

## ARE THE RENTAL REGULATIONS INVALID?

Order 108<sup>1</sup> seems to have been more restricted in its application than one might suppose. After defining "basic" dates in section 1, section 2 provides that no person shall collect rent for any accommodation in excess of the maximum rental therefor fixed by the Maximum Rental Regulations or by or under that or any other Order of the Board; but the Order up to this point has not fixed rentals by reference to basic dates. It has only defined basic dates. Section 2, subsection 2 (a) and (b), subsection 3, subsection 4 and subsections 6 and 7 deal with leases variable in terms, cases where leases and subleases coexist, where there is an option, where properties are rented for a season or seasons only, with room or rooms in any housing accommodation and with hotel accommodation, and provide for maximum rentals in these cases related to the basic dates. The Order, however, does not contain any enactment applying the basic dates to cases other than the above and those referred to in section 3(1). In other words, there is no enactment covering ordinary housing or commercial accommodation. This defect seems to have been recognized when Board Order 294<sup>2</sup> was enacted, for under this Order maximum rentals are fixed.

Assuming, however, that a positive enactment has been made by Order 108, the effect of P.C. 3207, 1943,<sup>3</sup> must be considered. A portion reads as follows:—

5. (1) On and after December 1, 1941, the maximum rental
  - (a) for any real property for which there was a lease in effect on October 11, 1941, shall be the rental lawfully payable under that lease;
  - (b) for any real property for which there was no lease in effect on October 11, 1941, but for which there was a lease in effect at some time or times since January 1, 1940, shall be the rental lawfully payable under the latest lease in effect between January 1, 1940, and October 11, 1941; and
  - (c) for any other real property, shall be the maximum rental that may from time to time be fixed by or on behalf of or under authority of the Board.
- (4) Nothing contained in this section shall be deemed to supersede any provision of any order heretofore made or any maximum rental heretofore fixed by or on behalf of or under authority of the Board or to derogate from any power conferred on the Board and, without restricting the generality of this provision,

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<sup>1</sup> C.W.O. & R., Vol. 10, December 14, 1942, p. 507.

<sup>2</sup> C.W.O. & R., Vol. III, No. 7, August 23, 1943, p. 401.

<sup>3</sup> C.W.O. & R., Vol. II, No. 5, May 10, 1943, p. 277.

the Board may vary any maximum rental, may concur in any variation of a maximum rental, may prescribe other or additional terms or variation of a maximum rental, may prescribe other or additional terms or conditions of any lease, may exempt any person or any real property or any lease or transaction wholly or partly from the provisions of these regulations and may withdraw any such exemptions, either generally or in specific cases, and subject to such terms and conditions as the Board may prescribe.

Prior to this enactment, the Board had passed several Orders consolidated in Order 108.<sup>4</sup> The provisions of Order 108 covered the following:—

1. The area named in Schedule "A".
2. The area named in Schedule "B".
3. Any other area.

Order 108 was therefore a complete code for the whole of Canada. If the saving clause in P.C. 3207 is interpreted to mean that all the provisions of Order 108 were preserved, P.C. 3207 is in force only to the extent that it is not in conflict with Order 108.

The extent of the conflict is illustrated by the following:—

<i>P.C. 3207</i>	<i>Board Order 108</i>
1. Rental payable under lease in effect October 11, 1941.	1. Basic date, January 2, 1940.
2. Rental payable under latest lease in effect between January 1, 1940, and October 11, 1941.	2. Basic date is date of latest lease in effect in 1939.
3. Other cases—rentals to be fixed by Board.	3. Basic date, October 11, 1941.
	4. Basic date, January 2, 1941.
	5. Basic date is date of latest lease in effect in 1940.
	6. Basic date, October 11, 1941.
	7. Basic date, October 11, 1941.
	8. Basic date, date of expiration of latest lease in effect between January 1, 1940, and October 11, 1941.
1, 2 and 3 apply throughout Canada.	1, 2 and 3 apply in Area "A"; 4, 5 and 6 in Area "B"; and 7 and 8 in other areas.

The conflict is even greater than the above table would indicate. Under P.C. 3207, the maximum rentals are the rentals

<sup>4</sup> *Supra*, note 1.

payable under leases in effect at the specified dates. Under Order 108, rentals are fixed by basic dates. These are either specific dates or the dates of the leases; or, in one case, the date of expiration of the latest lease. Presumably the rentals actually provided for are those which happen to be payable on the particular dates in question. The rental payable on a particular date may not be the same as the rental actually payable under the lease. There are leases under which rentals may vary from time to time by virtue of the nature of the transaction or the seasons of the year or the amount of business done or revenue or produce obtained.

Section 2, subsection 2 of Order 108 is not all inclusive as to this class of lease. Evidently under Order 108 the intention was that the amount which happens to be payable on a particular basic date is the amount payable regardless of whether it happens to be the rental actually payable under the lease. One must assume that the language used by the Board contemplated the adoption of a system different to that set out in the Order-in-Council. Otherwise similar language would have been used. Because of this, even where the dates in the Orders-in-Council and those in Order 108 coincide, there is a conflict. Furthermore, the Orders-in-Council apply throughout the whole of Canada while Order 108 divides Canada into three areas with different rules applicable to each.

From the above, it is submitted, the following conclusions result:—

- (a) - Order 108 covers the whole of Canada.
- (b) In no single respect do the provisions of section 1(b) of Order 108 comply with the maximum rental provisions laid down by P.C. 3207.
- (c) Either the provisions of Order 108 are invalid or the Order-in-Council is a nullity.

The Order-in-Council, being subsequent to Order 108 and having been passed by the body by which the Board was created, cannot be regarded as having no effect. Had it not been for the saving clause, the Order-in-Council would have to be construed as repealing Order 108, the latter being wholly inconsistent with it. The difficulty is that if full effect is given to either enactment, the other disappears. On the view most favourable to the Board Order, some effect should be given to each enactment. This can be done if the saving clause is interpreted to mean that the Orders of the Board, notwithstanding the retro-

active nature of P.C. 3207, are still effective for the periods and in respect of the areas in which they were effective prior to the passing of Order-in-Council 3207. Convictions could, on this view, be obtained for offences committed prior to the date of the passing of P.C. 3207.

P.C. 3207 repealed P.C. 8965 (1941). The latter recited that "it is deemed to be necessary and advisable for the security and welfare of Canada that provision be made for the maximum rental at which *any real property in Canada may be rented or offered for rent*", and proceeded to enact the following:—

3. (1) On and after December 1, 1941, the maximum rental for any real property shall be as follows:
  - (a) for any real property for which there was a lease in effect on October 11, 1941, the rental lawfully payable under that lease;
  - (b) for any real property for which there was no lease in effect on October 11, 1941, but for which there was a lease in effect at some time or times since January 1, 1940, the rental lawfully payable under the latest lease in effect since January 1, 1940;
- (2) For any other real property, the maximum rental shall be that which may from time to time be fixed by or under the provisions of an Order of the Board.

A saving clause, similar to that in P.C. 3207, appears as paragraph (3). The same contradiction will appear if the saving clause is interpreted as keeping in force all Orders of the Board. To the extent of the conflict between such Orders and the provisions of section 3, the latter will be vacated. Some effect must be given to the substantial enactment fixing maximum rentals "at which any real property in Canada may be rented or offered for rent." Again, effect can be given to P.C. 8965 if the saving clause is interpreted as above.

It is to be noted that while P.C. 3207 is in substantially the same terms as P.C. 8965, sec. 3(1) (b) of the latter is amended by substituting for "in effect since January 1st, 1940" the words "in effect between January 1, 1940, and October 11, 1941". Evidently the Governor-in-Council intended to change the effect of P.C. 8965 and must have considered the latter to be in force at the time P.C. 3207 was passed. Furthermore, Order 108, in section 2(1), refers to the Maximum Rentals Regulations. These were established by P.C. 8965 and P.C. 3207 and the Board, in Order 108, therefore proceeds on the assumption that these Orders-in-Council are in effect.

It therefore follows, applying the ordinary rules of interpretation, that the provisions of P.C. 8965 and P.C. 3207 have been in effect since the passing of the former Order and rents are fixed having regard to the following:—

- (a) The rental payable under a lease in effect on October 11, 1941.
- (b) The rental payable under a lease in effect at some time or times since January 1, 1940 (P.C. 8965) or between January 1, 1940, and October 11, 1941 (P.C. 3207).
- (c) For any other real property, the rental fixed by the Board.

The problem facing any person arguing that Order 108 was in effect is to extract the meaning to be given to P.C. 8965 and P.C. 3207. The Board has legislated without regard to these Orders.

It is further submitted that the provisions of Order 108 are so discriminatory as to be invalid in any event. Under section 1(b) (i), the following are the basic dates:—

- (a) January 2nd, 1940.
- (b) The date of the latest lease in effect in 1939 (presumably the initial date).
- (c) October 11, 1941.

Under section 1(b) (ii), the following are the basic dates:—

- (a) January 2, 1941.
- (b) The date of the latest lease in effect in 1940 (presumably the initial date).
- (c) October 11, 1941.

And under section 1(b) (iii), the following dates apply:—

- (a) October 11, 1941.
- (b) Date of *expiration* of latest lease in effect between January 1, 1940, and October 11, 1941.

As a result of this enactment, persons renting property in the same locality in Area "A" may pay rents based on any of the following dates:—

- (a) January 2nd, 1940.
- (b) The date of the latest lease in effect in 1939.
- (c) October 11, 1941.

It is common knowledge that, following the outbreak of war, the price of building materials rose substantially and rents would, to some extent, be governed by the price of such materials. The rental payable under a lease entered into in October, 1941, would reflect such increase; but it would not be reflected in some lease which was in effect in 1939 and which might have been entered into in the depression days. Neighbours in area "A" may, therefore, pay varying rents fixed by conditions as they existed from October 11th, 1941, back to the date of a lease in effect in 1939, which might have been entered into some years before. If Governmental authorities expect people to have respect for law, the laws should be of such a nature as to command respect.

Similarly, in the area named in Schedule "B", the first basic date is January 2nd, 1941, which is a year later than the first basic date effective in the area named in Schedule "A". The second basic date is the date of the latest lease in effect in 1940, which may carry the basic date to a date considerably earlier. The last date in Schedule "B" is October 11th, 1941. Discriminations therefore exist within area "B", although they are somewhat modified as compared to those in area "A" by virtue of the basic dates being closer to October 11th, 1941; and approximate those fixed by P.C. 3207, which, however, apply throughout the whole of Canada.

In the residual area, the basic dates are October 11th, 1941, and the expiration of the latest lease in effect between January 1st, 1940, and October 11th, 1941.

It follows that, in Order 108, no attempt has been made to achieve equality either as between landlords or tenants in any one area or as between the various areas referred to in the Order. The following quotations would appear to be applicable:—<sup>5</sup>

..... that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination must, I think, explicitly and distinctly, appear by clear and unambiguous words.

..... I think we must assume, in the absence of any provision clearly indicating the contrary, that the legislature intended the Act to be construed on the principle of uniformity and impartiality.

..... I therefore think, if the legislature contemplated such a departure from uniformity and impartiality as is established by this by-law, such an intention would have been made apparent on the face of it and cannot be inferred.

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<sup>5</sup> *Jonas v. Gilbert*, 5 S.C.R. at p. 365 ff.

The authority of the Board in the period in question is contained in P.C. 9029 (1941), section 3(1) (g) :

to fix the maximum rental at which any real property may be rented or offered for rent by any person and to prohibit a rental in excess of the maximum so fixed; and any order made pursuant to this regulation shall apply throughout Canada unless otherwise provided therein.

This provision contemplated generally that Orders made by the Board should apply throughout Canada — in other words, that uniformity should prevail. However, it was open to the Board ((presumably for sufficient reason) to make an Order which did not apply throughout the whole of Canada. This may or may not justify the discriminations in Order 108 as between different areas. There is nothing, however, in this provision contemplating discrimination between persons resident in the same area.

On the other hand, P.C. 8965 and P.C. 3207 appear to provide as much uniformity as the circumstances permit. The rent payable under a lease in effect on October 11, 1941, would, in most cases, reflect the increase in the price of materials and the Order applies throughout the whole of Canada. Where no lease was in effect on October 11, 1941, the rent is fixed by some lease which was in effect between January 1, 1940, and October 11, 1941, and this rule applies also throughout the whole of Canada. Substantial uniformity has therefore been achieved.

If the above is correct, the Board's power under P.C. 8965 and P.C. 3207 (aside from incidental matters) is restricted to fixing rents only in cases where there were no leases in effect on October 11, 1941, and none in effect between January 1, 1940, and October 11, 1941. Instead of confining its jurisdiction accordingly, it proceeded to legislate for the whole of Canada and in terms wholly at variance with the enactments of the Governor-in-Council as contained in P.C. 8965 and P.C. 3207.

#### NOTE

This article is written having particular reference to Order 108. In the ordinary course, prosecutions could be launched under this Order up to October 1, 1944. Order 294 (effective October 1, 1943), in section 4(1) (a) re-enacts 1(b) (1) and 1(b) (2) of Order 108 and therefore carries forward the conflict outlined above. In section 4(1) (b), Order 294 re-enacts the provisions of P.C. 3207. The Board seems to have considered

this necessary. In section 4(1) (c), the rental payable under a new lease as late as December 10, 1942, may become the maximum rental. As a result, rentals are now based on those payable at various times over a period beginning with the date of a lease in effect in 1939 and ending December 10, 1942. The element of discrimination is therefore even greater under Order 294 than under Order 108.

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