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Accountability for Subordinate Legislation: The Case of the Aboriginal Communal Fishing Licences Regulations

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Introduction

This paper focuses on the ability of the Standing Joint Committee for the Scrutiny of Regulations in Canada's Parliament to hold ministers accountable for the legality of the subordinate legislation (primarily regulations) sponsored by their department. The Committee is only one of a number of entities within the federal government that focus on some aspect of ministers' activities for the purpose of holding them accountable (see Priest and Stanbury, 1999).

The essence of any accountability regime (mechanism) is to evaluate the performance of persons to whom authority has been delegated with respect to the exercise of that authority, and to sanction or reward the person in light of the evaluation of their performance. The essence of authority is power—the ability to make certain things happen (or not to happen) even in the face of the opposition of other persons. The concept and practice of accountability is central to the idea of democracy (see Stanbury, 2002b). We insist on holding people accountable because a) it is necessary for those with the ultimate legitimate authority (the citizens in a constitutional democracy) to delegate part of their authority to others (their agents), and b) because power corrupts—it will almost certainly be abused, and so the exercise of the power must be controlled. Thus, those with legal authority to act (in this case in the name of the people) must be called to account for the actions taken to exercise the authority delegated to them.

This paper is organized as follows. Section 2 compares the process by which statutes are created (or amended) to that by which subordinate legislation is made into law. Section 3 briefly explores the role and activities of the Standing Joint Committee for the Scrutiny of Regulations. Section 4 consists of a detailed chronology of one (large) set of regulations, the Aboriginal Communal Fishing Licences Regulations (ACFLRs), focusing on their review and evaluation by the Standing Joint Committee. Thus, this paper is essentially a case study, but like other case studies, it is intended to identify lessons that have much wider application. Section 5 consists of my conclusions with respect to the accountability of ministers for their subordinate legislation based on the case of the ACFLRs. Section 6 contains further discussion and reflections on the case of the ACFLRs.

1. Comparing the Creation of Statutes and of Subordinate Legislation

New statutes and amendments to existing ones in Canada are subject to a public consultation requirement[1] before they are subject to the scrutiny of both the House of Commons and the Senate. It is common for major items of legislation to be reviewed by a committee of the House and also one of the Senate.[2] The hearings can be extensive and a number of independent experts can be called to give their views on the legislation. However, these Commons committees are "miniature replicas" of the party standings in the House,[3] and so the government can almost certainly ensure that their activities, and particularly the majority report, are acceptable to it. Yet, on occasion, the substantive merit of some of the testimony can lead to very useful revisions in legislation not anticipated by the government. Opposition members must submerge their egos so that the minister can take credit for the improvements generated by the Committee.

The situation for subordinate legislation (most notably regulations) is quite different in several ways, although it has exactly the same force of law. First, subordinate legislation is not submitted to Parliament. Rather, it is created by a Cabinet committee which meets about every two weeks. Second, in most years, the volume of law created by the Special Committee of Council (or by individual ministers authorized to do so) is greater than that which passes through the House and Senate.[4] Note, however, that regulations can only be made pursuant to an existing statute in which a minister or the Cabinet is authorized to create such regulations.[5] Third, since 1986, subordinate legislation has been

1 The extent of the consultation process varies somewhat across departments and the perceived importance of particular bills. In general, officials do a reasonably good job of consulting organized (and vocal) interests—largely because ministers want to "feel the pulse." Of course, those who don't win will usually say they weren't consulted enough. One has to look at the specifics to make a judgement call on what was "enough." In the case of proposed regulations, there is a formal notice and comment period with the draft published in full in the *Canada Gazette*. Some departments also consult with organized interests during the planning stage when perhaps only a very rough draft is available. (Generally, see Privy Council Office (PCO), 1992 and 1999b.)

2 Note, however, that it has become common for new statutes to be largely "framework" documents that rely on regulations to make them operational. A statement saying that the purpose of the statutes is "to prevent pesticides from harming Canadian citizens" is hard to argue with philosophically, but there can be major differences of opinion on which pesticides to regulate and what concentration constitutes harm, and so forth. So parliamentarians, by definition, are voting to authorize unknowns, except in rather broad terms. The devil *is* in in the details, and the details are usually found in regulations created after a new statute is enacted. Note, however, in the case of the new statute requiring registration of guns, interest groups and MPs were able to persuade the government to table the draft regulations along with the bill.

3 Following the British tradition, the chair of the Public Accounts Committee is an opposition member, but its composition mirrors the party standings in the House.

subject to *ex ante* scrutiny in the form of the Regulatory Impact Analysis Statement (see Stanbury, 1992; PCO, 1999b). In particular, a cost-benefit analysis must be conducted for new regulations[6]—although the methodology employed often would not pass muster by academic specialists or by experienced private sector consultants who do such analyses.[7] Further, the requirement that the social benefits exceed the social costs is not enforced.[8] Fourth, subordinate legislation is subject to *ex post* scrutiny by the Standing Joint Committee for the Scrutiny of Regulations.[9]

2. Role of the Standing Joint Committee

All new regulations are permanently referred to the Committee (see PCO, 2002). According to the Standing Orders of the House of Commons, section 108(B), "The Standing Joint Committee… shall include among other matters the review of statutory instruments referred to the Committee pursuant to the provisions of section 26 of the *Statutory Instruments Act*" (House of Commons, 2001).

The Standing Joint Committee for the Scrutiny of Regulations set out the criteria it will use for the current session of Parliament[10] as follows:

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4 By this I mean that the number of pages of subordinate legislation exceeds the number of pages of new statutes and amendments to existing ones. This is obviously a crude measure since it reveals nothing of the relative importance of the two types of new law. Curry (2002) states that the number of new regulations has declined, from 1,392 in 1985 to 529 in 2000.

5 They may be subject to a provision that specifies that the regulations go into effect within X days, *unless* they are stopped by the Governor in Council. The PCO (1999a) notes that "Parliament may delegate regulatory authority to Cabinet (the Governor in Council), a person (such as a minister of the Crown) or a body (such as the Atomic Energy Control Board). However, this authority remains subject to the will of Parliament and regulations made under this delegated authority are referred to as subordinate legislation."

6 See PCO, 1999b. Note that the extent of the analysis is expected to be proportionate to the expected economic consequences of the proposed regulation.

7 I base this statement on a careful review of the cost benefit analysis accompanying new "major" regulations selected by PCO. Unfortunately, my work for a consulting firm contracted by the PCO is confidential.

8 Moreover, it is clear that the manual provided by the Treasury Board Secretariat to departments confuses true social costs (or benefits) and income transfers. The effect of this error is usually to overstate benefits relative to costs.

9 As of January 22, 2002, the Committee had 24 members: 17 MPs, of whom 8 were Liberals and 4 were Canadian Alliance; and 7 Senators, of whom 5 were Liberals. The MP Joint Chairman is an opposition member but the Senate Joint Chairman is of the government party. The committee was created in 1971 as the Standing Joint Committee on Regulations and other Statutory Instruments (see Stanbury, 1992).

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; and
13. is defective in its drafting or for any other reason requires elucidation as to its form or purport (Standing Joint Committee, 2001).

10 At the beginning of each session, that Committee informs the House and the Senate of the criteria it will use to review subordinate legislation referred to it.

Except on rare occasions when members of the Committee take a greater interest in a particular regulation or in the Committee's processes, the Committee is heavily dependent on its highly-regarded staff. While most of the membership turns over fairly frequently,[11] making it hard for MPs or Senators to become expert on the substantive and procedural issues, the staff is "permanent." The staff appears to expect little "interference" from members, and has a large amount of influence on the Committee's procedures and the content of its documents (see Bernier, 2002). A key issue is the relative expertise of the members and staff with respect to the Committee's work. Few MPs have much knowledge of the substantive issues addressed in various regulations, and even fewer come to master the sometimes arcane legal issues involved in the review of subordinate legislation. Further, the Committee's agenda is quite tightly scripted, and usually proceeds in a brisk fashion. The long delays in dealing with particular items[12] are largely related to the large number of regulations which the Committee has to review relative to the number of meetings it can hold each year.[13]

Unlike most parliamentary committees, the Standing Joint Committee for the Scrutiny of Regulations has its own staff (i.e., staff do not work for several committees over time). The Committee's staff is quite large (about 7 people), and the staff have their offices in a building different from the one which houses the staff of other parliamentary committees.

While the Standing Joint Committee's review comes after the new regulations are in place—sometimes years after they were made into law—since 1987, the Committee can propose a disallowance motion (what I have called a "disallowance report") which is tabled in the House. If no debate takes place within two weeks, the resolution is deemed to be adopted.[14] This, in effect, orders the Cabinet to revoke the regulation. So far, no government has attempted to vote down a disallowance report.[15] But note that under

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11 In recent years, the exceptions have been Derek Lee, Tom Wappel, John Cummins, and a few others.

12 Two distinct periods need to be considered: a) from the date a regulation is enacted to the date it is first considered by the Standing Joint Committee, and b) from the date it is first considered by the Committee to when the Committee makes its report to Parliament. A review of 9 regulations which resulted in a disallowance report between 1987 (when the power first became available) and 2001 indicates that the average for a) was 18.1 years, and for b) it was 11.2 years! Thus, it took, on average, over 29 years from enactment to disallowance. (Author's analysis of information in Niemczak, 2001.)

13 Bernier, 2002, states that over the period November 7, 1997 to December 6, 2001, the Committee dealt with 1,133 pieces of subordinate legislation in the course of 45 meetings. **See February 18, 2002 in section 3 below for more details.**

14 Standing Order 108(4)(B) states that the Standing Joint Committee "shall be empowered to make a report to the House containing only a resolution which, if the report is concurred in, would be an order of the House to [the] Ministry to rescind one specified regulation or other statutory instrument, which the Ministry has the authority to rescind" (House of Commons, 2001).

the Standing Orders there is only one opportunity to do so during the two-week period.[16]

In general, the Committee works slowly. Also, government members usually do their best to protect ministers from criticism,[17] no matter how well founded. In general, there is normally one government member who takes on the job of representing the government's position or who makes a great effort to try to protect the government, much the same as a parliamentary secretary to the minister does on a regular Commons committee.[18]

3. The Aboriginal Communal Fishing Licences Regulations: A Chronology

The purpose of this main section of the paper is to examine how the Standing Joint Committee for the Scrutiny of Regulations handled a controversial and important case, the "Aboriginal Communal Fishing Licences Regulations" made into law in mid-1993. My particular concern is the extent to which the process of review by the Standing Committee is effective in holding ministers accountable for the subordinate legislation they create as individuals, or which they submit to the Special Committee of Council which makes it into law. Under the Westminster model, Cabinet ministers are to be held jointly and severally accountable for their performance in office.[19] While draft regulations are subject to an *ex ante* notice and comment period, the only official *ex post* review of the regulations is that conducted by the Standing Joint Committee for the Scrutiny of Regulations.[20]

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15 Between 1987 and 2001, the Standing Joint Committee issued 9 "disallowance reports," 5 of which were in the period 1994-2001 (Niemczak, 2001).

16 Standing Order 128 specifies that "when a notice or notices of motion for concurrence given to Standing Order 123(4) has been set down for consideration pursuant to Standing Order 124, the House shall meet at 1:00 o'clock p.m. on the Wednesday next, at which time the order of business shall be consideration of the said notice or notices. When the House meets at 1:00 o'clock on any Wednesday pursuant to Section 1 of this standing order, the House shall not consider any other item but those provided…"

17 This is part of the legacy of strong party discipline in Canada's version of the Westminster model. The current prime minister has insisted on a very high degree of party discipline. See, for example, Taber and Clark (2002). The concentration of power in the PM's hands makes it easy for him to enforce discipline on his party's MPs (see Savoie, 1999).

18 Lest one think this is a worst case example, the "Reindeer Regulations" were created on December 8, 1954, and first reviewed by the Committee on March 24, 1983, but only on December 6, 2001, was a disallowance report sent to Parliament (Niemczak, 2001).

19 The reality, however, is far from the theory—see, for example, Sutherland, 1991.

Because of the numbers and complexity of events in this case study, the approach adopted here is to present the developments in the form of a chronology. This method appears to illustrate well the process of reviewing subordinate legislation and also the "games" that can be played by certain participants. This paper does not purport to examine the substance of the policy issues involved in the ACFLRs. See Appendix 1.

Period 1992 through 1996

- **April 1992**: The federal Cabinet approves the Aboriginal Fisheries Strategy (AFS). It allows "test sales" of fish caught by Aboriginals for food. This requires new regulations—see June 1992. The budget designated for the AFS time is about $100 million over four years. The Cabinet requires the Department of Fisheries and Oceans (DFO) to conduct a mid-term review in 1996.

- **June 26, 1992**: The "Aboriginal Fisheries Agreements Regulations" (put forward by DFO) are introduced (see SOR/92-415). In essence, the new regulations permit "test sales" of fish caught by Aboriginals under their rights to fish for food at times and places open only to Aboriginals. (Within two years these "test sales" will have become of indefinite duration. The 1992 regulations are the direct predecessor of the 1993 ACFLRs, the focus of this paper. The main difference from the 1993 ACFLRs (aside from the title) is section 6, which states that the agreements will supersede the existing regulations. In the subsequent version, "licence conditions" are to supercede the other regulations in the event of a conflict. At the time, John Crosbie is Minister of Fisheries and Oceans, having been appointed effective April 24, 1991.

- **March 1993**: The "Aboriginal Communal Fishing Licences Regulations" (ACFLRs) are drafted by Ms. Francie Ducros,[21] an official in the Department of Fisheries and Oceans (DFO) who in June 1999 became chief of communications in the Prime Minister's Office.[22] The ACFLRs are approved by the Minister.

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20 Private parties may challenge some part of a set of regulations in the context of judicial review, but that occurs infrequently.

21 According to an article by Graham Fraser (1999), Ms. Ducros obtained a law degree from McGill in 1986. Then, "in 1989, she went to work for the Canadian Legal Information Centre, where she concentrated on aboriginal legal issues. In 1990, she went to work for the Department of Fisheries and Oceans, where she developed the aboriginal communal-fishing licence regulations" (Fraser, 1999). The 1993 federal government phone book listed Ms. Ducros as Native Policy Advisor in the Native Affairs Division of DFO's Industry Program Directorate.

- **April 1993**: The BC Fisheries Survival Coalition (created in January 1993) files a challenge to the ACFLRs in the Federal Court of Canada and DFO amends its draft to deal with the issue raised by the coalition, according to its head, Phil Eidsvik (2002).

- **May 1, 1993**: The "pre-publication" draft of the "Aboriginal Communal Fishing Licences Regulations" is published in the *Canada Gazette, Part II*. Comments are solicited prior to June 1, 1993. The stated purpose of the ACFLRs is to give effect to certain court decisions on the fishing rights of aboriginals, most notably the 1990 decision of the Supreme Court of Canada in *R. v. Sparrow*.[23] However, the ACFLRs also seek to regulate commercial fishing activities that do not involve the exercise of any constitutionally-protected "communal" right.[24] The regulations purport to give the minister in section 4 the authority to allow native organizations to licence fishermen and vessels. Section 6 of the regulations purports to permit conditions on aboriginal fishing licences to override valid regulations made under the authority of the *Fisheries Act*. Section 7 of the ACFLRs purport to make failure to comply with a condition in an aboriginal fishing licence an offence punishable by fine or imprisonment.

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22 Between DFO and the PMO, Ducros worked in two ministers' offices: that of Brian Tobin (Fisheries) and, later, that of Stephane Dion (Minister for Intergovernmental Affairs). She was described by a former colleague as having "a brilliant policy mind" (quoted in Fraser, 1999). She is also described as being very aggressive and protective of the PM in her dealings with the press. In what she thought was a private conversation with a journalist, Ms. Ducros called the President of the United States "a moron" in November 2002 (see Winsor, 2002). The resulting headlines put great pressure on the PM to fire her. He did not do so, saying Mr. Bush "is not a moron. He is my friend." Ducros' initial offer to resign was refused by the PM. However, within two weeks, Ms. Ducros resigned. On the fallout, see Moore (2002).

23 [1990] 1. S.C.R. 1075 at pp. 1101, 1112. The Court effectively created a communal right to fish for food, social, and ceremonial purposes.

24 Note that the *Sparrow* decision did not strike down the existing set of regulations controlling access to the resource. Further, in a set of cases in 1996, known as the *Van der Peet* trilogy, the Supreme Court of Canada did not strike down the earlier (the ACFLRs) regulations. The Court specifically rejected separate or exclusive fisheries barring the exception of *R. v. Gladstone* [1996] 2 S.C.R.723, where it found an aboriginal right to commercially harvest roe in kelp. The ACFLRs were not needed to licence native to fish for food. That matter was covered in the existing DFO regulations. Rather, the ACFLRs were designed to permit the *sale* of food fish and/or to establish a separate natives-only commercial fishery. Thus it was wrong for the Regulatory Impact Analysis Statement accompanying the ACFLRs in May 1993 to claim that these regulations were effectively required by *Sparrow* in or other court decisions. This point is made clear by the Supreme Court of Canada in *R. v. Nikal*. In summary, the Court held in 1996 in *Nikal* that DFO can be the licencing authority. The issue is not who issues the licence, but whether a member of an aboriginal community that has such a right can exercise that right on behalf of the community. Very few MPs, however, are willing or able to do the work necessary to properly understand Supreme Court of Canada decisions and so spot their misuse by departmental officials bent on implementing a Cabinet *policy* decision.

- **May 6, 1993**: The Minister of Fisheries and Oceans, John Crosbie, appears before the House of Commons Standing Committee on Fisheries and Oceans on the matter of the ACFLRs. He makes several interesting points: a) the proposed regulations were an "experiment;" b) the ACFLRs were not dictated by the *Sparrow* decision,[25] but "because we think it's the best public policy;" c) "the aboriginals have [been] taking fish and selling the fish illegally in great amounts;" d) an important objective of the draft regulations was to regulate aboriginals' fishing/selling activities and thereby obtain far better data to keep the industry profitable; e) the ACFLRs were intended to reduce/avoid protracted litigation and "possible bloodshed" (there were five cases before the BC Court of Appeal and the *Van der Peet* trilogy went to the Supreme Court of Canada), and f) the government's objective was to "devise a system that satisfies everyone and that will be reasonable."

- **May 11, 1993**: Chris Harvey of the law firm of Russell & Du Moulin[26] in Vancouver analyzes the proposed ACFLRs for the BC Fisheries Survival Coalition, which had been formed in January 1993.[27] He strongly questions the legality of the proposed ACFLRs.

- **June 16, 1993**: By means of Order in Council PC 1993-1318 (June 16, 1993), the "Aboriginal Communal Fishing Licences Regulations" are registered and published. See SOR/93-332 in the *Canada Gazette, Part III* at p. 2899. John Crosbie is the Minister of Fisheries and Oceans, but only for 8 more days.

- **June 25, 1993:** Kim Campbell is sworn in as prime minister, replacing Brian Mulroney as leader of the Progressive Conservative Party. (She spent $3 million to win the leadership race.) Ian A.R. Ross replaces John Crosbie as Minister of Fisheries and Oceans.

- **October 25, 1993**: The Liberals under Jean Chrétien win a majority government (177 of 301 seats) in the federal general election. The Progressive Conservatives are reduced to two seats, and the Bloc Quebecois (BQ) (54 seats) becomes the

25 This is contrary to what was said in the RIAS accompanying the draft ACFLRs.

26 The current name of the firm is Fasken, Martineau, Du Moulin LLP.

27 John Howard, Q.C., then senior vice-president of MacMillan Bloedel Ltd., states that "I had recommended that the Coalition fight the case on constitutional grounds: first, that the regulations were a colourable use of the federal fisheries power, an argument frequently used before 1950 to strike down federal laws invoking, say, the criminal power to achieve some economic or social regulatory objective; and second, the obvious argument that the race-based regulations clearly contravene the Bill of Rights. At the time, the Coalition was having great difficulty raising funds to finance the litigation" (Howard, 2002).

Official Opposition. The Reform Party (now Canadian Alliance) wins only two fewer seats than the BQ. John Cummins is elected as a Reform Party MP for Delta-South Richmond. He goes on to challenge the legality of the ACFLRs for the next 9 years.

- **November 4, 1993**: Brian Tobin becomes Minister of Fisheries and Oceans in the new Liberal government.

- **May 26, 1994**: The "Aboriginal Communal Fishing Licences Regulations" are amended by SOR/94-390 to permit them to continue in force.[28] The 1993 ACFLRs had been established on a "trial basis." In 1993, the commercial sales of fish by Aboriginals were called "pilot" sales. This term continues on after the 1994 amendments put the ACFLRs on a "permanent" basis. The 1993 regulations provided for a review at the end of the 1993 fishing season. The 1994 amendments are necessary to continue them.[29] At this time, the Liberals effectively adopt the policy and regulations created by the Tories.[30]

- **August 3, 1994**: Amendments are made to the ACFLRs to extend the ACFLRs to non-tidal waters in Ontario until the end of 1994. The Minister of Natural Resources is authorized to issue ACFLRs in areas managed by his ministry and to fix the terms and conditions of such licences (see SOR/94-531). In 1995, amendments are made to the ACFLRs to extend them to non-tidal waters in Ontario indefinitely (see SOR/95-106).

- **January 9, 1996**: David Dingwall becomes Acting Minister of Fisheries, replacing Brian Tobin who returns to Newfoundland and quickly becomes premier.

- **January 25, 1996**: Fred Mifflin becomes Minister of Fisheries, replacing David Dingwall.

- **Spring 1996**: The Department of Fisheries and Oceans conducts the mid-term review of the Aboriginal Fisheries Strategy (AFS) as required by the Cabinet in April 1992. This exercise amounts to DFO reviewing a program it had developed and implemented—so it is hardly objective. The focus is on justifying continued

28 The amendments were made by Order in Council, PC 1994-861. See *Canada Gazette, Part II*, June 15, 1994.

29 Section 10 of the ACFLRs required that the application of the regulations be reviewed before June 1, 1994. The effect of the 1994 amendments was to delete that section.

30 Recall that in 1988, the Tories elected 11 MPs in BC out of a total of 169. The Liberals did not come into office until November 1993, but in the October general election the Liberals elected only 6 MPs in BC out of 177.

funding, some 70 percent of which is spent in BC. The A-base funding of the AFS in BC in 1996 was about $17.7 million for contributions agreements. The B-base funding, which covered special funding (e.g., treaty negotiations) was $11.7 million (per DFO mid-term review document).

The rhetoric of "temporariness" continued in 1996. The mid-term review referred to "Test Sale Projects," i.e., special Aboriginal commercial fisheries, i.e., ACFLRs. The mid-term review indicated that AFS was being "morphed" into a vehicle for managing Aboriginal and treaty rights issues expected to take "at least a decade." The overall goal was an "allocation transfer program, facilitating non-disruptive, cost-effective transfer of harvesting opportunity to Aboriginal people by gradual retirement of existing commercial licences" (AFS discussion document from the Clerk of the Commons Standing Committee on Fisheries).

- **November 26, 1996**: John Cummins,[31] Reform Party MP (Delta-South Richmond), sends a lengthy memo to Ted White, another Reform Party MP (North Vancouver), arguing that the 1993 ACFLRs (as amended in 1994) are *ultra vires* of the *Fisheries Act* and *ultra vires* of Parliament (Cummins, 1996).

Period 1997 through 1998

- **January 3, 1997**: Reform Party MP Ted White, then Joint Chairman of the Standing Joint Committee for the Scrutiny of Regulations, formally requests that Francois Bernier, General Counsel of the Standing Joint Committee, review the ACFLRs with respect to their legality. Although the regulations had been created in mid-1993, this is the first time they have been examined in any fashion by the Standing Joint Committee.

- **March 20, 1997:** Mr. Bernier reviews the regulations and concludes in his report to the Committee that the regulations are illegal for several reasons. The General Counsel's memorandum to the Committee is critical of the legality of the ACFLRs on several points. For example,

31 Cummins has been a gillnet fisherman. Note that he benefited from Chris Harvey's 1993 analysis of the ACFLRs for the BC Survival Coalition. Mr. White could have been co-chair of the Standing Joint Committee instead of Liberal Derek Lee. According to one observer, White tends to be very cautious and believes it is necessary to develop a consensus before taking action such as that proposed by Cummins. The key point, however, is that White, having had extensive private discussions with Cummins on the ACFLRs, was prepared to carry it to the Standing Joint Committee for Cummins.

- Re Section 4, 5(1)(b), 5(1)(h), 6 and 7: "Legitimate questions can be raised as to whether the licensing scheme which these Regulations put in place is one that is contemplated by the *Fisheries Act*."
- Section 6: "The legality of this provision is doubtful…. Licence conditions… cannot be made to override otherwise applicable subordinate laws made by the Governor-in-Council pursuant to the *Fisheries Act*."
- Section 7: "It is suggested there is no authority for this provision."
- Section 9: "The authority for this provision is also questionable."

Bernier's report was not considered by the Committee for eight months.

- **June 2, 1997**: The Liberals under Jean Chrétien win the federal general election, but obtain a reduced majority with 155 of 301 seats. (The Liberals receive only 38.5 percent of the popular vote.) The Reform Party wins 60 seats (making it the Official Opposition), while the Bloc Quebecois wins 44. John Cummins is re-elected.

- **June 6, 1997**: David Anderson becomes Minister of Fisheries and Oceans, replacing Fred Mifflin.

- **November 6, 1997**: The Standing Joint Committee reviews Francois Bernier's report of March 20, 1997 and Ted White's letter of January 3, 1997. It determines that the Aboriginal Fishing Regulations are inconsistent with the *Fisheries Act*. A decision is made to so advise DFO by letter. The letter is sent a month later.

- **December 9, 1997**: The Joint Standing Committee finds that the ACFLRs are illegal, and writes to Sharon Ashley, the Director of Policy Coordination for the Department of Fisheries and Oceans, advising her of its conclusions. The Department is very slow to reply—see November 23, 1998, below.

- **January 26, 1998**: The BC Provincial Court in Surrey rules that portions of the ACFLRs have no legal validity and are therefore null and void (press release by John Cummins, MP, January 26, 1998).

- **June 11, 1998**: The Standing Joint Committee discusses the appropriate time period for a reply to its letters by the Department (3 months) and by the Minister to its letters (usually 4 months).[32] The Committee decides to write directly to the minister as the officials have not yet replied to its December 9, 1997 letter.

32 While the Committee has a general rule on the time in which it expects replies to its letters, it is seldom enforced. The tendency is to give the officials or minister more time.

- **October, 1998**: The Committee sends the letter to the Minister of Fisheries (David Anderson) which it had approved on June 11, 1998. This is after the House reconvenes in September. Note that this letter asks the minister to have his officials reply to the Committee's letter of December 9, 1997 to Ms. Ashley.

- **November 23, 1998**: DFO's Designated Instruments Officer replies to the Committee counsel's letter that was sent to DFO on December 9, 1997. The reply focuses on the merits of the regulations and the considerations that led the government to enact them in 1993. The letter rejects the idea that the regulations are illegal. It is no wonder that some members of the Committee are outraged by the official's reply. In effect, the official rejects the mandate of the Committee—to determine if regulations created by the Cabinet are legal (recall the criteria listed in section 2 above). The official focuses on the *policy* objectives the ACFLRs were to achieve. (DFO officials, when they later appeared before the Committee, gave the impression that they were unconcerned about the matter of legality. They even said that they had not come to try to convince the Committee of the legality of the ACFLRs. Ted White was provoked to tell them that if they failed to address this issue, their regulations might not survive.)

Period 1999 through 2001

- **August 3, 1999**: Herb Dhaliwal becomes Minister of Fisheries replacing David Anderson.

- **March 23, 2000**: The Standing Joint Committee addresses the Department's reply (dated November 23, 1998) regarding the Aboriginal Communal Fishing Licences Regulations. Note that this is about 18 months *after* the Committee received DFO's letter. At the same meeting, the Committee instructs the co-chairs to write to the Minister of Fisheries (now Herb Dhaliwal), and this is done.

- **September 26, 2000**: The Standing Joint Committee for the Scrutiny of Regulations sends a letter to the Minister of Fisheries and Oceans[33] describing the regulations as "defective," "lack[ing] in proper statutory authority," "involv[ing] an unauthorized sub-delegation of the Governor-in-Council's authority to make regulations," having "simply no authority under the *Fisheries Act* for the enactment of such an extraordinary provision," and saying that "such a provision is illegal absent a specific grant of enabling authority from Parliament." The Committee's

33 Note that the Committee's policy is first to spell out its concerns in a letter to senior officials in the relevant department. Then, if the matter cannot be resolved, the Committee writes to their Minister.

letter to the Minister says that in its view, the ACFLRs are "inconsistent with the *Fisheries Act*." It also says that:

> What section 6 purports to do is provide that a non-legislative instrument issued by someone other than Parliament's delegate will take precedence over a legislative instrument made by Parliament's delegate in the exercise of a regulation-making power. In other words, the official charged with the licence issuing function is being granted a power to override duly enacted laws. It remains our view that such a provision is illegal absent specific grant of enabling authority from Parliament.

No reply was received from the minister until November 21, 2001.

- **November 27, 2000**: In the federal general election, the Chrétien government is returned with a larger majority than in the last election: 173 of 301 seats. The Canadian Alliance[34] wins 66 seats while the BQ wins 38. The NDP wins 13 and the Progressive Conservatives win 12. John Cummins is re-elected.

- **April 30, 2001**: The Standing Joint Committee sends a reminder letter to the Minister of Fisheries and Oceans. No reply is received.

- **July 10, 2001**: The Minister of Fisheries and Oceans (Herb Dhaliwal) replies only to the reminder letter from the Committee dated April 30, 2001. He says that his officials have been waiting for further direction from the Committee following the November 2000 general election. The Minister does not address any of the substantive issues raised by the Committee concerning the ACFLRs.

- **September 10, 2001**: The Standing Joint Committee sends another letter to the Minister. No reply is received.

- **October 2001**: Canadian Alliance MP John Cummins (Delta-South Richmond) joins the Standing Joint Committee and begins to push for a report to Parliament on the ACFLRs.[35]

- **October 25, 2001**: The Standing Joint Committee decides, in light of the failure of the Minister to reply to its letter of September 26, 2000, that the Minister should be told that if a reply is not received prior to its December meeting, the

34 The Reform Party became the Canadian Alliance in April 2000 and Stockwell Day was elected leader over Preston Manning who had led the Reform Party since its founding in 1987. In March 2002, Stephen Harper was elected leader of the Canadian Alliance, defeating Stockwell Day.

Minister will be asked to appear in person. Note that this occurs very rarely in the Committee's work.[36] One member makes it clear that the Minister's (Hon. Herb Dhaliwal) July 10, 2001 letter to the Committee was a "stalling tactic."

- **November 6, 2001**: The Committee sends another letter to the Minister of Fisheries and Oceans. This time the letter has some teeth. The Minister is advised that he will be called upon to appear before the Committee if his reply is not received before the Committee's meeting in early December.

- **November 19, 2001**: The House of Commons Standing Committee on Fisheries and Oceans holds a hearing in Steveston, BC to address the concerns of west coast fishermen, including matters related to the ACFLRs. Phil Eidsvik of the BC Fisheries Survival Coalition provides testimony.

- **November 23, 2001**: The Minister (Hon. Herb Dhaliwal) finally replies to the Committee's original letter of September 26, 2000, i.e., over 26 months later. He relies heavily on a BC Court of Appeal decision, *R. v. Huovenin*,[37] which he claims responds to the Committee's concerns, claiming that the regulations are not defective, and were in fact properly authorized by the *Fisheries Act*. However, the *Huovenin* decision did not address the concerns of the Committee as set out in its September 26, 2000 letter to the minister. The issue in the *Huovenin* case was the validity of a licence to sell fish that had been issued under the regulations, rather than the validity of those regulations. The Court was very clear that it was *not* considering the validity of the ACFLRs. Note that the minister met the Committee's deadline, but the government members on the Committee did not wish to consider his letter until the New Year.

- **December 6, 2001**: The Joint Standing Committee decided (by a vote of 8 to 7) to prepare a "disallowance report" (motion) on the regulations and to send it to Par-

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35 Mr. Cummins was first elected as a Reform Party MP in 1993, and re-elected in 1997 and 2000. He holds a B.A. from the University of Western Ontario and an M.A. from the University of British Columbia. For 20 years he operated commercial fishing vessels. On December 9, 1998, he was appointed as vice-chair of the House of Commons Standing Committee on Fisheries and Oceans. However, in November 2002 he lost this position under the newly-created practice of using a secret ballot to elect chairs and vice-chairs of Commons committees. See Laghi, 2002.

36 Ministers are very rarely called to testify because the focus of the Committee's work is on the legality of regulations. Ministers usually want to focus on the virtues of the policy or even the politics of the matter. They usually seem to have little concern about the "technical" matter of legality.

37 [1998] B.C.J. No. 2064 (Prov. Ct.); (1999) 179, D.L.R.(4th) 567 (B.C.S.C.); (2000), 188 D.L.R. (4th) 28 (B.C.C.A.).

liament.[38] The effect of such a report would be to *revoke* the impugned regulations created in 1993 (unless the government marshaled its majority to defeat the motion within two weeks, and this had never been done before). In a press release, John Cummins, MP, noted that there was no commercial salmon fishing season on the Fraser River in 1999, only two days fishing in 2000, and none in 2001. He argued that this was due to "difficulties surrounding enforcement of [the ACFLRs which has] decimated commercial salmon fishing on the Fraser River."

Period January through December 2002

- **January 15, 2002:** In a major cabinet shuffle, Robert Thibault replaces Herb Dhaliwal as Minister of Fisheries and Oceans. He is the seventh Minister since the ACFLRs were created in mid-1993.

- **February 7, 2002**: The Standing Joint Committee meets to consider the draft "disallowance report" prepared by the general counsel, Mr. Bernier, as a result of the December 6, 2001 meeting. However, the Liberal members obtain a three-week delay of the Committee's consideration of the draft report. They argue that they want to have the minister appear before the Committee, which is highly unusual. However, he does not appear before the next meeting in March, when the draft report is discussed.

- **February 7, 2002**: At a meeting of the Committee for the Scrutiny of Regulations, Liberal MP (and Joint Chairman of the Committee) Derek Lee emphasizes the need to distinguish policy issues and legal issues with respect to the ACFLRs. He also says the Committee has not had the opportunity to discuss the implications of a "disallowance report," "the ripple effect… the implications… on the street." He is concerned about the "real practical impacts … [which can be] potentially huge, so much so that we defer on a disallowance." In his view, "We do not want our legal analysis to overwhelm real-life politics." Thus it appears that Mr. Lee is suggesting that the principle of the rule of law be sacrificed on the altar of political embarrassment.

- **February 11, 2002**: In *The Hill Times* (an Ottawa newsweekly that focuses on the activities of the federal government—see *www.thehilltimes.ca*), reporter Bill Curry (2002) describes the slow pace at which the Standing Joint Committee has functioned since the Chrétien government came to power in 1993. Curry suggests that

38 Between 1987 and 2001, only nine disallowance reports were made to Parliament (Niemczak, 2001).

this slowdown has undermined the special powers given to the Committee following the McGrath Report on parliamentary reform in 1985.

- **February 18, 2002**: *The Hill Times* publishes a letter to the editor from Francois Bernier, General Counsel of the Standing Joint Committee (see Bernier, 2002). He is critical of the story in *The Hill Times*. Bernier claims that the Committee is working effectively, whereas the paper says the process is very slow. Bernier notes that since the Committee took up its statutory mandate in November 1974, it has made some 77 reports to Parliament. As for the 9 disallowance reports, they only began in 1987 because until then, the Committee did not have the authority to make a report recommending disallowance of a regulation. He rejects Mr. Curry's suggestion that the staff had failed to carry out the instructions of the Committee. Mr. Bernier notes that between November 6, 1997 and December 6, 2001, the Standing Joint Committee held 45 meetings and considered 1,133 statutory instruments. Further, it had issued 8 reports, 4 of which recommended disallowance. Bernier concludes that the Committee "is without question the most effective such committee in Canada and one that is highly respected in other Commonwealth jurisdictions." It has been praised by "respected academic observers," he says. It appears that Mr. Bernier took the *The Hill Times* reporter's criticisms (see Curry, 2002) of the Committee's work personally. Due to his long association with the Committee and deep knowledge of the legal and procedural matters related to its operation, he *is* the Committee. Thus, he evidently felt the need to publicly defend its functioning.

- **February 19, 2002**: John Cummins writes a letter to the editor of *The Hill Times* responding to Mr. Bernier's letter published the day before. (It is published on February 25—see Cummins, 2002.) Cummins argues that Bernier's conclusion that the Committee "is effectively carrying out its mandate" is contradicted by its record with respect to the ACFLRs. Cummins implies that some of the delays are attributable to Bernier, e.g., i) while the Committee decided to send a letter to the Minister on June 11, 1998, it was not sent until October; ii) although the letter from the Department was received in November 1998, it was not put on the Committee's agenda until March of 2000; and iii) although the Committee decided to send its concerns directly to the Minister in March 2000, the letter was not sent until September 26, 2000.

- **February 21, 2002**: The Minister of Fisheries (Robert Thibault) indicates in advance that he will *not* be able to appear before the Standing Joint Committee at this meeting. The Committee considers a motion to censure Francois Bernier over

the public position he took as General Counsel in his letter to *The Hill Times*.[39] This matter is sent to a subcommittee (which then meets on March 12, 2002). John Cummins took the view that a staff member had no business making such comments publicly. Bernier was chastised and has not spoken publicly about the Committee's work since. It appears that Cummins interpreted Bernier's comments as approval of the government members' desire to move at a very slow pace.

- **February 25, 2002**: *The Hill Times* publishes John Cummins' letter in response to Francois Bernier's letter published in *The Hill Times* on February 18, 2002. It catalogues delays between actions ordered by the Standing Joint Committee staff. Cummins also makes the following point: "Having found that the regulations were illegal in 1997, they are still in force in February, 2002. Six fishermen have been arrested and jailed under these illegal regulations. In addition, hundreds of fishermen have been charged and the charges are still winding their way through the BC provincial court system while the committee dithers on when to table the disallowance report that would lead to the revoking of these illegal regulations and to the end of the charges against innocent fishermen."

- **March 14, 2002**: The Liberal members of the Committee use their majority to *reject* the draft "disallowance report" prepared by the Counsel of the Standing Joint Committee for the Scrutiny of Regulations.[40] This is the first time that the

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39 The motion, by John Cummins, MP, was that "committee staff must seen to be neutral in matters of debate within committee and therefore should avoid public comment on such matters." Mr. Cummins said that the purpose of his motion was quite clear: "Counsel for committee saw fit to respond to an article that was published in *The Hill Times* and took a position with which I disagreed. The position was a matter of discussion and debate in this committee at our last meeting. I took offence to that. I do not think it appropriate for staff to be doing so. If the committee saw fit to publish a clarification of the article in the paper, then it should have been a matter of the committee's function. It should have been discussed with committee members and it would have been appropriate for one of the committee joint chairmen to do that. Having said that, I do not disagree with the article. I found the article to accurately reflect the position that I had taken and that I maintain. I also found the comments of counsel to be inaccurate in the article, so I took issue with that.
My motion today is a soft motion, but it is meant to reaffirm what I think is a tradition of the House that staff do not inject themselves into debate that may be ongoing in committee or in the House. It is not their place to do so. This motion is a simple reaffirmation of that tradition" (Proceedings of the Standing Joint Committee for the Scrutiny of Regulations, February 21, 2002).

40 Derek Lee is the only Liberal MP to side with the opposition members. Yet in his speech in the Committee he says that all other options have not been exhausted, and that disallowance is "the nuclear option." Phil Eidsvik (2002) of the BC Fisheries Survival Coalition argues that "Although DFO argued vehemently that disallowance meant disaster—it's interesting that they now claim that a few minor amendments done in a matter of days solves all the problems. If it was this easy to fix the problem, why did DFO argue against it for five years?"

Committee have ever rejected a "disallowance report" after agreeing to have the draft prepared by counsel. The draft report described the 1993 Regulations as "unlawful," a "flagrant contradiction with essential principles of administrative law," "fictitious," a "subterfuge amount[ing] to a blatant evasion of the Act," "a fraud on the law," and "an insult to an Act of Parliament." This is very strong language indeed. (There was a 22-page Appendix explaining the reasons for the proposed action.) The behavior of the Liberal majority on the Committee caused MP Jim Pankiw[41] to resort to some frank but somewhat unparliamentary language: "I am not prepared to sit here and tolerate this crap anymore. You have an obligation to table the disallowance report. We voted in December to disallow these regulations, and they will be disallowed. That is it! Finished and done! Let us not have any more racism—because it is veiled racism—by defending these regulations!"

- **April 11, 2002**: The Minister of Fisheries and Oceans (Hon. Robert Thibault) appears before the Standing Joint Committee accompanied by senior officials. He argues that he has not engaged in an unauthorized sub-delegation of his licensing powers. In its *Sixth Report* to Parliament on May 30, 2002, the Standing Joint Committee emphasized strongly that the Minister and his officials had badly misconstrued the Committee's argument re S.43(f) of the *Fisheries Act* on the legislative authority of the Cabinet to determine who can issue licences. Individuals must be named in the licence—it cannot be communal as provided in the ACFLRs of 1993. According to one observer, the Minister denied there was a problem, and that he seemed unfamiliar with the Regulations. He argued that the Regulations provided for a situation analogous to the practice of a fisherman (or company) engaging a relative or employee in the fishing. But the fishermen or the company were not in fact licensing the fishermen. The *Fisheries Act* specifies that the Minister or the Cabinet may issue licences to individuals. But the Cabinet cannot give the Minister authority to delegate his licensing power to anyone else. The Aboriginal Communal Fishing Licences Regulations purported to give aboriginal organizations (usually the chief) powers to issue licences to individuals through the issuance of so-called "designation cards," which, as noted by Committee Counsel Francois Bernier, are fishing licences in every thing but name. When John Cummins pulled his own fishing licence out of his wallet, no one from DFO recognized it!

41 At that point, Mr. Pankiw was sitting as a PC/DRC representative [DCR = Democratic Reform Coalition]. He was able to gain the support of Progressive Conservative senators. Also, the Alliance MPs gained support from Bloc Quebecois MPs. One observer called the Committee's discussion on March 14, 2002, "a real rumble. It was the first real action on the Standing Joint Committee in years. It is clear that many members enjoyed asking real questions of the Liberals." The PC/DRC group consisted of Progressive Conservative MPs plus Canadian Alliance MPs who were unhappy with the leadership of Stockwell Day. Joe Clark, the PC leader, acted as head of this informal coalition. It has since been disbanded.

According to Phil Eidsvik of the B.C. Fisheries Survival Coalition:

> What was apparent in that sequence of events was that DFO's senior counsel and the Minister were arguing that there was no difference between a corporation choosing who would fish its vessel and the Band deciding who it would "designate" to fish its "communal licence." After a bit more discussion the Minister left, and DFO's senior counsel was left to make the same argument. Cummins asked him whether he was aware that even though the corporation may choose who fishes its vessel, the crew themselves had to go to DFO to obtain a personal licence. The vessel is also registered by DFO. In the case of the communal licence, not only does the Band decide who fishes, but the Band issues a "designation" (actually a licence) and a vessel registration without any DFO involvement. DFO's senior counsel had no idea that crew on a corporate-owned vessel are required to obtain personal licences from DFO. The point of this important discussion is that it destroyed DFO's corporate analogy upon which it had relied upon so heavily (Eidsvik, 2002).

- **April 25, 2002**: The Committee receives further evidence by letter from DFO officials following the Minister's appearance before the Committee. However, that information does not provide a cogent legal rationale supporting the validity of the Regulations.

- **May 30, 2002**: The Standing Joint Committee for the Scrutiny of Regulations presents a *regular* report to Parliament stating that the 1993 "Aboriginal Communal Fishing Licences Regulations" are illegal and requests that they be replaced within 90 days. The Parliamentary Secretary to the Minister of Fisheries says that new regulations are being drafted. By this point, the government members of the Standing Joint Committee have changed. The chair of the House of Commons' Fisheries Committee (Wayne Easter) is now a member; the minister's parliamentary secretary (George Farrah) is a member, as is Dominique Le Blanc, another Fisheries Committee member. In short, the government finally seems to realize that it has no fisheries expertise on the Standing Joint Committee, which is about to report on important fishing regulations.

The Standing Joint Committee's report on the "Aboriginal Communal Fishing Licences Regulations" (see Standing Joint Committee for the Scrutiny of Regulations, 2002) stated that the 1993 Regulations were *ultra vires* of the *Fisheries Act* and contained an unlawful sub-delegation of the authority of the Cabinet. The

Committee's report on the ACFLRs was very pointed about the apparent lack of competence of DFO officials dealing with these Regulations:

- "The Department has failed to provide a sound cogent legal rationale in support of the validity of the Regulations. The responses received from the Department have often been characterized by improvisation and irrelevance. In addition, the testimony that has been offered to your Committee disclosed some significant gaps in the understanding which departmental officials have of the objections of the Committee and of the operation of the *Fisheries Act*."
- "These remarks, of course, evinced a serious lack of comprehension of the state and they were subsequently withdrawn by the Senior General Counsel."
- "Over the course of the Joint Committee's examination of the [regulations], departmental officials have often referred your Committee to case law that turned out to have been misread or misused."
- "After more than four years of discussions, and in spite of the efforts of your Committee, the *Minister's advisers still do not correctly understand the Committee's principal objection to the [regulations]*." [emphasis in the original]
- "It is simply incomprehensible to your Committee that department officials could so obviously misconstrue an argument that has been fully explained on many occasions" (Standing Joint Committee for the Scrutiny of Regulations, 2002).

- **June 4, 2002**: MP John Cummins, Official Opposition Critic for Fisheries and Oceans, and a member of the Standing Joint Committee for the Scrutiny of Regulations, issues a press release criticizing the response of DFO to the Committee Report stating that the 1993 ACFLRs are illegal. "The Committee has the power to revoke the regulations but the Department says it doesn't matter. They act as if the Department is somehow above the law and can, at their own discretion, act illegally when it suits their purposes… DFO's Director General of Policy Coordination, Sharon Ashley, yesterday indicated that the Department will continue to operate the fishery under the illegal regulations as it is yet unsure if the Committee has a point when it found the fishing regulations to be illegal." Note that it was Ms. Ashley who appeared with the Minister before the Committee on April 11, 2002 to defend the Regulations. The Committee's report was sharply critical of DFO officials' responses to the issues raised by the Committee.

- **June 7, 2002**: Only a few days after it receives the Standing Joint Committee's report to Parliament, the government puts in place amendments purporting to

make the 1993 "Aboriginal Communal Fishing Licences Regulations" legal.[42] The registration of SOR/2002-225 is June 7, 2002. The amendments are published in *Canada Gazette, Part II*, on June 19, 2002, at p. 1,471.

- **July 2, 2002**: John Cummins issues a press release summarizing a legal analysis of the new amendments to the "Aboriginal Communal Fishing Licences Regulations" by Christopher Harvey, QC, which concludes that the Regulations continue to be *illegal*. Mr. Harvey said, in part:

  - "As a response to the Reports of the Standing Joint Committee for the Scrutiny of Regulations these amendments are nothing short of contemptuous."
  - "No change has been made to section 7 of the Aboriginal Regulations… The Committee has already found section 7 to be unauthorized because 'the requisite clear and explicit enabling authority for such a provision cannot be found in the *Fisheries Act*.' Nothing has changed."
  - "The problem has not been resolved. There has been no real attempt to resolve it. The changes reflect at best a superficial understanding of the defects in the original scheme."
  - "I am firmly of the view that the regulatory scheme as amended is invalid" (Harvey, 2002b).

- **August 4, 2002**: MP John Cummins is among 39 people charged after protesting against an aboriginal fishery on BC's lower Fraser River. Cummins says that he has told the federal government that it is acting illegally and in a racist manner by granting aboriginal fishermen exclusive rights to fish for sockeye salmon during the weekend. The BC Fisheries Survival Coalition organized the protest, which involved some 50 commercial vessels (Kennedy, 2002).

- **December 12, 2002**: The Standing Joint Committee for the Scrutiny of Regulations considered the amendments made to the ACFLRs in June. The Joint Committee's legal advisor, Francois Bernier, said that the

> amendments make it appear that the authority of Aboriginal organizations to license fishing activities is now conferred directly by regulation of the Governor in Council, a moment's reflection shows that in fact, it is still the minister who decides, otherwise than by regulation, which Aboriginal organizations will have that authority.

42 See Order in Counsel PC 2002-994 "Regulations Amending Certain Regulations Made Under the *Fisheries Act* (Miscellaneous Program)," dated June 7, 2002.

> As for the government response to the sixth report [of the Standing Joint Committee], I think it would be generous to characterize it as inadequate, and I will leave it at that. The quality of the arguments presented by the government is in keeping with what the committee has received before. (Evidence, Unrevised, of the Standing Joint Committee, December 12, 2002)

Bernier declined to recommend a particular course of action—explicitly leaving it up to the Committee members. He explained that the substantive issue of sub-delegation had *not* been addressed by the amendments. Liberal MP Derek Lee said he was "a bit more positive about the government's response." He said, "It is odd to me that the government went back to cabinet and made a change. Going to cabinet to make a change in response to an SJC report is relatively high on the Richter scale, so I suggest that the government did try to address the problem" (Evidence, Unrevised, of the Standing Joint Committee, December 12, 2002).

Canadian Alliance MP John Cummins quoted a long paragraph from lawyer Chris Harvey's (2002b) analysis of the amendments made in June. Alliance MP Ted White proposed that the Committee write a disallowance report. He was supported by Cummins.

The Standing Joint Committee adopted a motion requesting that its counsel, Mr. Bernier, prepare a disallowance report to be reviewed by the Committee at its next meeting in February 2003.

Period Early 2003

- **February 6, 2003:** The Standing Joint Committee for the Scrutiny of Regulations met for the first time in 2003. The previous day the Committee received a letter from the Minister of Fisheries arguing that the normal procedure of the Committee had not been following in the case of amendments to the Aboriginal Communal Fishing Licences Regulations registered as SOR 2002-225 (in June 2002). The Minister requested that his officials be given an opportunity to discuss those amendments with the Committee. Legal counsel Francois Bernier said, "given that those amendments do nothing to resolve the sub-delegation issue, which is the main concern to this Committee, I am not quite sure what there is to discuss." Bernier then captured perfectly the frustration of the Standing Joint Committee with respect to the ACFLRs: "We seem to be in this circle and I am not sure if it is the tenth or fifteenth circle of hell."

After some discussion by members, the Joint Chairman, Mr. Gurmant Grewal, said, "We all know this issue has dragged on far too long… I am not prepared to give the Minister a few more weeks." The consensus of the Committee was that the Minister of Fisheries and his staff appear before the Committee on February 20th, although the Committee had before it a draft disallowance report. [As we shall see, DOF officials appeared on February 27th.] The Committee decided to make that report available fairly widely. Finally, the Committee decided that it would later modify the report to indicate that it had met with departmental officials (*Proceedings of the Standing Joint Committee*, February 6, 2003).

- **February 27, 2003:** The Standing Joint Committee received extensive testimony from three officials of the Department of Fisheries: Ms. Mary Ann Green, Director, Legislative and Regulatory Affairs; Ms. Ruth Grealis, Senior Legal Counsel of DOF; and Mr. Kevin Stringer, Executive Director of Aboriginal Programs. They submitted a paper on sub-delegation and the legal personality of Aboriginal organizations as it related to the ACFLRs. They made it very clear that the Chrétien government believes that the ACFLRs, as amended in June 2002, are sound and properly authorized by the *Fisheries Act*.

  George Farrah, Parliamentary Secretary to the Minister of Fisheries, attended the SJC meeting and spoke in favour of delaying the draft disallowance report. He said that in June 2003, a new *Fisheries Act* would be introduced. John Cummins proposed that the Committee proceed to issue a disallowance report on the June 2002 amendments to the ACFLRs.

  A confusing discussion ensured. Senator Nolin observed: "We are happy with the [disallowance] report, but there is no consensus to adopt it" (*Proceedings of the Standing Joint Committee for the Scrutiny of Regulations*, February 27, 2003). The Liberal Whip's staff advised Liberal members of the Standing Joint Committee for the Scrutiny of Regulations how to delay release of a disallowance report on the amendments to the ACFLRs made in June 2002 (Cummins, 2003). As a result, the Committee decided to again *postpone* final adoption and release of its report proposing disallowance of the June 2002 amendments until at least March 20, 2003. Recall that the draft disallowance report had been approved in December 2002.

4. Conclusions about Accountability

Overview

Holding the minister of a majority government accountable to Parliament for the subordinate legislation she creates appears to be almost impossible. And then there is a very big gap between accountability to Parliament and accountability to citizens (see Stanbury, 2002b).

This case study reveals the arrogance of the nearly unconstrained power of a majority government under Canada's version of the Westminster model of government. It is virtually certain that this is a case of *willful defiance* of the principle of the rule of law by several ministers, aided by their senior officials over a period of almost a decade.

For almost a decade the federal government has been able to use a set of illegal regulations to create race-based commercial fishing licences for selected aboriginal groups. (Since 1992, of the 197 Indian bands in BC, a maximum of 28 bands were given this special access to the fishery.[43]) Moreover, the critics indicate that the legal errors in the Regulations created in 1993 were not subtle. They were glaring if the analysis of the Standing Joint Committee for the Scrutiny of Regulations' report on May 30, 2002 is correct.

In a democracy that prides itself in "the rule of law," the creation of laws by the Cabinet subsequently found to be unconstitutional[44] *usually* amounts to a serious error since the Cabinet has a virtual monopoly over the supply of draft legislation submitted to the House of Commons.[45] The Cabinet itself (more precisely the Special Committee of Council) is also a law *maker* in the case of subordinate legislations, notably regulations. I

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43 Note that some 30 percent of vessel owners and operators in the traditional BC commercial fishery are aboriginals. Further, in 1992, DFO had two choices. It could have adopted the proposal put forth by the Native Fishing Association to expand native participation in the all-Canadian traditional fleet with government or it could have created separate race-based commercial fisheries. DFO made the decision to go ahead with separate fisheries, which led to the ACFLRs. (I am indebted to Chris Harvey for this point; see Harvey, 2002c.)

44 Of course, the most authoritative decision would be that of the Supreme Court of Canada. In the case of the 1993 ACFLRs, the most authoritative assessment is that of the Standing Joint Committee for the Scrutiny of Regulations in its report of May 30, 2002. Given the strong reputation of the Committee, its conclusions would appear to be highly authoritative. In the past, none of its "disallowance reports" were challenged by the government.

45 Only a tiny percentage of private member's bills ever get voted upon in the House of Commons. See Toews (2001) who notes that only 21 of 772 private member's bills or motions in the 36th Parliament were made votable. Recently, the prime minister has promised that more private members' bills will come to a vote in the Commons. The Canadian Alliance (2002) and Paul Martin (2002) have made similar proposals.

use the word "usually" because there are cases where the constitutionality of new laws is subject to debate where both sides acknowledge that the holding of the courts could go either way with equal likelihood. But there are other cases (e.g., the "Aboriginal Communal Fishing Licences Regulations" created in mid-1993) that from the time the draft is made public that independent lawyers conclude are very likely illegal. When such legislation is finally overthrown, it is fair to say that a *serious* error has been made.

In the case of the ACFLRs, some of the government members of the Standing Joint Committee for the Scrutiny of Regulations changed their minds and prevented the Committee from issuing a "disallowance report" which very likely would have resulted in the repeal of those regulations. The forceful and detailed criticisms in the Committee's report of May 30, 2002, however, make it clear that the 1993 ACFLRs were illegal. The amendments made shortly after the Committee's report was tabled appear not to have purged the ACFLRs of illegality (see Harvey, 2002b), and it appears that the Standing Joint Committee will issue a disallowance report on the June 2002 amendments in 2003.

The other parliamentary committee that might have identified the problem with the Regulations in question and urged the Cabinet to remedy it was the House of Commons Standing Committee on Fisheries. But it never considered whether the "Aboriginal Communal Fishing Licences Regulations," created in mid-1993, were authorized by the Act that is the focus of its responsibilities—although it was aware of the Standing Joint Committee's detailed critique of the legality of the ACFLRs in 1997.

Standing Joint Committee as an Accountability Mechanism

As a mechanism for holding ministers accountable for the legality of the regulations they put forward, the Standing Joint Committee for the Scrutiny of Regulations has notable weaknesses. First, the review/assessment process often begins long after the regulations become law. In the case of the ACFLRs, the review began 4.5 years after the regulations became law.[46] This length of delay is not uncommon.[47] Second, the review/assessment process can be prolonged.[48] In the case of the ACFLRs, the Standing Joint Committee's report, proposing replacement of the regulations,[49] was made over five years after the Committee began its review. The combination of delays described in section 3 above are

46 It also appears that one man (Ted White of the Reform Party) was instrumental in getting the ACFLRs on the Committee's agenda. He, in turn, was reflecting the strong interest and analytical efforts of fellow Reform MP John Cummins. See the section "One Person Can Make a Real Difference" below.

47 See the data in footnote 12 above.

48 Curry (2002) states that since 1993, the average duration of the Standing Joint Committee's reviews of regulations is 5,975 days. Before the Liberals returned to power, it was 1,721 days.

inconsistent with an effective accountability regime which requires prompt evaluation of performance so that feedback is timely and learning is facilitated.[50]

Third, relative to its workload, the Standing Joint Committee has a modest staff and other resources. That may well explain the delay in beginning reviews of regulations and the generally slow pace of the review/assessment process.[51] Thus, it may be possible to reduce the initial lag, but the result may be to extend the review period as more items compete for the scarce time on the Committee's agenda. The review period is obviously extended when Committee requests for necessary information go unanswered or are delayed for strategic reasons, as certainly appears to be the case with the 1993 ACFLRs. Further, government MPs can control the Committee's agenda and so put off consideration of a set of regulations that might prove to be embarrassing to the government (see February 7, 2002 above).

Fourth, the Standing Joint Committee has a very limited repertoire of responses following its review or evaluation of a set of regulations: (i) It can find that the regulations are free of illegality or other legal flaws; (ii) It can find that serious problems exist, but choose to deal with the matter informally by letter to the relevant officials in the expectation that the minister will avoid (minimize) embarrassment by amending the regulations to address the Committee's concerns. This is the Committee's favoured procedure when it concludes that part of a set of regulations is illegal;[52] (iii) The Committee can prepare and issue a "disallowance report," usually only after it has tried response (ii) and the minister has failed to act. Such reports are very rare—only 9 were issued between 1987 and 2001; (iv) The Committee can issue a report criticizing the regulations—even stating that it believes them to be illegal and recommending that they be replaced in 90 days. This was the Committee's choice regarding the 1993 ACFLRs in its May 30, 2002 report to Parliament.

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49 Note: The May 30, 2002 report was *not* a "disallowance report" because Liberal members refused to agree to such a report. Note also, however, that on December 6, 2001, the Committee voted 8 to 7 to issue a "disallowance report."

50 The effect of the delay was to involve more ministers in tacitly or expressly defending the ACFLRs, thus greatly complicating the accountability problem.

51 Recall Bernier (2002) for data on the Committee's workload and pace of work.

52 This method allows the minister to "save face" and avoid public condemnation by the Committee in the form of a "disallowance report." It may also avoid a fight within the Committee if opposition members were to push for a "disallowance report." However, the efficacy of the procedure in terms of holding ministers accountable seems questionable, for they suffer only a modest rebuke for what could be a serious error. One wonders if there will be much incentive to avoid similar errors in the future.

Fifth, the current rules provide that the membership of the Standing Joint Committee reflects party standings in the House of Commons and the Senate. While the Committee's mandate is the rather narrow (but very important) issue of the legality of regulations, the implications of its conclusions are necessarily political. Errors by a minister can be exploited for partisan advantage. Thus, one should not be surprised that government MPs on the Committee use their numbers to "protect" a minister from what could be an embarrassment—even if the current minister did not originate the regulations.[53] It is clear that the Liberal majority used its power to delay a proposed "disallowance report" and, more importantly, to prevent such a report from being issued. See December 6, 2001, and March 14, 2002 in the chronology in the section "Period January through December 2002" above. They did the same thing in February 2003.

Sixth, the often lengthy delay between the enactment of new regulations (or amendments) and the Standing Joint Committee's final assessment means that those responsible for good or ill are long gone from the position they had when the regulations were created. In the case of the ACFLRs made into law in mid-1993 and subject to an adverse report on May 30, 2002, the minister responsible for creating the regulations (John Crosbie) was a member of a Progressive Conservative government and had long since retired from politics.[54] It is hard to believe that the Committee's adverse report made under a Liberal government will blacken his reputation. And even if it did, what will that mean for future ministers tempted to create illegal regulations when faced with what they believe is a strong political imperative to be seen to be doing the "right thing"?

And what of the one Tory and six Liberal Ministers of Fisheries and Oceans, each of whom defended the ACFLRs in one way or another. In particular, what do we make of the Honorable Robert Thibault, who had been in office only a little over four months when the Committee's adverse report was issued? He supervised a set of amendments that conspicuously *did not* remedy the faults identified by the Committee. Should one infer that i) he has been "captured" by his senior officials who refuse to admit error, or ii) he has nothing but contempt for the work of the Standing Joint Committee, or iii) he is incompetent? Surely no positive inference can be drawn from his actions. And what of the Prime Minister, who appoints all ministers and can fire them at will? Did he tell the minister to "tough it out" by only *appearing* to deal with the Committee's criticisms?

53 It must be appreciated, however, that under the Westminster model the current minister is saddled with the policies and legislation of previous ministers so long as he or she fails to take action to repudiate or amend the legislation, regulations, or policy statement issue.

54 He retired in June 1993 when Kim Campbell replaced Brian Mulroney as prime minister and leader of the Progressive Conservative Party.

Seventh, the Standing Joint Committee for the Scrutiny of Regulations can do little to "punish" a minister if he or she has the support of the Prime Minister.[55] Even the legal effect of a harshly critical report by the Committee can be obviated—as happened in this case. The ACFLRs were not repealed as a result of the Committee's report saying they were illegal. Instead, the Minister of Fisheries rushed through the Cabinet a set of amendments to the ACFLRs which retained the substance of the 1993 version and which also appear to be fraught with illegality (see Harvey 2002b).

Conclusions: A Metaphorical Approach

It is hard to avoid the conclusion that the 1993 ACFLRs have "taken on a life of their own" and that the political system has suffered a massive pathology.[56] It is as if the ACFLRs have become a sort of creature from the black lagoon that is immune to any of the constraints that are supposed to control its depredations. It is a creature that will not die (as they say in horror films).

But this "creature" is a set of words on paper created by government officials supposedly under the supervision and control of a minister chosen by the prime minister from among his party's MPs.

Before they became the law of the land, these regulations were said to be illegal by external critics (but not, of course, by the sponsoring department or, more importantly, by officials of the Department of Justice who work within the Privy Council Office (PCOJ)). None of the Crown's lawyers explained their reasoning in writing in public, however.

While it took 4½ years for the ACFLRs to get on the agenda of the Standing Joint Committee, its highly regarded counsel concluded that they were illegal for several reasons within three months (a very short time, given the workload of the Committee and its counsel). Eight months later, DFO was informed of the Committee's serious concerns. (The reason for this long lag is not clear.) In other words, another loud alarm bell (from an authoritative source) should have been heard within the sponsoring department. If it was heard, it was ignored.

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55 On the enormous concentration of power in the hands of the PM, see Savoie (1999), and Thompson (2002).

56 The ACFLRs represent a pathology in the sense that they appear to be an attempt to kill the principle of the rule of law. They amount to the prevention of efforts to hold a minister, his officials, and the Cabinet accountable for the laws they create and enact. This pathology has another very important attribute. When citizens are apprised of its details, it is likely that they will be angry, frustrated, and also "turned off" by what is claimed to be responsible government that is supposed to be ultimately accountable to citizens as voters. See Canadian Press (2002), Lawlor (2002), Simpson (2002), and Marzolini (2002, pp. 7-8).

The Department's reaction was a combination of protracted delay, extreme defensiveness, and willful evasion of the legal issues raised by the Committee. The DFO officials appearing before the Standing Joint Committee explain why the Committee's view that the ACFLRs were illegal was wrong. Letters went back and forth for several years. The Minister's reply came 26 months after the Committee's letter to him!

In the face of a vote to prepare a disallowance report 4 years after DFO received initial word of the Committee's concerns, partisanship reared its head and the government members delayed consideration of the draft report. But compared to all the other delays in this case, this one was nearly inconsequential. More importantly, after first supporting a "disallowance report," the Liberal members later voted against using the Committee's "A-bomb" on the ACFLRs.

Despite a detailed, highly adverse report by the Committee, the "creature" effectively incarnated itself (with the help of DFO officials and the Special Committee of Council) losing almost none of its features held to be so offensive by the Standing Joint Committee. Thus, instead of being killed by the Committee's report, the "creature" was given new legal life also apparently replete with illegality. More "games" were played by the Liberal majority in February 2003 with respect to the draft disallowance report on the June 2002 amendments to the ACFLRs.

How can the "creature" be stopped? We are told that the life of a werewolf can be extinguished by driving a stake through its heart. What is the equivalent for the runaway system that produced, then re-produced the apparently illegal ACFLRs? If the Liberals were reduced to two seats (as the Tories were by the October 1993 election), the new party in power might repeal the ACFLRs. But what about the officials who variously drafted, reviewed, and publicly defended both versions of the impugned ACFLRs? They are unlikely to suffer any adverse consequences. Could they not argue with some force that they were merely serving the will of the government of the day? They may even have sent memos to various ministers warning them that the regulations were of highly questionable legality. And what of the Standing Joint Committee? It has reviewed the amendments to the ACFLRs made in June 2002. In December 2002, the Committee voted to have its counsel prepare a draft disallowance report. Will the Liberal members of the Committee vote it down? What is to stop a repetition of the farce? Nothing—as the chronology for early 2003 describes.

Turnover and the Accountability of Ministers

It is hard to avoid the unhappy conclusion that it is nearly impossible to hold individual ministers accountable for the creation of illegal regulations, no matter how egregious are the errors. A key reason is that the turnover among ministers is so great. For example,

between April 1991 and September 2002, there have been 8 Ministers of Fisheries and Oceans (two Progressive Conservative and 6 Liberal).[57]

From the fierceness with which the Chrétien government defended the ACFLRs, one might be surprised to learn that they were created by a Progressive Conservative Minister of Fisheries—the redoubtable John Crosbie. He held the office between April 21, 1991 and June 24, 1993.[58] The ACFLRs were registered on June 16, 1993 (SOR/93-332). When Ms. Ducros drafted the regulations in the spring of 1993, she did so under Mr. Crosbie's direction. Thus, if any *single* person should be held accountable for putting forward blatantly illegal regulations, it is him.[59] As of May 30, 2002 when the Standing Joint Committee finally branded the ACFLRs as illegal, where was Mr. Crosbie? He had been retired for 9 years. There is simply no practical way of holding him to account for this serious error. The worst that could happen to him is a footnote in some future political history briefly referring to the debacle.

But other Ministers of Fisheries and Oceans should fairly share the blame (responsibility) for defending the indefensible, and doing so in a fashion so contemptuous of Parliament. Since Mr. Crosbie left office in mid-1993 there have been 6 ministers and one acting minister, all but one of whom have been Liberals (under three successive Liberal governments led by Jean Chrétien). When Ted White launched his effort to get the Standing Joint Committee to focus on the ACFLRs in January 1997, the Minister was Fred Mifflin. When the Committee made its initial finding that the Regulations were illegal and should be rescinded on December 9, 1997, the Minister was David Anderson. He allowed his officials to "stonewall," to try to divert the Committee's focus on illegality and to provide extremely poor legal analysis. Mr. Anderson is still in Mr. Chrétien's Cabinet as Minister of the Environment.

When the Committee sent a letter to the Minister on September 26, 2000 saying that the ACFLRs were seriously defective and lacked proper statutory authority, the incumbent was Herb Dhaliwal. He did not offer a substantive reply until a year later. Yet in mid-January 2002, the Prime Minister rewarded Mr. Dhaliwal's weak performance as Minister of Fisheries by making him Minister of Natural Resources.

When he appeared before the Committee, the current Minister, Mr. Robert Thibault, seemed to have only a poor grasp of the issues raised by the Committee.[60] However, Mr.

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57 The date each minister began his responsibilities is given in the chronology in section 3, "The Aboriginal Communal Fishing Licences Regulations: A Chronology."

58 He was succeeded by the Honorable Ian A.R. Reid until the Liberals came into office on November 4, 1993.

59 While amendments were made prior to the Committee's report, they did not address the key issues raised by the Committee.

Thibault got his officials to prepare amendments with great speed following the Committee's strong condemnation of the ACFLRs in its report to Parliament. But Mr. Thibault must "carry the can" for allowing the officials to write amendments that Chris Harvey, Q.C. (2002b) describes as "nothing short of contemptuous," and "invalid."

Finally, we need to consider the accountability of the Minister of Justice. It was his officials (legal advisors in DFO and in PCOJ) who advised on the development of the ACFLRs and, in particular, vetted them for legality. The attorney general function should require that he oversee the legality of regulations (as well as statutes). Was this a case of the perversion of "Cabinet solidarity"? It appears that in the spring of 1992, the federal Cabinet, in committing itself to the "Aboriginal Fisheries Strategy," committed itself to new regulations to permit the communal sale of fish caught by Aboriginals under their rights to fish for food. The die was cast. The election of the Liberals did not change the ACFLRs.[61]

5. Further Discussion and Reflections

Complex Process: Multiple Opportunities for Warning Bells

The process of making new law in the form of subordinate legislation is a complex one involving a considerable number of different people and organizations. This fact vastly complicates efforts to achieve accountability. Here is an outline of the key steps in the process that applied when the ACFLRs were created:[62]

a) Officials in the sponsoring department gain the minister's approval to generate a rough draft of the proposed regulations needed to implement the department's policy objectives.[63]

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60 Mr. Thibault was appointed effective January 15, 2002. His inexperience in the post may explain his limited knowledge. Or was the problem the limited knowledge of his officials? Or did the officials fail to brief him properly? Or was Mr. Thibault saddled with a hopeless brief to which the government had long been committed?

61 Critics of the 1993 ACFLRs were not taken seriously. The government (then the end of the Mulroney period) had committed itself to the cause of Native fishermen. It had broken with the non-Native fishermen, i.e., they had been "written-off." The Liberals under Jean Chrétien took office early in November 1993. By then the ACFLRs had been in place over four months. But these regulations were to be operative for only one season. The Liberals had to take positive action to extend the life of the ACFLRs. This was done on May 26, 1994. Then came the mid-term review in the Spring of 1996. Both these opportunities to review the legality of the ACFLRs were not grasped.

62 The process as it existed in 1993 when the ACFLRs were created is described in Stanbury (1992).

b) The officials create a rough draft of the regulations together with the required Regulatory Impact Analysis Statement (RIAS).[64]

c) The draft regulations go to the PCO where officials in the Department of Justice section (i.e., PCOJ)[65] are mandated to review them so that i) the proposed regulations meet the government's rules for the drafting of regulations, ii) the proposed regulations are constitutional, iii) that the regulations are consistent with Canada's international obligations, and iv) that the French and English versions have the same meaning.

d) After being "blue stamped" by PCOJ, the proposed regulations must be officially signed-off by the sponsoring minister formally recommending pre-publication by the Cabinet.

e) The draft regulations are now subject to initial review by Regulatory Affairs Branch within the Treasury Board Secretariat.[66] The review considers whether the regulations are consistent with the Federal Regulatory Policy and broader government initiatives. The quality of the RIAS is assessed and further work by the department may be requested.

f) The revised version of the regulations, as approved by PCOJ, are now "pre-published" in the *Canada Gazette, Part II* (along with the RAIS) and are subject to the notice and comment period of at least 30 days.

g) The sponsoring department may make revisions in light of the comments received. If so, the new version requires a "blue stamp" from PCOJ (now Department of Justice) officials. Also, even if the regulations are unchanged, the RIAS must be modi-

63 Each department tables its Report on Plans and Priorities in Parliament each spring, which contains a list of planned regulatory initiatives. These are also on the departmental web sites. When the earlier ACFLRs were first being considered in 1991, proposed new regulations had to be listed in the Federal Regulatory Plan. See Stanbury (1992).

64 It is more common now for the initial draft to be done by the Legislative Drafting section of Justice, and departments may even have legislative drafters assigned to them in house from the Department of Justice. So the use of non-lawyer staff to draft is being reduced. This has both advantages and disadvantages.

65 This was the procedure applied to the ACFLRs. Currently, the draft regulations and supporting documentation go to the Senior General Counsel of the Regulations Section of the Legislative Services Branch of the Department of Justice. See Privy Council Office (2002).

66 Currently, this task is performed by the Regulatory Affairs and Orders in Council Secretariat of the PCO (see Privy Council Office, 2002).

fied to reflect the comments received. If changes are made in the regulations, the sponsoring minister has to "sign-off" again.[67]

h) The regulations now go to the Special Committee of Council, accompanied by a briefing note by a PCO official. That note is likely to refer to the comments/criticisms received by the sponsoring department. If approved, the regulations become law (are registered) within seven days of being approved. They are then published in the *Canada Gazette, Part III*, within no more than 23 days of registration.

I have two main purposes for describing the regulation-making process. First, in describing its complexity and fine division of labour, the main effect is to bring several separate entities into the process. Thus, new regulations are like the making of a movie, a collective creative process. This makes the assignment of praise and blame to specific persons in the matter of accountability a difficult exercise. The theory of the Westminster model is that the key person to be held accountable is the minister of the department sponsoring the regulations. As Sutherland (1991) makes clear, the reality of ministerial accountability is far different. In any event, the minister's regulatory initiatives are subject to a multi-stage "filtering" process, and must be approved by a committee of his or her colleagues—the Special Committee of Council.[68]

My second purpose is to consider the number of points in the regulations-making process at which alarm bells might go off, questioning the legality of the proposed regulations. There are two stages at which the proposed regulations are subject to scrutiny for legality by expert civil servants: a) by legal advisors in the sponsoring department (who in fact, are employees of the Department of Justice) at the time the initial draft is being put together,[69] b) by PCOJ, officials of the Department of Justice who work within the PCO and whose mandate is to vet regulations for legality. Each of these people or organizations should set off alarm bells if there is any doubt as to the legality of the proposed regulations.

Then there is the possibility of another alarm bell, namely, the notice and comment period with the "pre-publication" of the regulations.[70] Often the representations received at that point consist of efforts by parties of interest to lessen the expected bur-

67 Under the current process, the proposed regulations return to Regulatory Affairs in PCO which considers the nature of the comments received following "pre-publication," and the department's response to those comments. PCO prepares briefing materials for the ministers on the Special Committee of Council. See Privy Council Office (2002).

68 In practice, even major sets of regulations are seldom discussed for more than an hour by the SCC.

69 Today, it is more likely that the initial draft will be done by officials in the Legislative Drafting section of the Department of Justice. In the case of the ACFLRs, the drafting was apparently done by a DFO official, Ms. Francie Ducros, who obtained a law degree from McGill University in 1986 (see Fraser, 1999).

den associated with the draft regulations—hence they may be given little weight by officials.[71] In the case of the ACFLRs, however, DFO received a critique from the BC Fisheries Survival Coalition which challenged the legality of the proposed regulations. While it came from a lawyer employed by a party of interest, it was a careful analysis by a lawyer in a major firm (see Harvey, 1993). It should have set off alarm bells suggesting that DFO officials send the criticisms to the legal "vetters" in PCOJ. Unfortunately, the lawyers in that unit do not have to make their analysis or arguments public—hence their potential critics outside government have no opportunity to examine their reasoning. In short, there is no public peer review process. While critics make their analysis public, PCOJ merely states that it concludes the regulations questions are legal—end of discussion.[72] Thus, the burden of testing who is right by going to court falls on the external critics. Now the endlessly deep pockets of the Crown come into play—often deterring a challenge. A legal challenge could move three levels and, even if the critic won, they could not possibly recover all of their out-of-pocket costs, let alone the other adverse economic consequences of a multi-year legal battle. Thus, illegal regulations might stay on the books indefinitely because they are not challenged and overthrown.

One Person Can Make a Real Difference

This case study indicates that one person—even an opposition MP—may be able to make a difference in calling an arrogant majority government to account, albeit after long delays. But that person must be both highly motivated and well informed about the legal issues involved in order to make the case to the Standing Joint Committee for the Scrutiny of Regulations. In this case, it appears that John Cummins' strong concerns about the adverse effects of the ACFLRs on non-Native fishermen (of which he had been one) drove him to question the *legal* basis of the Regulations even while the Regulations were in draft form in May 1993.[73]

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70 In some cases, the sponsoring department circulates a full draft of the proposed regulations when it consults "stake-holders" *prior* to the official notice and comment period.

71 Note, however, that ministers tend to be very interested in the number of comments received, from whom they come, and the substance of the points made.

72 The arrogance of this approach usually infuriates everyone on the receiving end. Critics must make reasoned arguments in public. PCOJ lawyers have no obligation to do the same. The result is likely to be both a decline in respect for government and lessened accountability of the lawyers in PCOJ.

73 As a gillnet fisherman, Cummins probably had access to the analysis by Chris Harvey (1993) done for the BC Fisheries Survival Coalition. However, he did not become an MP until November 1993—over four months after the regulations were enacted.

John Cummins first worked through Ted White on the Standing Joint Committee to advance his issue beginning in January 1997. Then he got himself appointed to the Committee where he could work from the inside. Once he joined it on October 2001, John Cummins made a strong effort to see that every meeting of the Standing Joint Committee addressed his concerns with the ACFLRs. He effectively tried to change the agenda set by the staff in conjunction with the co-chairmen of the Committee. He kept "his" issue on the front burner. Normally, a senior staff member brings forward an item, and a letter is written to senior officials or (later) to the minister. Then the item usually drops out of the Committee's sight for months awaiting a reply. In some cases, no reply is received. Cummins' approach was to follow up on such letters, to "force" the process so as to advance his issue. He effectively took the risk of alienating both staff and Committee members in order to right what he saw as serious evidence of illegality by DFO and the Cabinet.

Cummins' mastery of the issue—both the policy side and, more importantly, the legal side (although he is not a lawyer)—made him a force to be reckoned with on the Committee. He applied his skills with unusual energy. Ottawa may regard the Standing Joint Committee as a "backwater" (see Grimand, 1998), but Cummins used the Committee to greatly raise the visibility of "his" issue.[74] The fact is that Cummins knew (and knows) his file. He worked hard on it personally—and he allocated much of his office's resources to the ACFLRs. Cummins' behavior stands in contrast to that of most MPs. They move from committee to committee so often that they have insufficient time to master the issues.[75] In the case of the Joint Standing Committee, the focus is on fairly arcane legal matters, not policy (except in the broadest sense of the fundamental concept of the rule of law). To be a "player" on this Committee, a far greater commitment is required. For all but a very few, the game does not seem to be worth the candle. In short, Cummins had a sound strategy and he executed it very well—although the battle does not appear to be over.

Performance of Officials

The behavior of DFO officials in this matter certainly appears to be highly questionable on several grounds: lack of knowledge of the legal issues involved; failure to learn about those issues when authoritative information was provided by the Standing Joint Committee; failure to address the substance of the Committee's criticisms; apparent failure

74 Thus Cummins belied the generalization that MPs—and even ministers—rarely have strong views on policy issues—aside from how an issue may serve to get them re-elected. Cummins' interest, knowledge, and actions seem to have gone far beyond simple expected electoral advantage.

75 To be fair, the party whip is often responsible for re-assigning MPs, particularly the government whip.

to brief the current Minister (Mr. Thibault) properly for his appearance before the Committee; and a complete failure to acknowledge gross errors.

It is possible that DFO officials were trying to make the best of a very bad position in order to "protect the minister." They may have advised the minister of the very dubious legality of the ACFLRs when the regulations were in draft form. Successive ministers may have chosen to disregard that advice. These ministers may have sent out the officials to be "flak catchers" to defend a position taken by ministers on political grounds. The instinct among public servants to "protect the minister" is a very strong one.

A Privy Council Office document entitled "Responsibility in the Constitution" quotes Jack Pickersgill as follows on the duties of public servants to the government of the day:

> While bureaucrats should not be partisan, they do not have the right to be neutral between government and opposition. Public servants owe loyal service to the government in office whether they like its politics or not. Governments are put in office by the electors and public servants have no right to sabotage or even to obstruct the decision of the voters. For the best public servants it is not enough to avoid obstructing the political will of the minister and the government. The best of them will try to contribute to the limit of their abilities to the formulation, amelioration, and implementation of new policies or changes in policy of the government of the day, since the government, not the public service, is answerable to the legislature and the public. (Privy Council Office, 1993, section VII)

If this is a case of politics overriding legality, it appears that the officials should not be blamed for trying to "make a silk purse out of a sow's ear." The problem is more complex, however. When they were questioned during their appearance before the Standing Joint Committee, were the officials not obligated to tell the truth? If so, surely it would have become clear that their own analysis was different from the official DFO line specified by the Minister. The larger question is whether in public are senior officials expected to act only as spokespersons for the Minister (or as lawyers with a bad brief)—or are they to act in accord with the proposition that they are non-partisan professionals who are masters of the technical aspects of their jobs?

The Standing Joint Committee was highly critical of DFO officials. But, for example, will Ms. Ashley's career in the public service be adversely affected? Will the career of the chief counsel for DFO—who had to publicly retract some of his erroneous understandings of the relevant law—be adversely affected?[76]

The nature, extent, and severity of the criticisms of the legality of the ACFLRs leveled by the Standing Joint Committee in its report of May 30, 2002, reflects badly on the Depart-

ment of Justice officials in the PCO who "blue-stamped" them in the spring of 1993.[77] How could they have been so wrong? It was their job to see that the draft regulations "have a proper legal basis… [i.e., are constitutional] and that they are in accordance with the *Statutory Instrument Act* [and Regulations] (Privy Council Office, 2002). Is it possible that in the case of the ACFLRs these officials' advice was over-ridden by ministers? If so, then it is hard to avoid the conclusion that the system is corrupt or can be corrupted by ministers. If the PCOJ concluded that the ACFLRs were legal, their professional competence must be seriously questioned on the basis of the Standing Joint Committee's report of May 30, 2002.

Legal Issues

As noted in the section above, the burden of establishing that substantive legislation is not legal lies with parties outside government. They must take the issue to court. John L. Howard, Q.C. (2002), argues that

> the central problem of administrative law in Canada is that nearly all regulation is achieved through subordinate legislation, which legislation is not subject to any judicial oversight of administrative action. Administrative law in Canada has been confined to judicial review of administrative tribunals playing the court's role in relatively minor cases. As a result it misses the mark. Indeed, it only encourages the tribunals to try to "outjudicialize" the courts when hearing cases, paying even more attention than the courts to details of procedure and evidence. Realizing this was also true in the USA, in the 1946 *Administrative Procedure Act* Congress expressly subjected the exercise of rule-making powers to judicial review, applying the usual standards of being *intra vires*, not arbitrary, etc. That worked well until the "activist" courts began to get excited by the great potential—for them—inherent in social regulation. As a result, it has become almost impossible to promulgate regulations in the USA without years of litigation, a system no one would want to emulate. We, however, do need some such constraints on rule-making, for as you only

76 An effective accountability regime requires that the persons responsible for errors, bad advice, or other types of poor performance be subject to negative sanctions (see Priest and Stanbury, 1999).

77 Currently, this review is conducted within the Department of Justice—see Privy Council Office (2002). Note that the "Cabinet Directive on Law-Making" specifies that "draft regulations [are to] be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice" (Privy Council Office, 1999a).

imply, the most arbitrary and undesirable form of governance is through subordinate legislation that is controlled by a majority government."

Liberals Defending a Tory Policy?

Why have three successive Liberal governments so strongly (and wrongly) defended the ACFLRs created by the Tory government of Brian Mulroney? True, the Liberals effectively made the ACFLRs their own when they made them "permanent" in 1994. But why did they do so? Did they simply miss the signals that these regulations were legally defective? Note that the Liberals had no knowledge of the extensive discussions in the Progressive Conservative national caucus that had gone on prior to the creation of the 1993 ACFLRs. They could, however, have read critiques of the draft ACFLRs prior to their enactment (e.g., Harvey, 1993).

An Extreme Case of "Saving Face"?

This case seems to show most strongly that the desire not to "lose face" is a very important aspect of Canada's political culture (see Stanbury, 2002a). Although the 1993 ACFLRs were replete with questionable provisions leading to the conclusion that they were *ultra vires*, it took almost 5 years of effort by the Standing Joint Committee to force the minister and his officials to amend the Regulations. And, even then, it certainly appears that their arrogance (and/or technical incompetence) lives on—for the amendments themselves appear to be illegal (see Harvey, 2002b).

Was the arrogant and unyielding response of the senior officials of DFO and of the Minister simply an *institutional* one—the standard operating procedure for large organizations that feel somewhat threatened by those with superior knowledge? Having made a not-very-subtle error, key personnel in the political-bureaucratic system redoubled their efforts to justify it, or even to show that in the final analysis no error was made because the impugned regulations remain in force. The flag continues to fly despite the heavy bombardment (with apologies to Francis Scott Key).

A Case of the End Justifying the Means?

As noted above, two Tory and 6 Liberal Ministers of Fisheries (advised by "expert" officials) fought very hard to keep in force for so long a set of regulations which, from the outset 9 years ago, were described by external critics as very seriously defective, i.e., *ultra vires*? Is there any example of comparable behavior in the past? Is this a case of the glori-

ous end justifying the ugly/illegal means? If so, what is the glorious end, i.e., policy purpose, served by the ACFLRs?

The critics provide cogent arguments that the ACFLRs create a race- or ethnicity-based fishery. Only Natives can qualify for these special licences. Is this a particular example of what it means to be what political scientist Alan Cairns called "citizens plus"? It is hard to believe that Natives are sufficiently important as voters to justify a set of illegal regulations. Or is this a case of political correctness run amok? Is it a case of white middle-class pseudo guilt requiring a large sacrifice for the benefits of "downtrodden and exploited" Natives? (See Yaffe, 2002.)

Final Comment

For all of those so heavily invested (emotionally and intellectually) in the purported legality of both the 1993 ACFLRs and the amendments made in June 2002, I can only echo the words of Oliver Cromwell: "I beseech you, in the bowels of Christ, think it possible you may be mistaken" (August 3, 1650).

Appendix 1: Notes on the Larger Issue—The Fishery as a Public Resource

The larger issue (a discussion of which is too complicated to include in this paper) is that the *Fisheries Act* was designed on the basis of law and policy that treated the fishery as a public resource, and thus permitted subordinate legislation only on the basis of equality of access to all Canadian citizens. That sweeping statement has always been subject to the exception of aboriginal food fishing, which was always allowed to continue on an exclusive basis. This derives from a recognition in pre-Confederation times that the *Magna Carta* restrained the Crown from allocating the fishery in tidal waters to an exclusive group. In Canada West (Ontario), this was extended to non-tidal waters. The best historical account of this is in Roland Wright's (1994) paper.

The policy was extended to BC after Confederation. For example, the first Dominion Inspector of Fisheries, A.C. Anderson, said in 1878 that "[W]here fishing with white men and with modern appliances, the Indians so fishing should be considered as coming in all respects under the general law" (Canada Sessional Papers, 1979, *Fisheries Annual Report*,1878, p. 293). That continued to be DFO's policy with respect to the commercial fishery until 1992 with the introduction of the ACFLRs, which allowed commercial sales out of the food fishery, i.e., at times and places open only to aboriginal persons. At the same time, cases were going through the courts attempting to establish that the sale of salmon as a s.35 aboriginal right. When these failed (*Van der Peet* in the Supreme Court of Canada), the aboriginal right exception could not lawfully be used as a basis for granting exclusive commercial rights. Commercial licences should have continued to be issued under the *Fisheries Act* on the basis of no personal qualifications other than Canadian citizenship. However, the government seemed determined to press on, relying on subordinate legislation passed under an Act that contemplated management and regulation of the public right of fishing as a public right. An attempt was made to amend the Act to authorize the minister to make agreements (with specific groups) that would supersede general fisheries regulations, but that attempt failed when widespread opposition was voiced to giving the minister such powers. That left the ACFLRs as an attempt by government to fit a square peg into a round hole. It was doomed to failure. Whatever the merits of allowing certain designated aboriginal people to fish at times and places not open to Canadians of all races and places of residence holding commercial licences, the attempt to do so reversed over a century of government fisheries policy and flew in the face of the common law, which establishes a public (i.e., non-exclusive) right of fishery in all tidal waters and arguably, in all non-tidal waters insofar as they are navigable (Chris Harvey, 2002c, edited slightly by the author).

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