.) or to the **title** of a statute or regulation since the most recent revision or consolidation or, if the statute or regulation is not included in the last revision or consolidation, since it was first enacted.

As a rule, references to registered regulations or statutory instruments are indicated using their registration number or the chapter of the 1978 consolidation (e.g., SOR/97-434; SI/98-14; C.R.C., c. 1246), while references to statutes are indicated using the year and chapter number (e.g., S.C. 1998, c. 1; *see* CITATION OF STATUTES).

1. PREPUBLICATION NOTICES AND ORDERS IN COUNCIL OR OTHER EXECUTIVE ORDERS

In prepublication notices and orders in council or other executive orders, including "whereas" clauses, the footnote indicator is a lower-case letter in superscript (^a, ^b, ^c, etc.) placed at the end of the cited material, before the punctuation.

Example 1: Prepublication notice

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

Interested persons may make representations with respect to the proposed Regulations within 90 days after the date of publication of this notice. All

such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to the Chairman, Canadian Transportation Accident Investigation and Safety Board, P.O. Box 9120, Alta Vista Terminal, Ottawa, Ontario K1G 3T8.

Ottawa, March 22, 1998

Michel Garneau
Assistant Clerk of the Privy Council

^a S.C. 1989, c. 3

Example 2: Order in council

His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, pursuant to sections 125^a, 125.1^b, 125.2^c, 126^d and 157^e of the *Canada Labour Code*, hereby makes the annexed *Regulations Amending the Canada Occupational Safety and Health Regulations*.

^a S.C. 1993, c. 42, s. 4

^b S.C. 1993, c. 42, s. 5

^c R.S., c. 24 (3rd Supp.), s. 5

^d S.C. 1993, c. 42, s. 6

^e S.C. 1994, c. 41, para. 37(1)(p)

Example 3: Executive order with "whereas" clauses

Whereas the Governor in Council has, by the *Canadian Chicken Marketing Agency Proclamation*^a, established the Canadian Chicken Marketing Agency pursuant to subsection 16(1)^b of the *Farm Products Agencies Act*^c;

Whereas the Canadian Chicken Marketing Agency has been empowered to implement a marketing plan pursuant to the *Canadian Chicken Marketing Agency Proclamation*^a;

Whereas the Canadian Chicken Marketing Agency has taken into account the factors set out in paragraphs 7(a) to (e) of the schedule to the *Canadian Chicken Marketing Agency Proclamation*^a;

Whereas the proposed regulation entitled *Regulations Amending the Canadian Chicken Marketing Quota Regulations, 1990*, annexed hereto, is a regulation of a class to which paragraph 7(1)(d)^d of that Act applies by reason of section 2 of the *Agencies' Orders and Regulations Approval Order*^e, and has been submitted to the National Farm Products Council pursuant to paragraph 22(1)(f) of that Act;

And whereas, pursuant to paragraph 7(1)(d)^d of that Act, the National Farm Products Council is satisfied that the proposed regulation is necessary for the implementation of the marketing plan that the Canadian Chicken Marketing Agency is authorized to implement, and has approved the proposed regulation;

Therefore, the Canadian Chicken Marketing Agency, pursuant to paragraph 22(1)(f) of the *Farm Products Agencies Act*^c and subsection 6(1)^f of the schedule to the *Canadian Chicken Marketing Agency Proclamation*^a, hereby makes the annexed *Regulations Amending the Canadian Chicken Marketing Quota Regulations, 1990*.

Ottawa, Ontario,

1998

^a SOR/79-158

^b S.C. 1993, c. 3, s. 13(b)

^c S.C. 1993, c. 3, s. 2

^d S.C. 1993, c. 3, s. 7(2)

^e C.R.C., c. 648

^f SOR/91-139

2. ENACTING AND AMENDING FORMULAS

In the enacting and amending formulas of amending regulations, the footnote indicators are superscript Arabic numerals placed at the end of the cited material, before the punctuation (¹, ², ³, etc.).

A. Regulations being amended

In amending regulations, the first time that the regulations being amended are referred to in the amending clauses, they should be footnoted. The footnote should set out their original SOR number or, if the regulations are included in the last consolidation, their C.R.C. number.

Examples:

1. Paragraph 2(d) of the *Imported Goods Records Regulations*¹ is replaced by the following: . . .

¹ SOR/93-554

1. Paragraph B.02.130(b) of the *Food and Drug Regulations*¹ is amended by adding the following after subparagraph (vi): . . .

¹ C.R.C., c. 870

1. The *NAFTA Advance Ruling Regulations*¹ are repealed.

¹ SOR/94-222

If the title of the regulations has been amended since the making or the consolidation of the regulations, a reference to the SOR number of the enactment that amended the title is added.

Example:

1. The *Import Control List*¹ is amended by adding the following in numerical order: . . .

¹ C.R.C., c. 604; SOR/89-251

In those rare situations where the regulations are not registered or published in the *Canada Gazette*, Part II, the footnote indicates the P.C. number and the date on which the regulations were made or approved, if they were made or approved by the Governor in Council, or the date of the making of the regulations in any other case.

Example:

1. Section 17 of the *Canadian Forces Tactical Operations Regulations*¹ is replaced by the following: . . .

¹ P.C. 1997-214, January 15, 1997

B. Definitions

In the case of an amendment to a definition, the superscript is placed after the defined term rather than after the section number.

Example:

1. The definition "strip stamp"¹ in section 2 of the *Distillery Regulations*² is repealed.

¹ SOR/93-605

² C.R.C., c. 569

In the case of an amendment to part of a definition (paragraph, subparagraph, etc.), the superscript is placed after the provision being amended.

Example :

1. Paragraph (b)¹ of the definition "length" in subsection 2(1) of the Regulations

is replaced by the following: . . .

¹ SOR/96-212

C. Sections, subsections, paragraphs and other provisions

In the case of an amendment to a section, subsection, paragraph or other provision, the superscript is placed immediately after the reference to the amended provision.

Example:

7. Section 11³ of the Regulations is replaced by the following:

³ SOR/94-726

When two consecutive provisions are being amended and are individually named, a separate superscript is placed after each one, if applicable.

Examples:

13. Sections 24⁵ and 24.1⁵ of the Regulations are replaced by the following:

24.1 . . .

14. (1) Subsections 43(1)⁵ and (2)⁵ of the Regulations are replaced by the following:

43. (1) . . .

(2) . . .

⁵ SOR/92-709

In the case of an amendment to a number of consecutive provisions, the superscript is placed after the last provision identified. The footnote lists the most recent amendment for each provision affected. The footnote references are given in the order in which the footnoted provisions are cited in the text, not in the order of their registration (SOR) numbers.

Example:

2. The heading before section 1.01 and sections 1.01 to 44¹ of the Regulations are replaced by the following:

1.01 . . .

¹ SOR/95-56; SOR/78-866; SOR/86-850

When a portion of a section, subsection, paragraph, etc., is being amended, the superscript is placed immediately after the reference to the section, subsection, paragraph, etc.

Example:

14. The portion of section 24.2⁵ of the Regulations before paragraph (a) is replaced by the following:

24.2 . . .

⁵ SOR/92-709

D. Headings

In the case of an amendment to a heading, the superscript is placed after the word "heading".

Example:

6. The heading⁶ before section 108.1 of Schedule 4 to the Regulations is replaced by the following:

INSPECTION

⁶ SOR/79-306

In the case of an amendment to a heading and to a provision that follows the heading, the superscript is placed after the word "heading" and after the reference to the amended provision.

Example:

5. Section 74¹ of the Regulations and the heading¹ before it are replaced by the following:

APPLICATION FOR REGISTRATION

74. . . .

¹ SOR/96-362

E. Repeals

When a section, subsection, paragraph, etc. is repealed, the superscript is placed

immediately after the provision to be repealed.

Example:

6. Section 4² of the Regulations is repealed.

² SOR/92-248

F. Additions

Footnotes are not used when new provisions are added to regulations.

Examples:

2. Section 3 of the Regulations is amended by adding the following after subsection (3):

(4) . . .

3. The Regulations are amended by adding the following after section 4:

4.1. . . .

G. Schedules

The footnoting rules set out above apply to schedules. As well, schedules occasionally have tables with items and columns. When an item in a column is amended, the superscript is placed after the column reference.

Examples:

5. Item 4³ of Part A of the schedule to the Regulations is replaced by the following:

	Column 1	Column 2
Item	Code	Description
4.	Simulcast	Programming simulcast pursuant to subsection 14(3) of these Regulations
5.	Other	Programming other than local programming, network programming, rebroadcasts from another station or simulcasts

³ SOR/93-517

3. The portion of subitem 2(2) of Schedule 1 to the Regulations in column 1¹ is replaced by the following:

Item	Column 1 Description
2.	(2) Newspapers and periodicals . . .

¹ DORS/91-183

* * * * *

"GREATER OR LESSER OF X AND Y"

When a provision refers to "the greater of" or "the lesser of" two alternative amounts, use "and" rather than "or" to link the alternative amounts.

Examples:

... the greater of X and Y

... the greatest of X, Y and Z

5. The fee payable is the lesser of

(a) . . . , and

(b) . . .

Notes: The above examples also apply to the use of the words "least", "later", "latest", "earlier", "earliest", etc.

When paragraphs must be read together in order to make clear the meaning of the provision, a comma, rather than a semicolon, is the correct punctuation to use at the end of each paragraph (except the last).

* * * * *



"IF", "WHERE" AND "WHEN"

Drafting conventions

Coode, as quoted in Driedger¹, makes the following distinction:

Case: A statement of the circumstances in which the law operates.

Condition: A statement of something that must be done before the law operates.

Driedger does not believe that the distinction is valid, and rolls both case and condition into "fact situation". He adds, "Frequently, one conjunction may be used in the place of another with the same effect. The conjunctions **if**, **where**, **whenever**, **when**, are often interchangeable."²

Many legislative drafters follow the rule of thumb that **where** is used to introduce the case at the beginning of a provision and **if** to introduce conditions at the end.

The dictionaries (*Shorter Oxford*, *Concise Oxford*, *Gage*, *Webster*) all differentiate between "case" and "condition". Briefly put, "case" means the facts; "condition", a prerequisite.

Grammar

Quirk *et al.*, in *A Comprehensive Grammar of the English Language*, distinguish between "clauses of contingency" and "clauses of condition":

Clauses of contingency:

- Recurrent or habitual contingency, paraphrased by "in circumstances where".
- In this usage, **if**, **where** and **when** are interchangeable. (In legislative texts we have been using **where** almost exclusively.)

Clauses of condition:

- When the situation in the main clause is directly contingent on that of the

¹ Elmer A. Driedger, *The Composition of Legislation*, 2nd ed. (Ottawa: Department of Justice, 1976) at 3.

² *Op. cit.*, at 39.

conditional clause.

- **If** is the correct conjunction for this usage.

Where: The main function of **where** is to introduce adverbial clauses that refer to a physical place: **where** is specific; **wherever** is non-specific.

When: **When** is used when time or timing is important to the rule; when it is a rare or once-only situation; or when there is some certainty that an event will occur that makes the use of **if** undesirable and possibly illogical.

If: is used to introduce both clauses of contingency and clauses of condition. It is also the word most easily recognized by English speakers as denoting condition.

If can almost always be used instead of **where** in legislative texts. In the few remaining cases, **when** is usually the more appropriate choice. We can reserve **where** for its principal English function of introducing a physical place.

Recommendations

If should be used instead of **where** to introduce clauses of condition and clauses of contingency. Since it is often difficult to express the difference between case and condition, and since **if** can be used for both, **if** will be correct in any event and precludes the need to make the distinction.

Examples:

If the third party has consented to the disclosure, the third party is deemed to have waived the requirement.

If a complaint relates to a request for access to a record, . . .

If there is an inconsistency between the provisions of this Act . . .

If the Governor in Council directs any action to be taken by or on behalf of Her Majesty . . .

If any person proposes to construct or alter any work . . .

If the Governor in Council believes on reasonable grounds that . . .

If the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, . . .

If a person is bound by recognizance to give evidence in any proceedings, . . .

Every person who threatens to commit an offence under paragraph (2)(a) in order to compel a person to do or refrain from doing any act, if the threat is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty . . .

Subsection (2) does not apply to an occupant of a motor vehicle in which there is a prohibited weapon if, by virtue of subsection (3), subsection (1) does not apply to the person who is in possession of that weapon.

When should be used when time or timing is a factor in the clause or if there is an element of certainty that makes using **if** undesirable or illogical.

Examples:

When a person dies, . . .

When a licence expires, . . .

Except **when** otherwise provided, . . .

When the surface of a manoeuvring area or part thereof is snow-covered or otherwise unsuitable for painting or the closure is not permanent, . . .

When any recurrent training phase is completed . . .

Where should be used only to introduce adverbial clauses that refer to a physical place.

Examples:

An air carrier shall provide a safety features card to every passenger on board any aeroplane operated by the air carrier, at the place **where** the passenger is seated.

. . . the indicating instrument located in an approved position on the instrument panel **where** it is plainly visible to and usable by any pilot . . .

As an alternative to the use of too many **ifs** in the same provision, consider restructuring the text to clarify the relationships between the layers of conditions:

Examples:

When a runway or part of a runway is closed, the operator of the aerodrome shall place closed markings on the runway as follows:

(a) **if** the runway is greater than 1 220 m in length, . . .

If a restricted area pass has been designed to be worn on outer clothing, no person

PART 4: Drafting and Format Rules

"IF", "WHERE" AND "WHEN"

shall enter or remain in a restricted area unless the pass is visibly displayed on the person's clothing in a place **where** the pass is designed to be worn.

If a court imposes a fine, the court shall not, **when** the sentence is imposed, direct that the fine be paid forthwith unless . . .

Perhaps using more than one subsection to express the above would result in a simpler text overall.

* * * * *

INTERNATIONAL SYSTEM OF UNITS (SI)

When a number written in figures is used to express a measurement, the SI (metric) symbol of the unit must follow the figures. If the symbol is not commonly known, the name of the unit may be written in parentheses after the symbol.

Example:

15 μ V (microvolts)

SI symbols are printed in accordance with the *Canadian Metric Practice Guide*.

They are written in lower-case letters (e.g., m for metre) unless the name of the unit is derived from a proper name, in which case the symbol is written in upper-case letters (e.g., A for ampere).

They remain unaltered in the plural (i.e., do not add an "s").

They are written without periods (except at the end of a sentence).

They are placed after the numerical value in the expression for a quantity, with a space between the numerical value and the first letter of the symbol.

Example:

32 m **not** 32m

However, when the first character of the expression is not a letter, there is no space.

Examples:

75°12'45" **not** 75 ° 12' 45"

32°C **not** 32 °C

When a number is expressed in letters or when no number is involved, the name of the metric measure is written out.

Examples:

two metres

The form shall set out the number of kilometres between points A and B.

A single SI unit should be used to designate a quantity.

Example:

7.65 m not 7 m 65 cm

In text, a symbol should not be used to start a sentence.

SI symbols are the same in French and English.

<i>Quantity</i>	<i>Name</i>	<i>Symbol</i>
Length	metre	m
	kilometre	km
	centimetre	cm
	millimetre	mm
Area	square metre	m ²
	square kilometre	km ²
	square centimetre	cm ²
	square millimetre	mm ²
	hectare	ha
Volume	cubic metre	m ³
	cubic decimetre	dm ³
	cubic centimetre	cm ³
	cubic millimetre	mm ³
	litre	L
	millilitre	mL
Mass	kilogram	kg
	gram	g
	milligram	mg
	tonne	t
Plane Angle	degree	°
	minute	'
	second	"
Velocity	metre per second	m/s
	kilometre per hour	km/h
	centimetre per second	cm/s
	millimetre per second	mm/s
Pressure	pascal	Pa

PART 4: Drafting and Format Rules
INTERNATIONAL SYSTEM OF UNITS (SI)

Temperature	Celsius kelvin	°C K
Force	newton	N

SOURCE: *Canadian Metric Practice Guide* CAN/CSA-Z234.1-89. See also the schedules to the *Weights and Measures Act*, R.S., c. W-6.

* * * * *

ITALICS

Italics are used to draw attention to certain words or phrases or to set them apart from the rest of the text. In federal regulations, the following should be italicized:

- (a) the titles of publications (e.g., the *Canada Gazette*), statutes — long and short titles — (e.g., *An Act respecting divorce and corollary relief*; the *Divorce Act*), regulations (e.g., the *Pensioners Training Regulations*), and standards (e.g., Canadian Standards Association Standard CAN/CSA-Z76.1-M90, *Recloseable Child-Resistant Packages*);
- (b) certain headings (*see* DIVISION OF REGULATIONS);
- (c) in schedules, the references that are placed immediately under the heading "SCHEDULE" — including parentheses (*see* SCHEDULES TO REGULATIONS);
- (d) all foreign words and phrases not set off by quotation marks and not considered part of the English language, including Latin expressions and the scientific names of drugs, plants, fish and animals, but excluding names of institutions, companies, organizations, etc. (e.g., *ex parte*, *prunus*, *Crédit commercial de France*);
- (e) the French equivalent of a defined term that appears in parentheses at the end of a definition, including the word "*ou*" in a combined definition such as "*(vol affrété avec réservation anticipée ou VARA)*" (Note that the parentheses are not in italics.);
- (f) in a list (usually found in a schedule), the French equivalent of a listed word (*see*, for example, the schedules to R.S. 1985, c. F-11).

* * * * *

LATIN EXPRESSIONS

Special effort was made in the Revised Statutes of Canada, 1985 to eliminate the use of Latin in statutes. Expressions in Latin and other foreign languages should also be avoided in regulations, wherever possible. They go against the clear-language policy and can always be replaced by an English expression, as demonstrated by the following examples:

<i>mutatis mutandis</i>	with such modifications as the circumstances require
<i>viz</i>	namely
<i>e.g.</i>	such as; for example
<i>prima facie</i>	. . . is, in the absence of evidence to the contrary, proof . . . ; is evidence ¹

However, this general rule does not apply to Latin expressions that have been accepted in the English language, for example, "quota", "quorum", "maximum" and "minimum".

* * * * *

¹ See section 25 of the *Interpretation Act* and Elmer A. Driedger, *The Composition of Legislation*, 2nd ed. (Ottawa: Department of Justice, 1976) at 268-269.

MARGINAL NOTES

Marginal notes are now used in regulations, just as they are in legislation. However, they are optional, and a regulating-making authority may decide not to use them.

As the term indicates, marginal notes are shown in the margin of the text, using the same format as in the Acts, that is, in small upper- and lower-case letters.¹ If they are used, they must appear next to every section and subsection. They should be clear, simple and short, and serve as an indicator of the contents of the provision, not as a restatement of the text.

Marginal notes are not part of the text and therefore have no legal value. In this regard, section 14 of the *Interpretation Act* states the following:

14. Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

Generally, marginal notes should not be used in amending regulations if the regulations being amended do not contain such notes, in order to maintain internal consistency. However, it may be appropriate to include them if, for example, a part or a large portion of the regulations is being replaced.

A marginal note may repeat information contained in a heading immediately before it or in a preceding marginal note, especially when repetition may facilitate database searches. This convention applies particularly to marginal notes and headings pertaining to definitions or the date of coming into force, which occur in most regulations.

However, additional details should be included in appropriate cases if the drafter considers they would be useful to the reader and would not make the marginal note too long. For example, if registration by different authorities is provided for under the heading "Registration of Establishments", the marginal notes next to the relevant provisions could read as follows:

¹ In the stamped copies issued by the Regulations Section, the marginal notes are placed above the provision to which they apply. At the time of printing, the text is reformatted and the notes are placed in the margin.

REGISTRATION OF ESTABLISHMENTS

Registration by
the Governor in
Council

90. The Governor in Council may issue a registration in respect of the establishment of a producer if . . .

Registration by
the Minister

91. The Minister shall register the establishment of the producer if . . .

Registration by
an inspector

92. If the establishment of a producer was the subject of a previous registration, an inspector shall register the establishment if . . .

* * * * *

MATHEMATICAL FORMULAS

If a provision contains a calculation, it may be useful to use a formula so that the provision is not overly cumbersome and the message is clear. Formulas are commonly used in regulations dealing with fiscal matters, such as the *Income Tax Regulations*.

Here are some examples of provisions containing mathematical formulas:

Example 1:

35. (1) Subject to subsection (2), a grant shall not be made pursuant to section 34 to a qualifying student if it would cause the aggregate of all grants made pursuant to that section by an appropriate authority or other body to exceed, for a loan year, an amount determined by the formula

$$(A \times C) / B$$

where

- A is the estimated number of all persons, on the first day of the previous loan year, who were living in the province, who had attained 18 years of age and who had not attained 25 years of age, as determined by the Minister after consultation with the Chief Statistician of Canada;
- B is the estimated number of all persons, on the first day of the previous loan year, who live in a province to which section 14 of the Act does not apply, who had attained 18 years of age and who had not attained 25 years of age, as determined by the Minister after consultation with the Chief Statistician of Canada; and
- C is the amount set by the Minister for the current loan year, in consultation with the Minister of Finance.

Example 2:

(5) The family supplement is the amount, rounded off to the nearest dollar, determined by the formula

$$A - \frac{(A \times B)}{5,000}$$

where

- A is equal to the percentage set out in subsection (7) multiplied by 12/52 of the amount of the child tax benefit referred to in subsection (3); and
- B is

(a) the amount, not greater than \$5,000, by which the adjusted income, for the base taxation year in which the month that includes the Sunday of the relevant week falls, of the person in receipt of the child tax benefit exceeds \$20,921, if the adjusted income exceeds that amount, and

(b) zero, where the adjusted income is less than \$20,921.

Example 3:

"Tier I province" means, for the 12-month period beginning on April 1 of a calendar year, a province in respect of which the result of

$$A/B + C/D$$

expressed as a percentage, is less than 17%, as calculated on April 1 of that year on the basis of the immediately preceding calendar year,

where

- A is the total number of persons granted landing as investors in that province in that calendar year on the basis of an immigrant visa naming that province as the province of destination for the investor;
- B is the total number of persons granted landing as investors in Canada in that calendar year;
- C is the amount of investments made in that province by all persons granted landing as investors in that calendar year; and
- D is the amount of investments made in Canada by all persons granted landing as investors in that calendar year.

* * * * *



Furthermore, please note that the last criterion set out in the Manual ("repeal of spent provisions or regulations") seems to include two things, according to Regulatory Affairs policy: "obsolete regulations -- that is, regulations that are outdated but still legally enforceable" and "spent regulations that have no further application or effect" !?!

MISCELLANEOUS AMENDMENT REGULATIONS

Miscellaneous amendment regulations are used to correct errors, omissions and inconsistencies in regulations in an expeditious way. The process, which in the past could be used once or twice a year, can now be used at any time, and has the following advantages:

- it allows the use of a simplified RIAS (Regulatory Impact Analysis Statement);
- it does not require the signature of the minister or the head of the agency on the RIAS;
- it does not require a communications plan; and
- it does not require prepublication (unless this is required by the enabling Act).

Criteria

1. Miscellaneous amendment regulations can be used only to make routine or minor corrections that have no policy implications (i.e., non-substantive changes). These routine corrections are restricted to

- errors in format, syntax, spelling and punctuation;
- typographical errors, archaisms, anomalies and renumbering;
- inconsistencies between the English and French versions; and
- - repeal of spent provisions or regulations. *
- - minor, non-substantive unclear passages

2. Miscellaneous amendment regulations may also include changes requested by the Standing Joint Committee for the Scrutiny of Regulations, whether or not they have policy implications.

Format

Miscellaneous amendment regulations follow the same format as any amending regulations. The only difference is in the title (*see examples at the end of this item*).

If a miscellaneous amendment regulation amends more than one regulation, the regulation-making authority must be the same for all the regulations being amended. For example, if some of the regulations being amended were made by the Governor in Council and others by the minister, two miscellaneous amendment regulations are required.

Note that when several regulations are being amended or repealed, they are set out

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June 30/98
B. Auger
ngm
1998-07-24

in the amending regulation in the order of their original publication (e.g., C.R.C., c. 534; C.R.C., c. 1054; SOR/81-221; SOR/90-1038; and SOR/96-117), and are grouped under their enabling Acts if they are made under more than one Act. The Acts that are listed as headings are set out in English alphabetical order, in accordance with the Table of Public Statutes.

If some of the instruments being amended are designated "SI" and others "SOR", two separate instruments are required: one to amend the SIs and the other to amend the SORs.

It is possible to combine, however, in one miscellaneous amendment regulation, regulations that are required by the enabling Act to be republished in the *Canada Gazette*, Part I, with regulations that are not subject to such a requirement. In such a case, a "whereas" clause is inserted in the executive order that is published in the *Canada Gazette*, Part II, to reflect the fact that the relevant regulations were republished in accordance with the enabling Act (see Example F at the end of this item).

Below are the titles to be used for miscellaneous amendment regulations. When **orders** or **rules** are being amended, the title of the miscellaneous instrument is "Order [Rules] Amending Certain Orders [Rules] made . . .".

A. REGULATIONS MADE UNDER A SINGLE ACT

1. Amendment of one regulation:

Regulations Amending the Meat Inspection Regulations (Miscellaneous Program)

2. Amendment of two or more regulations:

Regulations Amending Certain Regulations (Instruments) Made under the Meat Inspection Act (Miscellaneous Program)*

* When both orders and regulations are amended, for example.

3. Repeal of one regulation:

Regulations Repealing the Timber Cargo Regulations (Miscellaneous Program)

4. Repeal of two or more regulations:

Regulations Repealing Certain Regulations Made under the Customs Act (Miscellaneous Program)

5. Amendment and repeal of two or more regulations:

Regulations Amending and Repealing Certain Regulations Made under the Customs

Act (Miscellaneous Program)

B. REGULATIONS MADE UNDER TWO OR MORE ACTS

- 1. Amendment of two or more regulations made under two or more Acts for which a single department is responsible:**

Regulations Amending Certain Department of Health Regulations (Miscellaneous Program)

- 2. Repeal of two or more regulations made under two or more Acts for which a single department is responsible:**

Regulations Repealing Certain Department of Transport Regulations (Miscellaneous Program)

- 3. Amendment and repeal of two or more regulations made under two or more Acts for which a single department is responsible:**

Regulations Amending and Repealing Certain Department of Finance Regulations (Miscellaneous Program)

The following are some examples of miscellaneous amendment regulations.

Example A: Amendment of two or more regulations made under a single Act

Whereas the proposed *Regulations Amending Certain Regulations Made under the Customs Act (Miscellaneous Program)* make no material substantive change in the existing regulations and are therefore, by virtue of paragraph 164(4)(d) of the *Customs Act*^a, not required to be published under subsection 164(3) of that Act;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of National Revenue, pursuant to subsections 32(1)^b and (2), paragraph 74(3)(b)^c, subsections 75(1) and 97.2(1)^d, paragraph 164(1)(i)^e and subsections 164(1.1)^f and (1.2)^g of the *Customs Act*^a, hereby makes the annexed *Regulations Amending Certain Regulations Made under the Customs Act (Miscellaneous Program)*.

REGULATIONS AMENDING CERTAIN REGULATIONS MADE UNDER
THE CUSTOMS ACT (MISCELLANEOUS PROGRAM)

REFUND OF DUTIES REGULATIONS

1. The portion of section 21.1¹ of the *Refund of Duties Regulations*² before paragraph (a) is replaced by the following:

21.1 This Part applies to the granting of a refund under paragraph 74(1)(c.1) of the Act of duties paid on goods.

2. Paragraph 21.3(b)¹ of the Regulations is replaced by the following:

(b) the duties payable on the goods as a result of the goods being eligible for preferential tariff treatment under NAFTA or preferential tariff treatment under CCFTA, as the case may be.

EXPORTERS' AND PRODUCERS' RECORDS REGULATIONS

3. The definition "advance ruling" in section 1 of the *Exporters' and Producers' Records Regulations*³ is replaced by the following:

"advance ruling" means an advance ruling referred to in Article 509 of NAFTA, Article 5.8 of CIFTA or Article E-09 of CCFTA. (*décision anticipée*)

CIFTA TARIFF ITEM NO. 9827.00.00 ACCOUNTING REGULATIONS

4. The title of the *CIFTA Tariff Item No. 9827.00.00 Accounting Regulations*⁴ is replaced by the following:

CIFTA AND CCFTA TARIFF ITEM NO. 9827.00.00 ACCOUNTING REGULATIONS

5. Paragraph 2(b) of the Regulations is replaced by the following:

(b) proof of exportation of the goods to Chile or to Israel or another CIFTA beneficiary.

COMING INTO FORCE

6. These Regulations come into force on < >.

^a R.S., c. 1 (2nd Supp.)

^b S.C. 1995, c. 41, s. 8

^c S.C. 1997, c. 14, s. 43(4)

^d S.C. 1997, c. 14, s. 45

^e S.C. 1992, c. 28, s. 30(1)

^f S.C. 1993, c. 44, s. 108(1)

^g S.C. 1997, c. 14, s. 47(1)

¹ SOR/93-550

² SOR/86-945

³ SOR/97-71

⁴ SOR/97-74

Example B: Amendment and repeal of two or more instruments (orders and regulations) designated "SOR"

His Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to section 6^a of the *Radiocommunication Act*^b, hereby makes the annexed *Regulations Amending and Repealing Certain Instruments Made under the Radiocommunication Act (Miscellaneous Program)*.

REGULATIONS AMENDING AND REPEALING CERTAIN INSTRUMENTS
MADE UNDER THE RADIOCOMMUNICATION ACT (MISCELLANEOUS
PROGRAM)

PRIVATE RECEIVING ANTENNAE CONSTRUCTION ORDER

1. The *Private Receiving Antennae Construction Order*¹ is repealed.

RADIOCOMMUNICATION REGULATIONS

2. The heading before section 72 of the *Radiocommunication Regulations*² is replaced by the following:

Fixed Station Communication with a Station not Otherwise Described

3. Items 7 and 8 of Schedule II to the Regulations are repealed.

COMING INTO FORCE

4. These Regulations come into force on < >.

^a S.C. 1989, c. 17, s. 4

^b S.C. 1989, c. 17, s. 2

¹ C.R.C., c. 1373

² SOR/96-484

Example C: Regulation amending a single regulation

The Minister of Agriculture and Agri-Food, pursuant to subsection 204(9)^a of the *Criminal Code*, hereby makes the annexed *Regulations Amending the Pari-Mutuel Betting Supervision Regulations (Miscellaneous Program)*.

Ottawa, , 1997

Lyle Vanclief
Minister of Agriculture and Agri-Food

**REGULATIONS AMENDING THE PARI-MUTUEL BETTING SUPERVISION
REGULATIONS (MISCELLANEOUS PROGRAM)**

AMENDMENT

1. Paragraph 103(1)(h) of the English version of the *Pari-Mutuel Betting Supervision Regulations*¹ is replaced by the following:

(h) the amount of the deduction from each dollar bet authorized under a provincial enactment;

COMING INTO FORCE

2. These Regulations come into force on < . . . >.

^a S.C. 1994, c. 38, para. 25(1)(g)

¹ SOR/91-365

Example E: Regulation amending two or more regulations made under two or more Acts (We deliberately omitted the footnotes in this example.)

His Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture and Agri-Food, hereby makes the annexed *Regulations Amending and Repealing Certain Canadian Food Inspection Agency Regulations (Miscellaneous Program)*, pursuant to

- (a) section 32 of the *Canada Agricultural Products Act*;
- (b) section 5 of the *Feeds Act*; and
- (c) subsection 5(1) of the *Fertilizers Act*.

REGULATIONS AMENDING AND REPEALING CERTAIN CANADIAN
FOOD INSPECTION AGENCY REGULATIONS (MISCELLANEOUS
PROGRAM)

CANADA AGRICULTURAL PRODUCTS ACT

Egg Regulations

1. The definition "Regional Director General" in section 2 of the *Egg Regulations* is replaced by the following:

"Regional Director General" means the person designated as a Regional Director General by the President of the Agency. (*directeur général régional*)

2. Paragraph 24(2)(a) of the Regulations is replaced by the following:

(a) where the eggs are of Canadian origin, mark the container with a stamp approved by the Agency; and

Fresh Fruit and Vegetable Regulations

3. Paragraph 29(2)(c) of the *Fresh Fruit and Vegetable Regulations* is replaced by the following:

(c) a release permit issued by an inspector, in a form established by the Agency, where an inspection cannot be performed within the time referred to in paragraph 40(1)(a) or (b).

Maple Products Regulations

4. The definition "Regional Director General" in section 2 of the *Maple Products Regulations* is replaced by the following:

"Regional Director General" means the person designated as a Regional Director

General by the President of the Canadian Food Inspection Agency. (*directeur général régional*)

5. Paragraph 19(2)(b) of the Regulations is replaced by the following:

(b) authorization in writing is obtained from the Regional Director General for each shipment before it enters Canada and, on entry into Canada, the shipment is subjected to any inspection or analysis that under these Regulations is necessary to determine whether the product complies with these Regulations.

Agricultural Standards Inspectors Regulations

6. The *Agricultural Standards Inspectors Regulations* are repealed.

FEEDS ACT

Feeds Regulations, 1983

7. Subsection 2(1) of the *Feeds Regulations, 1983* is amended by adding the following in alphabetical order:

"Agency" means the Canadian Food Inspection Agency established by section 3 of the *Canadian Food Inspection Agency Act*. (*Agence*)

8. Paragraph 5(2)(g) of the Regulations is amended by adding the word "and" at the end of subparagraph (v) and by repealing subparagraph (vi).

FERTILIZERS ACT

Fertilizers Regulations

9. Subsection 2(1) of the *Fertilizers Regulations* is amended by adding the following in alphabetical order:

"Agency" means the Canadian Food Inspection Agency established by section 3 of the *Canadian Food Inspection Agency Act*. (*Agence*)

COMING INTO FORCE

10. These Regulations come into force on < >.

Example F: Regulation amending certain regulations subject to statutory republication

Whereas, pursuant to section 30 of the *Transportation of Dangerous Goods Act, 1992*^a, a copy of proposed *Regulations Amending the Transportation of Dangerous Goods Regulations (Miscellaneous Program)*, substantially in the form set out in section 2 of the annexed *Regulations Amending Certain Department of Transport Regulations (Miscellaneous Program)*, was published in the *Canada Gazette*, Part I, on September 20, 1997, and a reasonable opportunity was thereby given to interested persons to make representations to the Minister of Transport with respect to the proposed Regulations;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, hereby makes the annexed *Regulations Amending Certain Department of Transport Regulations (Miscellaneous Program)*, pursuant to

(a) sections 5 and 11 of the *Motor Vehicle Safety Act*^b; and

(b) paragraph 27(1)(h) of the *Transportation of Dangerous Goods Act, 1992*^a.

REGULATIONS AMENDING CERTAIN DEPARTMENT OF TRANSPORT
REGULATIONS (MISCELLANEOUS PROGRAM)

MOTOR VEHICLE SAFETY ACT

Motor Vehicle Safety Regulations

1. Subsection 1201(1)¹ of Schedule VI to the *Motor Vehicle Safety Regulations*² is replaced by the following:

1201. (1) Every snowmobile other than a competition snowmobile shall be constructed so that it conforms to the requirements set out in the *SCCC/10 Safety Standards for Snowmobile Product Certification*, published by the Snowmobile Safety and Certification Committee, Inc. (1640 Haslett Road, Suite 170, Haslett, Michigan 48840, U.S.A), dated June 8, 1994, other than the labelling requirements of Figures 4 to 7, and in the *SSCC/10 Supplement, Detailed Standards and Testing Specifications and Procedures*, dated June 8, 1994, when tested in accordance with the tests referred to in those Standards and that Supplement.

TRANSPORTATION OF DANGEROUS GOODS ACT, 1992

Transportation of Dangerous Goods Regulations

2. The portion of subsection 7.33.1(6)³ of the *Transportation of Dangerous Goods Regulations*⁴ before paragraph (a) is replaced by the following:

(6) A tank referred to in subsection (5) is considered to have been tested in accordance with subsection 178.341-7 of clause 5.6 of CSA Preliminary Standard B620-1987, *Highway Tanks and Portable Tanks for the Transportation of Dangerous Goods*, dated October 1987 and amended February 1992, for the purposes of paragraph (5)(b), if the tank was tested at the time of manufacture.

COMING INTO FORCE

3. These Regulations come into force on < >.

^a S.C. 1992, c. 34

^b S.C. 1993, c. 16

¹ SOR/96-360

² C.R.C., c. 1038

³ SOR/95-547

⁴ SOR/85-77

* * * * *

"MUST", "MAY" AND "SHALL"

"Must" may be used instead of "shall" in mandatory provisions. "Must" may also be used in a negative prohibition ("No person may . . ." or "A person must not . . .").

Whichever choice is made, however, it is important to maintain consistency of use within a regulation, in particular when the regulation is being amended.

Note that, in Acts, a more restrictive use of the alternative "must" has been adopted. There, the convention is to use "shall" unless the drafter considers it appropriate to use "must", but "must" is a choice only if the mandatory provisions are not enforceable as offences or by the imposition of penalties.

* * * * *

NOTICE OF PREPUBLICATION

Most proposed regulations are prepublished in the *Canada Gazette*, Part I.

They are prepublished either under the Government policy on prepublication or pursuant to a requirement of the enabling Act.¹ A notice of prepublication accompanies every proposed regulation that is prepublished.

Notices that accompany proposed regulations prepublished pursuant to a requirement of the enabling Act are examined and stamped by the Regulations Section along with the regulations. Notices that accompany regulations prepublished under the Government policy on prepublication are generally prepared by the regulation-making authority and are not sent to the Regulations Section for examination. However, the Section may examine them at the client's request.

If the proposed regulations are prepublished under the enabling Act, the notice must adhere to the wording used in the enabling provision.

Prepublication notices generally follow a standard format. Their content, however, is left at the discretion of the regulation-making authority, especially as regards the reference to the *Access to Information Act*.

Examples of prepublication notices are provided below. Note that they do not have to include the date of coming into force if that date is provided at the end of the proposed regulations. Note also that, in the address, two spaces are required between the province (territory) and the postal code. If clients wish to provide their telephone and fax numbers and E-mail address, they should indicate them as shown in Example 2.

Example 1: *Canadian Transportation Accident Investigation and Safety Board Act* —
Subsection 34(3)

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

Interested persons may make representations with respect to the proposed Regulations within 90 days after the date of publication of this notice. All

¹ See PUBLICATION, item 6 in Part 2.

such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to the Chairman, Canadian Transportation Accident Investigation and Safety Board, P.O. Box 9120, Alta Vista Terminal, Ottawa, Ontario K1G 3T8.

Ottawa, March 22, 1998

Michel Garneau
Assistant Clerk of the Privy Council

Example 2: *Canada Post Corporation Act* — Subsection 20(1)

Notice is hereby given, pursuant to subsection 20(1) of the *Canada Post Corporation Act*, that the Canada Post Corporation, pursuant to subsection 19(1) of that Act, proposes to make the annexed *Regulations Amending the Special Services and Fees Regulations*.

Interested persons may make representations with respect to the proposed amendments within 60 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to the Minister of Public Works and Government Services, Minister responsible for the Canada Post Corporation, Room 435-S, Centre Block, Ottawa, Ontario K1A 0A6. (Tel.: . . . ; fax: . . . ; E-mail: . . .)

Ottawa, December 12, 1997

Michel Garneau
Assistant Clerk of the Privy Council

Example 3: *Motor Vehicle Safety Act* — Subsection 11(3)

Notice is hereby given, pursuant to subsection 11(3) of the *Motor Vehicle Safety Act*, that the Governor in Council, pursuant to section 5 and subsection 11(1) of that Act, proposes to make the annexed *Regulations Amending the Motor Vehicle Safety Regulations (Side Doors)*.

Interested persons may make representations with respect to the proposed Regulations to the Minister of Transport within 60 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to (*name*), Road Safety and Motor Vehicle Regulation Directorate, Department of Transport, 330

Sparks Street, Ottawa, Ontario K1A 0N5.

The representations should stipulate those parts of the representations that should not be disclosed pursuant to the *Access to Information Act* and, in particular, pursuant to sections 19 and 20 of that Act, the reason why those parts should not be disclosed and the period during which they should remain undisclosed. The representations should also stipulate those parts of the representations for which there is consent to disclosure pursuant to the *Access to Information Act*.

Ottawa, August 28, 1996

Michel Garneau
Assistant Clerk of the Privy Council

Example 4: *Food and Drugs Act* — Administrative republication

Notice is hereby given that the Governor in Council, pursuant to sections 45 and 51 of the *Food and Drugs Act*, proposes to make the annexed *Regulations Amending the Food and Drug Regulations (1056)*.

Interested persons may make representations with respect to the proposed Regulations within 30 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to (*name*), Risk Management and Regulatory Affairs Division, Department of Health, Address Locator No. 0702B1, Health Protection Building, Tunney's Pasture, Ottawa, Ontario K1A 0L2.

The representations should stipulate those parts of the representations that should not be disclosed pursuant to the *Access to Information Act* and, in particular, pursuant to sections 19 and 20 of that Act, the reason why those parts should not be disclosed and the period during which they should remain undisclosed. The representations should also stipulate those parts of the representations for which there is consent to disclosure pursuant to the *Access to Information Act*.

Ottawa, December 16, 1997

Michel Garneau
Assistant Clerk of the Privy Council

Example 5: *National Energy Board Act* — Administrative prepublication

Notice is hereby given that the National Energy Board, pursuant to subsection 24.1(1) of the *National Energy Board Act*, proposes to make the annexed *Regulations Amending the National Energy Board Cost Recovery Regulations*.

Interested persons may make representations with respect to the proposed Regulations within 30 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to (*name*), Manager, Finance, Corporate Services Business Unit, National Energy Board, 311 Sixth Avenue SW, Calgary, Alberta T2P 3H2.

Calgary, December 21, 1997

Robert Priddle
Chairman of the National Energy Board

* * * * *

"NOTWITHSTANDING" CLAUSES

A "notwithstanding" clause is used in a provision to alert the reader that the provision is an exception to the general rule. A "subject to" clause may also be used for this purpose. However, both clauses should never be used in the two provisions involved.

"Despite" may serve as an alternative to "notwithstanding" when the latter is used as a preposition.

Maintain consistency of use within a document, whichever choice you make. In particular, when amending a regulation, maintain consistency within that regulation.

Examples:

1. An applicant may, **despite subsection (1)**, apply to the Minister in writing.

This is a phrase; it has no verb. The preposition "despite" introduces a phrase that modifies the predicate.

2. **Despite subsection (1)**, the employer may file the application before April 1998.

This is a phrase; it has no verb. The preposition "despite" introduces a phrase that modifies the whole sentence.

3. **Despite the fact that the building is under repair**, the office was open as usual.

This is a phrase; it has no verb. The preposition "despite" introduces the phrase, which is itself modified by an adjectival clause, "that the building is under repair".

4. **Notwithstanding that the building is under repair**, the office was open as usual.

If the words "the fact" were omitted from example 3, the clause "that the building is under repair" would remain, and "despite" would be incorrect; being a preposition, "despite" can introduce only a phrase. "Notwithstanding" can introduce clauses.

5. **Despite any other provision of this Act**, but subject to section 10, . . .

This is a phrase; it has no verb. The use of the preposition "despite" is correct.

6. The application is valid, **notwithstanding that it was filed after the 30-day period had expired**.

This is a clause; it has a verb. "Despite" would be ungrammatical in this case, because, being a preposition, it cannot introduce a clause.

7. **Notwithstanding that a certificate of amendment had been issued to an association in respect of articles of amendment referred to in subsection (2), . . . (s. 34(5) of the *Animal Pedigree Act*)**

This is a clause, and the use of "notwithstanding" is correct. "Despite", being a preposition, would be incorrect here, as it cannot introduce a clause.

8. **Notwithstanding the existence of a pre-emptive right, a shareholder of an association has no pre-emptive right in respect of shares to be issued. (s. 76(3) of the *Cooperative Credit Associations Act*)**

This is a phrase, and "notwithstanding" could be replaced by "despite" in this case. "Despite", being a preposition, can introduce a phrase and replace the preposition "notwithstanding".

A search of the federal legislation database for occurrences of "notwithstanding" reveals that "notwithstanding" is used as a preposition in the majority of cases. "Despite" can be substituted in such instances.

* * * * *

NUMBERING

In regulations, **sections** are numbered using consecutive Arabic numerals in boldface that are followed by a period, except when the decimal system is used. Items in schedules are also identified using Arabic numerals, which may or may not be in boldface (*see SCHEDULES TO REGULATIONS*).

Subsections are indicated using Arabic numerals in parentheses.

Paragraphs are indicated using lower-case letters in parentheses.

Subparagraphs are indicated using lower-case Roman numerals in parentheses.

Clauses are indicated using upper-case letters in parentheses.

Subclauses are indicated using upper-case Roman numerals in parentheses.

Sub-subclauses are indicated using Arabic numerals.

Note: The numbering of sections does not recommence at "1." in each part when the regulation contains two or more parts, divisions or subdivisions.

Example:

```
1. (1) . . . .  
   (2) . . . :  
   (a) . . . ;  
   (b) . . . :  
     (i) . . . ,  
     (ii) . . . :  
       (A) . . . ,  
       (B) . . . :  
         (I) . . . ,  
         (II) . . . :  
           1 . . . ,  
           2 . . . ,  
         (III) . . . ,  
       (C) . . . ,  
     (iii) . . . ,  
   (c) . . . .  
   (3) . . . .  
2. . . . .
```

As a rule, the provisions of a regulation are not renumbered when the regulation is amended, since cross-references may already exist in that regulation or in others.

Renumbering could create confusion as to which provision is intended by the reference. For the same reason, one should exercise great caution when assigning to an amendment the number of a previously repealed provision.

If a new section is inserted, the decimal numbering system is used. Thus, sections inserted between sections 8 and 9 would be numbered 8.1, 8.2, 8.3, etc. Subsections inserted between subsections (4) and (5) would be numbered (4.1), (4.2), (4.3), etc. Paragraphs inserted between paragraphs (b) and (c) would be designated (b.1), (b.2), etc. (Note, however, that it is not possible to insert a section prior to section 1. Section 1 must be revoked and replaced with the new section 1. The old section 1 becomes section 1.1.)

To add sections between sections 3 and 4:

3.
3.1
--- 3.11 (insertion)
--- 3.12 (insertion)
3.2
3.3
3.4
3.5
3.6
3.7
3.8
3.9
4.

To add sections between sections 3.1 and 3.2 and after section 3.2:

3.1
--- 3.101 (insertion)
--- 3.102 (insertion)
3.11
3.12
3.13
3.14
3.15
3.16
3.17
3.18
3.19
3.2
--- 3.21
--- 3.22
--- 3.23
3.3

To add sections before section 3.1 and after sections 3.1 and 3.11:

3.
3.01
3.02
3.03
...
3.1
3.101

3.102
3.103
--- 3.1031 (insertion)
--- 3.10311 (insertion)
--- 3.1032 (insertion)
3.104
3.105
3.106
3.107
3.108
3.109
3.11
3.111
3.112

To add paragraphs after paragraph (z):

(z)
(z.1)
(z.2)

Notes: If in the existing regulation the paragraphs that follow paragraph (z) are designated (aa), (bb), etc., the same system is to be used in the amendments, unless paragraphs are being inserted between paragraph (z) and paragraph (aa). In that case, the decimal system should be used (z.1, z.2, etc.).

Breaking down a section beyond the subparagraph level often indicates a problem in the organization of ideas, and should be avoided. In such cases it is preferable to add a section or subsection (*see* DIVISION OF REGULATIONS).

* * * * *

NUMBERS

Numbers 10 and up are expressed in figures; numbers under 10 are written out. This applies to cardinal and ordinal numbers.

There are three exceptions to this rule:

- at the beginning of a sentence, numbers are always written out;
- when a number is used with a unit of measure or proportion represented by a symbol or abbreviation (e.g., \$, %, kg, m), figures are always used; and
- when there is a series of numbers, one of which is 10 or more, figures are always used.

* * * * *



OATHS

The *Interpretation Act* defines "oath" (and "sworn") as follows:

"oath" includes a solemn affirmation or declaration when the context applies to any person by whom and to any case in which a solemn affirmation or declaration may be made instead of an oath, and in the same cases the expression "sworn" includes the expression "affirmed" or "declared"[]

Oath of office

I,, do solemnly swear [or "affirm"] . . .

Other examples of oaths and affirmations

I certify that:

(a) . . .

(b) . . .

and that I have knowledge of all matters contained in this Certificate.

Signature

I declare that the information contained in this report is accurate.

Signature

I solemnly affirm that . . .

Signature

* * * * *

ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS

The executive order is the formal means by which the regulation-making authority expresses its decision; it serves to announce the decision to make regulations and is therefore placed before the regulations. It is called an Order in Council if it is made by the Governor in Council on the recommendation of a minister.

On the subject of orders in council, Dussault and Borgeat state the following:

They are the manifestation of official government decisions; as such, they are of a decision-making nature and are not normative. Thus, when the government makes or approves a regulation, . . . it makes a decision to act, which, in its written formulation, assumes the form of an Order-in-Council. The fact of approving or making a regulation is a decision to change the existing legal order which, by itself, has nothing normative about it Therefore, it is important to distinguish the Order-in-Council mandating the instrument from the instrument itself.¹

For that reason, the executive order of a regulation is limited to announcing the decision that is being made. In the case of a new regulation, the formulation ". . . hereby makes the annexed *XYZ Regulations*" is used and, in the case of an amending or repealing regulation, the formulation ". . . hereby makes the *Regulations Amending [or Repealing] the XYZ Regulations*" is used.

The coming-into-force provision is inserted at the end, as the last provision of the regulations.²

Orders in council and other executive orders must specify the provision of the Act that constitutes the statutory authority for the regulations being made.

If the making of the regulations is subject to conditions, fulfilment of the conditions is recited in the order in council or other executive order.³

When citing the action that the Governor in Council is taking, make certain that it is the action set out in the enabling provision, e.g., making, approving or confirming.

In orders in council and other executive orders,

¹ René Dussault and Louis Borgeat, *Administrative Law: a Treatise*, Vol. 1, 2nd ed., (Toronto: Carswell, 1990) at 327.

² See **COMING INTO FORCE**, item 7 in Part 2, and **COMING-INTO-FORCE PROVISIONS**, in this Part.

³ See **CONDITIONS PRECEDENT**.

- (a) the titles of Acts and regulations are italicized;
- (b) in the English version, upper- and lower-case letters are used for "His Excellency the Governor General in Council";
- (c) in the English version, the expression "hereby makes (approves, confirms)" is used instead of "is pleased hereby to make (approve, confirm)"; and
- (d) footnotes are indicated using lower-case letters in superscript (^a, ^b, ^c, etc.) rather than asterisks (*, **, ***, etc.).⁴

Below are some examples of orders in council and other executive orders:⁵

1. New regulations

(1) Made by the Governor in Council

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . Act, hereby makes the annexed *XYZ Regulations*.

(2) Made by a minister

The Minister of . . . , pursuant to subsection . . . of the . . . Act, hereby makes the annexed *XYZ Order*.

2. Amending regulations

(1) Made by the Governor in Council

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . Act, hereby makes the annexed *Regulations Amending the XYZ Regulations*.

(2) Made by the Governor in Council (when a list is to be amended)

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . Act, hereby makes the annexed *Order Amending the ABC List*.

⁴ See FOOTNOTES.

⁵ See TITLE OF REGULATIONS for details on how to draft the title.

(3) Made by a minister

The Minister of . . . , pursuant to sections . . . of the . . . *Act*, hereby makes the annexed *Regulations Amending the XYZ Regulations*.

3. Approval by the Governor in Council

(1) After the regulation is made

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . *Act*, hereby approves the *Regulations Amending the XYZ Regulations*, made [on . . . (*date*)] by . . . (*name of regulation-making body*).

(2) Before the regulation is made

His Excellency the Governor General in Council, on the recommendation of the Minister of Transport and the Canada Ports Corporation, pursuant to section 27 of the *Canada Ports Corporation Act* and section 13 of Schedule I to that Act, hereby approves such amendments, in the form set out in the annexed *By-law Amending the Harbour Dues Tariff By-law (Montreal Harbour)*, as may be made from time to time by the Montreal Port Corporation, by way of a certified resolution in the annexed form, to the rates set out in column II of Schedule VII to the *Harbour Dues By-law*, provided that, in respect of each rate that is the subject of an amendment made pursuant to this approval,

(a) where the rate has not previously been amended pursuant to this approval, the amendment does not change the rate by more than four per cent per year from the rate effective on January 1, 1997;

(b) where the rate has previously been amended pursuant to this approval, the amendment does not change the rate by more than four per cent per year from the rate effective on the day on which the most recent amendment of the rate came into effect; and

(c) the amendment does not come into effect after January 1, 2002.

Note: When a regulation must be approved by the Governor in Council, the current practice is to publish a copy of the regulation-making instrument (e.g., the resolution or ministerial order) in the *Canada Gazette* as well as the approval order.

Example:

RESOLUTION

The Canada Employment Insurance Commission, pursuant to paragraphs 5(6)(e) and 7(4)(c), subsection 14(4) and sections 16, 54 and 167 of the *Employment Insurance Act*, hereby makes the annexed *Regulations Amending the Employment Insurance Regulations*.

June 13, 1997

P.C. 1997-903 3 July, 1997

His Excellency the Governor General in Council, on the recommendation of the Minister of Natural Resources Development, pursuant to paragraphs 5(6)(e) and 7(4)(c), subsection 14(4) and sections 16, 54 and 167 of the *Employment Insurance Act*, hereby approves the annexed *Regulations Amending the Employment Insurance Regulations*, made by the Canada Employment Insurance Commission.

4. Regulations amending two or more regulations

(1) Made by the Governor in Council under one enabling Act

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . *Act*, hereby makes the annexed *Regulations Amending the Grain Shipment Regulations and the Elevator Fees Regulations*. [Alternative: *Grain Shipment and Elevator Fees Amending Regulations*]

(2) Made by the Governor in Council under more than one enabling Act

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , hereby makes the annexed *Regulations Amending Certain Department of . . . Regulations (Tobacco Advertisement)*, pursuant to

- (a) section . . . of the . . . *Act*;
- (b) section . . . of the . . . *Act*; and
- (c) section . . . of the . . . *Act*.

5. Miscellaneous amendment regulations⁶

(1) Made by the Governor in Council under one enabling Act

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . Act, hereby makes the annexed *Regulations Amending Regulations Made under the XYZ Act (Miscellaneous Program)*.

(2) Made by the Governor in Council under more than one enabling Act

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , hereby makes the annexed *Regulations Amending Certain Department of . . . Regulations (Miscellaneous Program)*, pursuant to

- (a) section . . . of the . . . Act;
- (b) section . . . of the . . . Act;
- (c) section . . . of the . . . Act; and
- (d) section . . . of the . . . Act.

6. Repealing regulations

(1) Made by the Governor in Council

His Excellency the Governor General in Council, on the recommendation of the Minister of . . . , pursuant to section . . . of the . . . Act, hereby makes the annexed *Regulations Repealing the XYZ Regulations*.

(2) Made by a minister

The Minister of . . . , pursuant to section . . . and subsection . . . of the . . . Act, hereby makes the annexed *Order Repealing the XYZ Order*.

* * * * *

⁶ See MISCELLANEOUS AMENDMENT REGULATIONS.

PARAGRAPHING CONJUNCTIONS

The conjunctions "and" and "or" are two of the most common, yet most ambiguous, words used in legislation. They have overlapping meanings, depending on the context in which they are used (*see* Elmer A. Driedger, *Construction of Statutes*, 2nd ed., at 15). Their distinctive meanings are as follows:

"A and B" = *both* A and B

"A or B" = *either* A or B

Their common meaning is *any one of* A alone, B alone or both A and B.

These conjunctions are commonly used to connect paragraphs, subparagraphs, clauses and subclauses (for simplicity, all of these units of text are referred to as *paragraphs* here). The practice in Canadian English drafting is to follow ordinary writing style and put a conjunction at the end of the second-last paragraph. A comma or semi-colon takes the place of the conjunction at the end of the preceding paragraphs.

Drafters can often rely on the context to make clear which sense of the conjunction is intended. The following example illustrates this:

1. A person is not required to pay an admission fee if they are

(a) under 18 years of age; or

(b) at least 65 years of age.

These two paragraphs express mutually exclusive cases so that the "or" between them must mean either one or the other, and not both.

However, context does not always make clear which meaning is intended. This is demonstrated by the case law dealing with the interpretational problems that these conjunctions sometimes create. For example, *Marzetti v. Marzetti* (1994), 169 N.R. 161 (S.C.C.) concerned section 67 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, which read

67. (1) The property of a bankrupt divisible among his creditors shall . . .
comprise . . .

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been

exercised by the bankrupt for his own benefit.

It was argued that these paragraphs could only be read conjunctively in the sense that the property mentioned in paragraph (c) could only be included if any associated powers also met the requirement of paragraph (d) that they be exercisable for the bankrupt's own benefit. This argument was rejected by the Supreme Court on the basis that *and* should be read disjunctively.

A similar argument was made in *Bayliner Marine Corp. v. Doral Boats Ltd.* [1986] 3 F.C. 421 (C.A.). It involved subsection 11(2) of the *Industrial Designs Rules*, C.R.C., c. 964:

11. (1) A design shall be deemed to be used as a model or pattern to be multiplied by any industrial process . . .

(a) where the design is reproduced or is intended to be reproduced in more than 50 single article, unless . . . ; and

(b) where the design is to be applied to

(i) printed paper hangings,

(ii) carpets, floor cloths, or oil cloths manufactured or sold in lengths or pieces, . . .

Here too the court concluded that "**and**" should be read disjunctively.

Recommendations

Paragraphing provides a convenient structure to clarify which conjunctive sense is intended. Drafters should consider whether clarifying language should be added to the umbrella (*chapeau*) portion preceding the paragraphs to indicate how they are conjoined. Words and phrases such as *both*, *either*, *any of*, *one or more of* and *all of* can be used. For example:

1. Nothing in this Act invalidates a payment by a bankrupt to any of their creditors if **both** of the following conditions are complied with:

(a) that the payment was made in good faith and took place between . . . ; and

(b) that the person, other than the debtor, to whom the payment was made had not, at the time of the payment, notice of any act of bankruptcy committed by the bankrupt.

2. If the Governor in Council is of the opinion that any construction, alteration or extension would result in the deposit of waste in contravention of subsection 4(1),

the Governor in Council may, by order, **either**

(a) require any modifications in the plans and specifications for the construction, alteration or extension that the Governor in Council considers to be necessary;
or

(b) prohibit the construction, alteration or extension.

3. If **any of the following information** is to be part of the agreement, it must be set out in a schedule to the agreement:

(a) trade secrets of any person;

(b) financial, commercial, scientific or technical information that is confidential information and is treated consistently in a confidential manner by any person;
or

(c) information the disclosure of which could reasonably be . . .

4. Alternative measures may be used if **all of the following conditions** are met:

(a) the measures are part of a program of alternative measures authorized by the Attorney General, after consultation with the responsible minister;

(b) an information has been laid in respect of the offence; **and**

(c) the Attorney General, after consulting with the responsible . . .

Note, however, that **both** and **either** indicate that only two choices follow. If additional choices are added, the opening words must be changed to **all of** or **any of**.

Finally, drafters should continue the current practice of putting a conjunction at the end of the second-last paragraph and putting commas or semi-colons at the end of the preceding paragraphs.

* * * * *

"PROVIDED THAT"

Grammatically, the word "provided" followed by a noun clause (for example, "provided that it does not rain" or simply "provided it does not rain") indicates a true condition. "Provided" and "provided that" are correctly used if they can be replaced by the word "if".

However, at least by the legal community, the words "provided" and "provided that" have been given other roles. As Driedger states, the proviso has been used as "an all purpose conjunction, invented by lawyers but not known to or understood by grammarians".¹ "Provided" and "provided that" have been used by the legal community to set up a condition, to create an exception to or a qualification of a general rule, and to create an additional requirement. The meaning in a particular instance will depend on the context. The practice of assigning multiple functions to the words "provided" or "provided that" can lead to ambiguity. Sometimes it is not possible to determine from the context what meaning to give them.

In order to avoid any ambiguity, "provided" and "provided that" should never be used in drafting regulations. They should be replaced by the appropriate conjunction, such as "if" or "when" for a condition, "unless", "but", "except that" or "nevertheless" for an exception or qualification, and "and" or a semi-colon for an additional requirement. The regulatory provision might also be rewritten to avoid the need for a proviso altogether.

Note: There is no objection to using the verb "provide" as a transitive verb or followed by the word "for" or "against".

* * * * *

¹ Elmer A. Driedger, *The Composition of Legislation* (Ottawa: Department of Justice, 1976) at 96.

PROVINCES AND TERRITORIES: ORDER OF LISTING

Provinces are to be listed in the order in which they entered Confederation, unless a special order is required by the context.

The territories, when named, are to be listed after the provinces, with the Yukon Territory preceding the Northwest Territories. Although the Northwest Territories were created before the Yukon Territory, the latter has always been listed first. This tradition is to be maintained, as paragraph 32(1)(a) of the *Canadian Charter of Rights and Freedoms* lists the Yukon Territory first.

The *Nunavut Act* (S.C. 1993, c. 28) was assented to on June 10, 1993. Sections 1 and 4 of that Act came into force on June 20, 1996 (*see* SI/96-51). The other provisions of that Act will come into force at the latest on April 1, 1999 (*see* s. 79(1) of that Act). When section 3 of the *Nunavut Act* comes into force, Nunavut should be added to any list of Canadian territories.

Below is the correct order of provinces and territories, and their abbreviations:

Ontario	Ont.
Quebec	Que.
Nova Scotia	N.S.
New Brunswick	N.B.
Manitoba	Man.
British Columbia	B.C.
Prince Edward Island	P.E.I.
Saskatchewan	Sask.
Alberta	Alta.
Newfoundland	Nfld.
Yukon Territory	Y.T.
Northwest Territories	N.W.T.
Nunavut	NT ¹

* * * * *

¹ This abbreviation is not yet official.

PUNCTUATION

There are many reference works that deal with the use of punctuation marks. Our intention here is not to review rules than can easily be consulted elsewhere, but to identify practices that are specific to regulations.

The period

The period indicates the end of a sentence; it is therefore placed at the end of each sentence in a section or subsection. Its use is governed by ordinary rules of grammar.

The numeral used to designate a section is followed by a period and a space (except where the decimal numbering system is used, in which case there is no final period after the section number).

Examples:

- 4. The Clerk of the Commission . . .
- but*
- 4.1 No person shall . . .

Every definition in a definition provision ends with a period (except in an amendment to a definition that follows previous formatting rules).

Examples:

"Act" means the *Divorce Act*. (*Loi*)

"child" means child of the marriage. (*enfant*)

The statement that appears within parentheses under the title "EXPLANATORY NOTE" in a statutory instrument is followed by a period.

Example:

EXPLANATORY NOTE

(This note is not part of the Order.)

The period is **not** used

(a) at the end of the title of a regulation or its headings;

(b) after a numeral designating a provision in the body of the regulations;

Examples:

3. The document referred to in section 5 is . . .

6. Subject to subsection 3(2), . . .

(c) at the end of a footnote.

Examples:

^a S.C. 1991, c. 24, s. 7(2)

¹ SOR/86-1011

The colon

The colon has an annunciatory function and is generally used in an enumeration introduced by the words "the following . . ." or ". . . as (that) follows(s) . . .".

Example:

19.2 The following methods of signalling may be used to send signals to fishing vessels:

(a) flag signalling using alphabetical flags;

. . .

The colon is used at the end of amending clauses (except amending clauses that simply repeal a provision).

Examples:

1. Section 5 of the *ABC Regulations* is replaced by the following:

but

2. Subsection 16(3) of the *Regulations* is repealed.

The semicolon

The semicolon is generally used at the end of every paragraph (except the last).

Example:

12. . . .

(a) . . . ;

(b) . . . ; and

(c)

In orders in council and other executive orders that contain "whereas" clauses, the semicolon is used at the end of each of these clauses.

Example:

Whereas the Governor in Council . . . ;

Whereas the Canadian Chicken Marketing Agency has been empowered . . . ;

And whereas the proposed regulation entitled . . . ;

Therefore, the Canadian Chicken Marketing Agency, pursuant to paragraph

The comma

The comma should be used with restraint and only to improve the readability of a sentence. The meaning of a sentence should not depend on the comma. If you cannot remove the comma without changing the meaning, it may be preferable to redraft the sentence.

The comma is used to mark off a parenthetical phrase or clause.

Example:

17. The Governor in Council, after consultation with the government of a province, may . . .

Note that a defining (restrictive) relative clause, which is a clause that contains information essential to the meaning of a sentence, is not set off or enclosed by commas.

Example:

8. An accountable advance that is not repaid or accounted for as required by subsection (2) may be recovered . . .

The comma is used at the end of paragraphs that must be read together in order to make clear the meaning of a provision.

Example:

9. The fee payable is the greater of

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

It is also used to separate subparagraphs, clauses and subclauses.

Example:

(c) any two corporations if

- (i) one person or group of persons holds shares in both corporations,
- (ii) a person who holds shares in one of the corporations is related, as described elsewhere in this subsection, to a person who holds shares in the other corporation, or
- (iii) a person who holds . . . ;

* * * * *

"PURSUANT TO"

The expression **pursuant to** is used in legal drafting to link a provision to another provision or to some factual matter. Although it is used in legal writing and in the legal community, it is not used in ordinary speech or writing. It is also sometimes ambiguous because it has a number of different meanings. For these reasons, drafters should use another word or expression that is more common and, if there is a risk of ambiguity, more precise.

Under is perhaps the most generally applicable alternative. It is a more common word and has a range of meanings that match those of **pursuant to**. For example, in *Osman v. Callander* (1986), 48 Sask. R. 23 (Q.B.) at 24, the judge said

The word "under" has many meanings -- in many instances, it denotes a lower or subservient state, but it also denotes a reference to or relationship with some other thing.

This comment also suggests that **under** is a broader term. **Pursuant to** tends to denote things that are principally or specifically dependent on a related provision, while **under** also includes things that are merely related to it.

Other alternatives are **in accordance with**, **as required by**, **described in**, **authorized by**, **on the basis of**, **because of** and **as a result of**. The following examples and commentary explain how these alternatives may be used.

If a provision involves something that is established, issued or done, **under** can provide the link necessary to refer to the provision. For example:

an offence **under** section 5

This example can be used if section 5 creates the offence. However, it is also appropriate if section 5 establishes procedures to which the offence is subject. If it is necessary to make the latter meaning clear, it is better to say

an offence **described in** section 5

Similar concerns arise with the following example:

a licence issued **under** section 5

In this example, **under** is assumed to link the licence to the authority for its issuance. However, section 5 may be related in another way: it may provide rules about issuing licences. If it is necessary to clearly refer to the authority for its issuance,

it is better to say

a licence **authorized by** section 5

By the same token, in order to convey unambiguously the sense of conformity with a set of rules, **in accordance with** or **as required by** should be used. For example:

a licence issued **in accordance with** section 5

a licence issued **as required by** section 5

These examples suggest not only that section 5 provides authority for issuing the licence, but also that it sets out rules governing or requiring its issuance.

When a reference is made to some factual matter, rather than another legislative provision, **on the basis of**, **because of** and **as a result of** are good alternatives. For example:

a warrant issued **on the basis of** information provided by a peace officer

weeks for which benefits may be paid **because of** [or **as a result of**] illness

* * * * *

RECOMMENDATION OF THE MINISTER

In the Canadian system of parliamentary democracy, the Governor General acts only on the advice of the council of ministers (the Cabinet), although he can exercise a certain number of personal prerogatives independently in exceptional circumstances.¹

It is because of this constitutional convention that legislation generally uses the term "Governor General in Council" or "Governor in Council"² when a power — regulatory or otherwise — devolves upon the Governor General. In order for the power to be exercised, the minister responsible for the sector of government in question must first make a recommendation to that effect. Sometimes the legislation specifies which minister is to make the recommendation.³ In such cases, the recommendation must originate with that minister in order for the power exercised by the Governor in Council to be valid.⁴ All the measures that the Governor in Council proposes to take must therefore be accompanied by a recommendation from the appropriate minister, which is submitted to Cabinet for approval. In practice, this approval is given by a committee of Cabinet, that is, the Special Committee of Council, which usually meets once a week.

The Regulations Section does not examine ministerial recommendations under the *Statutory Instruments Act*, except on special request. It is the department or the regulatory agency that finalizes these recommendations, making certain that the enabling provision and the title of the regulation are the same as in the order.⁵

Example:

(departmental or ministerial letterhead)

(date)

To His Excellency the Governor General in Council:

The undersigned has the honour to recommend that Your Excellency in

¹ Paul Lordon, *Crown Law* (Cowansville: Éditions Yvon Blais/Department of Justice, 1992) at 16.

² Although these two terms are synonymous according to the definition in subsection 35(1) of the *Interpretation Act*, the second is more common.

³ For example, subsection 11(2) of the *Coasting Trade Act* states that ". . . the Governor in Council may, on the recommendation of the Minister of Transport and the Minister of Foreign Affairs, take such action as the Governor in Council considers appropriate."

⁴ John Mark Keyes, *Executive Legislation* (Toronto: Butterworths, 1992) at 67.

⁵ See **ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS**.

Council, pursuant to section . . . of the . . . *Act*, make the annexed . . . *Regulations*
(or *Regulations Amending* . . .).

Respectfully submitted,

(signature) _____
(name)
Minister of *(name of department)*

* * * * *

RECOMMENDATION OF THE TREASURY BOARD

If the enabling provision specifies that the Treasury Board's recommendation is required for the making of a regulation, this must be stated in the executive order.

Treasury Board's recommendation is sometimes required even if the enabling statute makes no mention of it, to enable Treasury Board to fulfil its responsibilities under the *Financial Administration Act* for resource allocation, expenditure management, sound financial and personnel management and the administration of government. (See the *Cost Recovery and Charging Policy*, published by the Treasury Board Secretariat.)

It is up to the regulatory department or agency to determine whether a submission to Treasury Board is required under Treasury Board policy. If so, the Treasury Board recommendation should be mentioned in the executive order, although its inclusion is not mandatory.

If there is any doubt, the sponsoring department or agency should consult the appropriate branch of the Treasury Board Secretariat to determine whether a submission is to be made to Treasury Board.

SOURCES:

1. *Cost Recovery and Charging Policy*, Treasury Board Secretariat, April 1997.
2. *Federal Regulatory Process: Procedures for Submitting Regulations for Ministerial Approval*, Treasury Board Secretariat, 1996.

* * * * *

REGULATORY IMPACT ANALYSIS STATEMENT (RIAS)

Most regulations are subject to the government's policy on the prepublication of proposed regulations,¹ which requires that they be published with a Regulatory Impact Analysis Statement (RIAS). The regulations affected are regulations within the meaning of the *Statutory Instruments Act*, in other words, instruments designated "SOR". Excluded are draft regulations from the Canadian Radio-Television and Telecommunications Commission (CRTC) and the Copyright Board, although these agencies are encouraged to abide by the policy.

The RIAS is published in the *Canada Gazette*, Part I, then in the *Canada Gazette*, Part II, at the time of final publication. Regulations that are not subject to the administrative prepublication policy and other statutory instruments that are required to be published in the *Canada Gazette*, Part II, are published with an explanatory note instead of a RIAS.²

The RIAS is prepared by the department or agency sponsoring the regulations and is submitted for review, along with the draft regulations, to the Regulatory Affairs Division (Treasury Board Secretariat). The department or agency is responsible for the content of the RIAS; the Regulations Section is not involved in drafting or reviewing this document. A copy is, however, sent to the Regulations Section for information purposes, along with the draft regulations to be examined.

The RIAS comprises six parts:

1. Description
2. Alternatives
3. Benefits and costs
4. Consultation
5. Compliance and enforcement
6. Contact

For details on how to draft a RIAS, please consult the *Federal Regulatory Process: Procedures for Submitting Regulations for Ministerial Approval*, published by the Treasury Board Secretariat.

* * * * *

¹ See **Prepublication** — *Canada Gazette*, Part I, item 6.1 in Part 2.

² See **EXPLANATORY NOTE**.

REMISSION ORDERS

Remission orders are the means by which the government remits customs duties, income taxes and other taxes, penalties and any other debt. The remission may be in respect of amounts payable, i.e., that have not yet been paid. Therefore, a remission order does not necessarily imply disbursement of money by the government.

Most remission orders are made under the *Financial Administration Act* and the *Customs Tariff*.

1. *Financial Administration Act*

Subsection 23(2) of the *Financial Administration Act* authorizes the Governor in Council, on the recommendation of the appropriate minister, to "remit any **tax or penalty**, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty."

Subsection 23(2.1) of that Act authorizes the Governor in Council, on the recommendation of the Treasury Board, to "remit any **other debt**, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the other debt is unreasonable or unjust or that it is otherwise in the public interest to remit the other debt."

The terms "other debt", "penalty" and "tax" are defined as follows in subsection 23(1) of the Act:

"other debt" means any amount owing to Her Majesty, other than a tax or penalty or an amount in respect of which subsection 24.1(2) applies;

"penalty" includes any forfeiture or pecuniary penalty imposed or authorized to be imposed by any Act of Parliament for any contravention of the laws relating to the collection of the revenue, or to the management of any public work producing tolls or revenue, notwithstanding that part of such forfeiture or penalty is payable to the informer or prosecutor, or to any other person;

"tax" includes any tax, impost, duty or toll payable to Her Majesty, imposed or authorized to be imposed by any Act of Parliament.

Remission orders made under section 23 of the *Financial Administration Act* are not

"regulations" within the meaning of the *Statutory Instruments Act*.¹ However, under paragraph 11(3)(d) of the *Statutory Instruments Regulations*, they must be published in the *Canada Gazette*, Part II, and are therefore examined by the Regulations Section.² These remission orders are designated "SI" and are accompanied by an explanatory note rather than a RIAS.

Unlike regulations, which generally come into force on the date of registration, remission orders made under the *Financial Administration Act* come into force on the date they are made.³ The practice of inserting a blank coming-into-force provision at the end of a regulation does not apply to these remission orders. However, if a specific coming-into-force date is required, a coming-into-force provision is inserted at the end of the order.⁴

The format of these remission orders is flexible. In some cases, the remission is dealt with in the order in council itself, while in other cases it is dealt with in an annexed order, with or without schedules.

The reason for the remission is set out in the order in council, since a remission can be made only if the Governor in Council considers that the collection of the tax or other debt or the enforcement of the penalty is unreasonable or unjust or that the collection of the other debt is unreasonable or unjust, or that it is otherwise in the public interest to remit the tax, penalty or other debt.

Example 1: Remission in order in council (GST)

His Excellency the Governor General in Council, considering that it is in the public interest to do so, on the recommendation of the Minister of Finance, pursuant to subsection 23(2) of the *Financial Administration Act*, hereby remits to Albaraka Leasing Ltd. tax under Part IX of the *Excise Tax Act* in the amount of \$32,503.56.

¹ See **Definition "regulation"**, item 2.3 in Part 2.

² See **EXAMINATION**, item 4 in Part 2.

³ For additional information on the coming into force of statutory instruments, see **COMING INTO FORCE**, item 7 in Part 2.

⁴ See **COMING-INTO-FORCE PROVISIONS**.

Example 2: Remission in order in council (penalty — ascertained forfeiture)

His Excellency the Governor General in Council, considering that the enforcement of the penalty is unjust, on the recommendation of the Minister of National Revenue, pursuant to subsection 23(2) of the *Financial Administration Act*, hereby remits the amount of \$439,263.00, representing the ascertained forfeiture demanded from Provincial Airlines Ltd. on June 20, 1996 pursuant to paragraph 133(1)(c) of the *Customs Act*.

Example 3: Order in council with attached order

His Excellency the Governor in Council, considering that it is in the public interest to do so, on the recommendation of the Minister of Finance, pursuant to subsection 23(2) of the *Financial Administration Act*, hereby makes the annexed *Prescribed Areas Forward Averaging Remission Order*.

PRESCRIBED AREAS FORWARD AVERAGING REMISSION ORDER

INTERPRETATION

1. The definitions in this section apply in this Order.

"Act" means the *Income Tax Act*. (*Loi*)

"averaging amount" has the meaning assigned by subsection 110.4(1) of the Act as that subsection applied to the 1987 taxation year. (*montant d'étalement*)

REMISSION

2. Subject to section 3, remission is granted to a taxpayer in respect of the 1987 taxation year of an amount equal to the amount, if any, by which

(a) the total of the taxes and penalties, and interest thereon, payable by the taxpayer for that year under the Act

exceeds

(b) the total of the taxes and penalties, and interest thereon, that would have been payable by the taxpayer for that year under the Act if the taxpayer's averaging amount for that year were reduced by the amount that the taxpayer was entitled to deduct under section 110.7 of the Act in computing the taxpayer's taxable income for that year by reason of having resided in an area prescribed by subsection 7303(5) or (6) of the *Income Tax Regulations*.

CONDITIONS

3. The remission is granted on condition that

(a) the taxpayer makes an application for the remission in writing to the Minister of National Revenue on or before December 31, 1997; and

(b) the amount of the reduction determined under paragraph 2(b) in the taxpayer's averaging amount for the 1987 taxation year is excluded in determining the taxpayer's accumulated averaging amount under paragraph 110.4(8)(a) of the Act after 1987.

2. *Customs Tariff*

Subsection 115(1) of the *Customs Tariff* authorizes the Governor in Council, on the recommendation of the Minister of Finance or the Minister of National Revenue, by **order**, to remit duties. The term "duties" is not defined as such in the *Customs Tariff*; however, under section 4 of that Act, the definition "duties" in subsection 2(1) of the *Customs Act* applies.

"duties" means any duties or taxes levied or imposed on imported goods under the *Customs Tariff*, the *Excise Tax Act*, the *Excise Act*, the *Special Import Measures Act* or any other Act of Parliament, but, for the purposes of subsection 3(1), paragraphs 59(3)(b) and 65(1)(b), sections 69 and 73 and subsections 74(1), 75(2) and 76(1), does not include taxes imposed under Part IX of the *Excise Tax Act*;

Remission orders made under subsection 115(1) of the *Customs Tariff* are "regulations" within the meaning of the *Statutory Instruments Act*, even if they apply to one person only.⁵ They are therefore designated "SOR" and published with a RIAS. The format of these remission orders is the same as for any regulation; consequently, a coming-into-force provision must be included.

Note that, unlike remission orders under the *Financial Administration Act*, these orders are not subject to the unreasonableness or public interest test; the Governor in Council's power to remit is totally discretionary.

Example 1: Remission order with conditions

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 115 of the *Customs Tariff*, hereby makes the annexed *Order Remitting Customs Duties on Grinding Beads*.

⁵ See opinion O/92-215 of the Regulations Section.

ORDER REMITTING CUSTOMS DUTIES ON GRINDING BEADS

REMISSION

1. Subject to section 2, remission is hereby granted of the customs duties paid or payable under the *Customs Tariff* on grinding beads produced by melting together the oxides of zirconium and silicon, with lesser amounts of other oxides, of tariff item No. 3823.90.90.

CONDITIONS

2. The remission is granted on the condition that

(a) the grinding beads were imported into Canada during the period beginning on July 1, 1996, and ending on December 31, 1997;

(b) the grinding beads are for use in the wet grinding of minerals; and

(c) a claim for remission is made to the Minister of National Revenue within three years after the date of importation of the grinding beads.

COMING INTO FORCE

3. This Order comes into force on < >.

Example 2: Remission order containing a schedule

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 115 of the *Customs Tariff*, hereby makes the annexed *Order Remitting Customs Duties on certain Fresh and Semi-processed Fruits and Vegetables Imported for Processing*.

ORDER REMITTING CUSTOMS DUTIES ON CERTAIN FRESH AND SEMI-PROCESSED FRUITS AND VEGETABLES IMPORTED FOR PROCESSING

REMISSION

1. Subject to section 2, remission is hereby granted of the customs duties paid or payable under the *Customs Tariff* by or on behalf of the company listed in column 1 of an item of the schedule up to the amount listed in column 4 of that item, in respect of the product listed in column 2 of that item, if the product was imported for processing during the year listed in column 3 of that item.

CONDITION

2. The remission is granted on condition that a claim for remission is made to the Minister of National Revenue no later than December 31, 1998.

COMING INTO FORCE

3. This Order comes into force on < >.

SCHEDULE
(Section 1)

	Column 1	Column 2	Column 3	Column 4
Item	Company	Product	Year	Amount (\$)
1.	Carrière Foods Inc.	Asparagus	1995	67,583.24
2.	Fraser Valley Foods	Asparagus	1995	21,204.48
		Strawberries	1994	11,014.62
		Strawberries	1995	32,749.63
3.	Multifoods Inc.	Cucumbers (gherkins)	1994	53,289.13

* * * * *

ROUNDING OFF OF AMOUNTS

The following precedent can be used for rounding off dollar amounts to the nearest multiple of a dollar:

(X) Where an amount to be used for a taxation year by virtue of an adjustment under this section contains a fraction of a dollar, the amount shall be rounded off to the nearest whole dollar, and if the result is equidistant between two whole dollars, to the higher thereof.

Examples:

\$53.23 to \$53
26.50 to 27
36.75 to 37

The following are examples of more complex rounding-off provisions:

(X) Where the product referred to in paragraph . . . contains a fraction of a dollar, the fraction shall be expressed as a decimal fraction rounded off to two decimal places, and if the result is equidistant between the two decimal places, to the higher thereof.

Examples:

\$53.234 to \$53.23
26.535 to 26.54
36.758 to 36.76

(X) Where the quotient referred to in paragraph . . . contains a fraction, the fraction shall be expressed as a decimal fraction rounded off to three decimal places, and if the result is equidistant between the three decimal places, to the higher thereof.

Examples:

53.2343 to 53.234
26.5355 to 26.536
36.7587 to 36.759
36.7599 to 36.76

* * * * *



SCHEDULES TO REGULATIONS

Schedules generally contain lists, tables, tariffs, forms, figures, charts, or other factual or statistical information. They are accessory to provisions set out in the body of the regulations and should not contain substantive provisions.

Example:

1. An offence under a provision, or a combination of provisions, to a Regulation set out in column 1 of an item of Schedules 1 to 4 is designated as a contravention for the purposes of the *XYZ Act*.

Following a new convention adopted by the Legislative Services Branch in 1996, schedules in **new regulations** are now numbered using Arabic numerals.

In regulations amending regulations that contain schedules numbered in Roman numerals, the drafter is encouraged to replace the numbers with the corresponding Arabic numerals if it is appropriate to do so, for example, if a large portion of the regulations is being replaced or if the regulations are very short, or at the request of the client. In such cases, it is possible to use general amending formulas designed to replace an expression throughout the regulations. If, however, the regulations are very long or the client wishes to keep the old numbering system, the drafter is advised not to make the change. For uniformity, a single numbering system should be used for a series of schedules.

Note: These numbering rules also apply to parts, divisions, tables and columns.

If a regulation has only one schedule, the schedule is not numbered or capitalized in the body of the regulation.

The heading "SCHEDULE", in full capitals, is centered at the top of the first page of the schedule. The regulatory provisions to which the schedule refers are indicated in parentheses and in italics on the line immediately under the heading. The title of the schedule, in full capitals, is centered below.

Example:

SCHEDULE 2
(Section 12 and subsection 33(2))

LIST OF PROHIBITED SUBSTANCES

The word "schedule" takes the preposition "to", not "of".

Example:

Schedule 1 to the Regulations . . .

The sections or items of a schedule are numbered using Arabic numerals.

In a schedule set out in the form of tables (columns) or lists, the item numbers are not in bold. In a schedule that consists of sentences or that is divided into sections, subsections, paragraphs and so forth, the section numbers appear in bold.

In stamped copies, schedules and tables consisting of more than one page should not bear the heading "SCHEDULE (*Continued*)" or "*(Concluded)*". The *Canada Gazette* staff will insert the heading "SCHEDULE (*Continued*)" on all the pages of a schedule following the first.

* * * * *

SINGULAR "THEY"

The trend toward language that is free of gender bias is prompting a return to the use of the singular **they** and its other grammatical forms (**them, themselves, their**) as a gender-neutral third-person singular pronoun. This practice, proscribed in the last two centuries, was used continuously in earlier times, and can be found in the writings of Chaucer, Austen and Shakespeare, among others. It is furthermore acknowledged by dictionaries and by grammar and style guides.

Examples:

The Shorter Oxford English Dictionary:

- They:** 2. Often used in reference to a singular noun made universal by **every, any, no**, etc., or applicable to either sex (= 'he or she')
- Their:** 3. Often used in relation to a singular noun or pronoun denoting a person, after **each, every, either, neither, no one, everyone**, etc. Also so used instead of 'his or her', when the gender is inconclusive or uncertain.
- Themselves:** 2. In concord with a singular pronoun or noun denoting a person, in cases where the meaning implies more than one, as when the noun is qualified by a distributive, or refers to either sex: = 'himself or herself'.

Webster's Dictionary of English Usage

They, their, them have been used continuously in singular reference for about six centuries, and have been disparaged in such use for about two centuries. Now the influence of social forces is making their use even more attractive.

R. Quirk *et al.*, *A Comprehensive Grammar of the English Language*

6.9 . . . Difficulties of usage arise, however, because English has no sex-neutral third-person singular pronoun. Consequently, the plural pronoun *they* is often used informally in defiance of strict number concord, in coreference with the indefinite pronouns *everyone, everybody; someone, somebody; anyone, anybody; no one, nobody*.

10.50 The pronoun *they* is commonly used as a third-person singular pronoun that is neutral between masculine and feminine. It is a convenient means of avoiding the dilemma of whether to use the *he or she* form. At one time restricted to informal usage, it is now increasingly accepted even in formal usage, especially in American English

Some jurisdictions (the Government of Ontario, the Commonwealth of Australia) are now using this gender-neutral style in their legislation in order to avoid the cumbersome repetition of **he or she** and its variants when referring to an indefinite singular noun.

Example:

"consumer" means any person who . . . purchases or receives delivery of tobacco . . . for **their** own use or consumption or for the use or consumption by others at **their** expense . . . or as the agent for, a principal who desires to acquire the tobacco for use or consumption by **themselves** or other persons at **their** expense; (R.S.O. 1990, c. T-10)

Recommendations

1. Consider using forms of the third-person plural pronoun (**they, their, them**) to refer to a singular indefinite noun, to avoid the unnatural language that results from repeating the noun or the expression **he or she**.

Example:

Subject to this Act, every person who is qualified as an elector is entitled to have **the person's** name included in the list of electors.

. . . that person has no other residential quarters that **the person** considers to be the person's residence.

Between the date of issue of the writ and polling day, each returning officer shall update the Register of Electors from the information that **the returning officer** obtains in the course of duty.

Each revising agent shall take an oath in the prescribed form before beginning **the revising agent's** duties.

A person who, during the period . . . , has changed the place of **the person's** ordinary residence from one polling division to another polling division in the same electoral district may, if otherwise qualified as an elector,

Subject to this Act, every person who is qualified as an elector is entitled to have **their** name included in the list of electors.

. . . that person has no other residential quarters that **they** consider to be **their** residence.

Between the date of issue of the writ and polling day, each returning officer shall update the Register of Electors from the information that **they** obtain in the course of duty.

Each revising agent shall take an oath in the prescribed form before beginning **their** duties.

A person who, during the period . . . , has changed the place of **their** ordinary residence from one polling division to another polling division in the same electoral district may, if otherwise qualified as an elector,

register **the person's** name on the list of electors in the new polling division.

. . . the person against whom the objection is made, where that person wishes to present **the person's** position, . . .

register **their** name on the list of electors in the new polling division.

. . . the person against whom the objection is made, where that person wishes to present **their** position, . . .

2. Use **he** or **she** to refer to a definite subject, or repeat the noun.

Examples:

The Chief Electoral Officer shall, for at least two years after receiving them, retain in **the Chief Electoral Officer's** possession, on film . . .

If the Assistant Deputy Minister determines that . . . , **the Assistant Deputy Minister** shall issue a registration.

If a medical device has been registered and the Assistant Deputy Minister believes on reasonable grounds, after reviewing a report or information brought to **the Assistant Deputy Minister's** attention, that the device . . .

The Chief Electoral Officer shall, for at least two years after receiving them, retain in **his or her** possession, on film . . .

If the Assistant Deputy Minister determines that . . . , **he or she** shall issue a registration.

If a medical device has been registered and the Assistant Deputy Minister believes on reasonable grounds, after reviewing a report or information brought to **his or her** attention, that the device . . .

3. Be certain that the pronoun's antecedent is clear, as one would do when using any pronoun. The general rule is that the antecedent is the closest noun to the pronoun.

Example:

When an applicant notifies the other residents, **they** must lodge a section 12 notice within 14 days.

Grammatically, the antecedent of **they** is **residents**; the intended antecedent is **applicant**. In this case, use of the pronoun is not advised and it would be better to repeat the noun **applicant** or replace it with **he** or **she**. There are exceptions, however, depending on the context.

Example:

A person is entitled to have an alternative address . . . if **their** name, but not **their** residential address, is on an electoral roll.

The only noun to which **their** can refer is **person**. The noun is clearly singular because of both the indefinite article **a** and the form of the noun **person**. Therefore **their** must also be singular. It is the context that is crucial.

* * * * *

"SUCH" AND "THERE-" WORDS

It has been the practice in legislative writing to use certain words to refer to an idea — generally expressed previously, but sometimes subsequently — without having to repeat the details of the idea.

Such

Such is used to refer *backward* to a noun that has been previously mentioned (for example, "The Minister may issue fishing licences and *such* licences may specify limits on the number of fish that may be caught") or *forward* to something that is mentioned later (for example, "The Minister may issue *such* licences *as the Minister considers appropriate*").

Backward reference

The backward reference may be to something *specific* that is previously mentioned, or to something that is merely *similar*.

The first practice should be avoided in drafting legislation. References to specific things should be made by using *the*, *that* and *those*. Using *such* to make specific references can create confusion, as is shown by the Ontario Court of Appeal decision in *Euroclean Canada v. Forest Glade Inv.* (1985), 16 D.L.R. (4th) 289. This case concerned section 66a of the *Personal Property Security Registration Act*, R.S.O. 1980, c. 375:

66a. Notwithstanding clause 3(1)(c) of this Act, a mortgage, charge or assignment the registration of which is provided for in the *Corporation Securities Registration Act* shall not be invalid by reason only that it has not been registered under that Act, if the security interest created by the mortgage, charge or assignment is perfected by registration in compliance with this Act and this Act shall be deemed always to have applied to any *such* security interest.

A majority of the Court interpreted "any such security interest" to mean one created by *any* mortgage, charge or assignment that could be registered under the *Corporation Securities Registration Act*, and not just those that had been perfected by registration under the *Personal Property Security Registration Act*. If, as commentators on section 66a have maintained,¹ the intent had been to refer only to the latter, the drafter should have written "*the* security interest".

¹ A.C.L. Lövgren, "The Place of the Case in Legislative Sentences" (1986), 7 Statute L. Rev. 23.

The second practice, in which *such* refers to something *similar*, is quite acceptable:

X. An offender who is serving a term of imprisonment that includes a sentence for a prescribed offence may be referred to an assessment where the offence was a driving offence involving the use of alcohol or any other intoxicating substance and there are reasonable grounds to believe that the offender will commit *such* an offence again.

However, *such* must be used carefully in these instances, because, depending on the context, it may not be clear how far the similarity extends. This can be illustrated by the following example: "motorized boats exceeding ten metres in length used for commercial fishing and other *such* boats used for recreational purposes". Here, *such* may refer either to "motorized boats" or to "motorized boats exceeding ten metres in length".

Forward reference

The forward reference of *such* is exemplified in the *such . . . as* construction, in which *such* looks forward to a subordinate clause introduced by *as*. It occurs frequently in provisions that both impose a requirement and confer an implicit power in relation to that requirement. For example, "Applicants shall provide *such* information *as the Minister may require*". Another common example is the following definition of "Minister":

"Minister" means such member of the Queen's Privy Council for Canada as the Governor in Council may designate as the Minister for the purposes of this Act.

A Comprehensive Grammar of the English Language comments that the forward usage of *such* is "formal and somewhat archaic".² In most cases, the subordinate clause should be introduced by *who*, *that* or *which*. *Such* can then be replaced by another determiner, like *the*, *a* or *any*. The above definition of "Minister" should therefore be redrafted as follows:

"Minister" means a member of the Queen's Privy Council for Canada that the Governor in Council may designate as the Minister for the purposes of this Act.

The expression *until such time as* should **never** be used. The word *until* suffices.

² R. Quirk *et al.*, *A Comprehensive Grammar of the English Language* (New York: Longman, 1985) at 1144.

There- words

These words should be avoided in legislation. Instead, the appropriate preposition should be used with a noun or pronoun or, in the case of *thereof*, the possessive. For example, "unload any conveyance or open any part *thereof*" should be redrafted as "unload any conveyance or open any *of its parts*". In addition, *there-* words that refer to places can often simply be replaced by the word *there*.

Redrafting is more difficult when *there-* refers to something other than a noun, as in "An Act to amend the *XYZ Act* and to amend other Acts in consequence *thereof*". To avoid *thereof*, one must first think of a way of expressing the idea to which *thereof* refers, i.e., *amending the XYZ Act*. The title can then be redrafted as "An Act to amend the *XYZ Act* and to *make consequential amendments to other Acts*".

Avoiding *there-* words not only results in plainer language, but often resolves ambiguities about their antecedents. A typical ambiguity was noted by the Supreme Court of Canada in *Chrysler v. Competition Tribunal* (1992), 92 D.L.R. (4th) 609 at 618. The Court was considering subsection 8(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), which reads as follows:

8. (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related *thereto*.

8. (1) Le Tribunal entend les demandes qui lui sont présentées en application de la partie VIII de la *Loi sur la concurrence* de même que toute question s'y rattachant.

Gonthier J. commented as follows:

In English, the phrase "any matters related thereto" may refer to the applications or to their hearing and determination, though to my mind, the latter reading is constrained [sic] and does not reflect the natural meaning of the words, namely "... hear and determine all applications made under Part VIII of the *Competition Act* and hear and determine all matters related to the applications". In French, "s'y rattachant" can only refer to the noun "demandes", and not to the verb "entend", or otherwise the clause would read "toute question se rattachant aux auditions".

Although the Court was able to resolve the ambiguity, the issue would have been avoided altogether if *to the applications* had been used instead of *thereto*.

Examples

The following examples show how *such* and *there-* words can be replaced or, in the case of *such*, where they are appropriate.

Original Version

"non-resident" means . . .

(b) the government of a foreign country or any political subdivision thereof, or any agent or agency thereof.

1. The operator of a sufferance warehouse, bonded warehouse or duty free shop shall, at the request of an officer,

(a) allow the officer free access to the warehouse or duty free shop or any place under their control that is attached to or forms part of the warehouse or duty free shop; and

(b) open any package or container of goods therein or remove any covering therefrom.

2. The Governor in Council may make regulations

(a) prescribing qualifications as to citizenship, residence and knowledge of the laws and procedures relating to importations and exportations and any other qualifications that must be met by an applicant for a customs broker's licence issued under section xx, and any such qualifications that must be met by a person who transacts business as a customs broker on behalf of a person so licensed;

(b) prescribing the terms and conditions on which such licences may be issued, including the security that may be required and the fees, if any, to be paid for the licences;

(c) prescribing the duration of

Revised Version

"non-resident" means . . .

(b) the government of a foreign country or any of its political subdivisions, or an agent or agency of the government.

1. The operator of a sufferance warehouse, bonded warehouse or duty free shop shall, at the request of an officer,

(a) allow the officer free access to the warehouse or duty free shop or any place under their control that is attached to or forms part of the warehouse or duty free shop; and

(b) open any package or container of goods there or remove any covering from it.

2. The Governor in Council may make regulations

[*such* is appropriately used here to refer to something *similar*]

(b) prescribing the terms and conditions on which the licences may be issued, including the security that may be required and the fees, if any, to be paid for them;

(c) prescribing the duration of the

such licences and the manner of applying for such licences or for renewals thereof;

(d) prescribing the fees to be paid for such licences, the amount of any deposit that may be taken in respect thereof and the conditions under which such fees or deposits may be refunded; and

(e) prescribing the records to be kept by customs brokers and the period for which such records must be kept.

3. In the prescribed circumstances, the Minister may suspend or cancel a customs broker's licence issued under section xx or any other person may suspend or cancel such a licence that they issue thereunder.

4. In this section, "wreck" includes

(a) cargo, stores and tackle of any vessel and of all parts of the vessel separated therefrom; and

(b) any wrecked aircraft or any part thereof and cargo thereof.

5. Imported goods are charged with duties thereon from the time of importation thereof until such time as the duties are paid or the charge is otherwise removed.

licences and the manner of applying for them or for their renewal;

(d) prescribing the fees to be paid for the licences, the amount of any deposit that may be taken in respect of them and the conditions under which the fees or deposits may be refunded; and

(e) prescribing the records to be kept by customs brokers and the period for which they must be kept.

3. In the prescribed circumstances, the Minister may suspend or cancel a customs broker's licence issued under section xx, or any other person may suspend or cancel a licence that they issue under that section.

4. In this section, "wreck" includes

(a) cargo, stores and tackle of any vessel and of all parts of the vessel separated from it; and

(b) any wrecked aircraft or any of its parts and cargo.

5. Imported goods are charged with duties from the time of their importation until the duties are paid or the charge is otherwise removed.

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TABLE OF CONTENTS

A table of contents or table of provisions may be prepared by the Regulations Section for a new regulation if the length of the text warrants it. It is provided to the client in a standard format and is generated by a macro created for that purpose. A **table of contents** consists of headings and subheadings, and accompanies new regulations that do not have marginal notes. A **table of provisions** consists of headings, subheadings and marginal notes, and accompanies new regulations that have marginal notes. If the document is divided into parts, both kinds of tables may be used: a table of contents for the text as a whole and a table of provisions at the beginning of each part.

Clients who prefer a table of contents or table of provisions that differs from the standard format are responsible for its preparation.

The table of contents or table of provisions usually follows the order in council or executive order. It is printed at the front of the regulations, and a note at the top of the table states that it is not part of the regulations (it is for information purposes only). The table is followed by a series of asterisks (* * * * *) that mark the start of the regulations proper (*see*, for example, SOR/97-175). Note that the table does not appear in the electronic version of the regulations prepared by the Department of Justice.

Whether or not it follows the standard format, the table of contents or table of provisions is not amended through the regulatory process with the regulations. The client may, however, publish administratively an updated version of the table.

* * * * *

TAXES, TARIFFS, FEES, CHARGES, RATES AND TOLLS

1. Taxes versus tariffs, fees, charges, rates and tolls

It is often difficult to determine whether an amount required to be paid under a regulation is a tax or a tariff, fee, charge, rate or toll. One of the key differences between taxes and tariffs, fees, charges, rates or tolls is that the latter are imposed to recover from users the administrative costs of a service provided by Her Majesty in right of Canada, while taxes are imposed to generate revenue for government expenditures.

2. Enabling authority

To begin with, check

- (a) enabling legislation that might confer the power to impose taxes, tariffs, fees, charges, rates or tolls;
- (b) the Act establishing the department in question, which might confer the same power;
- (c) the relevant Treasury Board policy.

As a rule, a regulation cannot impose tariffs, fees, charges, rates or tolls unless there is express authority to do so in the enabling statute. Although it is arguable that a wide regulation-making power could authorize the imposition of a tariff, fee, charge, rate or toll without express authority, any regulation imposing them in the absence of such authority would run a risk of being declared *ultra vires* by the courts.

Similarly, it has been clearly stated by the courts on numerous occasions that a tax may never be imposed unless there is express authority to do so in the enabling statute. For example, in *R. v. National Fisheries Co. Ltd.*, [1931] Ex. C.R. 75, Mr. Justice Audette states, "The Governor in Council has no power *proprio vigore* to impose taxes unless under authority specifically delegated to it by statute."

Paragraphs 39(1)(d) and (e) of the *Canada Ports Corporation Act* is an example of an enabling statute in which Parliament expressly delegates the power to impose rates and tolls:

39. (1) The Corporation may, with the approval of the Governor in Council, make by-laws, for the direction, conduct and government of the Corporation and its

employees, and the administration, management and control of the several harbours, works and property under its jurisdiction including

...

(d) the imposition and collection of tolls for any use of any bridge under the administration, management and control of the Corporation;

(e) the imposition and collection of rates or tolls on vessels, vehicles and persons coming into or using any of the harbours,

Any amount imposed pursuant to paragraph 39(1)(d) would be a "toll", while one made pursuant to 39(1)(e) could be either a "rate" or a "toll". The use of "fee" or "charge" would be wrong in either case.

Paragraphs 39(1)(d) and (e) refer to "imposition and collection". They do not confer sufficient authority to charge interest or a penalty for late payment or non-payment.

3. *Financial Administration Act*

Even if neither the enabling statute nor the departmental Act mentions a power to set fees or charges, such authority may be found in the *Financial Administration Act* ("FAA"). Subsection 19(1) of that Act enables the Governor in Council, on the recommendation of the Treasury Board, to

- (a) prescribe by regulation the fees or charges to be paid for a service or the use of a facility [paragraph 19(1)(a)];
- (b) authorize the appropriate Minister to prescribe by order those fees or charges [paragraph 19(1)(b)].

In no case, however, may a fee or charge imposed under these paragraphs exceed the actual cost of providing the service or the use of the facility [subsection 19(2)].

The FAA also allows the Governor in Council to set the fee or charge for the conferment of a right or privilege by means of a licence, permit or other authorization, by

- (a) prescribing by regulation the fees or charges to be paid by those on whom the right or privilege is conferred [paragraph 19.1(a)];
- (b) authorizing the appropriate Minister to prescribe by order those fees or charges [paragraph 19.1(b)].

Rules for the adjustment of a fee for a service or facility may be prescribed by setting an amount or a ratio, in the latter case specifying all factors of adjustment to be considered [subsection 19.2(1)].

Under section 19.3 of the FAA, regulations and orders may be made for the provision of a service or facility or the conferment of a right or privilege under section 19 or 19.1, even if such provision or conferment is already required under another Act of Parliament.

The power to return or repay an amount duly paid to a public officer for a purpose that was not fulfilled is provided for under the *Repayment of Receipts Regulations* [subsection 20(2) of the FAA].

4. Where to include the requirement to pay in regulations

Amounts to be paid may be set out in the body of the regulations or in a schedule to the regulations. When they are set out in a schedule, there must be a provision in the body of the regulations introducing the schedule (*see SCHEDULES TO REGULATIONS*). If, for example, the Canada Ports Corporation decided to impose tolls on certain vessels coming into certain harbours, the relevant provision could be formulated as follows:

10. The toll set out in column 3 of an item of Schedule 2 is payable in respect of a vessel set out in column 1 of that item that comes into the harbour set out in column 2 of that item.

The schedule could read as follows:

SCHEDULE 2
(Section 10)

Item	Column 1 Vessel	Column 2 Harbour	Column 3 Toll (\$)
1.	A vessel that is less than 50 m in length	Harbour A	100
2.	A vessel that is 50 m or more in length	Harbour B	150
3.	A vessel that is less than 50 m in length	Harbour C	90

5. Amounts payable are to be specified or calculable

Regulations may either state the exact amount of the tariff, fee, charge, rate or toll or set out a formula used for calculating the amount.

Example of formula:

12. (1) Every owner of a lot located in Banff National Park, Yoho National Park or Waterton Lakes National Park shall pay the garbage collection and disposal charge determined by the formula

$$A \times B/12 \times C/D$$

where

A is the aggregate of the volume values of the units on the lot,

B is the number of months in the year during which the owner is permitted to occupy the lot under the lease, permit or licence of occupation for that lot,

C is the total operating and maintenance cost incurred in respect of the park, and

D is the total volume value for the park.

6. Sources

The following sources are recommended reading for a thorough understanding of the field:

- (a) *Financial Administration Act Commentary*, Part II (sections 19, 19.1-19.3), Department of Justice, December 1994.
- (b) *The Federal Regulatory Process: Documents and Guidelines*, Treasury Board Secretariat, 1991.
- (c) *Prescribing User Fees and Charges under the FAA*, Treasury Board information bulletin, November 19, 1993.
- (d) *Cost Recovery-User Fees*, compendium prepared by H.K. Schultz, Administrative Law Section, February 1995.
- (e) *Cost Recovery and Charging Policy*, Treasury Board Secretariat, April 1997.

* * * * *

TERMINOLOGY

The terminology used in a regulation must be consistent with that used in the enabling statute and, to the extent possible, with that used in other statutory instruments made under the same Act.

Terms must be used correctly. For spelling and usage, *The Shorter Oxford English Dictionary* is the accepted standard for the English version and *Le Petit Robert* for the French version.

Terminology should be kept as simple as possible. Latinisms, foreign phrases and neologisms that have not been accepted into ordinary usage should be avoided.

To the extent possible, common terms should be used, in their ordinary meaning. It is appropriate, in technical regulations, to use technical terms or to assign a specialized meaning to common terms. In such cases, definitions may be advisable (*see DEFINITIONS*).

Defined terms and expressions must be used in a uniform manner. Whenever possible, specialized or key terms and phrases should also be used in a uniform manner. Strive for consistency.

The essence of the language should be respected. Neither language version should be a slavish translation of the other.

If a regulation incorporates a standard by reference, the terminology used in the regulation and the terminology used in the standard should be aligned as much as possible. At the very least, the terminology should not be incompatible.

* * * * *

TIME LIMITS

The expression of time limits, dates, periods of time, time of day and age must take into account sections 26 to 30 of the *Interpretation Act*. These sections read:

26. Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

27. (1) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.

(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

28. Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by

(a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;

(b) excluding the specified day; and

(c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.

29. Where there is a reference to time expressed as a specified time of the day, the time is taken to mean standard time.

30. A person is deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of that person's birth.

Below some phrases customarily used to express time limits, dates and periods of time:

. . . goods imported during the period **beginning** on April 15, 1990 and **ending** on June 15, 1990 are exempt from the application of sections . . .

. . . goods imported **on or after July 1, 1997** are subject to the rate of duties set out in Schedule I . . .

. . . goods imported **on or before July 1, 1998** . . .

. . . beginning on July 1 **in one year** and ending on June 30 **in the next year** . . .

. . . commencing on January 1 **in the year next following the year in which** . . .

* * * * *

TITLE OF REGULATIONS

The title is an essential component of a regulation. It identifies the regulation, for which it serves as a sort of "label", and tells the reader the general content of the text. The title may also be used to interpret the regulation.¹ Unlike federal Acts, which generally have two titles (a short and a long one), regulations now have only one title.²

Drafting guidelines

For these reasons, the title of a regulation is very important and should be chosen with great care. Since finding a good title is not always an easy task, here are some guidelines for the drafter:

- To the extent possible, the title should be short but complete, and simple but precise.
- It should employ terms that are used in the regulation.
- It should not mislead or create a false impression.

Form

When a regulation is published in the *Canada Gazette*, its title is centered and in bold capital letters. Because of the style feature used by the Legislative Services Branch, in the stamped copies issued by the Regulations Section the title begins at the left margin and is not in bold type. Arrangements have been made with the staff of the *Gazette* to make the necessary changes when the regulation is printed.

A reference to the title of a regulation in orders in council and other executive orders, as well as in the body of the regulation, is in italics. The first letter of each word in the title is capitalized, except articles, conjunctions and prepositions that have fewer than five letters, unless they are placed at the beginning or at the end of the title. Note that the definite article that precedes the title of the regulation is not in italics, since it does not form part of the title.

¹ Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Éditions Yvon Blais, 1991) at 51-53.

² Note that in some provinces, including Quebec, British Columbia and Alberta, Acts and regulations have only one title.

Examples:

5. The operator of an establishment shall submit the application in accordance with section 21 of the *Pest Control Products Regulations* . . .

23. The *Aircraft Regulations* do not apply to airplanes to which these Regulations apply.

Drafting rules

As a rule, the first element of the title, which is followed by the word "Regulations", denotes the subject matter.

Examples:

Meat Inspection Regulations

Medical Devices Regulations

In the case of amending regulations, the title begins with the words "Regulations Amending the", followed by the title of the regulations that are being amended.

Examples:

Regulations Amending the Motor Vehicle Regulations

Order Amending the Customs Duties Accelerated Reduction Order

*Regulations Amending the Transportation of Dangerous Goods Regulations (Miscellaneous Program)*³

In some cases, other than in the context of miscellaneous amendment regulations, a regulation may amend more than one regulation made by the same regulation-making authority. This situation usually occurs if the amendments deal with the same subject, for example, the revocation of a right to appeal provided for in three separate regulations. It is recommended, in these cases, that the title refer to the common subject matter to which the amendments relate.

Examples:

Regulations Amending Certain Regulations Made by the Minister of Immigration (Revocation of the Right to Appeal)

³ See MISCELLANEOUS AMENDMENT REGULATIONS for details on the titles of those regulations.

Regulations Amending Certain Regulations Made under the Customs Tariff (Tobacco Advertising)

Regulations Amending Certain Regulations Concerning the Shipping of Grain

If the amendments have no common subject matter, it might be necessary to mention the titles of the regulations being amended. If more than two regulations are being amended, we recommend making a general reference to these regulations to avoid a lengthy title.

Examples:

Regulations Amending the Meat Inspection Regulations and the Carcass Grading Regulations

Regulations Amending Certain Regulations made under the Customs Act

When a regulation-making authority makes a new regulation to replace an existing one, the fact that the existing regulation is being repealed is not mentioned in the title. A provision repealing the existing regulation is placed at the end of the new regulation, generally before the coming-into-force provision (see AMENDING REGULATIONS).

The title of the new regulation need not be different from the title of the regulation being repealed, if it is determined that the existing title is the most appropriate one in the circumstances. For example, if the *Medical Devices Regulations* are being rewritten and replaced by a new regulation, the most appropriate title might still be the *Medical Devices Regulations*. There is no need to add a year to the title of the new regulation.

In some cases, words like "defining" and "repealing" are used to describe the content of the regulation.

Examples:

Order Revoking the Aircraft Inspection Regulations

Regulations Defining Certain Expressions for the purposes of the Customs Tariff

Exceptions

If voluminous regulations are amended frequently, it might be useful to add specific identifiers at the end of the title to avoid confusion, especially where persons are invited to submit their comments on a particular set of amendments.

This practice is followed in amendments to the *Food and Drug Regulations* and the *Motor Vehicle Safety Regulations*, where specific identifiers are inserted in brackets at the end of the titles. In the case of the *Food and Drug Regulations*, a sequential numbering system is used, and in the case of the *Motor Vehicle Safety Regulations*, the subject matter to which the amendment relates is added at the end of the title.

Examples:

Regulations Amending the Food and Drugs Regulations (1044)

Regulations Amending the Motor Vehicle Safety Regulations (Rearview Mirrors)

In other cases, it might be appropriate to add to the title a number, a year or both to avoid confusion, particularly in annual or periodical regulations.

Examples:

Temporary Entry Remission Order, No. 44

Special Appointment Regulations, No. 1996-18

Prohibition of Entry on Certain Lands Order, No. 13 of 1996

In the case of a regulation that is called a "list" (for example, the *List of Toxic Substances*), the title should mention the instrument by which the list is to be made (i.e., order, resolution, and so forth) to avoid the anomaly "*List Amending the List of Toxic Substances*". For example, if the List is made or established by the Governor in Council, the title should be "*Order Amending the List of Toxic Substances*".

* * * * *



VERB FORMS

Verb tenses

The present indicative is the tense of choice in statutes and regulations, because, as stated in section 10 of the *Interpretation Act*, the law is "always speaking":

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Active voice and passive voice

In legislation, the active voice should be used every time it can replace the passive voice with equal meaning and clarity.

The passive voice should generally be avoided, because it tends to create ambiguity. The active voice is better at stating who holds the power and who has the obligation, and legislative principles rest essentially on these twin pillars — power and obligation.

However, the passive is sometimes preferable, as in the following cases:

- when the person or thing carrying out an action is implied or undetermined (e.g., "The information may not be disclosed except with the authorization of the party that gave it.");
- when the subject of the verb contains the essential information, taking pride of place while the agent serves as a mere complement (e.g., "The funds are authorized by Treasury Board . . .").

* * * * *



"WITH SUCH MODIFICATIONS AS THE CIRCUMSTANCES REQUIRE"

When a particular word or expression used in regulations is to be substituted for another word or expression, the expression "with such modifications as the circumstances require" is included in the amending clause. This expression authorizes any amendments required to make the new word or expression fit the grammatical structure of the provisions into which it is substituted, e.g., putting it in the singular or plural, capitalizing it, or, in the French version, making gender agreements. The expression is used only if the substitutions do involve modifications. Sometimes they do not.

Example:

5. The Regulations are amended by replacing the expression "walk-in van-type truck" with the expression "walk-in van", with such modifications as the circumstances require, in the following provisions:

- (a) subsection 203(2) of Schedule IV;**
- (b) paragraph 204(1)(a) of Schedule IV;**
- (c) subsection 208(13) of Schedule IV; and**
- (d) paragraph 212(1)(b) of Schedule IV.**

The expression is also used to avoid repetition in regulations where certain provisions apply equally to other provisions. The following are some examples of this use.

Examples:

(5) The provisions of section 6 apply, with such modifications as the circumstances require, to an appeal under subsection (4).

36. The provisions of this Part relating to motor vehicles apply, with such modifications as the circumstances require, to a bicycle or any cycle regardless of the number of wheels it may have.

* * * * *



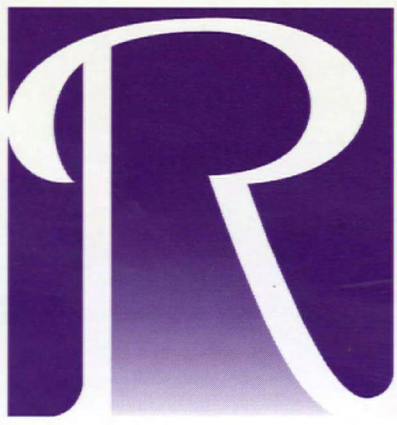
CROSS-REFERENCE TABLE

ENGLISH	FRENCH
ABBREVIATIONS: INITIALISMS AND ACRONYMS	SIGLES ET ACRONYMES
ADAPTATION OF A STATUTE	ADAPTATION DE LA LOI
AGREEMENTS, CONVENTIONS, TREATIES AND SIMILAR DOCUMENTS	ACCORDS, CONVENTIONS, TRAITÉS ET AUTRES DOCUMENTS SIMILIAIRES
AMENDING REGULATIONS	RÈGLEMENT MODIFICATIF
"BUT"	
CAPITAL LETTERS	MAJUSCULES
CITATION OF STATUTES	DÉSIGNATION DES LOIS
COMING-INTO-FORCE ORDERS	DÉCRETS D'ENTRÉE EN VIGUEUR D'UNE LOI
COMING-INTO-FORCE PROVISIONS	DISPOSITIONS D'ENTRÉE EN VIGUEUR
CONDITIONS PRECEDENT	CONDITIONS PRÉALABLES
CONTEXTUAL INFORMATION	RENSEIGNEMENTS CONTEXTUELS
CROSS-REFERENCES	RENOIS
DATES	
DEFINITIONS	DÉFINITIONS
DIVISION OF REGULATIONS	ÉLÉMENTS DU RÈGLEMENT
"DUE TO"	
ELLIPSES	
EM DASHES	TIRETS
ENACTING AND AMENDING FORMULAS	FORMULES D'ENCADREMENT
"EXPIRY", "EXPIRATION" AND "END"	
EXPLANATORY NOTE	NOTE EXPLICATIVE

ENGLISH	FRENCH
FINES AND IMPRISONMENT	AMENDES ET PEINES D'EMPRISONNEMENT
FOOTNOTES	NOTES EN BAS DE PAGE
"GREATER OR LESSER OF X AND Y"	
"IF", "WHERE" AND "WHEN"	« LORSQUE », « QUAND » ET « SI »
INTERNATIONAL SYSTEM OF UNITS (SI)	SYSTÈME INTERNATIONAL D'UNITÉS (SI)
ITALICS	ITALIQUE
LATIN EXPRESSIONS	EXPRESSIONS LATINES
MARGINAL NOTES	NOTES MARGINALES
MATHEMATICAL FORMULAS	FORMULES MATHÉMATIQUES
MISCELLANEOUS AMENDMENT REGULATIONS	RÈGLEMENT CORRECTIF
"MUST", "MAY" AND "SHALL"	
NOTICE OF PREPUBLICATION	AVIS DE PRÉPUBLICATION
"NOTWITHSTANDING" CLAUSES	DÉROGATION
NUMBERING	NUMÉROTATION
NUMBERS	REPRÉSENTATION DES NOMBRES
OATHS	SERMENT
ORDERS IN COUNCIL AND OTHER EXECUTIVE ORDERS	DÉCRETS ET AUTRES FORMULES D'ÉDICTION
PARAGRAPHING CONJUNCTIONS	ÉNUMÉRATION VERTICALE
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PROVINCES AND TERRITORIES: ORDER OF LISTING	PROVINCES ET TERRITOIRES
PUNCTUATION	PONCTUATION
"PURSUANT TO"	
RECOMMENDATION OF THE MINISTER	RECOMMANDATION DU MINISTRE

ENGLISH	FRENCH
RECOMMENDATION OF THE TREASURY BOARD	RECOMMANDATION DU CONSEIL DU TRÉSOR
REGULATORY IMPACT ANALYSIS STATEMENT (RIAS)	RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION (REIR)
REMISSION ORDERS	DÉCRETS DE REMISE
ROUNDING OFF OF AMOUNTS	ARRONDISSEMENT DES NOMBRES
SCHEDULES TO REGULATIONS	ANNEXES DU RÈGLEMENT
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VERB FORMS	FORMES DE VERBE
"WITH SUCH MODIFICATIONS AS THE CIRCUMSTANCES REQUIRE"	« AVEC LES ADAPTATIONS NÉCESSAIRES »

* * * * *



Federal Regulations Manual

Part 5



**DEVELOPING
REGULATIONS**

**The Basic Steps
and the
Plain Language
Approach**

March 1998



Department of Justice and
Treasury Board

Ministère de la Justice et
Conseil du Trésor

Canada

This document was prepared by the Plain Language Partnership, which is composed of representatives of the Department of Justice, the Treasury Board Secretariat, Natural Resources Canada, Industry Canada, Transport Canada and Human Resources Development, National Literacy Secretariat.

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Publié aussi en français sous le titre :
L'Élaboration des règlements : Les principales étapes et la lisibilité

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Developing Regulations: The Basic Steps and the Plain Language Approach

INTRODUCTION

This Guide is intended for anyone involved in preparing regulations. It should help everyone who participates in the process, including the technical and policy officers in the sponsoring department and the legal advisers from the Department of Justice in the departmental legal services units (DLSUs).

This Guide performs two functions. First, it gives an overview of the process of drafting regulations. Although much has been written on the subject, there is no “road map” to point out the choices confronted by the government regulator or to identify the documents to refer to along the way. This Guide introduces you to the basic steps to follow when you prepare a regulation, and it refers you to reference documents for further details on particular points. The reference documents are primarily federal government publications, as well as certain documents on plain language.

The second basic function of the Guide is to introduce plain language elements that can be used when drafting regulations. These elements affect both the process by which regulations are prepared and the words and format used. Plain language is much more than the words and grammar used to communicate an idea. It is a process that starts before you put pen to paper. It starts with forming a team, getting a clear understanding of your objective, recognizing your “audience” and their needs and abilities.

Many people are interested in making regulations easier to read and understand by using a plain language approach. We are still

in the early stages of applying plain language principles to regulations, but changes are being made.

There are many drafting conventions that apply to regulations, but it is beyond the scope of this Guide to cover all of them. The drafting part of this Guide is limited to highlighting the plain language processes and techniques that may currently be used in developing federal regulations. Other plain language techniques are being considered and, as these are approved, they will be communicated to regulators. These new processes and techniques will be added to the comprehensive *Federal Regulations Manual* prepared by the Regulations Section, Department of Justice, which sets out virtually all the drafting rules for federal regulations. This Guide should be used in conjunction with that Manual.

The steps outlined in this Guide combine traditional approaches to drafting regulations with more innovative ones based on plain language principles. Certain stages in the creation of a regulation, for example, the formal making, registration and publication of a regulation, will be familiar to anyone who has been involved in the process. Other elements, such as the emphasis on teamwork, consultation and usability testing, represent a less traditional approach to drafting that makes use of plain language principles. In the course of developing regulations, time and resource pressures may limit how closely you are able to follow the plain language approach outlined in this Guide; for example, urgent circumstances could justify not conducting usability testing.

1. PRELIMINARY STEPS

1.1 *Identify the Issue and the Objectives*

Good drafting depends on knowing what you want to say and saying it well. A critical element of successful drafting is thorough policy formulation. There are, of course, other important elements: good organization of the text, appropriate choice of words, clarity of style, presentation and testing for usability. However, if the regulation is not based on a clearly formulated policy, the other elements cannot make up for this omission, and the result will be an ineffective regulation. A French poet, philosopher and linguist once said:

Whatever is well conceived is clearly said, And the words to say it flow with ease.¹

These words, written in 1674, are still valid today. The purpose of the written word is to convey a message, no less in legislative drafting than in other writing. Regulations convey rules. In order for those rules to be expressed clearly and accurately, they must be clear in the regulator's mind. The issue and objectives must be identified.

This section of the Guide provides you with a framework and checklist for finding the most practical approach to identify the issue and determine the remedial objectives.

(A) Principles

The first step in establishing clear rules is to identify the objective clearly. You may not be motivated by a negative or difficult

situation. You may instead be aware of an issue or new initiative that you want to address. In either case, you must recognize and analyze the realities of the situation that your department wants to address. In doing so, you will have to identify powerful external factors, economic, cultural, social or psychological, that usually influence people's behaviour in the situation. It is not sufficient to conclude that there is a problem or issue that needs to be addressed; you must also know:

- why the situation needs to be addressed;
- how the circumstances combine to generate the issue;
- how severe the need is to address the issue;
- how often the issue arises; and
- what the costs of not dealing with it are.

You should assemble a team of people to flesh out the issue. By forming a working team at the beginning of the project, you can ensure that the team leader is informed and guided when identifying the issue, weighing the risks associated with the various options, and deciding which approach to take. You will need people with technical and legal expertise in the area concerned. Once the issue is defined, it must be looked at in its legal and governmental context. Call on your DLSU and the Regulations Section of the Department of Justice for assistance.

Analysis of the legal and governmental context will tell you:

- whether the matter falls within federal and departmental jurisdictions. This step is essential because if the matter is

¹ Nicolas Boileau-Despréaux (1636-1711), *The Art of Poetry* [1674], canto I, l. 153

outside those bounds, you cannot address it through regulations, nor are you responsible for the solution.

- Other government sectors or public interest groups may be concerned and should be consulted. Consultation is a key means of taking the views of the various stakeholders into consideration.

The objective of consultation is to ensure harmonization and avoid duplication with other action taken to address the issue.

You should refer to the Privy Council Office publication *Consultation Guidelines for Managers in the Federal Public Service* for more information on this subject.

(B) Checklist

- ✓ What is the issue that you want to address?
- ✓ Is government intervention warranted?
- ✓ What is your objective and the purpose of intervention?
- ✓ What is creating or contributing to the issue?
- ✓ Who are the key players?
- ✓ To what extent are the various players involved in the situation?
- ✓ What external factors are influencing their behaviour?
 - Do people understand and acknowledge that there is an issue?
 - Do they understand and acknowledge their contribution?
 - Do they understand and accept the government's objectives?
 - Do they understand and accept the way you want them to behave?
 - Are they capable of behaving that way?
 - What economic, cultural, social or psychological factors are involved?

- Can the government or other bodies adequately monitor the solution?

- ✓ What changes do you want to see?
- ✓ How much change do you really need?
- ✓ Which instruments will best bring about the desired result?

1.2 Assess Ways of Achieving your Objectives

Once you have identified the issue, you should explore possible ways of addressing it. No matter what solution you consider, you must ensure that the relevant legislation is broad enough to address the problem. To ensure that any potential solution is legally viable, you should consult with your DLSU. You should also consult with the people who are likely to be directly or indirectly affected by the possible solutions. Diagram 1 on the following page provides an overview of the steps and considerations involved in assessing alternative ways of achieving your objectives.

(A) Principles

One way of achieving your objectives is, of course, by making regulations. This method has its drawbacks, however, chief among them being a significant investment of time and money. Before you decide to address the issue by writing regulations, you need to ask yourself if there are alternatives to regulation that could help you address the issue.

Alternatives may include such government intervention as taxing, owning businesses or promoting voluntary action.

The questions listed in the checklist in (B) below will help you to assess the best way of reaching your objective. The checklist is an analytical framework to help you discover whether there are other solutions

that would work just as well as traditional regulation to achieve the results you seek. The following are examples of alternatives, some of which do not involve regulations at all:

- taxation (raising or lowering the cost of a particular behaviour, such as the tax on cigarettes)
- expenditure (such as subsidizing purchase of pollution-abatement equipment)
- loans and loan guarantees (such as retro-fitting workplaces to meet new safety standards)
- user charges (such as charges for disposal of toxic waste)
- public ownership
- persuasion (such as promoting voluntary action)
- modification of private law rights (such as creating new legal rights of action)
- insurance schemes (such as adjusting the premium to encourage or discourage certain behaviour)

Another option would be to consider alternative forms of regulation, such as:

- imposing direct product controls (such as putting price ceilings on public utility services)
- imposing supplier entry and exit controls (such as licensing to control the number of suppliers in the market)
- imposing production process controls
- imposing information controls
- establishing marketable rights

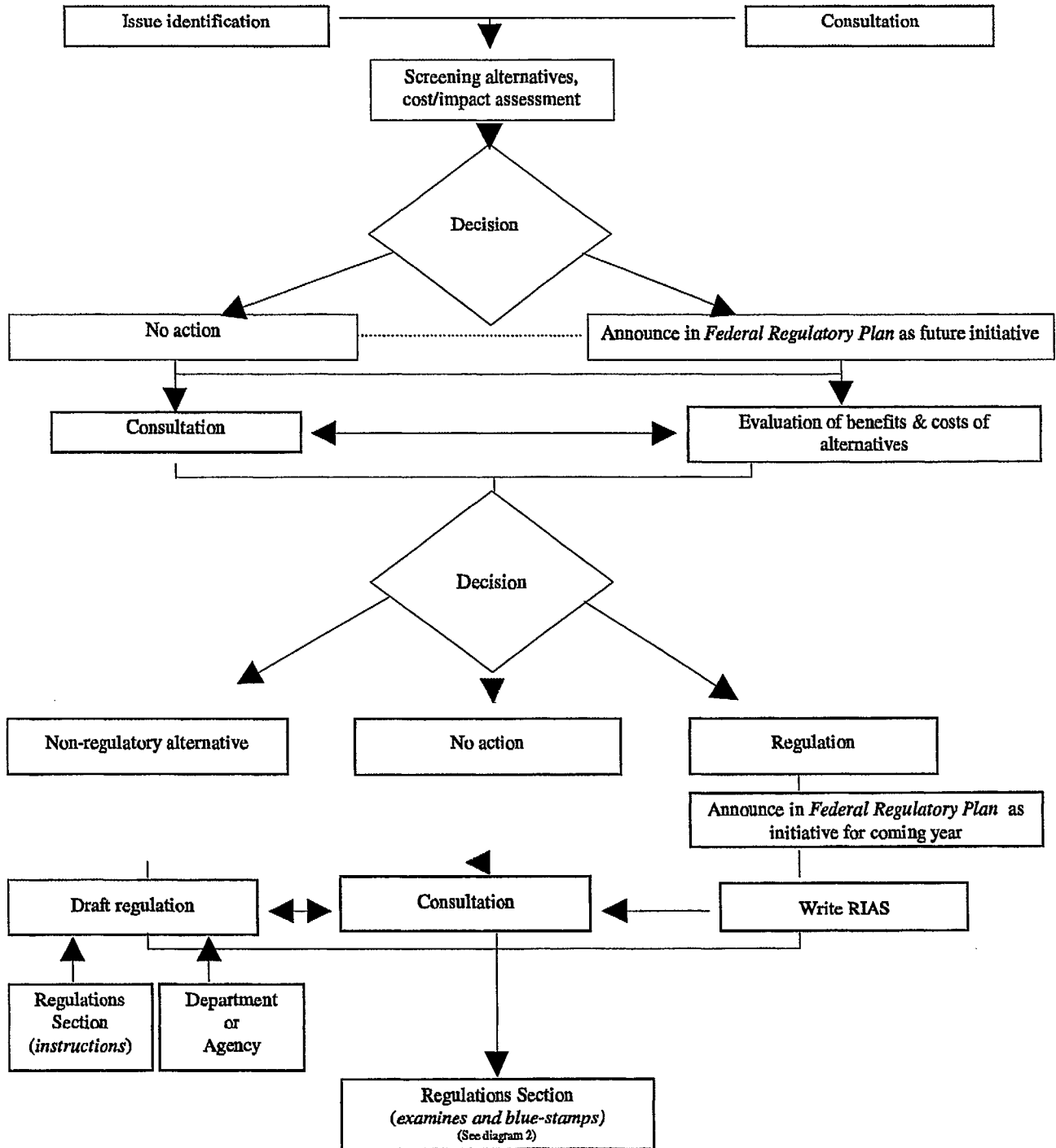
You may decide that the best strategy is to use incentives to strengthen the factors that bring about the desired result, or to use disincentives to weaken or eliminate the factors that bring about undesirable results.

Your decision on how to handle an issue must be based on a systematic comparison of possible alternatives. If you decide to regulate, you must demonstrate that the benefits of a regulation outweigh its cost.

The costs related to a proposal can be many and varied. Costs include any negative impact on business (for example, the paper burden and the ability to compete and be innovative), on consumers (for example, higher prices and less product choice), on governments (for example, compliance, enforcement and administrative costs), on the environment, and on health and safety. If the regulation is expected to have a wide effect with significant economic implications, one useful diagnostic tool is the Business Impact Test. For example, a Business Impact Test that was used to assess cost-recovery proposals revealed that Canadian businesses that are starting up often have particular difficulties finding the funds to pay for approvals. This finding was helpful in choosing how to implement a cost-recovery program in those circumstances.

The next section of the Guide gives you a framework and checklist for finding the most practical approach to address the issue.

DIAGRAM 1 ASSESSING THE ALTERNATIVES



(B) Checklist

- ✓ What instruments (directives, regulations, policy documents) and approach (incentives, disincentives) will bring about the desired result?
- ✓ How would each alternative work in practice?
- ✓ Do you have the resources to do it? Implementing an alternative without the resources to execute it could attract liability.
- ✓ What are the comparative advantages of each alternative?
- ✓ How might each alternative be expected to alter the key issues that you have identified?

Different types of approaches, whether regulatory or non-regulatory, give different levels of assurance that the risk will be reduced. To judge which regulatory and non-regulatory alternatives are options, you will need to assess each of them according to the following criteria:

- **Is it legal?** The *Constitution Act* allocates legislative (and governing) authority, establishing the division of powers between the federal and provincial governments. The *Canadian Charter of Rights and Freedoms* sets limits on *how* governments can exercise their authority. Contact your DLSU for help in this area.
- **Would it be effective?** How would this alternative strengthen or weaken the factors that influence the behaviour contributing to the issue? How difficult and costly would it be to detect non-conforming behaviour?
- **Would it be efficient?** An efficient solution is one where the benefits equal or exceed the costs.

Your analysis will have two parts: quantifiable and non-quantifiable impacts.

- **Would it be fair?** Who would win and who would lose? By how much? How would this alternative change the relative standings of the various stakeholders affected?
- **Is it too intrusive?** How many people would be affected by this method of intervention? How detailed would the standards of behaviour be? Is this macro or micro management? What form would the behavioural specifications take? If, for example, a standard is required, can you get by with a performance specification or will you have to address technical design attributes? What kind of behaviour is being addressed? Is it something that is generally accepted as being the government's business, or is it something that is better left to other forces to resolve?
- **How visible would it be?** Government is there to serve the people; people need to know if, when, and how they are being served. If this alternative is used, therefore, will it be evident that government is taking action to deal with the situation? Is this alternative more, or less, visible than others? Can its visibility be increased through government action such as public announcements or other communications?
- **How fast can you have it?** You should be prepared to estimate how quickly each alternative could be implemented and how long it would take to generate results. For instance, regulation might be more effective, but it might take two to three years to implement.

A voluntary approach might result in somewhat lower levels of compliance but might be achievable in 6 to 12 months.

- **Is it responsive?** The alternative has to respond to the issue and be seen as responsive. If it doesn't address the contributing behaviour head-on, people may think that the government isn't taking the issue seriously. If it isn't tangible, if it doesn't have form, structure, and specifications that define the desired result, it may be viewed as a smoke screen.
- ✓ What type or what combination of alternatives would work best? Factors that influence the situation you want to modify are likely to be complex and interrelated. The best solution will probably be a combination of techniques that work on different aspects of the situation. Most regulatory systems rely on an assortment of techniques to achieve the desired result; for example, the techniques of training, public communications and financial assistance can be used to promote compliance. Various forms of

requirements are often mixed together in statutes and regulations. For example, licensing systems may control who can provide a product, but they often also incorporate standards and pricing controls.

REFERENCE DOCUMENTS

For more information on alternative approaches to regulation, see the following Treasury Board Secretariat publications:

Assessing Regulatory Alternatives (May 1994).

Benefit-Cost Analysis Guide for Regulatory Programs, Chapter 2, Screening the Alternatives (1995).

Competitiveness and the Design of Regulations (Dec. 1992).

Intergovernmental Cooperation, Summary (Nov. 1994).

Enlightened Practices in Regulatory Programs, Vols. 1 & 2 (May 1993).

The Business Impact Test.

See also:

Tort Liability of Public Authorities: Review of Jurisprudence, 2nd Ed., Administrative Law Section, Department of Justice (Feb. 1995).

1.3 Preparing to Write a Regulation

You have assessed the available alternatives and you have been advised that you have legislative authority to proceed with a regulatory solution. At this point, you will either amend an existing regulation or write a new one. The considerations and steps involved in either process are set out below.

(A) Form a Team

Once the decision is made to write a new regulation or to amend an existing regulation, call together a team of people to serve

as the key resource contacts. Ideally, the team should be made up of representatives of all of the groups who are to be involved in the regulation's development: a project leader, a technical adviser, a legal adviser from your DLSU, two drafters from the Regulations Section, Department of Justice (one for the French version and one for the English), and a representative of any other group that can contribute to the drafting effort. Regulations are prepared in both official languages; the one version is not simply a translation of the other. You must have people on the team who can provide the necessary expertise in each official language.

To promote interaction and emphasize the complementary roles of the various team members, define each member's roles and responsibilities at the outset and be sure they are understood. It may not be necessary for every team member to attend every meeting, but it is very important that the team members know who to contact if certain issues arise.

You will find that the drafters from Regulations Section will be better able to respond to the needs of the client and to the situation in which the regulation will operate through their contact with the rest of the team. This contact should reduce, if not prevent, the delays and frustrations that result from discovering problems at a late stage in the process.

Identifying all the players from the start makes the process more efficient and saves time and money.

(B) Determine What can be Done under the Authorizing Statute

It is essential to determine the legal framework set by the authorizing statute, because it gives the team an understanding of their legal constraints. These constraints rest on two legal bases:

- that the regulation-making authority has no regulation-making powers beyond those delegated to it by Parliament in the authorizing statute, and
- that in the regulations themselves it must confine itself to acting within the scope, subject-matter and legal limits that Parliament has set it in the authorizing statute.
- To define the scope of the legal framework, you need to answer these questions:

- Who can exercise the regulatory power?
- What is the extent of the regulatory power, given the wording of the authorizing statute?
- How far can the holder of the regulatory power go in subdelegating matters?

The Regulations Section drafter is a specialist in the area of delegated legislation. The DLSU legal adviser is a specialist in the department's legal interests. Together, they can advise other members of the team on the extent of the legal authority the team has to work with.

REFERENCE DOCUMENTS

For more information on the legal framework for regulations, see the following Justice publication:

Federal Regulations, Department of Justice Regulatory Awareness Program, Privy Council Office Section (1992).

(C) Develop a Realistic Regulatory Strategy and a Work Plan

Team members should develop a strategy and create a work plan for the regulation. The work plan should realistically take into account all the steps in preparing, implementing and enforcing the regulation. Once your team has a work plan, you can estimate the resources necessary to accomplish the task and determine whether enough funding is available.

REFERENCE DOCUMENTS

These reference documents provide practical advice for improving compliance with regulatory objectives. They also identify alternatives to the traditional "command and control" model of regulation, such as the use of incentives and self-regulation techniques:

Designing Regulatory Laws that Work, Administrative Law Section, Department of Justice (1995).

A Strategic Approach to Developing Compliance Policies, Treasury Board Secretariat, Regulatory Affairs (1992).

2. PREPARE THE REGULATORY APPROACH

2.1 Consult with Users and Public Sector Administrators

Consultation is the pathway to fair and "transparent" regulatory development. If time and resources permit, it is helpful to involve the policy-makers and the drafters in the consultation process. Involving them will lead to a better understanding of the user-regulator relationship and will result in more effective regulations. Depending on the scope of the consultations and the form they take, you may also want to include researchers.

Consultation is conducted principally with two groups: users and stakeholders; and public sector administrators. You should consult with both groups at the same time because their differing policy concerns can have a profound effect on the outcome. Consultation with stakeholders should also be conducted from the outset (see section 1.2), to reduce the chances of choosing an ineffective or inappropriate solution.

The examination of policy objectives normally starts with the regulator and extends out, by means of consultation, to the various stakeholder and user groups. The policy is continually tested for effectiveness, with adjustments being made to correct flaws as they are identified.

Consultation will involve selecting target groups and drafting questions to draw out the key issues, tailoring the methods to the users when necessary. The Research and Statistics Section of the Department of Justice may be able to help you in this regard. If the client department has a research or evaluation unit, it should be brought into the project, since it will likely have valuable substantive knowledge about the regulated area that the Department of Justice researchers will not have. The sponsoring department may also have other internal resources that could help during the consultation phase, such as a Public Affairs Section. The Research and Statistics Section of the Department of Justice has research experience and considerable knowledge about the plain language process, and can provide a useful liaison role in the technical discussions with the client department's research unit. Research is a resource-intensive activity, and the availability of resources will be crucial in determining what can be done and by which organization.

Consultation may take the form of visits to selected users. If the user group is relatively small or well-organized, one-on-one meetings with representatives may work best. If the group is diverse and largely unorganized, a representative sample will have to be identified and consulted, possibly in the form of a focus-group discussion, to make the process credible. Consultation can also be conducted using client-specific newsletters, conferences and electronic media (e.g. the Internet).

(A) Consult with Users and Stakeholders

The first step is to identify and consult with the users of the proposed regulation and any associated stakeholders. Users can range from the regulator and the compliance and enforcement network all the way to the end user, often the general public.

For their part, stakeholders differ from users in that the stakeholders do not directly use the regulations, although they do have an interest in the area covered by the regulations. Stakeholders may include other federal departments, provincial authorities, municipal bodies, international organizations, industry associations or consumer organizations. For example, in the context of an environmental regulation, the users would be the industry that has to comply with emissions standards, whereas the stakeholders would be the general public. Identifying all stakeholders is critical to having a complete, well-balanced and productive consultation process.

(B) Consult with Public Sector Administrators

It is equally important to identify and consult with public sector administrators when shaping the final policy position. Consultation between regulators and administrators at different levels and in different sectors of government is vital. Some public sector administrators are:

- Treasury Board, if the regulation has financial implications;
- departments or central agencies that will have a role to play in the regulatory scheme (such as a scheme that contemplates a cooperative regime between two departments); and
- departments that have relevant expertise in an area affected by the regulation (such as the Department of Justice

for human rights issues, Department of the Environment for environmental impact, or Department of Industry for market competition issues).

You should ensure that all potential conflicts that could hamper the regulatory initiative are resolved at this stage. While initial consultations will have covered much ground, you may need to consult further as the regulation is refined. Consultation produces a well-thought-out policy document that forms the basis of sound legal drafting instructions or draft regulations.

With a consultation-tested policy document in hand, you can tackle the legal drafting process with confidence.

2.2 Prepare a Detailed Plan of the Regulation

To prepare a draft regulation you will need a detailed plan. A regulation should always be organized in logical order. The text should unfold progressively so the reader can understand the document without having to skip ahead to refer to later sections. Some degree of flexibility in the organization of regulations is acceptable, but logic and ease of use are the paramount considerations.

Definitions should appear at the beginning, followed by the general rules and, finally, the particular rules, penalties and exceptions. Although it is not always possible to follow this structure, a coherent and logical plan of some sort is critical. More guidance on the organizing of regulations is given in Section 4 of the Guide.

This exercise will help ensure that the text is complete and that every aspect of the problem has been covered. You will be in a better position to identify missing elements and conceptual flaws. Resolve problems as soon as they are detected. Problems may be the result of an over-

sight, or they may be symptomatic of a fundamental error in policy conception. Either way, the issue should be addressed and resolved before drafting begins.

To draft before the policy is finalized is usually counter-productive. Any perceived time savings made by doing so will eventually be lost. To a certain degree, it is inevitable that the drafting process will test the soundness of the policy and fuel new policy developments. These developments will in turn raise legal issues which will need to be assessed and which may lead to refinement of the regulatory scheme. However you should try to avoid the inefficiency of constantly drafting and revising while the fundamental policy continues to evolve. Usability tests should not reveal policy questions that remain undecided.

2.3 Select What to Put in the Regulation

When developing a regulation, you should remember that, once it is made, every change to it must follow the regulatory process. The regulatory process takes time and, given the number of people involved, is costly. In order to minimize future amendments to a regulation, it is important to separate what is essential to include in the regulation from what can be dealt with elsewhere. The regulations themselves should set out the general rules or standards of behaviour and provide criteria for applying those standards. Administrative documents such as policy guidelines and directives can provide the detail on how the criteria are to be applied on a case-by-case basis, but these documents will not have the force of regulations.

Ideally, each section of a regulation should be assessed in terms of the frequency of possible future amendments. It is also important to figure out how much detail you really need in a regulation. Usually, the

more detailed regulations are, the more difficult it is to read them and the more likely they are to be amended. Therefore, details that are not necessary to achieving the objectives of the regulations should be communicated through policy documents instead.

2.4 Prepare the Regulatory Impact Analysis Statement (RIAS)

This section of the Guide will help you prepare your Regulatory Impact Analysis Statement (RIAS). A RIAS is required under the Government of Canada's regulatory policy, and is used to demonstrate to the public that all of the policy requirements were addressed when the regulation was being developed. The RIAS has six sections:

- **Description:** outlines how the regulation will work and why it is needed.
- **Alternatives:** demonstrates that alternatives were considered, and describes them.
- **Benefits and costs:** quantifies the regulation's effects.
- **Consultation:** shows the nature of discussions held with users and stakeholders.
- **Compliance and enforcement:** discusses the expected means of ensuring compliance.
- **Contact person:** identifies the person best able to answer questions.

Applying the following checklist will ensure that your work complies with the government's regulatory policy:

- ✓ **Writing Style:**
 - Are the conclusions that you want your audience to arrive at clear in your own mind?

- Have you addressed the concerns of your audience?
 - Do your arguments lead logically to your conclusions?
 - Have you put what is most important first?
 - Are your sentences short and is your wording clear?
 - Have you kept technical language to a minimum?
- ✓ Description:
- Have you defined the situation succinctly?
 - Can your readers quickly establish if and how the regulation will affect them?
 - Have you shown why regulatory action is necessary?
 - Have you described the solution that the regulation or amendment is intended to provide?
 - Have you set out the context of the regulation succinctly?
- ✓ Alternatives:
- Have you clearly described the alternatives to regulation and any alternative types or forms of regulation that were considered?
 - Did you explain why the alternatives were not selected?
- ✓ Benefits and Costs:
- Have you shown that the costs and benefits you predict are realistically proportionate to the impact of the regulation?
 - Have you provided a cost-benefit analysis?
 - Have you assessed which groups or interests will bear the costs of the regulation, and which will receive the benefits?
- Have you incorporated quantitative analyses of repercussions, operating costs and direct benefits of the regulation, as well as any repercussions on inflation and employment?
 - Have you included costs to industry, the public and the government, including enforcement costs?
 - Have you made a qualitative assessment of those effects that do not lend themselves to a detailed quantitative analysis?
 - Have you identified any possible environmental effects?
- ✓ Consultation:
- Has notice of the regulation been given in the Federal Regulatory Plan and has the regulation been published in the *Canada Gazette*, Part I (if the regulation is not exempt from being pre-published)?
 - Who was consulted?
 - What consultation mechanisms were used?
 - What were the results of the consultation, and how was the regulation changed as a result?
 - Have you identified any groups still opposed to the regulation (and named them in a Supplementary Note to ministers)?
 - If the text of the regulation has been revised so that it reflects and responds to comments received after its pre-publication, have necessary changes been made to the RIAS?
- ✓ Compliance and Enforcement:
- For a new regulation, have you explained the enforcement mechanisms and described the penalties for non-compliance?

- Have you described the means which will be used to detect non-compliance?
- For amendments to a regulation, have you described how the need for enforcement has changed as a result of the amendment?

✓ Contact Person:

- Have you included an address that is complete enough to enable people unfamiliar with the government to get through easily, and a fax and phone number and an e-mail address?

REFERENCE DOCUMENTS

For more information on preparing a RIAS, refer to the following Treasury Board Secretariat publications:

RIAS Writer's Guide (1992).

Assessing Regulatory Alternatives (May 1994) *Benefit-Cost Analysis Guide for Regulatory Programs, Summary* (1995).

Regulatory Policy (Nov. 1994).

3. DRAFT THE REGULATION

3.1 Two Main Ways to Proceed

At present there are two main ways of drafting a regulation, both of which can be modified to accommodate specific circumstances: either drafters from the Regulations Section draft the regulation on the basis of instructions from the client department, or the department prepares a draft regulation which is then examined by the Regulations Section. In either case, you must respect the bilingual nature of the drafting process by giving instructions or draft regulations in both languages.

If you proceed by instructions, they must contain enough detail to be useful as the basis for preparing a draft regulation. Not only do the drafters need to have detailed directions on what is required, but your departmental policy officers and management must understand exactly what is contemplated. To prepare instructions, answer the basic question, "Who is

responsible for doing what, and how and when?" In some cases, it may be possible to take other regulations as a model and point out what has to be changed.

The project team leader ultimately decides which way to proceed, based on considerations of efficiency in the particular circumstances and taking into account all relevant factors, including the resources available, the time available and the complexity of the subject area.

The team approach should underlie whatever choice you make, so that the work of drafting and reviewing is based on ongoing communication among those involved.

When instructions or a draft regulation are sent to the Regulations Section from the department, they should be accompanied by a letter of transmittal from the departmental manager responsible for the project. This requirement ensures that time is not spent developing a regulation that does not have the explicit support of

the sponsoring department. The drafters can help you determine when this formal letter of transmittal should be sent.

REFERENCE DOCUMENT

For more information on the different ways to proceed and the roles of the respective parties in each case, refer to the Department of Justice publication: *Users' Guide*, Regulations Section, Department of Justice, 1997.

3.2 Drafting Style and Presentation

The wording of a regulation must be clear, precise and concise. Drafting a regulation calls for discipline in selecting vocabulary and structuring sentences. Graphic presentation is another key component of producing a text that is accessible and easy to read.

Long-established drafting rules serve to ensure a degree of uniformity in regulations. However, you may be interested in tailoring the language and presentation used in the regulation to your user group. It is possible to write concisely and simply, using a minimum of legalese, cross-references and other elements that make a text difficult to understand, without sacrificing the clarity or accuracy of the regulation. You will have to be consistent, though, with the technical and legal language used in the authorizing statute, or the unamended part of the relevant existing regulations, and this may be a limiting factor in your particular regulations or amendments.

Section 4 of this Guide describes some plain language drafting features that you may find useful. The reference documents listed below describe drafting rules in more detail.

Plain Language Clear and Simple, a publication prepared by Human Resources Development, National Literacy Secretariat, in partnership with 14 other departments, describes basic "plain language" writing and graphic techniques that make documents easier to read and understand. Most of these techniques can be used in drafting regulations; for example, it is easier for any user to find material in regulations if marginal notes are used. Another simple aid to comprehension is to avoid dense, uninterrupted blocks of text.

Any suggestion you may have for making the regulation easier to read and understand should be given to the Regulations Section drafters on the team. They will analyze it in light of possible legal or practical obstacles and, whenever possible, will help you apply it.

To simplify drafting on the computer, the Regulations Section has developed format styles, which must be used, because they save the expense of an intermediate reformatting step. Training on how to use the "Styles" is available from the Regulations Section.

TOOLS AVAILABLE

Department of Justice, Regulations Section's automated "Styles" to format documents.

REFERENCE DOCUMENTS

For more information on drafting techniques, including "plain language" techniques, refer to the following publications:

Federal Regulations Manual/Manuel de réglementation fédérale, Regulations Section, Department of Justice (1998).

Plain Language Clear and Simple/Pour un style clair et simple, Trainer's Guide, Human Resources Development, National Literacy Secretariat, Multiculturalism and Citizenship Canada (1994).

Justice position paper on incorporation by reference, Administrative Law Sector, Department of Justice (Sept. 1995).

Directives on Submissions to the Governor in Council and Statutory Instruments/Directives sur les présentations soumises au gouverneur en conseil et les textes réglementaires, Privy Council Office, (1985).

4. PLAIN LANGUAGE DRAFTING

4.1 Introduction

The basic approach to writing documents in plain language is set out in *Plain Language Clear and Simple* prepared by the Human Resources Development, National Literacy Secretariat. Another very helpful reference for writing and editing is *The Canadian Style*, which contains a chapter on plain language. Although these publications deal mainly with non-legal documents, they contain many principles for writing clearly that can also be applied when writing regulations.

Traditionally, regulations have been written in legal, technical language that many readers find difficult to understand. "Plain language" writing focuses on the users (usually non-lawyers) of the regulations.

Writing regulations in plain language does not make them unenforceable in court. In fact, it's a good way to avoid ambiguities

and interpretational problems. Also, court enforcement of regulations is only one way to achieve compliance. Research has shown that most people in a regulated group will voluntarily comply if they understand what is being asked of them. Relying on this concept, some regulators are shifting away from using the threat of prosecution towards trying to encourage voluntary compliance. Since a major cause of non-compliance is simply a failure to understand what to do and how to do it, writing regulations in plain language should improve compliance.

In addition to improving compliance, readily understandable regulations reduce costs by reducing:

- the need for secondary explanatory material, such as pamphlets and brochures;
- the number of inquiries from the people who use the regulation; and
- the need for interpretative deskbooks or training programs for those who enforce the regulation.

In short, a regulatory regime will work more efficiently if the starting point is a regulation that can be easily understood by the intended audience.

This section outlines various plain language techniques that you can use to make regulations easier to understand. It concludes with an example of traditional drafting, taken from the *Explosives Regulations*, and an example of how it can be redrafted in plain language. The techniques outlined in this section are optional. (See 4.3 below for the factors that may influence your choice of techniques.)

For more information on using plain language when drafting regulations, refer to Janice C. Redish's *How to Write Regulations (And Other Legal Documents) in Clear English*, Document Design Center, American Institutes for Research, Washington D.C., 1981, and Susan Krongold's article "Writing Laws: Making Them Easier to Understand," *Ottawa Law Review*, Vol. 12, No. 2, 1992. You can also consult drafters in the Regulations Section of the Department of Justice as well as that Section's *Federal Regulations Manual* and the Legislative Drafting Conventions of the Legislative Services Branch of the Department of Justice.

4.2 Key Rules for Plain Language Regulations

The key rules in writing regulations in plain language are:

- 1st Know who your readers are.
- 2nd Know what you want to communicate.
- 3rd Organize the regulation in a way that your readers will understand.

4th Use language that your readers can understand.

5th Use formatting features to help your readers.

6th Test to see if you have achieved your purpose.

1st Know Who your Readers Are

To be able to communicate well, you must know whom you are communicating with and what information they need. Your audience may be one or several groups of people who are subject to the regulations, or it may be the general public. (This is discussed in 2.1 (A) above at p. 10.) To understand the needs of the reader, you will have to consult various sources, starting with the policy and operational officials in the sponsoring department. Consider including drafters from the Regulations Section in these and other consultations. This will allow them to see the underlying policy questions more directly and give them a better understanding of the background of the regulation. However, it is not the drafters' role to check on whether the consultations have been sufficient.

You should also consult the intended readers. This serves two main purposes. It educates the drafters about the audience and the issues, resulting in more informed drafting. It also involves the regulated group in making the regulations, which in turn should strengthen that group's commitment to them and improve the level of compliance.

The nature of the intended audience affects the style and terminology used in the regulations. For this reason, identifying the readers and understanding their needs is an indispensable first step.

2nd Know What You Want to Communicate

Determine the policy before you start to draft the regulations. Include only what your audience needs. Determine what sorts of things have to be in the regulations themselves, and what can be left to administrative documents.

For example, consider whether you really need to put all the details of the regulatory scheme in a law. Any administrative details that do not have to be legally enforced can be dealt within departmental policy documents.

Remember, the success of the regulatory scheme depends on having a clear idea of what you want to communicate. It is important to take the time to work through both the principles underlying the regulations and the practical effects of applying them. Ask yourself, "Who is responsible for doing what, and how and when?" Often, provisions that are generally worded and that lack clarity or specificity are a sign that a difficult issue has not been confronted. In such cases, using a vaguely worded provision just sidesteps the problem, which will have to be addressed eventually.

3rd Organize the Regulation in a Way that your Readers can Understand

Most people only read regulations because they need information or they need the answer to a specific question. Regulations should be organized and written with this in mind. They should make it easy for the reader to find information on any particular point that they cover. So, place yourself in the reader's shoes and organize the text according to what the reader needs.

If there are several different groups of readers who have different perspectives, you may have to choose which one to use. For example, if there are different prohibitions, those who are required to comply with the regulations will likely prefer to have the prohibitions stated throughout the regulations with the other provisions that relate to them. This would allow them to see the prohibitions integrated with the other provisions. However, enforcement officials may prefer to have all the prohibitions grouped together in one place. This would make it easier for them to find the provisions that are most important to their enforcement functions.

In some cases, it may be possible to avoid choosing one perspective over another. If you are writing different rules for several different groups of readers, you could organize the regulation into separate sections for each group or write separate regulations for each group. Thus, each group would have to go through only those parts of the regulations that apply to them.

A table of contents is an effective tool to use when deciding how to organize regulations. It provides an overview and can help the drafter identify elements that have something in common and should be arranged together.

Generally speaking, it is best to progress from the general to the specific. As well, if the regulations include requirements relating to a procedure, such as making an application, you should set out all the steps in chronological order.

Definitions are usually put at the beginning of a regulation in alphabetical order within a single section or subsection. The English version follows the order of the English words while the French version follows the order of the French words. This convention makes it easy for readers to find definitions because they are all in one

place. However, if a defined term is used only in single section, you may place the definition in that section.

4th Use Language that your Readers can Understand

Once you know who your readers are, choose the most effective way of communicating with them. Effective communication depends on a suitable level of language and suitable complexity of writing style. For example, the readers of a regulation that deals with a technical area might be expected to have a comparable level of expertise and be able to understand regulations written in technical language. Obviously, this approach would not succeed with other audiences. If possible, you should adjust the terminology in any given set of regulations to ensure that its particular readers will understand.

There are limits on the use of this approach. One is that you cannot replace technical terms that are used in the authorizing statute with other terms in the regulations. This rule avoids the confusion caused by having two different terms that mean the same thing, since the courts tend to assume that different terms are intended

to have different meanings. It also ensures that, by using the same terms as the authorizing statute, the resulting regulation does not exceed its authority.

Some specific features that you can consider using to create a plain language regulation are described below. Additional guidance is included in the *Federal Regulations Manual*, which is available through the Regulations Section of the Department of Justice.

(A) Use Words that your Readers can Understand

One of the most important ways to improve clarity and accessibility is to use words that readers will understand. For some audiences, the largest obstacle to comprehension is language that is archaic or unnecessarily legalistic or complex. Although you must use the technical or legal terms used to express concepts in the authorizing statute, you are usually free to choose terms for other concepts. In many cases, a more familiar word or phrase can safely be substituted for an archaic or unnecessarily legalistic or complex one. Some examples are set out below:

INSTEAD OF AUTOMATICALLY USING:**TRY USING:**

accomplish, perform	do
aforementioned, aforesaid	mentioned above
assist	help
by reason of	because
commence	begin
disseminate	send out, distribute
endeavour, attempt	try
exceeds	is more than
expiration	end
fix (a date)	set
furnish	give
hereby	by this
herein	in this regulation
in the event that, in the case of	if
on the part of	by
optimum	best, greatest, most
notwithstanding	despite, even though
preceding, prior to	before
provisions of these Regulations	these Regulations
pursuant to	under, in accordance with
said ("the said Regulations")	the, that, these
strategize	plan
submit	send, give
subsequent	after, following
such ("in such case")	that or the
therefor	for it
therein	in that place/document
thereof	of it
until such time as	until
utilize	use
where	if
whereby	by which
with a view to	to
with regard to/with respect to	about
without restricting the generality of the foregoing	but not limited to

This list is based, in part, on a list contained in *Plain Language Clear and Simple*. Refer to that document for more examples of simpler terms that you may be able to substitute, depending on the terminology of the relevant Act.

(B) Be Careful Using Definitions

Defined terms are more difficult for readers to understand because they cannot be accepted at face value. They oblige the reader to return to definitions at the beginning of the regulation for their meaning. In addition, the reader has to remember which words are defined because their usual meanings no longer apply. This can be a simple task if the regulations are short. However, in regulations of 300 sections, it is quite probable that the reader may forget that certain words are defined, especially if there are many definitions. For this reason, you should only define terms if their ordinary meaning is unclear or overly broad, or if some technical meaning is intended.

Despite these drawbacks, defined terms can have some advantages. They can be used to avoid the repetition of information each time a complex idea is mentioned. The details of the idea can be put into a definition so that the defined term will express them each time it is used. This may also simplify the drafting of the provisions that use the term, rather than loading them down with details. For example, "licence" may be defined to avoid the repetition of "a licence to fish on a recreational basis issued under section 3". When this sort of definition is introduced, be careful to choose a defined term that is appropriate to convey the contents of its definition.

When new regulations are being made, or an entire definition (sub)section is replaced, the opening words of the new definition (sub)section are "The definitions in this (sub)section apply in these Regulations". Each of the definitions that follows is made up of one or more complete sentences that end with a period.

For example:

2. The definitions in this section apply in these Regulations.

"contravention" means an offence that is created by an enactment and is designated as a contravention by regulation of the Governor in Council.

"heritage language" means a language that contributes to the linguistic heritage of Canada. It does not include an official language.

"licence" means, in respect of an undertaking, a licence issued under section 10. It does not include a certificate or a licence issued under subsection 25 (3).

"program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain. It does not include G33 visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

(C) Use Gender-neutral Language

Avoid gender-specific references unless the reference is to persons of only one gender. Almost all regulations apply to both women and men, and they should be drafted in a way that reflects this. You should be particularly aware of gender-specific references in two types of situations.

The first involves terms that refer to officeholders or occupations, such as "chairman" and "fireman". Gender-neutral equivalents such as "chairperson" and "firefighter" should be used.

The second type of situation involves pronouns and possessives (he/she, him/her, his/her). A number of techniques are available here, including using a double term ("she or he", "him or her", "her or his") or using "they", "them" and "their" in the singular sense. Another option is to repeat the noun instead of using the pronoun or possessive.

(D) Use Verb Forms that are Clear and Easy to Understand

Alternatives to "Shall"

You can use "must" instead of "shall" in commands. Not only is "must" more commonly used, it is also unambiguous and avoids the possibility of "shall" being interpreted in a permissive sense. "Must" also works for prohibitions, as in "a form must not include..." In the context of limiting a power, you can say "A person may not ..." or "No person may ...".

Always be consistent within the regulations, whichever word you choose, and make sure when amending the regulations that the consistency carries over into unamended parts.

Be Careful about Using the Passive Voice

Sometimes regulations require or permit things to be done without making it clear who is to do them. The regulations concentrate on what is to be done instead of the person who may or must do it. This problem most often results from using the passive voice. For example,

Service of a warrant or other document may be made on a person by showing the person a certified copy of the document.

Studies and reports of the Board made under this Part may be made

public with the approval of the Minister.

Contrast this fuzzy, bureaucratic effect with the clarity of these sentences when redrafted using the active voice:

The applicant may serve a warrant or other document on a person by showing the person a certified copy of the document.

The Board may make public any of its studies and reports made under this Part with the approval of the Minister.

Passive sentences may also be legally unenforceable. Consider the following example:

A dog must be kept on a leash when it is in the park.

This rule does not indicate who is responsible for keeping the dog on a leash. It could be the dog's owner or a person who is out walking the dog or a park official. If it is not clear who is responsible, the rule cannot be enforced.

Although the passive voice often creates problems, there are some situations where it is preferable. In a series of regulations, the first one may make it clear who is responsible for following the regulations. The subsequent regulations may be better drafted using the passive voice.

For example,

- 1. A person who brings a dog into a park must control the dog in accordance with these rules.**
- 2. The dog must be restrained by a leash that is no longer than 5 m.**
- 3. The dog must not be allowed to bark excessively.**

4. Faeces deposited by the dog must be collected in a plastic bag and placed in a garbage can without delay.

In this example, the passive voice is preferable to repeating the phrase "a person who brings a dog into a park". Once it is clear who is responsible for compliance with the regulations, the focus should be on the dog.

Avoid turning verbs into nouns

Use a more concrete style of writing by using active verbs instead of nouns that are made out of verbs. For example, you should avoid the abstract style of "non-

compliance with the regulations is subject to a penalty of ...", since it often makes it harder to identify who is subject to the sentence. It is easier to understand a more concrete statement, such as "a person who *does not comply* with the regulations is liable to a penalty of ...".

Verbs are often turned into nouns in situations where a simpler verb form of the same word will work. For example, "after consultation with" can be rendered more simply as "after consulting" and "after the issuance of the licence" is more straightforward when expressed as "after the licence is issued".

(E) Avoid Double Negatives

Try not to use double negatives, since it is much easier to understand positive statements.

For example:

Instead of writing:

A person who is not a designated person must not enter the regulated zone.

Write:

Only designated persons may enter the regulated zone.

Double negatives can also be avoided by using the phrase "at least" instead of "not less than" or by using the preposition "unless" or "without", instead of "if ... not". For example,

Instead of writing:

A person who is not less than 18 years old must not ...

A person must not enter the regulated zone if the person does not show their identity card.

Write:

A person who is at least 18 years old must not ...

A person must not enter the regulated zone without showing their identity card.

(F) Pay Attention to Word Order in Sentences

The way words are put together in sentences has an important effect on how easily they can be understood. Traditional legal drafting often distorts the usual word order to achieve greater precision. This most often occurs when a complex series of ideas is compressed into a single sentence. Certain components of the sentence may have lengthy modifiers. The modifiers are placed next to the components they modify in order to avoid ambiguity about what they modify. For example, a verb modifier may be placed between the auxiliary and the main verb:

The Minister may, with the approval of at least five members of the Council and after consultation with interested persons, issue a licence ...

This sentence leaves the reader looking for the main verb while having to read subordinate material that makes no sense until the verb is completed. This split between the main verb and its auxiliary can be avoided by rewriting the sentence:

The Minister may issue a licence if at least five members of the Council approve and the Minister is of the opinion that all interested persons have been notified and adequately consulted.

Another common problem is putting lengthy conditional clauses at the beginning of a sentence. This makes it difficult for the reader to find the main clause and understand what the sentence is about. In these cases, the reader has to read twice: once to find the main clause and a second time to understand the conditional clause and fit it together with the main clause.

For example,

If the Minister is of the opinion that all interested persons have been notified of the licence application and have been adequately consulted and at least five members of the Council approve, the Minister may issue a licence ...

This problem can be easily avoided by redrafting the sentence as shown above.

Finally, as noted above in the discussion about organizing regulations, exceptions to a general rule should follow the rule, not come before it. Long exceptions should be put in a separate sentence.

(G) Use Short Sentences

Few people can plough through a long, convoluted sentence and remember how it began. Usually, people have to read a long sentence over and over before they understand its meaning. This is particularly true of legislative sentences. Long, dense blocks of text are intimidating to most readers and make it very difficult for them to pick out the information they need.

Try to break up the information into components that the reader can recognize and understand. A long, convoluted sentence can be simplified by using paragraphs (discussed below under **Formatting Features** at p.26) or by dividing it into more than one sentence. Shorter sentences are easier to read and understand. They also often lead to a clearer description of the regulatory requirements, in contrast to long sentences with numerous modifying phrases. However, success is a matter of balance. Too many short sentences can make a text disconnected and threaten the relationship between the ideas that are being conveyed.

The following example shows how a long sentence can be broken up and made easier to read:

Original Version

2. Where any person who intends to oppose or intervene in any application fails to file his reply or submission with the Secretary or to send a copy thereof to the applicant within the time specified in the notice of application for filing a reply or submission with the Secretary, the application may be heard and determined without further notice to that person, except that nothing in these Rules shall be construed as authorizing the Board to suspend or cancel any certificate or licence without a public hearing and without notice thereof having been given to the holder of the certificate or licence and an opportunity having been afforded to such holder of being heard, or, in the case of an application for a certificate, to dispense with considering the objections of any interested person within the meaning of section 45 of the Act.

Revised Version

2. (1) An application may be heard and decided without further notice to a person who intends to oppose the application or intervene if the person fails to file a reply or submission with the Secretary or to send a copy of it to the applicant within the time specified in the notice of application.

(2) Despite subsection (1), these Rules do not authorize the Board

(a) to suspend or cancel a certificate or licence without a public hearing and without giving the holder of the certificate or licence notice and an opportunity to be heard; or

(b) in the case of an application for a certificate, to dispense with considering the objections of any interested person within the meaning of section 45 of the Act.

(H) Consider Using More than One Sentence in a Section or Subsection

A section or subsection should normally consist of a single sentence. However, more than one sentence may be used if

- the additional sentence is subordinate to the first or otherwise deals with the same idea;

- making it into a separate subsection would put undue emphasis on it; and
- the section or subsection does not become too long as a result.

For example,

A person directly affected by the decision is entitled to bring an appeal to the Minister. The person must give notice of the appeal to other directly affected persons.

(I) Avoid Excessive Cross-references

Cross-references are used to link ideas contained in different provisions of a set of regulations. The way cross-references are made has been simplified by sections 40 and 41 of the *Interpretation Act*. For example, you can refer to a subparagraph by writing “subparagraph 2(1)(a)(i)” rather than “subparagraph (i) of paragraph (a) of subsection (1) of section 2”. In addition, it is unnecessary to add the phrase “as amended” in order to incorporate subsequent amendments to a referenced provision.

Traditional English drafting uses cross-references whenever a reference is made to something in another provision (section, subsection, paragraph, etc.). However, you can often rely on context when a provision (section, subsection, paragraph, etc.) refers to something in a neighbouring provision. Readers may be expected to read the provisions together. Having read the first one, they can carry forward its ideas into subsequent provisions, as long as there are no intervening provisions to disrupt the flow of ideas or introduce ambiguity.

The assumption that a series of provisions will be read together is particularly strong with subsections of a single section. By numbering them as subsections, the drafter indicates that they are closely linked and should be read as a group.

This assumption also applies when a heading is used to group a series of sections together. The heading indicates that the sections have a common theme and should be read together.

The following examples show how cross-references can be avoided by relying on context:

4. (1) A person who is at least 18 years of age may apply to the Minister for a licence to fish on a recreational basis.
- (2) The application must be in the prescribed form and be accompanied by the prescribed fee.
- (3) On receiving the application, the Minister may issue a licence to the person in the prescribed form and may specify terms and conditions in the licence.
- (4) The licence authorizes the person to fish on a recreational basis, subject to any terms and conditions specified in the licence.
- (5) A disposal permit may specify or impose requirements about
 - (a) the quantity or concentration of any substance that may be released into environment either alone or in combination with any other substance from any source or type of source;
 - (b) the places or areas where the substance may be released;
 - (c) the commercial, manufacturing or processing activity in the course of which the substance may be released; and
 - (d) the manner in which and conditions under which the substance may be released

into the environment, either alone or in combination with any other substance.

5th Use Formatting Features to Help your Readers

In addition to writing in language your readers can understand, you can also help them by using formatting features, such as titles, headings, marginal notes and tables of contents. These features will help readers find the information they need. Another helpful feature is the division of lengthy or complex sentences into indented paragraphs to make them easier to understand.

(A) One Title

Traditionally, there has been a long title and a short title for every set of regulations, other than amending regulations. The long title appeared in the order in council or other executive order used to make the regulations. The short title was set out in section 1 of the regulations. Once the regulations were made, the long title fell into disuse, and the regulations were referred to by their short title only (as they are in, for example, the *Consolidated Index of Statutory Instruments*).

The use of both long and short titles has created confusion for readers, and long titles are no longer used for regulations.

The short title should be as informative as possible about the subject matter of the regulations. However, as its name indicates, it should also be short and to the point.

(B) Headings

Headings can be placed before groups of sections to indicate that they have a common theme or subject matter. Different levels of headings can also be used, depending on how the regulation is organized. For example, divide a regulation into parts with headings to indicate what they deal with. In turn, parts can be subdivided into groups of sections under a series of headings to indicate their subject matter with greater particularity.

(C) Marginal Notes

Marginal notes are short notes printed in the margin beside sections or subsections to tell the reader what the provision is about. They also help the reader to find particular provisions. If you include marginal notes, you must do so consistently throughout the new regulations.

The key to success with this feature is to keep the note short. The marginal note should not be a summary of the section; it should merely state its subject matter. To see examples of the proper use of marginal notes, you can refer to federal statutes, where they have long been used, or to the example of plain language redrafting of the *Explosives Regulations* at the end of this section.

Marginal notes do not form part of the regulation itself. They are inserted for convenience of reference only (see section 14 of the *Interpretation Act*).

(D) Tables of Contents or Provisions

Tables of contents or provisions give readers an overview of the structure and content of the regulations. This overview helps them find the information they need when they begin reading the regulations. The longer the regulations, the more important it is to have this overview.

There are two standard formats for these tables. One is based on headings and, because of its generality, it is called a table of contents. The other is based on both headings and marginal notes. Because it is more detailed, specifying something about the contents of each provision, it is called a table of provisions. In very lengthy regulations, you should consider having both types of tables: a table of contents for the entire set of regulations and tables of provisions for each part or schedule.

Developing these tables will influence the choice and use of headings so that the table strikes a balance between detail and generality.

(E) Paragraphing

Paragraphing is a formatting technique that divides a sentence into blocks of text and allows the reader to quickly grasp the grammatical structure of a complex sentence. It also avoids ambiguity and can be used when a sentence contains two or more parallel elements.

For example,

The Minister may issue a licence if the Minister is of the opinion that all interested persons have been notified of the licence application and have been adequately consulted, a majority of members of the Council approve of the issuance of

the licence and the applicant for the licence meets the requirements of these regulations.

This provision can be divided into three paragraphs.

The Minister may issue a licence if

- (a) the Minister is of the opinion that all interested persons have been notified of the licence application and have been adequately consulted;**
- (b) a majority of the members of the Council approve of the issuance of the licence; and**
- (c) the applicant for the licence meets the requirements of these regulations.**

Paragraphing this sentence highlights the main idea (the power of the Minister to issue a licence) and immediately indicates that the power depends on three conditions being met.

6th Test to see if you have Achieved your Purpose

See section 5 entitled "Test the Draft Regulation".

4.3 Choosing the Elements To Use

As stated at the beginning of this section, the techniques outlined in this section are optional. Your choice of which ones to use will depend on the nature of the regulations, their intended readers, and the time and resources available to you. Although some of these techniques are always effective, others may not work in all cases, particularly when you are preparing amendments to existing regulations. Consistency of language and

format is an important principle when writing regulations. Inconsistency in wording can lead to interpretational problems because it suggests that different meanings are intended. Similarly, the addition of new formatting features, such as marginal notes, in some places but not others may create a confusing patchwork. Finally, usability testing may not be possible because of the limited time and resources available to conduct it. It will be a question of judgment

whether usability testing is worthwhile, depending on the extent and impact of the amendments.

4.4 Example of Plain Language Redrafting

The following example shows the differences between the traditional way of writing rules and the "plain language" approach. The first text which attempts to address the requirements for the storage and handling of all

Current Regulation

125. (1) Subject to subsection (2), the quantity of explosives of Division 2 of Class 7 (manufactured fireworks) and of Division 1 of Class 6 (ammunition) that a person may have in his possession if kept in any store or warehouse shall not exceed,

- (a) in a separate store or warehouse,
 - (i) 125 kilograms gross weight of Subdivisions 2 and 5 of Division 2 of Class 7,
 - (ii) 1 000 kilograms gross weight of Subdivisions 1, 3 and 4 of Division 2 of Class 7, or
 - (iii) 225 kilograms of explosives contained in ammunition of Division 1 of Class 6; or
- (b) in a container
 - (i) 25 kilograms gross weight of Subdivisions 2 and 5 of Division 2 of Class 7,
 - (ii) 100 kilograms gross weight of Subdivisions 1, 3 and 4 of Division 2 of Class 7, or
 - (iii) 222 kilograms of explosives contained in ammunition of Division 1 of Class 6.

(2) When Subdivisions 1, 3 and 4 of Division 2 of Class 7 are being displayed for sale they shall be displayed

- (a) in lots that do not exceed 25 kilograms each gross weight;
- (b) in a package, glass case or other suitable receptacle away from inflammable goods; and
- (c) in a place where they are not exposed to the rays of the sun or to excess heat,...

127. In this Part, "separate store or warehouse" means a store or warehouse that is

- (a) detached from any dwelling house and situated at a safe distance from any highway, street, public thoroughfare or public place;
- (b) made and closed so as to prevent unauthorized persons having access thereto, and to secure it from danger from without;
- (c) exclusively used for the keeping of manufactured fireworks and ammunition belonging to Division 1 of Class 6; and
- (d) well and substantially constructed of suitable material.

125. (1) Sous réserve du paragraphe (2), la quantité d'explosifs en pièces pyrotechniques de la division 2 de la classe 7, (pièces pyrotechniques fabriquées) et d'explosifs de la division 1 de la classe 6 (munitions) qu'une personne peut avoir en sa possession dans un magasin ou un entrepôt ne doit pas dépasser

- a) dans un magasin ou entrepôt isolé,
 - (i) un poids brut de 125 kilogrammes, dans les subdivisions 2 et 5 de la division 2 de la classe 7,
 - (ii) un poids brut de 1 000 kilogrammes, dans les subdivisions 1, 3 et 4 de la division 2 de la classe 7, ou
 - (iii) 225 kilogrammes d'explosifs contenus dans les munitions de la division 1 de la classe 6; ou
- b) dans un récipient
 - (i) un poids brut de 25 kilogrammes, dans les subdivisions 2 et 5 de la division 2 de la classe 7,
 - (ii) un poids brut de 100 kilogrammes, dans les subdivisions 1, 3 et 4 de la division 2 de la classe 7, ou
 - (iii) 225 kilogrammes d'explosifs contenus dans les munitions de division 1 de la classe 6.

(2) Lorsque les subdivisions 1, 3 et 4 de la division 2 de la classe 7 sont exposées à des fins de vente elles doivent être exposées

- a) en lot dont le poids brut respectif ne dépasse pas 25 kilogrammes;
- b) dans un emballage, une vitrine ou un autre récipient approprié à l'écart des marchandises inflammables; et
- c) à un endroit où elles sont à l'abri des rayons du soleil ou d'une température trop élevée....

127. Dans la présente partie, «magasin ou entrepôt isolé» signifie un magasin ou entrepôt qui est

- a) isolé de toute maison d'habitation et assez éloigné de tout chemin, rue, passage ou endroit public, pour ne pas constituer un danger;
- b) aménagé et fermé de façon à le mettre à l'abri de tout danger de l'extérieur;
- c) affecté exclusivement à la garde de pièces pyrotechniques fabriquées et de munitions appartenant à la division 1 de la classe 6; et
- d) bien et solidement construit en matériaux appropriés.

types of fireworks pyrotechnics and ammunitions, is from the existing *Explosives Regulations, C.R.C., c. 599*. The second text is from a set of draft regulations that focuses solely on consumer fireworks.

In the second version, not only has the presentation been improved, but the ideas have been reorganized and set out in a more coherent, understandable way. The overall result is a regulation that is easier to read and understand.

Re-drafted Regulation

	<i>Location</i>	<i>Emplacement</i>	
Safe distance	21. A detached storage unit must be located at a safe distance from any site where the presence of explosives could pose a danger to persons or property.	21. L'unité de stockage isolée doit être située à une distance sûre de tout lieu où la présence d'explosifs pourrait présenter un danger pour les personnes ou les biens.	Distance sûre
	DIVISION 3: DISPLAY	SECTION 3: EXPOSITION	
	<i>Maximum Quantity on Display</i>	<i>Quantité maximale de pièces exposées</i>	
1,000 kg	22. It is prohibited to display more than 1,000 kg of consumer fireworks in a display area.	22. Il est interdit d'exposer plus de 1 000 kg de pièces pyrotechniques-consommateurs dans un lieu d'exposition.	1 000 kg
	<i>75 kg Maximum if Not Sealed Packaging</i>	<i>Emballages non scellés - limite de 75 kg</i>	
In public area	23. It is prohibited to display, in the part of a display area to which the public has access, more than 75 kg of consumer fireworks that are not in sealed packaging.	23. Il est interdit d'exposer dans la partie du lieu d'exposition à laquelle le public a accès plus de 75 kg de pièces pyrotechniques-consommateurs qui ne sont pas dans des emballages scellés.	Endroit public
	<i>Requirements for a Display Area</i>	<i>Exigences visant les lieux d'exposition</i>	
Requirements	24. A consumer fireworks display area must meet all of the following requirements:	24. Les lieux d'exposition des pièces pyrotechniques-consommateurs doivent satisfaire aux exigences suivantes :	Exigences
If attached	(a) if the display area is attached to a dwelling, storage unit or place that contains a storage unit, it must be separated from the dwelling or storage unit by a wall that	a) si les lieux d'exposition sont attenants à un local d'habitation, à une unité de stockage ou à un local contenant une unité de stockage, ils en sont séparés par un mur :	Si attenant
	(i) meets the standards in applicable building codes, and	(i) conforme aux normes des codes applicables en matière de construction,	
	(ii) resists fire enough to allow all occupants to safely evacuate in the event of a fire;	(iii) ayant une résistance au feu suffisante pour permettre l'évacuation des occupants en toute sécurité en cas d'incendie;	
Exits	(b) the display area must have at least two unobstructed exits that permit quick exit in an emergency; and	b) chaque lieu compte au moins deux issues non obstruées permettant l'évacuation rapide en cas d'urgence;	Issues
Secure	(c) the display area must be kept secure from unauthorized access when it is not open for business.	c) chaque lieu est protégé de façon à interdire l'accès non autorisé pendant les heures de fermeture.	Protection

5. TEST THE DRAFT REGULATION

5.1 Why Test?

An important step in the plain language drafting process is testing. Testing means asking a sample of the people who are likely to be working with the regulation, the regulation's "users", to provide you with feedback on it. However, if you are making only minor amendments to a regulation, it may not be worthwhile to test.

The feedback you get from testing can help you to correct problems with structure, wording and policy which you might not otherwise detect. Testing recognizes that policy experts, legal specialists and drafters are not the ultimate users of a regulation. In fact, their detailed knowledge of the issues and policies involved can prevent them from adequately assessing how clearly the regulation states its purpose and how easily users can work with it.

Testing is neither a technical review of the regulation nor a popularity contest on its policy objectives. The purpose of testing is to identify problems users may have in finding information in and understanding the message of the regulation, so that these problems can be corrected *before* the regulation is brought into force.

5.2 The Benefits of Testing

Usability testing has become an essential part of computer hardware and software development during the last several years. Companies in this highly competitive market recognize the value of finding out how well a user can work with a piece of equipment or software package before they put it on the market. They realize that the pro-

grammers and engineers who create the products are not the users and cannot tell them what they need to know about the product's usability. By testing beforehand, they avoid consumer complaints, product failure and a poor product image.

Similarly, testing a regulation with users and then making appropriate changes to correct the problems that they identify before the regulation comes into force can have many positive results. It can:

- reduce the time spent by government employees answering phone calls and questions from people who cannot understand the regulation's requirements;
- increase compliance with the regulation, because people are more likely to obey the law when they understand it;
- decrease the need to amend a regulation because of unintended consequences or overlooked problems; and
- improve the overall quality of the regulation.

5.3 When to Test

Testing should take place when the draft regulation is close to its final form. The project team should be confident that they have completed the policy development and initial writing stages and made all the technical corrections that they can make. They should review the sequence of section numbers, and check for such things as the consistent use of defined words and the logical flow of ideas.

However, there is no point in testing a draft regulation if there is no time or intention to make changes to it. Testing provides valuable insights into how users read and work with the draft, but it is unfair to the test participants, and to the project team, to gather test results when the timetable or administrative realities do not allow these insights to be used.

5.4 Who Should Take Part in a Test

In section 2.1, we discussed the need to consult with users at a preliminary stage, before drafting begins. By reviewing the categories of users identified at that early stage, you can select a representative sample of users who, until the test, have not been involved in any way in the consultation or preparations leading up to the draft regulation. You may also want to show copies of the draft to people who were involved in earlier discussions; while that might be very helpful as a continuation of the consultation process, it would not constitute testing.

Users of regulations are likely to include people with and without legal training. Your test participants should be from both groups.

5.5 What to Test

Testing provides the opportunity to check with users on a variety of matters. Since you cannot test for everything, you need to decide what information is most important to gather. You can test, for instance, whether users can understand certain key sections of the regulation. Or, you may wish to select areas with the greatest impact on health and safety. You can test the users' ability to read the regulation and then to do what it requires. You can test whether they are able to use the table of contents efficiently to find the information that they need. You can also use the testing environment to find out which of two wording options or structures best meets the users' needs.

5.6 How to Test

The type of test you choose will depend on a variety of factors, including: (1) the infor-

mation you hope to gain from testing; (2) the time available for testing; (3) the resources available; (4) the nature of the regulation; (5) the length of the regulation; and (6) the characteristics of the users.

If your goal is to find out how well users understand the regulation, you could set up a **read-aloud** or **think-aloud** test. In a read-aloud test, a participant reads a sentence of the regulation aloud and then explains its meaning in his or her own words. Problems with comprehension become evident, especially when the same problems recur among participants. In a think-aloud test, a participant is asked to read through the regulation aloud and to voice his or her thoughts about it along the way. The participant's comments, for example, "didn't I just read something about that?", "I wonder what that means?", provide insights into difficulties users have understanding the regulation.

Read-aloud and think-aloud tests are useful for identifying problems with wording and structure. **Usability tests** clarify how efficiently and effectively users can find information and correctly interpret it. For a usability test, participants are usually asked to answer scenario questions which are based on the types of situations that they are likely to encounter. Testers watch participants work with the regulation during the test and keep track of, for instance, how many times the participants re-read a section, how often they refer to the table of contents, and how frustrated they appear to get. In some test situations, testers may sit down with participants one by one and ask them to talk about what they are thinking and doing as they try to answer the questions. In other situations, participants may be asked to note when they began working on a question and when they finished it and to write down their comments.

Usability tests provide information on how well participants are able to find the

relevant sections in the regulations and how well they understand the provisions. For example, when participants find the right section but give the wrong answer to a scenario question, it suggests a problem with the regulation's wording. When they cannot find the right section, it can suggest a problem with the structure, the table of contents, the headings or the marginal notes.

During all these tests, testers make an audio and sometimes a video recording. The tapes are played back later to review participant comments and ensure that valuable information is not lost. For instance, a problem which may have seemed insignificant with the first participant may afterwards appear as part of a pattern.

Participants may also be asked to complete a questionnaire on the regulation as part of the test. They might be asked if they thought the regulation was easy to under-

stand, if the table of contents was easy to use, if it was easy to find necessary information and so forth.

All the information collected during testing is analyzed to identify ways in which the regulation could be written more clearly and be better organized for users' needs.

5.7 The Cost of Testing

Testing does not have to involve hundreds of participants or fancy lab equipment: testing with five to eight participants is often sufficient to provide significant information about one language version of a draft regulation. Experienced testers can assist in designing the test protocols and conducting the test. Even the simplest test process can provide invaluable results, at a low cost. The key is to think about what you want to find out and then to listen carefully and with an open mind to what the test participants say.

REFERENCE DOCUMENTS

For more information on testing draft regulations for usability, readability and comprehension, refer to the following:

A Practical Guide to Usability Testing, Dumas, J.S. and Redish, J.C., Ablex, Norwood, N.J., 1993. This 412-page basic text explains the principles behind usability testing, describes how to plan and prepare a test and explains how to conduct a test and evaluate the results. Its authors are pioneers in the testing field who have experience testing a variety of "products", including government documents.

Technical Report: Consumer Fireworks Regulations Usability Testing, Schmolka, Vicki, Department of Justice, Ottawa, 1995. This paper documents the federal government's first usability test of a draft regulation and includes the test results and a complete collection of the materials used in the usability testing.

Consumer Fireworks Regulations: Final Report, Trevethan, Shelley; Gordon, Wendy; and Roy, Marie-Andrée, Department of Justice, Ottawa, 1995. This paper summarizes the steps that were taken to prepare a plain language version of a regulation, including usability testing. It offers an assessment of the process and a copy of the draft regulation that was prepared incorporating the test results.

Practical Approaches to Usability Testing for Technical Documentation. Velotta, C., ed., Society for Technical Communication, Virginia, 1995. This 100-page booklet covers usability testing basics, with sample checklists and questionnaires. It has a comprehensive, 14-page bibliography of usability testing literature that is an excellent guide to available research materials.

6. REVISE THE DRAFT REGULATION

Usability testing will identify changes you wish to make to the wording, policy concepts, organization or presentation style. Revisions can take time, depending on the test results received. Sometimes there are policy or legal reasons that prevent you from changing the regulations to respond to certain comments.

When all of the team members are satisfied with the final draft regulation, the drafters from the Regulations Section will "blue-stamp" the document and give it to the counsel from your Department Legal Services Unit. The blue stamp indicates that the document has been reviewed in accordance with the *Statutory Instruments Act* and that it is ready for the other steps in the regulatory process. Any necessary changes should also be made to the RIAS to be sure it reflects the final version of the regulation.

7. THE REGULATORY PROCESS

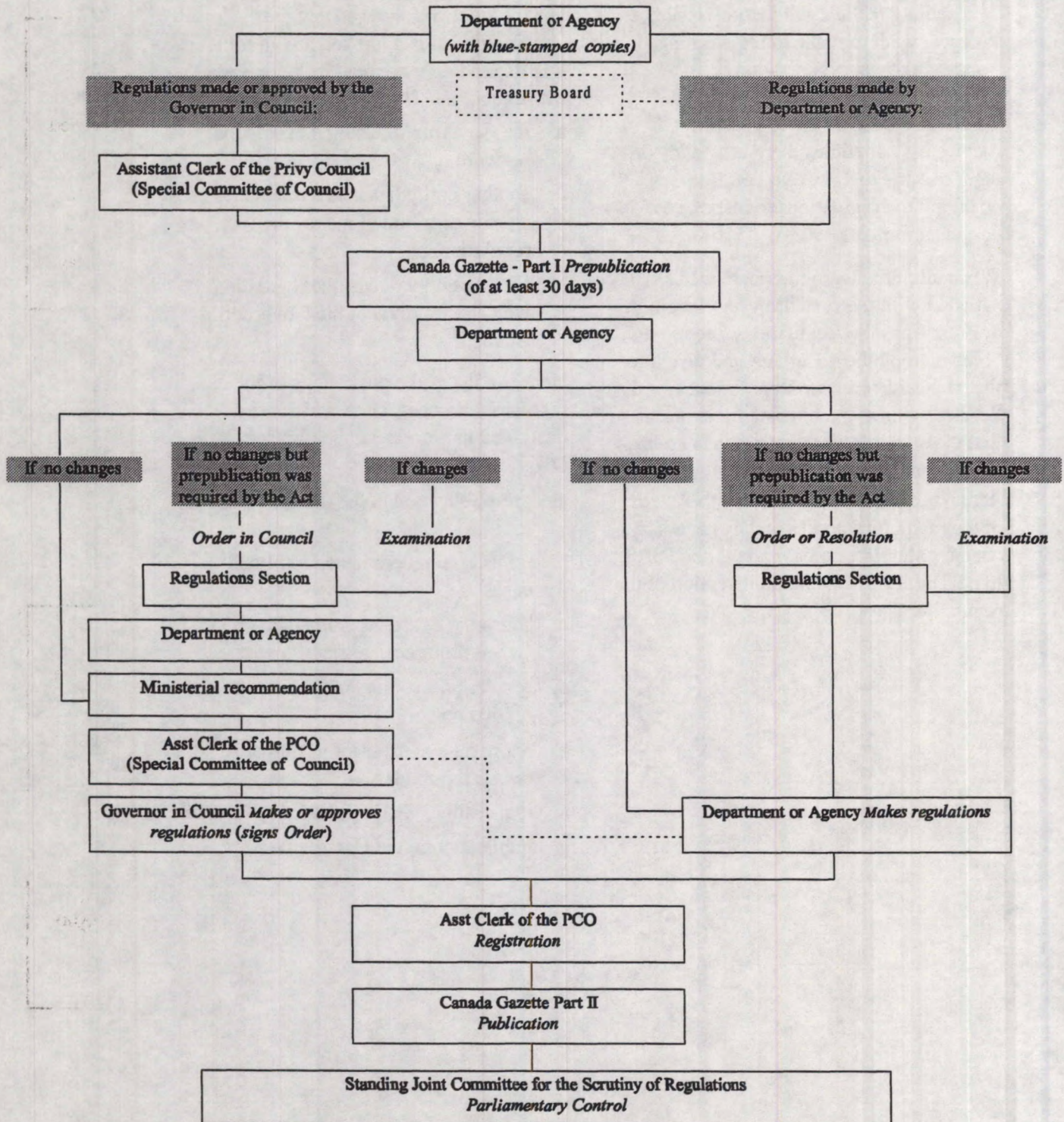
The steps to follow so that the regulation is approved and in force will depend on who must make or approve the regulation. The three possibilities are:

- a. the Governor in Council makes the regulation,
- b. another entity (such as a minister, agency or tribunal) makes the regulation, or
- c. another entity makes the regulation with the approval of the Governor in Council.

Here is a list of the basic steps of the regulatory process, all of which are described in more detail below (see Diagram 2):

- a. pre-publication in the *Canada Gazette*, Part I
- b. ministerial recommendation (in all cases)
- c. Treasury Board recommendation (when required)
- d. regulation-making entity makes the regulation
- e. approval by Governor in Council (when required)
- f. registration, Clerk of the Privy Council
- g. publication in the *Canada Gazette*, Part II

**DIAGRAM 2
THE REGULATORY PROCESS**



7.1 Pre-publication in the Canada Gazette, Part I

There may be either a statutory requirement for pre-publication or a Treasury Board policy that requires it. The drafters on the team can identify the category into which a regulation falls. You may request an exemption from the Special Committee of Council if there is no statutory requirement to pre-publish. Exemptions may be given for a number of reasons, including where sufficient exposure has been achieved through other means (e.g. newsletter or Internet) and the costs of publication in the *Canada Gazette* outweigh its benefits.

If the Governor in Council is to make the regulation, it must be forwarded via the Assistant Clerk of the Privy Council to the Special Committee for approval for pre-publication.

If another entity is to make the regulation, alone or with the approval of the Governor in Council, the regulation can go directly to the *Canada Gazette* for pre-publication.

7.2 Ministerial Recommendation

All orders of the Governor in Council must be recommended by the "sponsoring minister". In other words, the minister whose department is responsible for proposing the regulation writes to the Governor in Council, recommending that the regulation be officially "made" or approved, as the case may be. If the minister is not available, the acting minister can usually fulfil this role.

Once the ministerial recommendation is made, the regulation is sent to the Special Committee and then to the Governor in Council, via the Assistant Clerk of the Privy Council.

A ministerial recommendation is not sought if the Governor in Council has no role in the making of the regulation.

REFERENCE DOCUMENTS

The ministerial recommendation should be drafted in accordance with the instructions and examples contained in the following:

Directives on Submissions to the Governor in Council and Statutory Instruments/Directives sur les présentations soumises au gouverneur en conseil et les textes réglementaires, Privy Council Office (1985).

7.3 Treasury Board Recommendation

Whenever a regulation has financial implications, such as fees for the use of services or facilities or for the enjoyment of rights or privileges, a recommendation of the Treasury Board is required.

REFERENCE DOCUMENTS

The Federal Regulatory Process, An Interim Procedures Manual for Departments and Agencies, Regulatory Affairs Directorate (1991). In particular, see Section C of Chapter 2, Regulations Requiring the Recommendation of Treasury Board.

Treasury Board Circular 1987-15: Orders in Council Requiring the Recommendation of Treasury Board.

Treasury Board Submissions Guide, Submission and Cabinet Document Centre, Treasury Board (Sept. 1994).

Treasury Board 1996 Regulatory Process Guide, Treasury Board (July 96).

7.4 Regulation-making Entity Makes the Regulation

The actual making or signing of a regulation by the regulation-making authority is essential to its validity. A regulation that has not been made by the proper regulation-making entity has no legal effect.

For this reason, there must be an official document certifying that the regulation has been made. The name of this document varies according to whether the authority making the regulation is the Governor in Council, a minister, an agency or another entity. For example, when the Governor in Council or a minister makes a regulation, the official document is called an order. When the regulation-making authority is some other entity, the form of the making document may depend on the practice of the entity or may be described in the Act that created the entity. In all cases, you can contact the legislative drafters on the team for assistance in drafting this document.

REFERENCE DOCUMENTS

Where the regulation-making document is an order of the Governor in Council, which is called an "Order in Council", refer to the following for more information on drafting instructions and examples:

Directives on Submissions to the Governor in Council and Statutory Instruments/Directives sur les présentations soumises au gouverneur en conseil et les textes réglementaires, Privy Council Office (1985).

7.5 Registration, Clerk of the Privy Council

A regulation must be registered within the seven days after its making. To register a regulation, send it to the Clerk of the Privy Council, who will record the name of the regulation, the name of the regulation-making entity, the authority under which it was made, the date on which it was made and the date of registration. The regulation will be assigned an "SOR number" at that time, the acronym "SOR" (for Statutory Orders and Regulations) followed by a number which distinguishes that regulation from others.

Registration is crucial because the date of registration is often the date on which a regulation comes into force.

Some (a very few) regulations are exempt from registration. The drafters on the team can tell you whether your regulation falls into an exempt category.

REFERENCE DOCUMENTS

For more information on the registration of regulations, refer to the following:

Statutory Instruments Regulations, C.R.C., c.1509, sections 4 to 9.

Interpretation Act, R.S., c. I-21, section 6.

7.6 Publication in the Canada Gazette, Part II

A regulation must be published in the *Canada Gazette, Part II*, within 23 days after the date of its registration. The Assistant Clerk of the Privy Council will coordinate the publication after it has been registered.

Some regulations are exempt from publication. The drafters on the team can tell you whether your regulation is exempt.

A regulation cannot be ruled invalid just because it has not been published in the *Canada Gazette, Part II*. Conversely, it is not likely to be enforced, because someone cannot be convicted of contravening a regulation that had not been published by the time of the alleged offence unless reasonable steps were taken to inform potentially affected persons of the substance of the regulation.

REFERENCE DOCUMENTS

Statutory Instruments Act, R.S., c. S-22, sections 10 to 12.

Statutory Instruments Regulations, C.R.C., c. 1509, sections 9 to 15.

8. EXAMINATION BY STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

The Standing Joint Committee for the Scrutiny of Regulations is responsible for monitoring the use of regulatory powers on behalf of Parliament. The Committee reviews regulations after they have been made, checking to ensure that they meet 13 criteria. These criteria include ensuring the regulations are authorized by the enabling statute, do not conflict with the *Charter*, are not retroactive unless express authority exists, and are not deficient in terms of drafting. When the Committee finds a problem with a particular regulation, it usually recommends a solution to the regulation-making entity. If the regulation-making entity does not agree with or act on the recommendations of the Committee, the Committee can present a report to the House of Commons that, if adopted, will lead to the repeal of the regulation.

REFERENCE DOCUMENTS

For information on the regulatory process, including the role of the Standing Joint Committee and the legal framework of regulatory powers, refer to the following documents:

Statutory Instruments Act, R.S., c. S-22, section 19.

Standing Orders of the House of Commons, February 1990, section 123.

How Regulators Regulate, Treasury Board Secretariat (1992).

Regulations and Competitiveness, Seventeenth Report of the Standing Committee on Finance; First Report of the Sub-Committee on Regulations and Competitiveness, January 1993.

A Strategic Approach to Developing Compliance Policies, Regulatory Affairs (1992).

9. CONCLUSION

This Guide tries to give regulators and drafters the basic tools and references they will need to proceed through the steps of addressing a problem by way of regulations. The idea for this Guide came out of the recognition that there is a sometimes bewildering wealth of information on some aspects of government regulatory response and very little information on the newer parts of the process that involve plain language.

Preparing regulations is a complex matter that can consume a significant amount of time and resources. Going from point A, problem identification, to point B, problem resolution, can be a long journey, with many challenges along the way. It usually involves making many decisions and taking into account the interests and input of many people and divergent interests. The formal aspects of the regulatory process itself can be daunting. For these reasons, it is important to be well-prepared heading into the process and to do all you can to ensure a successful outcome. The overview of the process provided in this Guide should help participants plan their approach on an informed basis.

Legislative drafting is a very traditional area of law. Out of tradition comes consistency, which is an extremely important factor in interpreting and applying the law. For this reason, the changes recommended in this document have been considered carefully, in light of their potential impact on the larger body of Canadian law, as any other proposed changes must be. The federal government is only in the initial stages of using plain language techniques, but has already recognized how beneficial they can be.

The emphasis on consultation with the users and stakeholders is not new, but it underlines the importance of communicating in a way that the users can understand. Consultation provides information on the current use and

understanding of the regulations. Testing the regulations before they are finalized, to find out if the users and stakeholders can actually read, understand and use the regulations, is a very valuable tool. In addition to getting these groups' reactions from the outset, the consultations and usability testing make the user group more aware of the regulations that they should be following and, in so doing, perform a "marketing" role. They may also increase commitment to the regulations, since the users will have been involved in the entire process.

Although the short-term cost of developing plain language regulations may be greater than the cost of developing other regulations (because of consultations and usability testing), there are many long-term benefits and savings:

- ✓ There is less need to develop secondary documents to explain the regulations.
- ✓ Since the regulations are of better quality, they will not need to be revised as frequently.
- ✓ Less time will be spent answering readers' questions.
- ✓ The consultations allow the drafters to understand the context of the regulations better, allowing for more informed drafting.
- ✓ Since the user group is involved in the development of the document, the regulations are of better quality and elicit a higher degree of commitment.
- ✓ Usability testing ensures that individuals understand the document they must comply with.

Teamwork is the cornerstone of the whole process. The expertise and enthusiasm of the team members is critical to creating a regulatory tool that is efficient, realistic and well-adapted to the context in which it will be applied.

List of References:

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Consultation Guidelines for Managers in the Federal Public Service, Privy Council Office, 1992.

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Users' Guide, Regulations Section, Department of Justice, 1997.