

## THE PUBLICATION OF REGULATIONS AND OTHER DELEGATED LEGISLATION

The issue of large numbers of regulations of a special war emergency nature under the authority of Dominion legislation renders a discussion of provisions of other jurisdictions governing the issue, central filing and publication of regulations topical at this time.

The present paper forms the substance of a report presented to the Conference of Commissioners on Uniformity of Legislation. After discussing what has been done in England and the United States regarding the publication etc., of regulations, it makes proposals for a model uniform statute the study and drafting of which should be undertaken by the Conference.

The Conference adopted a resolution referring the matter to the Dominion representatives and the Ontario commissioners to draft an Act in line with the suggestions appearing at the conclusion of the paper.

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The matter of providing facilities for making available to the legal profession as well as to the public generally, at some convenient place or in some convenient form regulations and other delegated legislation passed under the authority of Ontario statutes has for some time occupied my attention. Recently I communicated with members of the profession and officials of the other Provinces of Canada and of the Government of Canada and found that in most of the Provinces as well as at Ottawa, a similar problem exists and that in only one of these jurisdictions (Nova Scotia) has any attempt been made by way of legislation to remedy the situation.

One of the provincial officials who is a member of the Conference, in replying to my inquiry, suggested that the problem is one which might well receive study by the Conference. Because it is a problem which exists in a greater or less form in all of the Provinces and because only one of the Provinces has taken any action, I agree with the suggestion. Further, because of the membership of the Dominion representatives and because of the unprecedented number and volume of Dominion regulations of a special wartime emergency nature passed, and which will be passed, by federal authorities, it is my view that the Conference might at its 1942 meeting very well consider and pass upon the principle of whether or not a model Act should be prepared by

the Conference. If this procedure is followed and a model Act is to be prepared, a draft Act could be made available for study at the 1943 meeting.

Having suggested that the principle of whether or not a model Act is to be prepared by the Conference should be determined at the 1942 meeting, I shall endeavour to furnish you with information which may be of assistance in studying the situation. Much could be and has been written on the subject. Please understand, therefore, that what follows is intended as a sketch rather than a detailed analysis of the situation.

*Ontario.*—Let me first state some facts with regard to the situation in our own Province which is fairly representative of that in most of the other Provinces of Canada, for the trend of legislation towards delegated authority is not limited to any one Province or country. Of the 399 statutes comprising the Revised Statutes of Ontario, 1937, 271 statutes delegate authority to make rules, regulations, orders or subordinate legislation in some form. Professor Finkelman of the Faculty of Law of the University of Toronto, spent some months collecting the various regulations and estimated that a printing of them would occupy as much space as the Revised Statutes. Something of the difficulties encountered in acquiring a complete set of all regulations in force passed under provincial legislative authority may be gathered by referring to Professor Finkelman's evidence given before the Select Committee of the Legislature appointed on February 21st, 1940, to inquire into the administration of justice. For further information regarding delegated legislation in Ontario, I would refer you to a volume entitled "*Canadian Boards at Work*" (McMillan, 1941) at pages 170-190. The book is edited by Mr. John Willis of Dalhousie University and the final chapter entitled "The Making, Approval and Publication of Delegated Legislation in Ontario" is by Professor Finkelman.

While it is true that all regulations which may be made or are required to be approved by the Lieutenant-Governor in Council are on file in the office of the Clerk of the Executive Council, many regulations are made by other authorities and do not require such approval. One problem is to provide for the central filing of all regulations. Other problems are the matter of making regulations available to those desiring copies and that of making them available in a form in which they may be used in court without difficulty as to their proof.

The Select Committee referred to above made the following recommendations under the heading "Rules and Regulations Generally":

1. That all rules, regulations and other delegated legislation passed under the authority of any Act of the Legislature be required to be filed with the Clerk of the Executive Council within thirty days of being passed or approved, as the case may be; that all rules, regulations and other delegated legislation heretofore passed be required to be filed with the Clerk of the Executive Council not later than January 1st next following the session of the legislature at which legislation requiring such filing is enacted; and, that any such rules, regulations or other delegated legislation not so filed should have no force or effect. (This provision would not affect regulations required to be made or approved by the Lieutenant-Governor in Council as they are now required to be filed with the Clerk of the Executive Council);

2. That the Clerk of the Executive Council be required to keep an index of rules, regulations and other delegated legislation according to subjects as well as according to the Acts under which such delegated legislation is passed; and

3. That a list of all rules and regulations passed during each year be published in the annual volume of the statutes.

No legislative action has been taken in pursuance of these recommendations.

*Nova Scotia.*—In 1941 the Nova Scotia Legislature passed as chapter 9, An Act to Require the Laying Before the House of Assembly of Certain Regulations. Subsection 1 of section 1 requires that "A copy of all rules and regulations heretofore or hereafter made . . . by the Governor in Council . . . by the Minister presiding over any department of the Public Service of the Province or by any official of such department . . . or . . . by any board, commission or body mentioned in the Schedule to this Act . . . shall be laid before the House of Assembly". The time for filing those already made as well as those which may be made in future is prescribed, and subsection 2 provides, "If such copy is not laid before the House of Assembly in compliance with the provisions of this Act, such rules and regulations shall *ipso facto* be and stand repealed."

The only other section of this short Act provides that "Any Act heretofore or hereafter enacted authorizing the making of any rules or regulations shall be read and construed as subject in all respects to the provisions of this Act, and in case of conflict the provisions of this Act shall prevail unless the contrary intention is expressly stated".

It will be observed that this Act accomplishes a central filing by requiring all regulations coming within its scope to be tabled in the House. It does not provide for printing or other publication nor does it provide for indexing or other details. Compliance with the Act is effectively enforced by a virtual nullification of offending regulations.

*Canada.*—Little need be said regarding the amount and scope of delegated legislation passed under The War Measures Act and other Dominion statutes since war became imminent. Some of these regulations, rules and orders are published in the Canada Gazette. Others are published in pamphlet form by the Department or Board having their administration.

Six volumes entitled "Proclamations and Orders-in-Council" are now available and will be added to quarterly. These volumes, the first three of which appear to be limited to "Proclamations and Orders-in-Council Passed under the Authority of The War Measures Act" are now described on their cover as containing "Proclamations and Orders-in-Council Relating to the War". It will be noted that the three more recent volumes are not limited to Proclamations and Orders-in-Council passed under any particular Act. Certain Proclamations and Orders-in-Council relating to the war and published elsewhere are omitted from this compilation. While these volumes are issued under the authority of a recommendation of the Honourable C. G. Power, Convener of the Committee of the Cabinet on Legislation, concurred in by the Committee of the Privy Council, are printed by the King's Printer and are a matter of great convenience, they are limited in their contents firstly, by containing only Proclamations and Orders-in-Council, and secondly, by containing only those relating to the War.

The problem of collecting centrally all delegated legislation including that which does not depend upon Proclamation or Order-in-Council for its validity, still remains.

*England.*—It is not surprising to find that the Imperial Parliament has led the way in this as in other fields. The Rules Publications Act, 1893, (Imperial) and the regulations passed thereunder soon after its enactment still continue in substantially the same form as that in which they were originally passed.

The Act is not lengthy. It may be divided as to its functions. The first section provides for the giving of forty days' notice of the making of statutory rules by publication of notice in the London Gazette and in certain cases in the Dublin Gazette. During that period copies of the proposed rules may be obtained

by public bodies upon payment of a nominal fee and suggestions may be made by any interested public body which suggestions shall be taken into consideration by the rule-making authority. The term "statutory rules", as defined for the purposes of section 1 (as contained in subsection 4) is very limited in its scope. Section 2 provides for the passing of provisional rules to come into force immediately in cases of urgency.

Section 3 serves quite a different function. For its purposes "statutory rules" has a wider meaning but one with definite limitations (see section 4 which is the definition section of the Act). The purpose of section 3 is to require that "All statutory rules . . . shall forthwith after they are made be sent to the Queen's printer of Acts of Parliament, and shall, in accordance with regulations made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, be numbered, and (save as provided by the regulations) printed and sold by him". Statutory rules may be cited by the number so given and the calendar year, (subsection 2). Where statutory rules are required by any Act to be published in one of the Gazettes, a notice in the Gazette of the rules having been made and of the place where copies may be purchased, shall suffice, (subsection 3). The scope of the regulations, as indicated in subsection 4 is, in my opinion, very important. The regulations may provide for the different treatment of statutory rules which are in the nature of public Acts and those which are in the nature of local and personal or private Acts. The regulations may also determine the classes of cases in which the exercise of a statutory authority constitutes or does not constitute the making of a statutory rule and may provide for the exemption from section 3 of any such classes. In the making of such regulations, each Government department concerned is to be consulted and due regard had to the views thereof, (subsection 5).

The regulations, which were passed in 1894, restrict the application of section 3 of the Act to the "exercise of a statutory power by a rule-making authority, which is of a legislative and not an executive character." They exclude from the operation of section 3 of the Act the "exercise of a statutory power which is confirmed only by a rule-making authority". They provide for distinguishing between statutory rules which are general and those which are local and personal. With certain exceptions provision is made for printing all statutory rules. Statutory rules similar to public general Acts are also to be printed in an annual volume. The Treasury with the concur-

rence of the Lord Chancellor and the Speaker of the House of Commons (who are responsible for making the regulations) reserve to themselves the right to exclude certain rules from publication and to determine certain questions which may arise in connection with the operation of the Act and regulations.

Let me here quote from a small volume entitled "*Delegated Legislation*" comprising three lectures by Cecil T. Carr, LL.D., (Cambridge University Press, 1921). Sir Cecil Carr has been editor of Statutory Rules and Orders since 1923, and the remarks which I here quote from pages 45 to 47 are directed at the Act and regulations described above.

The creation of this official system of publication has removed the reproach that the law embodied in statutory rules was less well known and less easy to find than the law embodied in Acts of Parliament. Nevertheless the title Statutory Rules and Orders is not synonymous with delegated legislation, for the official system of publication does not cover the whole field. The system, as has been stated is based on section 3 of the Act of 1893, and section 3 was a kind of afterthought introduced in the later stages of a Bill originally designed to apply only to rules about legal procedure. The Act therefore, even when finally extended to other rules, was not dealing with all delegated legislation but with the legislation made by certain 'rule-making authorities'. 'Rule-making authority' was defined by section 4 as including 'every authority authorized to make any statutory rules'. 'Statutory rules' were defined in section 3.

Many of the bodies to which Parliament has delegated legislative power are excluded by this definition. A railway is not a 'rule-making' authority nor is a municipal corporation; their bye-laws are therefore not statutory rules and orders.

There are other classes of secondary legislation which also escape the net of section 3 of the Rules Publication Act.

A large number are ruled out because they are merely confirmatory, others because they are of an executive rather than a legislative character. This latter distinction corresponds roughly with the distinction between general and particular commands which various writers have discussed. Confidential rules are also excluded; so also, subject to the direction of the Treasury with the approval of the Lord Chancellor and Speaker, are annual or periodically renewed rules such as the militia regulations or the education codes. The editor is allowed a discretion; if doubts arise, questions are decided by the Treasury, Lord Chancellor and Speaker.

Not every document which is officially registered and numbered is printed. Many which are of local interest are not printed, but are tabulated in a classified list at the end of the annual volumes of Statutory Rules and Orders. If departments think it unnecessary to have their orders printed, their wishes are considered. And not every Statutory Rule and Order is put on sale. Sometimes the department makes a free distribution to the persons concerned.

Finally Statutory Rules and Orders have been interpreted as being only those which are descended immediately from Acts of Parliament. If a rule or order is made by virtue of a previous rule or order, then the result is not the child but the grandchild of an Act of Parliament, it is not statutory but sub-statutory, and therefore it has strictly no right to be published in the series. This distinction between child and grandchild did not greatly matter until August, 1914, but during the war the Defence of the Realm Act had numbers of grandchildren; the Defence of the Realm Regulations were the immediate parents, and the Act was the grandparent. Mr. Alexander Pulling came to the rescue by producing a set of manuals of emergency legislation which introduced those grandchildren to the public.

It will be seen that the English Act does not apply to all delegated legislation. It is suggested that any Act adopted by the Conference should be more extensive in its scope. The limitation of its scope and the machinery for determining what regulations are of a public rather than a private or personal nature and what delegated legislation is of a legislative rather than of an executive nature, are matters which require special consideration.

The Committee on Ministers' Powers in its report (1932 Cmd. 4060) includes recommendations for the amendment of The Rules Publication Act, 1893, at page 66 which may be of assistance to the draftsman of a model Act. Among its recommendations is one that "Publication — possibly in the Gazette— should be a condition precedent to the coming into operation of a regulation. . . ." According to my information, the tendency has been to cut down all gazetting. A list and description of official publications relating to Statutory Rules and Orders appears on pages 61 and 62 of Sir Cecil Carr's book above referred to.

*The United States of America.*—In 1935 Congress passed the Federal Register Act. The Act requires publication in the Federal Register of Presidential Proclamations and Executive Orders except those having no general applicability and legal effect; documents which the President determines have general applicability and legal effect, (all documents prescribing penalties are deemed to come within this class) documents required so to be published by Act of Congress, and documents authorized to be published by the regulations under the Federal Register Act. "Document" means any Presidential Proclamation or Executive Order and any order, regulation, rule, certificate, code of fair competition, licence, notice or similar instrument issued, prescribed or promulgated by a Federal Agency. The regulations also prescribe the classes of documents required to be filed

(reg.2.2) and also contain, as an appendix, almost nineteen pages (double column) listing enactments under the heading "Documents or classes of documents determined by the President of the United States pursuant to section 5 (A) of the Federal Register Act, to have general applicability and legal effect". Certainly the result is that the scope of the Act is much wider than that of the English Act of 1893.

The original and two duplicate originals or certified copies of any document coming under the Act are required to be filed with the Division of Federal Register of the National Archives. The day and hour of filing are noted. The original is retained in the Archives. One copy is at once available for public inspection and one copy is transmitted immediately to the Government Printing Office. All documents required or authorized to be published by the Act are printed in the Federal Register, a daily publication.

The Archivist, an officer of the Department of Justice designated by the Attorney-General, and the Public Printer are constituted a permanent Administrative Committee. With the approval of the President they may prescribe regulations.

Section 7 of the Act is sufficiently important to quote in whole—

7. No document required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2: and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original, and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.

This mode of enforcing filing should prove very effective.

Section 8 permits publication in the Federal Register of any "notice of hearing or of opportunity to be heard" which is

“required or authorized to be given by or under an Act of Congress, or which may otherwise properly be given.” Section 9 provides for the cost of the Federal Register.

As originally passed section 11 applied to documents issued prior to the coming into force of the Act. As re-enacted in 1937 it provides for the filing, at five year intervals, by each Government agency of “a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency . . . .” Provision is made for publication of such codifications in a supplemental edition of the Federal Register. While the establishment of a Codification Board is provided for, this Board has been abolished and its functions transferred to the National Archives and consolidated with the Division of Federal Register, under the President’s Re-organisation Plan number 11, section 202 which was passed under the Re-organization Act of 1933.

In the interests of uniformity and efficiency the regulations prescribe the manner of the preparation, arrangement and form of various classes of documents, including such details as the method of numbering. Special attention is given to codification.

The publication entitled “The Code of Federal Regulations of the United States of America” is the result of the re-enactment of section 11 of the Federal Register Act referred to above. The Code includes fifty titles divided into chapters. It comprises some sixteen volumes together with a one or two volume annual supplement.

It may be well here to compare the English system of publication with that of the United States. In England the two current classes of publications are (1) Statutory Rules and Orders issued singly and placed on sale at prices from a penny upwards, and (2) Annual Volumes of Statutory Rules and Orders. (There are also a triennial consolidation and a Revised Edition of 1903). In the United States (where there has never been an Official Gazette) there are (1) daily or regular editions of the Federal Register, and (2) the supplemental edition known as the Code of Federal Regulations. To summarize my views with regard to our need for publications, I suggest that as we have an official Gazette in each jurisdiction we do not require anything further corresponding to the Federal Register. To hope for anything corresponding to the Code of Federal Regulations is, I think, reaching too far at this time. The code is a convenience; the central filing and regular publication which we seek is almost

a necessity. A publication corresponding to the Annual Volumes of Statutory Rules is also I think, at this stage, more in the nature of a luxury than an actual requirement. And so I suggest that we provide that regulations of a legislative character and in the nature of a public Act shall, unless of a confidential nature, be published in the Gazette or in official pamphlet form in which latter case a notice of the publication shall appear in the Gazette.

Before leaving the legislation of the United States may I, in order to indicate something of the causes which were responsible for its enactment, quote from the General Preface to the Code of Federal Regulations:

The establishment of an office for the central publication of Federal administrative regulations had long been advocated. The United States was the only important Nation without an official gazette fulfilling this function. Great Britain, Germany, France, Australia, Ireland, Canada, New Zealand, South Africa and most of the Latin American countries supported systematic publications which made available and accessible the records of the acts of their executive authorities. At the direction of President Franklin D. Roosevelt, who had advocated such a reform since 1914, an official committee, under the chairmanship of the then Assistant Secretary of Commerce, studied the subject in detail from 1933 to 1935. In 1934 the American Bar Association adopted a recommendation that—

Rules, regulations and other exercises of legislative power by executive or administrative officials should be made easily and readily available at some central office, and, with appropriate provision for emergency cases, should be subjected to certain requirements by way of registration and publication as prerequisite to their going into force and effect.

The argument of an important constitutional case (*Panama Refining Co. v. Ryan*, 293 U. S. 388; see selected Papers of Homer Cummings, Swisher ed., 1939, pp. 123-124) in the Supreme Court of the United States in the fall of 1934, in which the Assistant Attorney-General representing the Government, disclosed to the Court his discovery that the parties had proceeded in the lower courts in ignorance of the technical, though inadvertant, revocation of the regulation upon which the case rested, served to highlight the need for systematic publication of administrative regulations and called forth renewed pleas for a remedy. (See Griswold, *Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198)

The Federal Register Act, "to provide for the custody of Federal proclamations, orders, regulations, notices and other documents, and for the prompt and uniform printing and distribution thereof", was the direct result of these suggestions.

I draw your attention to the part played by the American Bar Association.

*Conclusion.*—Sir Courtney Ilbert wrote of the situation which prevailed in England prior to the Act of 1893—"The objection that the law embodied in statutory rules is less known and less easy to find than the law embodied in Acts of Parliament was . . . substantial and serious." Sir Cecil Carr has written—"Before that Act (Rules Publication Act, 1893) was passed, delegated legislation was almost undiscoverable. Part of it was buried in the pages of the 'London Gazette' the arid nature of which still justifies Macaulay's criticisms; the rest was scattered over Parliamentary Papers or other departmental documents or files without any definite system." In Canada no corresponding Act has been passed, with the possible exception of the Nova Scotia Act above referred to. Further, in the past forty years the increase in the occurrence of delegated legislation has been tremendous. That regulations, properly passed, are not less effective and forceful than the statutes themselves requires no further comment.

I take the liberty then of suggesting that if an Act is to be prepared by the Conference its preparation should be proceeded with without delay and in order to crystallize some of the problems and facilitate the determination of policies I respectfully make the following suggestions which may serve as a basis for discussion :

1. While the matter of providing for a central registry or place of filing is of paramount importance and that of providing for publication in a convenient form admissible in Court, is of secondary importance, the Act should provide for both.

2. As the Clerk of the Executive (or Privy) Council already has many regulations on file in his office, he might very well be named in the Act as the official with whom regulations shall be filed.

3. Publication in the Gazette of all regulations which are in the nature of a public Act and are not declared to be confidential should be required where there is no other official printing of the regulations. Where the official printing is otherwise than in the Gazette, notice of the regulation should be required to be printed in the Gazette.

4. No provision for codification or periodical consolidation similar to the Code of Federal Regulations or Annual Volumes of the Statutory Rules and Orders should be included in any Act prepared at this time.

5. Filing and publication should be enforced by rendering unfiled or unpublished regulations inoperative or by a provision similar to section 7 of the United States Act. \*

6. The Act should apply to existing regulations as well as those made after the coming into force of the Act.

7. The establishment of a board of three members, comprising the official with whom regulations are to be filed, the Legislative Counsel and a law officer of the Attorney-General's Department should be provided for.

8. The board would,—

- (a) determine what delegated legislation is of an executive rather than a legislative character and consequently would not require filing;
- (b) determine what delegated legislation is not in the nature of a public Act and what delegated legislation is of a confidential nature and which consequently, in either case, would not require publication;
- (c) make regulations governing the form of delegated legislation coming under the Act and other matters similar to those contained in the regulations under the English and American Acts; and
- (d) settle other incidental problems.

9. Each set of regulations should be assigned a number for convenience of reference.

10. A system of indexing should be provided for.

11. The Act should provide for the admisability in evidence of,—

- (a) copies of regulations printed pursuant to the Act; and
- (b) copies of regulations certified by the official with whom the regulations are required to be filed.

12. Where regulations are substantially amended, the passing of a consolidation rather than amending the regulations should be encouraged.

ERIC H. SILK.

Toronto.

\*The Conference favoured a plan of rendering unfiled regulations inoperative and applying a provision similar to Section 7 of the United States Act to unpublished regulations.