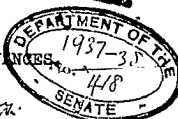


STANDING COMMITTEE ON REGULATIONS AND ORDINANCES



FOURTH REPORT OF THE COMMITTEE.

25 JUN 1938

The Standing Committee on Regulations and Ordinances has the honor to report to the Senate as follows :-

1. The Committee, with varying membership, has now been in existence for more than six years, having been first appointed on 17th March, 1932. As the term of service of a considerable number of Senators is about to expire, and new Senators will take their places, the Committee considers it appropriate that a report should be submitted to the Senate reviewing generally the past work of the Committee and setting out its views with regard to certain features of the system which has been termed "Government by Regulation".

2. The Report of the Select Committee of the Senate on the Standing Committee System, appointed during the session of 1929-30-31, contained the following recommendations (amongst others) -

- (a) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.
- (b) That all Regulations and Ordinances laid on the Table of the Senate be referred to such committee for consideration and report.
- (c) That such Standing Committee shall be appointed at the commencement of each session on the recommendation of a selection committee consisting of the President, the Leader of the Senate, and the Leader of the Opposition, shall consist of seven members, and shall have power to send for persons, papers, and records; and that four members shall form a quorum.
- (d) That such Standing Committee shall be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself; and that it shall also scrutinize regulations to ascertain -
 - (1) that they are in accordance with the Statute,
 - (2) that they do not trespass unduly on personal rights and liberties,
 - (3) That they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,
 - (4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

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3. The motion for the adoption of the Select Committee's Report (including the foregoing recommendations) was not agreed to by the Senate, principally because of the method of selection proposed in paragraph (c). The Report was re-committed, and the Select Committee afterwards presented a Second Report, stating that the previous recommendations had been the subject of further consideration, and submitting other recommendations, providing for a different method of appointment, in their place. The Second Report was adopted by the Senate, the Standing Orders were amended to give effect to the recommendations contained in it, and the Standing Committee on Regulations and Ordinances came into being.

4. The Committee therefore has never had the Senate's formal endorsement of the four principles set out in paragraph (d), and intended by the Select Committee for its guidance. Indeed, these four principles were strongly attacked in the Senate by the Leader of the Opposition, the Opposition at that time comprising a majority of Members of the Senate. (See Hansard, Vol. 124, pages 1550-1555). Nevertheless, the Committee has observed these four principles in its consideration of regulations, and to a less extent of ordinances.

5. The Standing Order (No. 36A) under which the Committee is appointed and under which it functions, while it gives the Committee power to send for persons, papers, and records, merely states that "All Regulations and Ordinances laid on the Table of the Senate shall stand referred to such Committee for consideration and, if necessary, report thereon." In the absence of direction as to procedure in considering the Regulations and Ordinances, the Committee has formulated its own procedure, which consists of obtaining from the public department responsible for the issue of a regulation or ordinance a full explanation of it, with the reasons for the making thereof. These explanations are considered by the Committee in conjunction with the regulation or ordinance under examination, and have been found helpful. It was inevitable that many regulations would come before the Committee which, while quite correct in form, gave effect

to some item of Government policy of a controversial nature. After careful consideration of this aspect, the Committee agreed that questions involving Government policy in Regulations and Ordinances fell outside the scope of the Committee. This decision necessarily limited the Committee's activities very considerably.

6. Within this limited range, however, the Committee has already presented three reports. The first report, presented to the Senate on 18th May, 1932, dealt with the subject of the censorship of cinematograph films. The Committee submitted for the consideration of the Senate the following resolution :- "That in the opinion of this Senate the time has arrived when public policy in regard to the censorship of imported cinematograph films should be set out in substantive legislation". The Report of the Committee was adopted by the Senate on 28th September, 1932. Up to the present, however, no action appears to have been taken to give effect to the above-quoted resolution.

7. The Committee's second report was presented to the Senate on 8th December, 1933, and was adopted by the Senate on 2nd August, 1934. Some minor recommendations contained therein were given effect to.

8. The Committee's third report was presented to the Senate on 31st October, 1935, and a motion for its adoption was moved on 28th November, 1935. This motion was debated at considerable length, and in the end was not agreed to, an amendment being carried to the effect that the report be "received and commended to the consideration of the Government". As a result, apparently, of the Government's consideration of the report, an amending Acts Interpretation Bill was brought in, designed amongst other things to legalise certain actions authorised by regulations in the past which the Committee considered, in view of the decision of the High Court in a particular case, would be held to be ultra vires. The Bill also tended to extend the powers of the Executive in the making of regulations. Although not strictly within its order of reference, the Committee felt justified in spending portion of its time in discussing this Bill, in order that its members might

be better informed regarding it during its consideration by the Senate. When in the Senate a majority of Senators supported the members of the Committee in rejecting an amendment made by the House of Representatives, the Government dropped the Bill; but it was introduced again in the next session, and passed into law, its passage reducing to some extent the Committee's field of criticism.

9. The provision which members of the Committee desired to be inserted in the Bill, and which the House of Representatives rejected, was designed to ensure that no regulation shall be made unless the Attorney-General or the Solicitor-General, or some officer of the Attorney-General's Department, certifies that the regulation would not be in excess of the power conferred by the Act, under which it purports to be made. An amendment to re-insert this ^{provision,} moved in the Senate on 25th August, 1937, resulted in an even vote, there being 14 Ayes and 14 Noes. Under the Constitution when the votes in the Senate are equal the question passes in the negative, and the amendment was therefore rejected. The Committee notes, however, the assurance given in the Senate by the Minister representing the Attorney-General, as follows :-

"I give honorable Senators an assurance that directions will be issued to all the departments to submit all draft regulations for the consideration of the Attorney-General's Department. In other words, the object of the proposed new section will be attained by administrative action, which will, in practice, be equally as effective as the proposed certificate..... It is anticipated that staff arrangements will permit of all regulations being promptly examined by legal officers. . . . When this scheme is in operation, all draft regulations will be examined minutely and according to definite legal principles, both as to the matter and form of the regulations. This is all that honorable Senators desire, and I ask them to accept the assurance I have mentioned." (Hansard, Vol. 152, page 2815).

The Committee draws special attention to this promise, and accepts the assurance given by the Minister.

10. The foregoing summary of past happenings is designed largely for the information of new Senators. The Committee desires now to refer to a number of other matters.

11. Trade Diversation Policy.- On 22nd May, 1936, just before the adjournment of both Houses for the winter recess, the Government announced a policy for controlling the importation of certain goods, which has come to be known as the "Trade Diversation Policy". The

Committee is very much concerned at the method which was followed on this occasion.

12. By way of explanation, honorable Senators are reminded that prior to 1934 the Government had power to prohibit the importation of goods by proclamation. Such proclamation was laid before Parliament for its information, but there existed no power for disallowing it. The House of Representatives could of course exercise a certain amount of control over the Government's use of this power, but the Senate could not, except indirectly. In October, 1931, the Senator who subsequently became the first Chairman of the Committee, introduced a Bill providing for the substitution of the word "regulation" for the former word "proclamation" in section 52(g) of the Customs Act. The Bill lapsed at the end of the session, but in the following session it was introduced as a Government measure and passed into law. It was under this power that the Government acted in its trade diversion policy.

13. Normally, the regulation giving effect to such an important item of policy would have been laid on the Table of both Houses immediately, and would have been subject to disallowance. But on this occasion, owing to the adjournment of the Parliament, the regulation (Statutory Rules 1936, No. 69) was not tabled until the Houses re-assembled on the following 10th September - nearly four months afterwards. Even if the Regulations Committee had met during the recess (as it has power to do), it could not have dealt with this important regulation because it had not at that time been tabled in the Senate. However, the regulation was laid before the Committee on 16th September, 1936, and was fully considered. In view of the previous decision of the Committee in 1933 that questions involving Government policy in regulations or ordinances fell outside its scope, no proposal was made to recommend the disallowance of the regulation because of the policy contained therein. Under the provisions of the Acts Interpretation Act it is open to any individual member of the Senate or House of Representatives to move in this direction, but it ^{was} ~~was~~ agreed that action by the committee, as a committee, was not called for. ⁶

At the same time the committee held the view that an important matter of policy such as trade diversion should have been the subject of Parliamentary enactment, and it is this view which the committee desires to emphasize in this Report. The regulations in question were subsequently challenged in the High Court and upheld in a majority judgment, two judges dissenting.

14. Bound Volumes.-- The Committee appreciates the speed and efficiency with which bound volumes of Statutory Rules are produced each year by the Department responsible, but regrets that the same cannot be said with regard to some of the Ordinances. While bound volumes containing the Ordinances of the outside Territories are issued at regular intervals, there has not been a bound volume of Seat of Government Ordinances since 1924 - since which time very many important Ordinances, and Regulations thereunder, have been promulgated. It must be a matter of extreme difficulty for the persons concerned to keep themselves in touch with the legal position in the case of matters in the Federal Capital Territory controlled by Ordinance. The Committee has had recourse to the expedient of having the Seat of Government Ordinances, and the Regulations thereunder, specially bound and indexed for its own use, and the Parliamentary Library has been forced to take similar action. The Committee understands that steps are now being taken to produce a bound and indexed set of Seat of Government Ordinances, and recommends that this work be expedited, and that in future such Ordinances be issued in bound volumes at regular intervals, in the same way as Statutory Rules are now issued.

15. The Committee has reason to believe, from evidence available, that its efforts in the past to keep a watch on the regulation-making power and on its undue exercise have been widely appreciated by the public -- especially as no such scrutinizing body exists in the House of ~~R~~Representatives. The Committee has endeavoured at all times to be reasonable in its recommendations. It is well aware that it has no judicial powers, yet it has been attacked on the score of endeavouring to exercise such powers. Wisely made and rightly regarded, its reports ought to be of assistance in the

making of effective legislation; yet some of its few critical recommendations have apparently been regarded by the Executive as hostile. Its activities have not resulted in any appreciable reduction ⁱⁿ of the number of regulations issued.

16. In conclusion, therefore, the Committee expresses the opinion that its appointment, which was in the nature of an experiment, has been justified, and that there still exists a field of activity (although now more limited than formerly) within which it may continue to function with advantage to the people of the Commonwealth.



Chairman.

Senate Committee Room,

22nd June, 1938.