**Of what quality are the *Queen’s Regulations and Orders***

***for the Canadian Forces*?**

Advanced Legislative Studies

DISSERTATION

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**1. Introduction**

In modern societies, delegated legislation predominates the legislative landscape and can be found in various forms including regulations, orders, tariffs, and ordinances. [[1]](#footnote-1) As legislatures lack the time and expertise needed to enact all the legislation required to address the needs of the state and its citizens, they turn to delegating significant portions of their legislation making authority to third parties, such as the cabinet, a minister or an administrative agency.[[2]](#footnote-2) Ranging in content from highly technical administrative detail to the establishment of general policy, delegated legislation provides an attractive alternative to primary legislation by offering greater administrative efficiency and flexibility, and it easily eclipses the volume of primary legislation produced by states.[[3]](#footnote-3) At the same time, delegated legislation attracts criticism as a perceived erosion of the constitutional values of representative democracy and provokes much concern over its potential for abuse, its possible use to implement significant or controversial change without due parliamentary debate or public notice, and the possibility that overregulation will bring economic ills.[[4]](#footnote-4)

In Canada, the legislatures at both the federal and provincial levels enjoy a largely unlimited ability to delegate their legislative authority on an institutional basis,[[5]](#footnote-5) and in so doing, they have broad discretion to give delegated authorities a law making power that has the same binding nature as that exercised by the legislature itself.[[6]](#footnote-6) In an effort to manage the proliferation of delegated legislation, in particular regulations, and to ensure that the instruments issued are authorized, accessible to the public, respect the standards for drafting and presentation, and align with the Government’s core regulatory policies and values, Canada employs at the federal level a ‘macro-regulatory Governance regime’ that comprises both legal and administrative components.[[7]](#footnote-7) The legal components come from the *Statutory Instruments Act* (the SIA), which defines what is a ‘regulation’, establishes the mandatory processes of examination, registration and publication for all regulations, and provides for parliamentary oversight by means of an *ex post facto* Parliamentary review.[[8]](#footnote-8) The administrative components of the regime are layered over the legal framework to create a detailed regulatory development process that is meant to apply to all regulations developed for Governor in Council[[9]](#footnote-9) approval, which comprise the majority of regulations made at the federal level.[[10]](#footnote-10)

The vast majority of federal regulations in Canada are subject to either the complete regime or the legal component only, but there are some regulations that for varying reasons fall outside of both - either entirely or in part. The principal body of regulations for the Canadian Armed Forces (the CAF), which regulate a broad scope of matters including the organization, training, discipline, efficiency and administration of the CAF, are in this anomalous position.[[11]](#footnote-11) These regulations are made under the authority of section 12 of the *National Defence Act* (the NDA), which is a federal statute that governs most matters pertaining to national defence in Canada, and in section 12, it grants the authority to make regulations to the Governor in Council, the Minister of National Defence (the Minister) and the Treasury Board.[[12]](#footnote-12) The regulations made under these authorities are published together in a consolidated format entitled *The Queen’s Regulations and Orders for the Canadian Forces,*[[13]](#footnote-13)which iscollectively referred to as the QR&O. The QR&O regulations are anomalous, first, because have been exempted from the legal requirements of examination, registration, and publication as defined under the SIAdue to the number of regulations they comprise.[[14]](#footnote-14) Furthermore, while the administrative components of the federal regulatory development process apply to proposed QR&O regulations that require Governor in Council approval, the applicable administrative requirements are only partially applied to those regulations.[[15]](#footnote-15) As a consequence, QR&O regulations are made at the extreme periphery, and in some cases largely outside, of the very regime that is meant to ensure legal and process standards for federal regulations;[[16]](#footnote-16) this reality prompts inevitable questions regarding the legislative quality of QR&O regulations.

The object of this dissertation is to examine the QR&O regulations as a body of law for the purpose of assessing its quality; there are, however, numerous bases by which the quality of legislation can be assessed. While the achievement of quality of legislation is highly pursued, it is a concept that lacks a standardized meaning, and as a consequence, it means different things to different people.[[17]](#footnote-17) One well accepted conception is that quality requires legislative products be drafted with sufficient clarity, precision and unambiguity so that the message will be understood by the intended audience and effectively accomplish its intended policy purpose.[[18]](#footnote-18) Another accepted conception is based on the legal nature of legislation and the quality of the legal process used in its making.[[19]](#footnote-19) For some, quality is a multifaceted notion that brings a diversity of elements into consideration and includes an instrument’s contents, its effectiveness, its legal framework and the process through which it was made.[[20]](#footnote-20) Within this context, Flückiger makes the concept more corporeal by schematically identifying the principal types of criteria used to define the term – factual, drafting-related and legal, and then uses European Community law to define the substantive meaning attached to each criteria type.[[21]](#footnote-21) The present assessment of the QR&O regulations will be conducted using the four legal criteria for quality identified by Flückiger, which are democratic legitimacy, subsidiary and proportionality, legal security, and the transparency of the legislative process, as the metric.[[22]](#footnote-22) These criteria consider elements relating to the legal context and framework of legislation as well as the process by which it is made, and it is the hypothesis of this dissertation that when assessed against these criteria the QR&O regulations are of weak legislative quality. This dissertation will begin by providing contextual information regarding the QR&O regulations and their development process. In the following part, each of the four legal criteria will be defined and, in turn, used to analyze the QR&O regulations, and in the final part, the specific deficiencies to which the QR&O’s weak ‘legal’ quality can be attributed will be discussed along with certain options for addressing each within QR&O’s existing legal framework.

**2. The *Queen’s Regulations and Orders for the Canadian Forces* (the QR&O)**

***2.1 What are the QR&O?***

The QR&O are relatively unique in the context of legislative publications as they function as a compendium of not only all the regulations made under section 12 of the NDA by each of the delegated authorities, but they also include certain orders issued by the Chief of the Defence Staff in the discharge of his duties under the NDA or in explanation or implementation of regulations[[23]](#footnote-23) as well as explanatory notes.[[24]](#footnote-24) The QR&O evolved from the *King’s Regulations and Orders,* which were published in 1951 with separate publications for each the Air Force, Army, and Navy,[[25]](#footnote-25) and in 1965 the publications were consolidated and given their present title.[[26]](#footnote-26) The QR&O span a wide range of subjects within three main areas - administration, discipline and finance - and are organized into chapters based on subject matter. The regulations and orders relevant to each subject matter are assembled together, and a notation is added immediately following each to indicate the authority by which they were made, for example, Governor in Council QR&O are followed by (G) and Chief of the Defence Staff orders are followed by (C).[[27]](#footnote-27) While the application of the QR&O is largely limited to the members of the CAF, they also apply to any person who is not a member but is subject to the *Code of Service Discipline.[[28]](#footnote-28)* Throughout this dissertation, unless otherwise indicated, references to the QR&O will be references to the QR&O regulations.

***2.2 What is the QR&O regulatory development process?***

The development process through which the QR&O are made is highly relevant to the present assessment of QR&O quality based on the identified legal criteria, and for these purposes, the most efficient way to explain that process is to begin by showing what it is not. As indicated previously, the current federal regulation development process comprises an administrative component that applies only to proposed Governor in Council regulations,[[29]](#footnote-29) which is layered over the legal component that, subject to exemption, applies to all federal regulations.[[30]](#footnote-30) The thirteen steps of this process are outlined below with the mandatory legal steps in the process indicated by underlining:

i. Planning – departmental officials consult with the Regulatory Affairs Section of the Treasury Board of Canada Secretariat[[31]](#footnote-31) (TBS-RAS) to develop the regulatory proposal, consider regulatory options and complete a triage process to assess the proposal’s impact.

ii. Analysis – department officials conduct consultations with issue-specific stakeholders and prepare the Regulatory Impact Assessment Statement (RIAS),[[32]](#footnote-32) which requires TBS-RAS approval.

iii. Drafting – departmental officials will draft the proposed regulation with the assistance of Department of Justice Legislative Counsel.

iv. Department of Justice Examination – the proposed regulation is submitted for review to ensure it is authorized by the enabling act, it does not constitute an unusual or unexpected use of the authority, it does not unduly trespass on rights and freedoms, it is not inconsistent with the *Canadian Charter of Rights and Freedoms*[[33]](#footnote-33) or the *Canadian Bill of Rights*[[34]](#footnote-34), and it conforms with drafting standards.

v. Sponsoring Minister’s Sign-off – ministerial support of proposed regulation.

vi. Review and Approval for Pre-publication – proposed regulation, RIAS and all supporting documents reviewed for TBS-RAS support and submitted for approval,

vii. Prepublication – proposed regulations and RIAS published in the *Canada Gazette*[[35]](#footnote-35), normally for a 30-day period.

viii. Regulatory Proposal Update – departmental officials consider any comments received and make required changes to the proposed regulations and RIAS.

ix. Second Department of Justice Examination – required if proposed regulations have been changed.

x. Sponsoring Minister’s Final Sign-off – ministerial support of proposed regulation.

xi. Final Regulatory Review and Approval –proposed regulation and all supporting documents are reviewed for TBS-RAS support and submitted for approval.

xii. Registration and Publication in the *Canada Gazette* – registration occurs within 7 days of approval and publication within 23 days of registration.

xiii. Scrutiny by the Standing Joint Committee for the Scrutiny of Regulations – the committee has mandate to scrutinize any regulation made after 31 December 1971.[[36]](#footnote-36)

While this process is meant to apply to all proposed Governor in Council regulations, including Governor in Council QR&O, owing to the applicable exemptions, the manner by which the administrative requirements are applied to the QR&O and the practices followed by certain actors in the process, only the following five steps are applied to Governor in Council QR&O, and some of these steps have been further abbreviated: (i) planning (triage process only); (ii) analysis (TBS-RAS approval of RIAS only); (iii) drafting; (x) Minister’s final sign-off, and (xi) Final Review by TBS-RAS and Governor in Counsel Approval.[[37]](#footnote-37)

For all QR&O, regulatory development is undertaken by the CAF or departmental organization responsible for the relevant subject matter.[[38]](#footnote-38) For example, the Office of the Judge Advocate General has the responsibility for leading policy and QR&O development in relation to the military justice system and the *Code of Service Discipline*.[[39]](#footnote-39) The impetus for a regulatory change can arise from an external source, such as an amendment to the NDA or another statute or from a recommendation made by an external review authority, or it can be internally driven; in either case it is the staff of the responsible organization who conducts the necessary analysis, obtains the necessary approvals from CAF and departmental authorities and develops the regulatory proposal, which is drafted with the involvement of Department of Justice Legislative Counsel.[[40]](#footnote-40) Although the QR&O are exempt from the formal examination requirement (step iv) under the SIA,[[41]](#footnote-41) during the drafting process, Justice Legislative Counsel will assess the proposed regulation against the examination criteria specified for step iv and, when satisfied, will certify the final product for ‘form and legality’.[[42]](#footnote-42)

In the case of Governor in Council QR&O, the responsible organization will consult with TBS-RAS to complete the triage process, which is used to assess a proposal’s impact and determine the type of RIAS required, and to obtain TBS-RAS approval of the completed RIAS.[[43]](#footnote-43) The TBS–RAS is not, however, involved with developing the substance of QR&O proposals. With the Minister’s approval of the proposed regulation, the regulation is submitted with the approved RIAS for final TBS-RAS review and support and Governor in Council approval.[[44]](#footnote-44) Unlike Governor in Council QR&O, proposed Treasury Board and Minister QR&O do not require a RIAS, and they follow and even shorter processes; Treasury Board QR&O require only three steps: (iii) drafting - includes Justice certification; (x) Minister’s final sign-off: and (xi) Final Review by TBS-RAS and Treasury Board Approval, while Minister QR&O require two steps: (iii) drafting - includes Justice certification; and (x) Minister’s approval.[[45]](#footnote-45)

While the QR&O are exempt from the normal promulgation and publication requirements applicable to federal regulations and, as a result, are not published in the *Canada Gazette,[[46]](#footnote-46)* they follow separate notification and publication requirements established under the authority of the NDA.[[47]](#footnote-47) Accordingly, the official version of the QR&O is published on the Defence website and is publically accessible.[[48]](#footnote-48)

**3. Legal Criteria – Analysis**

***3.1 First Criterion – Democratic Legitimacy***

In general terms, power can be legitimate if three conditions are met: (1) power is acquired and exercised in a manner that accords with established rules; (2), the rules conform with the beliefs of both the dominant and subordinate regarding the rightful source of authority; and (3) there is a demonstrable expression of consent on the part of the subordinate to the power relation.[[49]](#footnote-49) Considered within the specific context of representative democracy, legitimation requires that (1) citizens have the right and possibility to participate, including the right to elect their representatives and express their popular will; (2) the procedures of election and government are transparent and in accordance with the rule of law, and representatives are accountable; and (3) the decisions of the representatives are able to satisfy the majority of the represented.[[50]](#footnote-50) The citizen is the primary source for democratic legitimation, and it is through the expression of consent by their elected representatives in the legislature that legislative norms are validated and legitimized.[[51]](#footnote-51) In relation to delegated legislation, accountability to the legislature is essential for legitimation, which is particularly critical and challenging to achieve in light of the separation that naturally exists between the legislature and the delegated lawmaker.[[52]](#footnote-52) Pünder identifies three mechanisms for achieving democratic legitimation in delegated legislation, which function by means of either the elected representatives or the citizens themselves: (1) parliamentary predetermination of the executive rule;[[53]](#footnote-53) (2) parliamentary participation in the executive rulemaking process;[[54]](#footnote-54) and (3) public participation in the executive law-making process.[[55]](#footnote-55)

I. Democratic legitimation by parliamentary predetermination of the executive rule

In the context of delegated legislation, Pünder views parliamentary pre-determination as the principal method for achieving democratic legitimation.[[56]](#footnote-56) Parliamentary participation entails the legislature giving a specific delegation of its legislation-making power to the delegated authority, and its effectiveness for legitimation is tied to the level of specificity in the delegation with regard to how the delegation is to be exercised.[[57]](#footnote-57) While Pünder does not specify factors to be used when considering the content and sufficiency of the delegation, when comparing the approaches taken in different countries, he includes the following characteristics amongst his points of comparison: (1) the existence of a constitutional or legal authority for the legislature to delegate its legislation-making power; (2) the requirement for such a delegation before an authority other than the legislature could make legislation; (3) the necessity for the delegation to be made in primary legislation; and (4) the level of specificity of detail required in the delegation, and therefore, the level of decision-making discretion allotted to the delegated authority.[[58]](#footnote-58) On reflection, and along with the specificity of the delegation itself, Pünder’s consideration of these factors highlights the importance of the legal framework that underlies the delegation and the necessity, for the achievement of democratic legitimation, that the delegation be effected in accordance with the relevant legal principles and procedures of the jurisdiction.[[59]](#footnote-59) Accordingly, as a first step, the delegation in section 12 of the NDA will be considered in the context of the existing legal framework in Canada for delegating legislation making authority. The relevant portions of section 12 are set out below:

12 (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.

(2) Subject to section 13 and any regulations made by the Governor in Council, the Minister may make regulations for the organization, training discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.

(3) The Treasury Board may make regulations

(a) prescribing the rates and conditions of pay of military judges, the Director of Military Prosecutions and the Director of Defence Counsel Services;

(b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and

(c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.[[60]](#footnote-60)

In Canada, while there remains a remote ability for the executive to produce legislation using the prerogative authority, this authority has been largely put aside leaving the legislatures as the principal authority for making legislation, which is subject only to the Constitution.[[61]](#footnote-61) Under the principle of Parliamentary Supremacy, Canadian legislatures enjoy a largely unlimited authority to delegate their legislation making authority within their constitutional areas of responsibility,[[62]](#footnote-62) which includes significant discretion regarding the contents of the delegation and a continuing power to amend or revoke delegated powers along with any action taken there under.[[63]](#footnote-63) The NDA is a federal statute that governs most matters pertaining to national defence in Canada,[[64]](#footnote-64) including, the establishment of the Department of National Defence (the Department),[[65]](#footnote-65) the constitution and governance structure of the CAF,[[66]](#footnote-66) and matters pertaining to service in the CAF,[[67]](#footnote-67) and it was enacted pursuant to Parliament’s constitutional authority to legislate on matters pertaining to militia, military and naval service and defence.[[68]](#footnote-68) Further to the NDA being within Parliament’s constitutional area of responsibility, it is clear that Parliament has the power to delegate its legislation-making authority in section 12 to the authorities of its choosing and to make that delegation as broad as it wishes.[[69]](#footnote-69)

Regarding the substance of a delegation, the language of the enabling provision is critical as it frames the authority limits, and while the delegation must be clearly granted, there is no minimum level of specificity required; legislatures have the discretion to make the delegation as specific or general as they wish.[[70]](#footnote-70) In section 12, Parliament grants to both the Governor in Council and the Minister largely identical, broad authorities to make regulations for ‘the organization, training, discipline, efficiency, administration and good government of the Canadian Forces’ and ‘generally for carrying the purposes and provisions of this Act into effect’.[[71]](#footnote-71) While each authority is limited to the matters and purposes specifically referenced, the substantive scope of these matters are significant, and the enabling provisions themselves provide no specificity as to how either authority is to be exercised within this framework.[[72]](#footnote-72)

Some guidance regarding the specific matters to be addressed through regulation is provided in other NDA sections where specific reference is made to regulations that would be made under section 12. For example, relevant to the organization and administration of the CAF, section 19 provides that ‘The authority and powers of command of officers and non-commissioned members shall be as prescribed in regulations.’, and in relation to discipline, section 147 provides that ‘The authority of a service tribunal to impose punishments may be limited in accordance with regulations made by the Governor in Council.’.[[73]](#footnote-73) While these references identify specific matters on which Parliament expects amplification by regulation, they do not constrain the delegated authorities from regulating on other matters that fall within the limits of the delegation but are not specifically referenced. Furthermore, they do not provide direction to the delegated authority regarding the specific objectives and principles relevant to those regulations.[[74]](#footnote-74) Regarding the Minister’s authority, while broad, Parliament has constrained its use somewhat by making it subject to any regulations made by the Governor in Council and to any matters for which an express reference is made in the NDA to regulations made or prescribed by the Governor in Council or the Treasury Board.[[75]](#footnote-75)

The enabling provisions for the Treasury Board are more narrowly worded than those for the other authorities. The Treasury Board’s authority is focused entirely on matters of finance, such as rates and conditions of pay and forfeitures and deductions, however, within this subject area, the authority has been extended to cover ‘any matter concerning the pay, allowances and reimbursement of expenses … for which the Treasury Board considers regulations are necessary or desirable to carry out the purpose or provisions of this Act’.[[76]](#footnote-76) While parameters have been provided regarding the possible subject of the regulations, no specificity has been given as to their substantive content; it has been left to the Treasury Board to determine what is ‘necessary or desirable’ and also to determine the principles and substance applicable to the regulations.[[77]](#footnote-77)

While the authority delegated to the Treasury Board has a more narrow substantive focus, when considered as a whole, section 12 provides broad regulation making powers to each of the delegated authorities. The individual delegations specify the particular matters and purposes in relation to which each authority can make regulations, however, within these limits, all three delegated authorities have been granted significant substantive discretion. While the fact that section 12 does not specify any principles or objectives applicable to how the delegated authorities are to be exercised does not affect the validity of the delegations,[[78]](#footnote-78) it does affect the sufficiency of the predetermination provided in those provisions for the achievement of democratic legitimation.[[79]](#footnote-79) Based on their lack of substantive specificity, the enabling provisions in section 12 clearly provide a weak and insufficient source of democratic legitimation for the QR&O.[[80]](#footnote-80)

II. Democratic legitimation by parliamentary participation in the executive rule-making process

Pünder recognizes that depending on the existing legal framework and the level of specificity contained in the delegation, the enabling provision alone may be insufficient to provide the parliamentary predetermination needed for legitimation; accordingly, he identifies parliamentary participation in the regulation making process as a means to compensate for any weakness in parliamentary predetermination.[[81]](#footnote-81) While Pünder acknowledges criticism over the ability of retrospective parliamentary participation to fully achieve the same level of legitimation as can be realized through the statute itself, he nevertheless views it as a viable option for bolstering legitimation.[[82]](#footnote-82) In Canada, Parliament is not normally involved in the development or approval of regulations unless the enabling provision specifically requires a particular involvement.[[83]](#footnote-83) For example, it may be required that the approved regulation be laid before Parliament or that final approval of the regulation be tied to the completion of a positive or negative resolution procedure in Parliament.[[84]](#footnote-84) In the case of the QR&O, section 12 does not require any parliamentary involvement.[[85]](#footnote-85)

The most common mechanism in Canada for achieving retrospective parliamentary participation in the regulatory process is through the work of the Standing Joint Committee for the Scrutiny of Regulations, which has the mandate to conduct an *ex post facto* review of regulations.[[86]](#footnote-86) The Committee takes its mandate from the SIA, which provides that every statutory instrument made after 31 December 1971, which includes regulations and is subject to some exceptions, is permanently referred to any Parliamentary Committee established to review and scrutinize statutory instruments.[[87]](#footnote-87) In practice, the Committee reviews all instruments published in the *Canada Gazette* as well as some categories of instruments that have been exempted from registration and publication, and its review is considered the last step in the federal regulatory development process.[[88]](#footnote-88) The Committee’s review is conducted on the basis of the thirteen criteria established by the Committee, which focus on an instrument’s legality and procedure, and if necessary, the Committee has the statutory authority to seek the revocation of the all or part of a regulation.[[89]](#footnote-89) While the QR&O are exempt from publication,[[90]](#footnote-90) they are not exempt from referral to the Committee,[[91]](#footnote-91) and therefore, fall within the Committee’s review mandate. However, it is common knowledge amongst those who work with the development and drafting of QR&O that the Committee does not in fact conduct reviews of the QR&O.[[92]](#footnote-92) While the referral of eligible instruments to the Committee is mandatory under the SIA, the SIA does not expressly oblige the Committee to review the instruments referred to it,[[93]](#footnote-93) and in this case, the Committee’s reasons for not reviewing the QR&O are not known.[[94]](#footnote-94)

Accordingly, despite the availability of a mechanism for parliamentary participation in QR&O development, this mechanism is not used in practice.[[95]](#footnote-95) In the face of this apparent dearth of parliamentary participation in relation to the QR&O, it might be argued that a measure of parliamentary involvement and oversight is provided by the approval authorities themselves by means of the fact that they each comprise individuals who, while being members of the Cabinet, are also elected members of parliament and accountable to the people.[[96]](#footnote-96) In my view, such an argument ignores the nature of the approval authority’s role in regulation making and the underlying purpose of retrospective parliamentary participation, which is to add a measure of oversight and accountability in relation to how the delegated power is exercised.[[97]](#footnote-97) When approving regulations, the approval authority is within ‘arms-length’ of the bureaucracy of government and is directly engaged in exercising the delegated power granted by Parliament, and in light of this role, it is clear that the approval authority could not, appropriately, perform a concurrent supervisory function in relation to the very power being exercised.[[98]](#footnote-98) As a consequence, the fact that QR&O approval is effected by individuals who are at the time members of Parliament, cannot reasonably be viewed as a form of parliamentary participation for these purposes.[[99]](#footnote-99)

The absence of retrospective parliamentary participation in the context of the QR&O means that this mechanism for supplementing parliamentary predetermination and bolstering the weak democratic legitimation provide in section 12 of the NDA is not available.[[100]](#footnote-100)

III. Democratic legitimation by public participation in the executive law-making process

Another means identified by Pünder to compensate for a lack of substantive legislative predetermination in the enabling provision and to bolster legitimation is direct participation by the public in the delegated law-making process.[[101]](#footnote-101) Public participation is viewed as beneficial in several respects - it permits the public to be informed about regulatory initiatives and provide input on the subject; it contributes to transparency; and it can enhance the public’s acceptance of a particular initiative along with the credibility and legitimacy of the delegated law-maker’s decision.[[102]](#footnote-102)

In Canada, subject to a specific obligation to conduct public consultation, such as when required in the enabling statute, there is no overarching legal requirement for public consultation when making regulations.[[103]](#footnote-103) There is, however, an administrative requirement for public consultation as part of the federal regulatory development process that applies to Governor in Council regulations.[[104]](#footnote-104) Under this process, the responsible organization is required to identify parties that may be interested in or affected by the regulatory proposal and provide to them ‘opportunities to take part in open and meaningful consultations at all stages of the regulatory process’.[[105]](#footnote-105) In furtherance of this requirement - special guidelines have been issued for conducting effective consultations;[[106]](#footnote-106) it is required that details on the consultations conducted for each proposal be included in the RIAS produced for that proposal; and the TBS-RAS is required to perform a challenge function during RIAS approval to ensure that adequate opportunities have been given to those affected by a regulatory proposal to provide their comments or concerns on any matter pertaining to that proposal.[[107]](#footnote-107)

In the context of the QR&O, while the administrative requirement to conduct consultation applies to Governor in Council QR&O, consultation outside the CAF and the Department is uncommon, and consultation with the public, both the general public and the greater CAF public, is non-existent.[[108]](#footnote-108) During QR&O development, it is the CAF or departmental organization responsible for the proposal that decides what, if any, consultation is required.[[109]](#footnote-109) Consultation is generally undertaken for the purpose of supplementing existing knowledge or to coordinate with other interested organizations for feedback and to avoid conflicts with existing programmes and practices.[[110]](#footnote-110) When conducted, consultation is normally informal and limited to internal CAF and departmental actors; consultation with other government departments occurs but is not common,[[111]](#footnote-111) and despite the requirement to conduct ‘meaningful consultations’, TBS-RAS officials accept and approve the RIAS for proposed Governor in Council QR&O in absence of public engagement.[[112]](#footnote-112)

There are several arguments that may be used to explain and justify the lack of public engagement during QR&O development. The first argument is based on the fact that the QR&O’s application is largely limited to the CAF and its members, and insofar as this group encompasses the vast majority of stakeholders who would be interested in or affected by proposed QR&O changes, broader consultation is not unnecessary.[[113]](#footnote-113) Further arguments are linked to the nature and culture of the CAF, which is a hierarchical organization that is based on discipline and the requirement that its members obey all lawful commands, and which functions by means of a command structure that regularly exercises its command authority to make decisions relevant to the CAF and its members.[[114]](#footnote-114) On this basis, it may be argued that when the officials in the command structure make decisions relevant to QR&O changes, they do so as an exercise of their command responsibility on behalf of the CAF and its members making direct consultation with the larger CAF population is unnecessary.[[115]](#footnote-115) Without delving into the details of these arguments, their principal weakness, in my view, comes from an underlying paternalistic and narrow perspective of consultation with respect to both the type of information that would be relevant for QR&O development and the appropriate sources for this information. This perspective does not take into account the full value and potential benefits available from broad engagement, which include both proposal-specific benefits, such as information relevant to the substance of a proposal and its potential side effects that would not be available from internal sources, and more general benefits that relate to increasing the acceptance and credibility of a regulation and facilitating democratic scrutiny and accountability.[[116]](#footnote-116)

While Pünder does not define precisely what is meant by ‘public participation’, Kellerman tells us that legislation preparation should extend beyond state bodies and include consultation with external experts, interest groups, civil society and the public in general – anyone likely to be affected by a law on a practical or general level.[[117]](#footnote-117) On this basis it seems plainly obvious that public participation is meant to involve interaction with individuals beyond those officials who function as the administrative apparatus of the executive in the development of a regulatory proposal and who are invested in the proposal’s advancement.[[118]](#footnote-118) Even if one accepts, based on the QR&O’s limited application, that consultation on QR&O development can appropriately be confined to the CAF and its members as the most affected group, in the context of public participation as a means to bolster democratic legitimation, constrictions in the consultation pool are counterintuitive.[[119]](#footnote-119) This is especially the case when the constrictions effectively reduce the consultation pool to a much smaller segment of the affected group that effectively acts as the unelected representatives of the whole.[[120]](#footnote-120) On these bases, while reasons may exist to justify more limited consultation in certain contexts, the current lack of public involvement in QR&O development cannot reasonably be viewed as sufficient to provide any level of democratic legitimation for the QR&O, and as a consequence, would not be sufficient to bolster the legitimation afforded by the enabling provisions in section 12 of the NDA.[[121]](#footnote-121)

To conclude this section, without an effective source of either parliamentary participation or public participation in the QR&O development process, parliamentary predetermination is left as the sole source of democratic legitimation for the QR&O; however, based on the lack of specificity provided in the enabling provisions, parliamentary predetermination is not on its own sufficient to satisfy the democratic legitimation requirements of the QR&O. [[122]](#footnote-122)

***3.2. Second Criterion – Subsidiary and Proportionality***

Subsidiary and proportionality are each prominent principles within the European Community legal system; they are applied to constrain the Community’s legislation-making authority by focusing on the need to intervene at the Community level and the breadth of any regulatory intervention required.[[123]](#footnote-123)

I. Subsidiary

Subsidiary has the status of a constitutional principle within the European Community; it essentially embodies the Community’s approach to federalism and promotes the view that higher-level entities ought not to regulate on matters that could be better dealt with at a lower level.[[124]](#footnote-124) The purpose of the principle is to minimize the Community’s interference with the economy of its Member States by limiting the exercise of its authority in matters outside its area of exclusive competence to those circumstances when it is truly necessary.[[125]](#footnote-125) Under this principle, Community intervention would be considered necessary and justified when the objectives of proposed Community action could not be sufficiently achieved through action by individual Member States within their national constitutional system; accordingly, in such cases the objectives would be better effected by Community action.[[126]](#footnote-126)

While the concept of subsidiary per se does not exist in Canada, an equivalent principle can be found in the division of legislative powers that exists between the federal and provincial governments. Sections 91 and 92 of the *Constitution Act, 1867*, describe the specific subject matters in relation to which each level of government can legislate.[[127]](#footnote-127) For an enactment to be constitutionally valid, its ‘dominant or most important characteristic’ must fall within one of the areas of responsibility identified for the level of government that made the enactment while allowing for the possibility that some ‘subsidiary effects’ may fall beyond that legislature’s area of responsibility.[[128]](#footnote-128) The same constitutional limits that apply to primary legislation apply equally to delegated legislation, and as a consequence, these limits inform the interpretation of delegated legislation along with the purpose of the enabling provisions and the overall purpose of the enabling Act.[[129]](#footnote-129)

The constitutional authority to make the QR&O comes from the NDA, which was enacted under Parliament’s constitutional authority to legislate on matters relating to ‘Militia, Military and Naval Services, and Defence’, and insofar as the QR&O remain within the purposive umbrella of the NDA, they are rightly made at the federal level.[[130]](#footnote-130) There are, however, certain chapters of the QR&O that amplify the NDA yet relate to subjects that could be seen as broaching on areas of provincial responsibility. For example, while the ‘Administration of Justice in the Province’ is identified as a provincial responsibility, [[131]](#footnote-131) chapters 101-118 of the QR&O incorporate the disciplinary, regulatory, procedural and explanatory materials relevant to the *Code of Service Discipline* and the administration of military justice, which includes the preparation, laying and referral of charges and the conduct of service tribunals.[[132]](#footnote-132) Charges can be laid and a service tribunal conducted within the military justice system in any province of Canada,[[133]](#footnote-133) however, owing to the fact that the dominant characteristic of these regulations and the *Code of Service Discipline* is to allow the CAF to meet its disciplinary needs by dealing with matters that pertain directly to the discipline, efficiency and morale of the military,[[134]](#footnote-134) the dominant purpose of these regulations can be seen to fall squarely within Parliament’s jurisdiction over matters of defence and the military even though the administration of justice is a matter that normally falls within the responsibility of the provinces.[[135]](#footnote-135) The explicit limits placed on the matters and purposes in relation to which the delegated authorities can make regulations under section 12 of the NDA relate specifically to the CAF and its members and purposes of the NDA.[[136]](#footnote-136) Accordingly, the substantive limits of the QR&O clearly fall within Parliament’s constitutional jurisdiction and satisfy what would be the Canadian equivalent to subsidiary.

II. Proportionality

In general terms, proportionally stands for the idea that any regulation must achieve an appropriate balance between the advantages it provides and the constraints it imposes,[[137]](#footnote-137) and therefore legislation must assume only the scope and content required to appropriately address a particular issue.[[138]](#footnote-138) In accordance with this principle, the European Community is required to legislate only to the extent necessary, and as a consequence, Community legislation should be as simple as possible; be consistent with a satisfactory achievement of the legislative objective and the need for effective enforcement; limit the impairment of any right or freedom to the extent necessary to accomplish the legislative objective; and leave as much scope for national action as possible.[[139]](#footnote-139)

Like the principle of subsidiary, proportionality, as it applies to the exercise of legislation making authority, does not exist as a specific legal principle in Canada. At the federal level, however, administrative direction has been issued that expresses the Government’s expectations on lawmaking that generally align with the principle of proportionality. In particular, with regard to law making in general, it is the Government’s position that law should only be used to achieve the Government’s policy objectives when it is the most appropriate mechanism available.[[140]](#footnote-140) Furthermore, when planning policy initiatives, departments are directed to assess all possible regulatory and non-regulatory measures available for fulfilling the policy objectives and to identify options that will ‘maximize net benefits’ taking into account the potential positive and negative economic, environmental, and social impacts of each proposal along with possibilities for distributing the identified impacts across affected parties, sectors of the economy and regions of Canada.[[141]](#footnote-141) When the proposed action involves a regulatory change, the department is additionally required to demonstrate that the regulation is designed to address the relevant policy objectives, is proportional to the degree and type of risk identified, and does not unduly affect areas it was not designed to affect.[[142]](#footnote-142)

This approach to proportionality seeks to balance the potential impacts and benefits relevant to each proposal and places a particular emphasis on potential economic and business impacts.[[143]](#footnote-143) Like other regulatory proposals that require Governor in Council approval, proposed Governor in Council QR&O are subject to the triage process, during which, the TBS-RAS assesses the substance of proposed QR&O to determine its potential impact and to confirm that the proposed action appropriately balances those impacts.[[144]](#footnote-144) On a consistent basis, proposed Governor in Council QR&O are assessed as having a low risk of impact.[[145]](#footnote-145) While these impact assessments are proposal-specific, when one considers these consistent results with the CAF-centric focus of the QR&O and the emphasis placed on economic and business impacts under the federal approach to proportionality, one can reasonably reach the conclusion that as a body of law, the Governor in Council QR&O generally satisfy the proportionality requirements applied to federal regulations in Canada.[[146]](#footnote-146) While Treasury Board and Minister QR&O are not subject to the triage process or the impact assessment, given that they have a similar CAF-centric focus as the Governor in Council QR&O and do not regulate on economic or financial matters outside the CAF, it is reasonable to expect that they also comply with these proportionality requirements.[[147]](#footnote-147)

To conclude this section, while the principles of subsidiary and proportionality are European Commission-centric concepts, general equivalents can be found in the law and in the administrative requirements applicable to regulatory development in Canada, and based on these equivalent concepts, the QR&O can be seen as satisfying this criterion.

***3.3 Third Criterion – Legal Security/ Legal Certainty***

The criterion of legal security is also known as legal certainty;[[148]](#footnote-148) it is a general principle based on the rule of law and applied to enable those to whom the law applies to reasonably foresee and understand the consequences of different courses of action and, based on that knowledge, make decisions on how to act.[[149]](#footnote-149) Legal certainty comprises two principal elements: first, that law be accessible, which relates to its physical and public availability as well as the clarity of its contents; and second, that law be predictable, which means calculable and reliable.[[150]](#footnote-150)

Looking first at accessibility, the QR&O are exempt from the statutory promulgation requirements that normally apply to federal regulations;[[151]](#footnote-151) once made, the QR&O are not registered, which means they are not recorded or assigned a registration number, and they are not published in the *Canada Gazette*, which would normally provide sufficient public notification and allow the QR&O to be judicially noticed.[[152]](#footnote-152) The QR&O are, however, subject to special notification requirements under section 51 of the NDA and are considered to be ‘sufficiently notified to any person to whom they concern’ when electronically published on a Defence or Government of Canada website, made reasonably accessible to any person to whom they concern, and are drawn to the person’s attention by the commanding officer of the base, unit or other element at which the person is serving.[[153]](#footnote-153) These requirements place a specific obligation on commanding officers to bring the location and existence of the QR&O to the attention of CAF members serving at each location, and, if reasonable access to the website cannot be assured, to ensure that a version identical to the one on the website is made available.[[154]](#footnote-154) Separate notification requirements exist in the case of Reserve Force members who are not serving with a unit or other element of the CAF.[[155]](#footnote-155) At present, the complete official version of the QR&O is published on the Department’s website; all QR&O are published together in volumes and chapters based on subject and are available to both members of the CAF and the general public.[[156]](#footnote-156)

Accessibility to the QR&O from the perspective of proactive notification, ability to gain access to and use the publication, and ability to locate relevant regulations contained therein can generally be viewed as strong,[[157]](#footnote-157) and is arguably stronger than for regulations that are simply published in the *Canada Gazette,* and for which, there is no supplementary requirement that the regulations be drawn to the attention of and made accessible to those to whom they apply.[[158]](#footnote-158) There are, however, two principal accessibility weak points. First, the focus of the notification and publication framework is essentially limited to the provision of notice to members of the CAF. This targeted focus is understandable when one considers that the vast majority individuals subject to the QR&O are members of the CAF, however, the QR&O also applies to individuals who are not members of the CAF but are subject to the *Code of Service Discipline*.[[159]](#footnote-159) As one example, this would include anyone who accompanies a unit of the CAF that is on active service in any place, such as, the dependant of a CF member who accompanies that member while serving outside Canada.[[160]](#footnote-160) These individuals are not members of the CAF; they are not ‘serving’ at a base, unit or other element of the CAF, and they are not specifically captured by the QR&O notification and publication requirements.[[161]](#footnote-161) A lack of notification of applicable regulations clearly impacts the accessibility of those regulations to affected individuals,[[162]](#footnote-162) and while safeguards exist to protect against penal enforcement for an alleged breach of the QR&O[[163]](#footnote-163) and prevent a military judge at court martial from taking judicial notice of the publication or the sufficiency of notification of the QR&O,[[164]](#footnote-164) these safeguards do not prevent an affected individual from suffering non-penal consequences.[[165]](#footnote-165) For example, while QR&O 101.11 details the broad advisory and other legal services that can be furnished by the Director Defence Counsel Services for anyone who is liable to be charged, dealt with and tried under the *Code of Service Discipline* and are publically funded, without notification of the QR&O, someone who is in need of defence counsel may not have access to the relevant information, as a consequence, expend their own funds to hire legal counsel instead of using this free service.[[166]](#footnote-166)

Additionally, while there are sources of information available that may serve to mitigate the impacts of this notification and accessibility gap, these sources have their own weaknesses. For example, I am aware from experience that efforts are made to bring relevant information to non-CAF members who are subject to the QR&O, and while useful, these efforts are ad hoc, inconsistent and occur outside the mandates of the legal framework. Furthermore, while public access to the QR&O on the Internet may also serve to mitigate the effects of the notification and accessibility gap,[[167]](#footnote-167) the value of this mitigation source may be limited due to the challenges anyone unfamiliar with the QR&O may face trying to locate them on the Internet. For example, the Department of Justice maintains a website that is a principal source for public access to electronic versions of federal statutes and regulations in Canada. The QR&O, however, are not included on or accessible from this website, and in particular, they are not listed with the other regulations made under the authority of the NDA.[[168]](#footnote-168) While the QR&O can be located on the Defence website using other search methods, the accessibility benefits provided by on-line publication are lessened when the QR&O cannot be accessed using a principal on-line source for Canadian legislation.[[169]](#footnote-169)

The second weak point that clearly impairs both the accessibility and predictability of the QR&O arises from the publication delay that occurs in relation to all QR&O changes.[[170]](#footnote-170) While QR&O normally come into effect on the date they are made,[[171]](#footnote-171) the publication of changes always occurs at a later date, and that delay can extend to six months or longer.[[172]](#footnote-172) At present, the QR&O amendment list published on the Defence website indicates that amendments were last published on 01 August, 2015;[[173]](#footnote-173) however, it is not indicated whether there are subsequent QR&O changes that are awaiting publication, and if so, the articles that would be affected. Delays in regulation publication are common in Canada due to the fact that under the SIA, registered regulations come into force on the date of registration while publication in the *Canada Gazette* can take place up to 23 days after registration.[[174]](#footnote-174) While the safeguards against penal enforcement previously discussed would apply during the delay period,[[175]](#footnote-175) the impact of a publication delay goes beyond any risk of prosecution as it creates periods during which the official published version of the QR&O does not reflect the current law, which makes the current law inaccessible to its users.[[176]](#footnote-176) Furthermore, the delays in publication also affect the predictability and certainty of the law as there is no way for users to know whether the published version of a QR&O article is current or whether it is subject to an unpublished amendment.[[177]](#footnote-177) In my view, the uncertainty that is created regarding the currency of the QR&O is exacerbated by the highly insular nature of QR&O development whereby information pertaining to proposed QR&O changes are not shared with the public; in the face of regulatory change, the public availability of such information could function to enhance the predictability and certainty of the QR&O.[[178]](#footnote-178)

To conclude this section, while the QR&O’s notification and publication framework, structure and availability make the QR&O highly accessible to its principal audience group, its overall legal certainty is weakened, in part, by the notification and access gap that exists in relation to a small segment of the individuals subject to the QR&O and, more significantly, as a result of the publication delay that affects all QR&O changes and creates uncertainty regarding the state of the law.[[179]](#footnote-179) As a consequence of these weak points, the QR&O cannot be viewed as fully satisfying the criterion of legal certainty.

***3.4 Fourth Criterion - Transparency of the Legislative Process***

Transparency in the legislative process is looked upon as a basic principle of democracy in that it enables citizens to see how their representatives and governing institutions are exercising their law-making authority and to, in turn, hold law-makers accountable.[[180]](#footnote-180) Transparency comprises two principal elements: first, the openness of the legislative process, which involves both the executive and the legislature making their decisions in accordance with the relevant rules and regulations;[[181]](#footnote-181) and, second, access to information relating to the process and to the decisions made, which, other than in exceptional circumstances, should be freely available and directly accessible to anyone who will be affected by the decisions made or their implementation.[[182]](#footnote-182) To this end, consultation is considered a pre-condition for transparency; it should begin early in the legislative process and be conducted in an open and transparent manner.[[183]](#footnote-183)

In respect to the openness of QR&O development and its compliance with the relevant legal and administrative rules, that process is in a odd position owing to the exemptions that apply to it under the SIA,[[184]](#footnote-184) the manner by which the administrative processes applicable to Governor in Council regulations are applied,[[185]](#footnote-185) and the practice adopted by the Standing Joint Committee for the Scrutiny of Regulations of not reviewing the QR&O despite having the authority to do so.[[186]](#footnote-186) The oddity of its position arises because the QR&O are not required to adhere to the same rules and development requirements applied to other federal regulations, and while QR&O development proceeds in accordance with the rules and procedures applied to it, which is the criterion for openness,[[187]](#footnote-187) it is a largely insular process with minimal external involvement that is not readily visible to anyone outside the process.[[188]](#footnote-188) For example, TBS-RAS permits proposed Governor in Council QR&O proceed for approval without public consultation;[[189]](#footnote-189) the QR&O are not subject to pre-publication, which would provide the public access to the text of the proposed regulations;[[190]](#footnote-190) the RIAS, which functions to explain the regulatory proposal including the government’s objectives and the associated costs and benefits, is not required to be published or otherwise made publically available; [[191]](#footnote-191) and while the QR&O are published and publically available on the Defence website, they are not published in the *Canada Gazette* or accessible on the Department of Justice website with other federal regulations.[[192]](#footnote-192) The term ‘open’ is defined as ‘allowing access, passage or view’,[[193]](#footnote-193) and while QR&O development complies with the minimal requirements applied to it with regards to consultation, the odd effect is that despite apparently satisfying the expressed criterion for openness, the process is clearly anything but ‘open’ and cannot be said to comply with the spirit of that requirement.[[194]](#footnote-194)

The second element for transparency requires that information on the relevant process and the decisions made therein be ‘freely available and directly accessible’ to anyone who is affected by the decisions and their implementation.[[195]](#footnote-195) Wide, external pre-legislation consultation that extends to groups who will be practically or generally affected by proposed legislation is seen as critical for accomplishing the public engagement necessary for transparency.[[196]](#footnote-196) Even if one can accept in the context of the QR&O that the pool of affected individuals is appropriately limited to the CAF and its members, it is inconceivable that a process, which largely limits the flow of information to the small pools of CAF and departmental officials who are responsible for the development and approval of proposed QR&O changes, meets the requirement of wide external consultation needed for transparency.[[197]](#footnote-197)

To conclude this section, the level and nature of the consultation and information sharing that takes place in the context of QR&O development, which is internally focused and lacks any engagement with the public, cannot be viewed as sufficient to achieve transparency in the legislative process.[[198]](#footnote-198)

**4. Discussion and Conclusion**

The analysis conducted herein demonstrates that as a body of law, the QR&O effectively satisfy only one of the four legal criteria for quality of legislation identified by Flückiger, which proves the hypothesis that within the context of these legal criteria, the QR&O are of weak legislative quality.[[199]](#footnote-199) Expressed in a different way, the analysis shows that the QR&O fail to fully satisfy three of the four legal criteria - democratic legitimation, legal security/certainty and transparency of the legislative process. Closer scrutiny of this result reveals that the QR&O’s weak showing can be attributed to three principal deficiencies that relate to its development process as well as aspects of its legal framework: (1) insufficient public engagement; (2) insufficient parliamentary participation; and (3) insufficient accessibility of the QR&O. In this final part, each of the identified deficiencies will be examined for the purpose of identifying options that would serve to address the deficiency within the existing legal framework in order to better satisfy the related legal quality criteria and improve the QR&O’s overall legislative ‘legal’ quality.

In my view, the insufficiency of public engagement during the QR&O development process is the most significant of the deficiencies for two principal reasons. First, the lack of a mechanism for sharing information and involving the interested and affected members of the public during QR&O development is a critical deficiency that impacts two of the four legal quality criteria and is relevant to the QR&O’s failure to satisfy both.[[200]](#footnote-200) While public participation in regulation development is not the principal mechanism for achieving democratic legitimation, due to the insufficiency of the parliamentary predetermination provided in the enabling provisions, [[201]](#footnote-201) public participation is one of the means available for bolstering democratic legitimation for the QR&O.[[202]](#footnote-202) Additionally, public engagement through consultation is recognized as a critical factor for achieving the required transparency in the legislative process.[[203]](#footnote-203) The second reason is that the closed manner by which QR&O development proceeds, which includes minimal engagement of individuals outside the internal administrative and command apparatuses responsible for making the decisions relevant to proposed QR&O changes, touches ideals that are firmly engrained in CAF practice and possibly also its culture,[[204]](#footnote-204) which would undoubtedly make changing the existing approach as difficult as it is important.

Taking action to expand external participation in QR&O development, and specifically, to introduce measures to engage the appropriate public in the process is, in my view, critical for addressing the present deficiency and better satisfying the requirements for both democratic legitimation and transparency. To this end, the critical path would need to involve, as a first step, a change in the way information sharing and consultation are viewed in the context of QR&O development to recognize the value that is gained by sharing information on proposed changes and receiving the input and perspective of interested individuals who reside outside the pool of officials responsible for developing and approving the actual proposal.[[205]](#footnote-205) As a further step, the path would also require the establishment of clear internal direction that reflects a new approach to information sharing whereby consultation that is appropriate for each proposal is undertaken as an automatic part of QR&O development and reaches the appropriate pool of interest parties.[[206]](#footnote-206) Guidelines to aide in the planning and conduct of public consultation already exist within the federal regulation development process;[[207]](#footnote-207) what is missing in relation to the QR&O is a systemic recognition of the importance and value of consultation during proposal development, a requirement to assess and undertake appropriate consultation for each QR&O proposal, and an effective mechanism to ensure the established requirements are fulfilled even if they go beyond the administrative expectations and requirements being enforced by the TBS-RAS. Successfully effecting the suggested changes is far easier said than done, however, considering that at present QR&O development includes no public consultation, any step taken to increase public involvement in the QR&O process, no matter how modest, would produce a step towards greater legitimacy and transparency and, in turn, greater legislative quality.[[208]](#footnote-208)

The second identified deficiency relates to the insufficiency of parliamentary participation, which is also relevant to the achievement of democratic legitimation.[[209]](#footnote-209) While parliamentary predetermination of the delegated law making power is the principal method for effecting parliamentary involvement and achieving democratic legitimation for delegated legislation, in the face of weak parliamentary pre-determination a further option for bolstering legitimation is through retrospective parliamentary participation during the regulation making process.[[210]](#footnote-210) In the case of the QR&O, there is effectively no mechanism available for further parliamentary participation since the Standing Joint Committee for the Scrutiny of Regulations does not currently conduct *ex post facto* reviews of the QR&O despite having the statutory authority to do so.[[211]](#footnote-211) Short of seeking an amendment to section 12 of the NDA to either add the necessary specificity or require other measures for parliamentary involvement, the most obvious option for addressing the deficiency within the existing legal framework would involve the Minister making a request to the Committee to exercise its existing authority and proceed to review the QR&O.[[212]](#footnote-212) On its own or in concert with any steps undertaken to increase public involvement in QR&O development, having the Committee conduct a retrospective review of the QR&O would provide a positive step towards achieving sufficient democratic legitimation for the QR&O and, in turn, increasing its quality of legislation.[[213]](#footnote-213)

The final deficiency identified is the insufficient accessibility of the QR&O, which bears a direct impact on the QR&O’s achievement of legal certainty and can be attributed to two matters. The more critical matter arises from the delay in the official publication of QR&O changes on the Defence website, which during the period of the delay, makes the most current version of the QR&O inaccessible to all.[[214]](#footnote-214) The effect of this inaccessibility is compounded by the lack of information provided to identify the affected QR&O, which together impair predictability and certainty regarding the currency of the individual QR&O articles as well as the state of the law more generally.[[215]](#footnote-215) The obvious option for addressing this matter would be to eliminate the publication delay, or if this could not be done, to mitigate the uncertainty by providing public notice of all articles that are subject to an unpublished amendment.[[216]](#footnote-216) A further option that would eliminate the effect of the delay would be to tie the effective date for QR&O changes to the date of publication.[[217]](#footnote-217) While this option would not eliminate the delay itself, it would largely address its negative effects on accessibility and legal certainty by ensuring that regulatory change is only in effect once it is accessible.[[218]](#footnote-218) The second matter involves the exclusion of the small group of individuals from the existing notification and publication framework for the QR&O who are subject to the QR&O while not members of the CAF.[[219]](#footnote-219) This exclusion creates a notification gap, which in turn affects the accessibility of the QR&O for those in this group.[[220]](#footnote-220) While the practical impact may be small given the relative size of the affected group and the existing mitigation opportunities,[[221]](#footnote-221) the deficiency in accessibility would be effectively eliminated by simply expanding the responsibility that presently resides with commanding officers for ensuring the QR&O are reasonably accessible to the CAF members serving on their establishments to include any other individuals who are subject to the QR&O and supported by that establishment.[[222]](#footnote-222) Together, these measures would address the principal accessibility issues that function to impair the legal certainty of the QR&O.[[223]](#footnote-223)

In conclusion, the concept of quality legislation is multifaceted and brings together a number of elements that relate to how a legislative instrument is drafted, how well it achieves its legislative purpose as well as the legal framework in which it is made and exists.[[224]](#footnote-224) When considered in the context of the legal criteria for quality legislation, that is to say, democratic legitimation, subsidiary and proportionality, legal security/certainty and transparency of the legislative process, this dissertation demonstrates that the legislative quality of the QR&O is weak. While this result and the deficiencies identified in the QR&O’s legal framework and development process that underlie it are concerning, it has been shown through the options identified for addressing these deficiencies that the majority of the changes required to improve the quality of the QR&O rest in the organizational hands of the CAF and could be achieved within its existing legal framework. Nevertheless, identifying solutions is unquestionably easier than finding the organizational will to pursue change that would alter well-entrenched approaches and practices, and in particular, change that would open the curtains from around QR&O development and invite public involvement in a process where none has existed before.

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13. *The Queen’s Regulations and Orders for the Canadian Forces* (*National Defence and the Canadian Armed Forces)* (QR&O) National Defence and the Canadian Armed Forces, <<http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page>> accessed 23 August 2015. [↑](#footnote-ref-13)
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23. QR&O (n 13) art 1.23. [↑](#footnote-ref-23)
24. ibid, art 1.095. [↑](#footnote-ref-24)
25. *The King’s Regulations and Orders for the Canadian Army* (King’s Printer and Controller of Stationery 1951); *The King’s Regulations and Orders for the Royal Canadian Air Force* (King’s Printer and Controller of Stationery 1951); *The King’s Regulations and Orders for the Royal Canadian Navy* (King’s Printer and Controller of Stationery 1951). [↑](#footnote-ref-25)
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27. ibid, art 1.24(2). [↑](#footnote-ref-27)
28. The *Code of Service Discipline* comprises Part III of the NDA and provides the legal basis for the military justice system for the CAF; QR&O (n 13) art. 1.03. [↑](#footnote-ref-28)
29. Regulatory Process Guide (n 9) 3. [↑](#footnote-ref-29)
30. SIA (n 8) ss. 3-11, 19; Federal Regulations Manual (n 2) 5-19; Kirkby (n 8) 1-2. [↑](#footnote-ref-30)
31. The Treasury Board Secretariat is the administrative arm of the Treasury Board (Treasury Board of Canada Secretariat website < <http://www.tbs-sct.gc.ca/tbs-sct/abu-ans/tbs-sct/abu-ans-eng.asp> > accessed 23 August 2015). [↑](#footnote-ref-31)
32. The RIAS is a document that provides an accounting of the need for a regulation and includes information on the issue to be regulated, the reason for regulation, the government’s objectives, the costs and benefits of regulation, how performance of the regulation will be measured and details on the consultations conducted (Regulatory Process Guide (n 9) 7. [↑](#footnote-ref-32)
33. *The Constitution Act, 1982*, being Schedule B to the [*Canada Act 1982* (UK), 1982, c 11](http://www.statutelaw.gov.uk/documents/1982/11/ukpga). [↑](#footnote-ref-33)
34. SC 1960, c 44. [↑](#footnote-ref-34)
35. The *Canada Gazette* is the official gazette of Canada (SIA (n 8) s 10). [↑](#footnote-ref-35)
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37. SIR, (n 14) s. 7; Lortie (n 15). [↑](#footnote-ref-37)
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40. Joshi (n 12) 12-4; Dufour (n 15); Lortie (n 15). [↑](#footnote-ref-40)
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46. SIA (n 8) s. 3; SIR(n 14) s. 7. [↑](#footnote-ref-46)
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49. David Beetham, *The Legitimation of Power* (2nd edn, Palgrave Macmillan, 2013) 15-8. [↑](#footnote-ref-49)
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51. Pünder (n 1) 356; Ulrich Karpen, ‘Comparative Law: Perspectives of Legislation’ (2012) 6(2) Legisprudence 149, 154-5. [↑](#footnote-ref-51)
52. Murphy (n 1) 162-3; Pünder (n 1) 356. [↑](#footnote-ref-52)
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54. ibid 364. [↑](#footnote-ref-54)
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56. ibid 356-364. [↑](#footnote-ref-56)
57. ibid, 375; Murphy (n 1) 162-3. [↑](#footnote-ref-57)
58. Pünder (n 1) 356-364 [↑](#footnote-ref-58)
59. Voermans (n 17) 64, 66-8; Drinóczi (n 20) 7-10. [↑](#footnote-ref-59)
60. NDA (n 11) sub-ss 12(1)-(3). [↑](#footnote-ref-60)
61. Keyes (n 1) 21-2; Federal Regulations Manual (n 3) pt 1, 1-2. [↑](#footnote-ref-61)
62. The *Constitution Act, 1867* (UK) 30 & 31 Vict, c. 3, reprinted in RSC 1985, App II, No 5, ss 91 and 92. [↑](#footnote-ref-62)
63. Re Gray (n 5) 170; Murphy (n 1) 163; Keyes (n 1) 109-11 and 139. [↑](#footnote-ref-63)
64. Joshi (n 12) 2-6. [↑](#footnote-ref-64)
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66. ibid ss 14-9. [↑](#footnote-ref-66)
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70. ibid; Keyes (n 1) 22-3; 89-92; 503-8; Paul Salembier, *Regulatory Law and Practice in Canada* (LexisNexis Butterworths 2004) 196-9. [↑](#footnote-ref-70)
71. NDA (n 11) sub-ss 12(1)-(2); See text at n 60. [↑](#footnote-ref-71)
72. Murphy (n 1) 162-3; Pünder (n 1) 356-357, 361-4. [↑](#footnote-ref-72)
73. NDA (n 11). [↑](#footnote-ref-73)
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75. ibid sub-s 12(2) & s 13. [↑](#footnote-ref-75)
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82. ibid 361-9. [↑](#footnote-ref-82)
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90. SIA (n 8) ss. 3, 5, and 11; SIR (n 14) s 7; Joshi (n 12) 9-12. [↑](#footnote-ref-90)
91. SIA (n 8), s. 19; SIR (n 14) s. 22. [↑](#footnote-ref-91)
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93. SIA (n 8), s. 19; *House of Commons Procedure and Practice* (n 89), ch 17, text at fnn 16-18. [↑](#footnote-ref-93)
94. Lortie (n 15). [↑](#footnote-ref-94)
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103. Joshi (n 12) 48; Keyes (n 1) 192-3; 209-12. [↑](#footnote-ref-103)
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106. Treasury Board of Canada Secretariat, *Guidelines for Effective Regulatory Consultations* (2007) < [http://www.tbs-sct.gc.ca/rtrp-parfa/erc-cer/erc-cer01-eng.asp](http://www.tbs-sct.gc.ca/rtrap-parfa/erc-cer/erc-cer01-eng.asp) > accessed 23 August 2015. [↑](#footnote-ref-106)
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117. Kellerman (n 102) 203-4. [↑](#footnote-ref-117)
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128. *R.* v. *Hydro-Québec*, [1997] 3 SCR 213 at para 113 (SCC); Keyes (n 1) 139. [↑](#footnote-ref-128)
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131. *Constitution Act, 1867* (n 62), sub-s 92(14). [↑](#footnote-ref-131)
132. QR&O (n 13); Michele A Pineau, ‘Civilians under Military Justice: A Canadian Study’ (1979) 25 McGill Law Journal 3, 5. [↑](#footnote-ref-132)
133. NDA (n 11) s 68. [↑](#footnote-ref-133)
134. Michael Gibson, ‘Canada’s Military Justice System’ (Spring 2012) 12(2) Canadian Military Law Journal 61; ‘The Sources and Scope of Canadian Military Law’ (*Court Martial Appeal Court of Canada*, 30 March 2014) < <http://www.cmac-cacm.ca/business/military_law1-eng.shtml> > accessed 23 August 2015. [↑](#footnote-ref-134)
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136. NDA (n 11) s 12; See text at n 60. [↑](#footnote-ref-136)
137. Ulrich Karpen, ‘Instructions for Law Drafting’ (2008) Eur J L Reform 163, 166. [↑](#footnote-ref-137)
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139. Rt Hon Lord Justice Stanley Burnton, ‘Proportionality’ [2011] JR 179; Kellerman (n 102) 185-6. [↑](#footnote-ref-139)
140. Privy Council Office, *Guide to Making Federal Acts and Regulations: Cabinet Directive on Law-Making* (2003) s 2. <[http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm](http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm%20) > accessed 23 August 2015. [↑](#footnote-ref-140)
141. Cabinet Directive (n 7) paras 25-6, 33-7. [↑](#footnote-ref-141)
142. ibid sub-para 26 (v-vii). [↑](#footnote-ref-142)
143. ibid paras 33-7. [↑](#footnote-ref-143)
144. Regulatory Process Guide (n 9) 5-7; Schwartz (n 4) 21; Lortie (n 15). [↑](#footnote-ref-144)
145. Lortie (n 15). [↑](#footnote-ref-145)
146. Cabinet Directive (n 7) paras 25-37; Regulatory Process Guide (n 9) 5-7. [↑](#footnote-ref-146)
147. ibid. [↑](#footnote-ref-147)
148. Flückiger references this criterion from cl 2 of the 2003 Interinstitutional Agreement on Better Law-making, which uses the term ‘legal certainty’ (Flückiger (n 20) see fn 11). See also Karpen (n 51) ‘Comparative Law’ 156. [↑](#footnote-ref-148)
149. Patricia Popelier, ‘Legal Certainty and Principles of Proper Law Making’ (2000) 2 Eur JL Reform 327-8; James R. Maxeiner, ‘Legal Certainty: A European Alternative to American Legal Indeterminacy?’ (2006-2007) 15 Tul J Int’l & Comp L 541, 549; Patricia Popelier, ‘Five Paradoxes on Legal Certainly and the Lawmaker’ (2008) 2 Legisprudence 47; John McGarry ‘Effecting Legal Certainty under the Human Rights Act’ [2011] JR 66, 66-7. [↑](#footnote-ref-149)
150. Popelier (n 149) ‘Legal Certainty’ 327-8; Popelier (n 149) ‘Five Paradoxes’ 48. [↑](#footnote-ref-150)
151. SIA (n 8) ss 3, 5, and 11; SIR (n 14) s 7; Joshi (n 12) 9-12. [↑](#footnote-ref-151)
152. SIA (n 8) ss 5-6,11,16; SIR (n 14) s 5; NDA (n 11) sub-s 51(3); Keyes (n 1) 230-2. [↑](#footnote-ref-152)
153. NDA (n 11) sub-s 51(1); QR&O (n 13) art 1.21(2). [↑](#footnote-ref-153)
154. QR&O (n 13) art 1.21. [↑](#footnote-ref-154)
155. NDA (n 11) sub-s 51(2). [↑](#footnote-ref-155)
156. QR&O (n 13). [↑](#footnote-ref-156)
157. Popelier, ‘Certainty of the Law’ (n 149) 329; Duncan Berry, ‘Keeping the Statute Book up-to-date —A personal view’ (Commonwealth Association of Legislative Counsel Conference, London, September 2005) 33; Daniel Greenberg, ‘Access to Legislation—the Legislative Counsel’s Role’ (2003) 3 The Loophole 7, 9-10. [↑](#footnote-ref-157)
158. Joshi (n 12) 25-8; Berry (n 157) 33; Greenberg (n 157) 9-10; Keyes (n 1) 232-4. [↑](#footnote-ref-158)
159. QR&O (n 13) art 1.03. [↑](#footnote-ref-159)
160. NDA (n 11) ss 60(1)(f) and 61(1). [↑](#footnote-ref-160)
161. NDA (n 11) s 51; QR&O (n 13) art 1.21. [↑](#footnote-ref-161)
162. Popelier, ‘Certainty of the Law’ (n 149) 329; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-162)
163. SIA (n 8) 11(2); Keyes (n 1) 233. [↑](#footnote-ref-163)
164. *Military Rules of Evidence,* CRC, c. 1049,s. 15(2); Joshi (n 12) 25-6. [↑](#footnote-ref-164)
165. Salembier, ‘Designing Regulatory Systems’ (n 118) 12. [↑](#footnote-ref-165)
166. QR&O (n 13). [↑](#footnote-ref-166)
167. Keyes (n 1) 232-3. [↑](#footnote-ref-167)
168. ‘Justice Laws Website’ (*Department of Justice*) < <http://laws.justice.gc.ca/eng/> > accessed 23 August 2015. [↑](#footnote-ref-168)
169. Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-169)
170. Lortie (n 15). [↑](#footnote-ref-170)
171. *Interpretation Act,* RSC, 1985, c. I-21, s 6. [↑](#footnote-ref-171)
172. Lortie (n 15). [↑](#footnote-ref-172)
173. ‘QR&Os: Amendment List’ (*National Defence and the Canadian Armed Forces*, 01 August 2015) < <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/amendment-list.page> > accessed on 23 August 2015. [↑](#footnote-ref-173)
174. SIA (n 8), s 11; Salembier, ‘Designing Regulatory Systems’ (n 118) 12. [↑](#footnote-ref-174)
175. See text at nn 163 and 164. [↑](#footnote-ref-175)
176. Lortie (n 15); Popelier, Certainty of the Law (n 149) 329; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-176)
177. Popelier, ‘Certainty of the Law’ (n 149) 327; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-177)
178. ibid. [↑](#footnote-ref-178)
179. ibid. [↑](#footnote-ref-179)
180. Timmermans (n 124) S120. [↑](#footnote-ref-180)
181. Kadija Kappa, ‘Legislatures in Modern States: The Role of Legislatures in Ensuring Good Governancy is Inadequate: A Case Study of the United Kingdom and Sierra Leone’ (2010) 12 Eur JL Reform 426, 429; Poloko, (n 102) 426-9. [↑](#footnote-ref-181)
182. ibid; Kellerman (n 102) 203-4. [↑](#footnote-ref-182)
183. Kellerman (n 102) 203-4; Poloko (n 102) 426. [↑](#footnote-ref-183)
184. SIA (n 8) ss 3, 5, and 11; SIR (n 14) s 7. [↑](#footnote-ref-184)
185. Lortie (n 15). [↑](#footnote-ref-185)
186. Ibid. [↑](#footnote-ref-186)
187. Kappa (n 181) 429. [↑](#footnote-ref-187)
188. Joshi (n 12) 12-4, Dufour (n 15); Lortie (n 15). [↑](#footnote-ref-188)
189. Lortie (n 15). [↑](#footnote-ref-189)
190. ibid. [↑](#footnote-ref-190)
191. ibid; Regulatory Process Guide (n 9) 5-7. [↑](#footnote-ref-191)
192. SIA (n 8) ss 3, 5, and 11; SIR (n 14) s 7; See text at nn 145, 168. [↑](#footnote-ref-192)
193. *Concise Oxford Dictionary* (10th edn, Oxford University Press 1999). [↑](#footnote-ref-193)
194. Kappa (n 181) 429; Poloko (n 102) 427. [↑](#footnote-ref-194)
195. ibid. [↑](#footnote-ref-195)
196. Mkuye (n 97) 218-9; Hashim (n 102) 155-6; Kellerman (n 102) 203-4; Poloko (n 102) 427. [↑](#footnote-ref-196)
197. ibid; Keyes (n 1) 192-3. [↑](#footnote-ref-197)
198. ibid. [↑](#footnote-ref-198)
199. Flückiger (n 20) 214-5. [↑](#footnote-ref-199)
200. See text at nn 120-2 and 195-7. [↑](#footnote-ref-200)
201. NDA (n 11) s 12; Murphy (n 1) 162-3; Pünder (n 1) 356-357, 361-4, 377-8; See text at nn 78-80 and 122. [↑](#footnote-ref-201)
202. Pünder (n 1) 369. [↑](#footnote-ref-202)
203. Mkuye (n 97) 218-9; Hashim (n 102) 155-6; Kellerman (n 102) 203-4; Kappa (n 181) 429; Poloko (n 102) 426-9. [↑](#footnote-ref-203)
204. Joshi (n 12) 48; Dufour (n 15). [↑](#footnote-ref-204)
205. Kellerman (n 102) 203-4; Salembier ‘Designing Regulatory Systems’ (n 118) 6. [↑](#footnote-ref-205)
206. Kellerman (n 102) 203-4; Poloko (n 102) 426-7. [↑](#footnote-ref-206)
207. *Guidelines for Effective Regulatory Consultations* (n 106). [↑](#footnote-ref-207)
208. Kellerman (n 102) 203-4; Poloko (n 102) 426-7; Pünder (n 1) 374-7. [↑](#footnote-ref-208)
209. Pünder (n 1) 356-64, [↑](#footnote-ref-209)
210. ibid, 364-9. [↑](#footnote-ref-210)
211. SIA (n 8) s 19; Lortie (n 15). [↑](#footnote-ref-211)
212. ibid; NDA (n 11). [↑](#footnote-ref-212)
213. Pünder (n 1) 364-9, 377-8. [↑](#footnote-ref-213)
214. Popelier, ‘Certainty of the Law’ (n 149) 326-9; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-214)
215. ibid. [↑](#footnote-ref-215)
216. Berry (n 157) 33. [↑](#footnote-ref-216)
217. Salembier, ‘Designing Regulatory Systems’ (n 11) 12. [↑](#footnote-ref-217)
218. Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-218)
219. See text at nn 159-66. [↑](#footnote-ref-219)
220. Popelier, ‘Certainty of the Law’ (n 149) 329; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-220)
221. See text between nn 167-9. [↑](#footnote-ref-221)
222. QR&O (n 13) art 1.22; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-222)
223. Popelier, ‘Certainty of the Law’ (n 149) 329; Berry (n 157) 33; Greenberg (n 157) 9-10. [↑](#footnote-ref-223)
224. Mousmati (n 17) 192-3; Fluckiger (n 20) 213-4. [↑](#footnote-ref-224)