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SUBORDINATE LEGISLATION*

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I. *Nature of Subordinate Legislation.*

A statute, or an Act of Parliament, may be defined as the written will of a sovereign legislative body, solemnly expressed according to the forms necessary to constitute it the law of the territory over which that legislative body has jurisdiction.[1] A statute is a law. We know, however, that there are other written laws in the form of statutes that were not enacted by a sovereign legislative authority. Thus, there are laws made by the executive, that is to say, by the Governor General in Council or by a minister; there are laws made by municipal authorities, and by other bodies, as, for example, the National Harbours Board, the National Capital Commission.

These laws that are not enacted by a sovereign legislature are nevertheless made under the authority of a statute. Unless authorized by statute, neither the executive nor any other authority has the power to make laws.[2] In the *Chemicals Reference*[3] Chief Justice Duff said that "every order in council, every regulation,

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[1] Bouvier's Law Dictionary, 3rd Rev. 3129.

[2] *The Zamora*, [1916] 2 A.C. 77; *The Case of the Proclamations*, (1611), 12 Co. R. 74, 77 E.R. 1352.

[3] [1943] S.C.R. 1, at p. 13.

every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from . . . [an] Act of Parliament", and, quoting from *The Zamora*, he said that "All such instruments derive their authority from the statute which creates the power, and not from the executive body by which they are made."

These subsidiary laws are known by a variety of expressions —regulations, rules, orders, by-laws, ordinances—or, collectively, as subordinate legislation or delegated legislation. These expressions do not have precise or generally accepted meanings.

The term "regulation" is usually understood to be a subsidiary law of general application, whereas an "order" is usually regarded as a particular direction in a special case.[4] The term "order" is also used to describe the act or instrument that establishes rules or regulations, as, for example, an Order in Council. The term "regulation" is sometimes used to describe the whole instrument, and sometimes only to describe a provision thereof. The expression "rule" is usually applied to procedural regulations, as, for example, rules of court. These three expressions—regulations, rules, orders—are to some extent interchangeable, and one sometimes finds in one sentence power to make "orders, rules and regulations," with no clue as to what the difference is.

A law made by a municipal authority is usually called a "by-law" or an "ordinance". In *Kruse* v. *Johnson*[5] Lord Russell of Killowen, defined a "by-law" of a local authority as "an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance . . . . Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation". The expression "by-law" is also applied to rules made by a corporation for its internal management, but in this sense it is not "law". The expression "ordinance" is also applied to the enactments of a non-sovereign legislative body, as, for example, the Council of the Northwest Territories or the Yukon Territory. The enactments of colonial legislatures are sometimes called "ordinances" and in early English history the term "ordinance" was applied to a document that issued from Parliament but differed from a statute in

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[4] *Attorney General for Alberta* v. *Huggard Assets*, [1953] A.C. 420.
[5] [1898] 2 Q.B. 91, at p. 96.

that the latter had the assent of the Sovereign, the Lords and the Commons—the three estates—whereas the former had the assent of only two estates.[6]

Subordinate legislation may roughly be divided into two classes. First, there are laws made by the executive or by some body or person that is subject to some degree of control by the executive. Into this category would fall regulations made by the Governor in Council, by-laws of the National Harbours Board, regulations of the National Capital Commission. Secondly, there are enactments by independent or quasi-independent local governments. They derive their powers from the legislature but are not directly responsible to the executive. As we shall see later, these two classes of legislation have to some extent received different treatment by the courts. Both classes constitute law, and are usually enforced by sanctions. Rules of court may perhaps be considered a third category. They are usually made, not by the legislative or executive authority, but by the judiciary, and the sanction for breach of the rules is not usually fine or imprisonment.

Not all instruments issued under statutory authority are included in the expression "subordinate legislation". A statute may confer power to exercise legislative, judicial or ministerial powers. We are not concerned here with the judicial or ministerial, but only with those instruments that are of a legislative character. The dividing line between these classes of powers may be thin or obscure, and any further discussion thereon falls more properly within the scope of administrative law.

It is not intended here to adopt any precise definitions, but, for the sake of convenience, all subordinate legislation will be included in the term "regulations"; where it is necessary to make a distinction, laws enacted by municipal authorities will be referred to as "by-laws", and regulations governing matters of procedure will be referred to as "rules".

All subordinate legislation constitutes law. Is it the same as a statute? In *The Queen* v. *Walker*[7] Lush J. said that "an order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids". But it does not follow that a regulation is a statute. In *The King* v. *Singer*[8] the Supreme Court of Canada decided expressly that a regulation was not an Act of Parliament. Regulations were made under the War Measures Act prohibiting the sale of codeine without a pre-

[6] Craies on Statute Law (5th ed. 1952), p. 50.
[7] (1875), L.R. 10 Q.B. 355. [8] [1941] S.C.R. 111.

scription; the regulations contained no penalty. There was a general provision in the Criminal Code prescribing a penalty for breach of any "Act of the Parliament of Canada or of any legislature in Canada". It was argued that the Criminal Code applied to a violation of the regulations, but the court held that although the regulations were law they did not constitute an Act of Parliament; they were not "passed" by the Parliament of Canada or by the legislature of a province.

In another case, however, the Judicial Committee of the Privy Council did come close to equating regulations and an Act of Parliament. In the *Japanese Reference*[9] it was urged that the Colonial Laws Validity Act rendered inoperative certain regulations under the War Measures Act providing for the deportation of persons of the Japanese race, on the ground that those regulations were contrary to the British Nationality Acts. The Statute of Westminster, 1931, provided that no law "made by the Parliament of a dominion" should be void or inoperative on the ground that it was repugnant to the law of England, and that the Colonial Laws Validity Act should not apply to "any law made . . . by the Parliament of a dominion". It was argued that the Statute of Westminster applied only to Acts of Parliament and not to regulations and, therefore, the Colonial Laws Validity Act was still applicable. The Judicial Committee, however, had no difficulty in holding that the regulations in question were laws made "by the Parliament of a dominion" within the meaning of the Statute of Westminster. Lord Wright said that the "legislative activity of Parliament is still present at the time when the orders are made, and these orders are 'law'. In their Lordships' opinion they are laws made by the Parliament at the date of their promulgation".[10]

II. *The Challenge of Subordinate Legislation.*

In the United Kingdom an Act of Parliament cannot be questioned. Whatever it says, it is the law. In a federal state such as Canada, however, where legislative jurisdiction is divided between different legislative bodies, the validity of a statute can be challenged on the ground that the enacting legislature exceeded its constitutional authority. However, if a legislature in Canada acted within its constitutional powers, then the statute cannot be questioned.[11] Notwithstanding that a regulation may for some purposes be regarded as a statute, there is one important differ-

[9] [1947] A.C. 87.
[10] *Ibid.*, at p. 107.
[11] *The King* v. *Irwin*, [1926] Ex. C.R. 127.

ence. The courts can question the validity of subordinate legislation on the ground that the authority conferred by the Act was exceeded. The principle is the same as that applicable to statutes in a federal jurisdiction. If the statute confers the power, the regulation is valid; if the statute has not conferred the power, then the regulation is *ultra vires.*

In some statutes there is a provision to the effect that the regulations or rules made thereunder "shall be of the same effect as if they were contained" in the Act itself. This language was considered by the House of Lords in the case of *Institute of Patent Agents* v. *Lockwood.*[12] Herschell L.C. concluded that this clause prevented the courts from considering the validity of the regulation. Lord Watson agreed, but Lord Morris held that the clause applied only to rules that were validly made; if valid, they then had the same effect as the Act, that is to say, they constituted a law. The point came before the Supreme Court of Canada but was not decided. In *Belanger* v. *The King*[13] it was alleged that certain regulations made under the Railway Act were invalid on the ground that they conflicted with the Act. There was a provision in the Act that the regulations were to be "taken and read" as part of the Act. Duff J. "assumed" for the purposes of argument that the "regulations are to be treated as the House of Lords treated the rule which was in question" in the *Lockwood* case, but held that the regulation, in so far as it was inconsistent with the Act, must give way.[14] Again, in *The King* v. *Singer*[15] reference was made to the *Lockwood* case but was distinguished on the ground that the War Measures Act said only that orders thereunder "shall have the force of law" and not, as in the *Lockwood* case, that they should have the same effect as if contained in the Act. The point came up again in *Minister of Health* v. *The King (on the Prosecution of Yaffe)*[16] and this time the House of Lords did not consider itself precluded from considering the validity of a regulation of this character. In *MacCharles* v. *Jones*[17] the Manitoba Court of Appeal followed the *Yaffe* case and held that the court could question the validity of rules that were declared by the legislature to "have effect as if embodied in and as part of" the Act under which they were made.

A provision that a regulation is to have the same effect as if enacted in the Act is not common in modern Acts of the Parliament of Canada. There was a provision like this in the former

[12] [1894] A.C. 347. [13] (1916), 54 S.C.R. 265.
[14] *Ibid.*, at p. 276. [15] *Supra*, footnote 8. [16] [1931] A.C. 494.
[17] [1939] 1 W.W.R. 133 (Man. C.A.).

Food and Drugs Act[18] and it was regarded as having some significance there. That statute conferred authority to make regulations, but did not expressly confer authority to prescribe penalties for breach of a regulation. The statute itself prescribed a penalty only for breach of a provision of the Act. The provision that the regulations should have the "same force and effect as if embodied in this Act" was regarded as incorporating the regulations into the Act for the purpose of making the penalty section applicable to a breach of the regulations. On the other hand, in *Willingdale* v. *Norris*[19] it was held that a provision in an Act prescribing a penalty for breach of the Act extended also to a regulation. Lord Alverstone C.J. said that "If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex* v. *Walker* is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act."[20]

Whether regulations are or are not the same thing as a statute, it is clear that they are subordinate to the statute under which they are made, and if there is any conflict between them, the statute prevails.[21]

Parliament can, of course, by appropriate language, oust the jurisdiction of the courts to enquire into the validity of subordinate legislation. Thus, in *Ex Parte Ringer*[22] the court had under consideration a statute that authorized the making of an order for the compulsory acquisition of land. The statute provided that the order should have no force until it was confirmed by the Board of Agriculture and Fisheries "and an order when so confirmed shall be final and have effect as if enacted in this Act, and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act." The court held that the order, when confirmed, was not subject to review by the courts. A provision of this kind is unusual, and I am not aware of any provision like this in the statutes of Canada.

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[18] R.S.C., 1952, c. 123, s. 3(2).
[19] [1909] 1 K.B. 57. [20] *Ibid.*, at p. 64.
[21] *Belanger* v. *The King*, *supra*, footnote 13; *Institute of Patent Agents* v. *Lockwood*, *supra*, footnote 12.
[22] (1909), 25 T.L.R. 718.

III. *Grounds On Which Regulations May Be Challenged.*

The validity of subordinate legislation has been challenged in the courts on many different grounds with varying success. The following seem to be the principal grounds that have been put forward.

(a) *Repeal of authorizing Act.*

If an authorizing statute is repealed then, apart from any special statutory provisions, the regulations made under the statute also are repealed.[23] The Interpretation Act, however, provides that where an Act is repealed and other provisions are substituted, all regulations made under the repealed Act continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead.[24] In *Regina* v. *Konowalchuk*[25] the question arose whether an order continued in force after repeal of the statute under which it was made and the enactment of a similar provision, but somewhat wider in scope. The court held that the order under the repealed statute was inconsistent with the new statute and was therefore not in force. In some cases the new Act provides expressly for continuation of regulations made under the repealed Act.[26]

(b) *The authorizing statute is ultra vires.*

Obviously a valid regulation cannot be founded on an invalid statute. Regulations based on a statute that has been declared by the courts to be *ultra vires* must be regarded as a nullity. This was expressly decided in the case of *In Re Beck Estate*.[27] An order was made under the Succession Duty Act of British Columbia of 1907 extending reciprocal provisions to Ontario. This Act was subsequently declared *ultra vires* and it was later repealed and replaced by a new Act in 1924. No order was made under the new Act and it was sought to apply the order under the 1907 Act to the 1924 Act. The court held that the original order was a nullity and that the provisions of the Interpretation Act, which provided for the continuation of orders, did not apply.

(c) *Constitution of subordinate authority.*

If a statute authorizes a designated subordinate authority to

[23] *Blakey & Company, Limited* v. *The King*, [1935] Ex. C.R. 223.
[24] R.S.C., 1952, c. 158, s. 20; R.S.O., 1950, c. 184, s. 15.
[25] (1955), 112 C.C.C. 19.
[26] Broadcasting Act., S.C., 1958, c. 22, s. 37.
[27] [1939] 1 W.W.R. 208 (B.C.C.A.).

make a regulation, it follows logically that if the authority is not properly constituted, then the power conferred by the statute cannot be exercised. This point is not likely to arise where power is conferred on a Minister of the Crown or on the Governor General in Council, but it has arisen where power to make regulations was conferred on a number of persons. In *Rex* v. *Hatskin*[28] this point was considered by the Manitoba Court of Appeal. A Minimum Wage Board was established by statute and was to consist of five persons appointed by the Lieutenant-Governor in Council—two representatives of employees, two representatives of employers and one independent person who was to be the chairman. The Board had extensive power to make regulations. One of the members had tendered her resignation and before the resignation had been accepted a meeting was held and regulations were passed. The resigning member did not attend. A prosecution was instituted under the regulations and a conviction obtained. On appeal, Trueman and Prendergast JJ. held that the resignation was effective, and therefore the Board was not validly constituted; consequently the regulations were void. Robson and Richards J.J., on the other hand, held that the resignation was not effective until it was accepted, that it was not essential for the full board to meet, and therefore the regulations were valid.[29] The case is therefore not conclusive, but it does illustrate how the point might arise.

(d) *Conditions precedent.*

If the statute prescribes conditions precedent to the exercise of the power, then it follows that the conditions must be satisfied before the power exists.

(i) *Consultation.*

A statute sometimes requires a regulation-making authority to consult with some other person or organization before making a regulation. A provision like this is perhaps more common in the United Kingdom than it is in Canada. A recent example of this in Canadian statutes is subsection (2) of section 11 of the Broadcasting Act,[30] which requires the Board to give notice in the Canada Gazette of its intention to make or annul a regulation that affects licensees and to afford licensees an opportunity of

[28] [1936] 2 W.W.R. 321 (Man. C.A.).

[29] See also *May* v. *Beattie*, [1927] 2 K.B. 353; *Rex* v. *Minister of Transport* (1931), 47 T.L.R. 325.

[30] *Supra*, footnote 26.

making representations to the Board with respect thereto. If a statute requires an authority to consult with some other person or persons before it makes a regulation, then it must necessarily follow that the regulation is invalid if the authority does not so consult. Although there do not appear to be any decisions where a regulation was held invalid on this ground, the conclusion expressed above appears to be supported by the case of *Rollo* v. *the Minister of Town and Country Planning*.[31] In that case, the Minister was empowered to make an order designating an area as the site of a new town if he was satisfied, after consultation with any local authorities who appeared to him to be concerned, that it was expedient in the national interest that the land should be developed. The order was attacked on the ground that there had been no consultation, but the court held that the requirements of the Act had been complied with. Bucknill L.J. said that consultation meant "on the one side, the Minister must supply sufficient information to the local authority to enable it to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice".[32]

(ii) *Jurisdictional facts.*

If a statutory power is to be exercised only in prescribed circumstances, it follows logically that there is no jurisdiction to exercise this power unless those circumstances do exist. Who decides whether the circumstances exist? If it is the courts, then the validity of a regulation can be challenged in the courts on the ground that there was no jurisdiction to make the regulation. If, on the other hand, it is the regulation-making authority, then the validity of the regulation may not be challenged on this ground. One of the clearest statements of this principle, applicable to all statutory powers, be they "legislative", "ministerial", "judicial" or "administrative", is to be found in the judgment of Lord Esher in *The Queen* v. *The Commissioners for Special Purposes of the Income Tax*[33] where he said:

> When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of

[31] [1948] 1 All E.R. 13; see also *Fletcher* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 496.
[32] *Ibid.*, at p. 17.
[33] (1888), 21 Q.B.D. 313, at p. 319.

> facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislatures are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunals cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislatures gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends.

Statutes conferring legislative power, however, do not usually authorize the power to be exercised "whenever" certain facts exist. Rather, they provide that an authority may make regulations whenever "he is satisfied" that certain facts exist, or whenever, "by reason of" certain facts he deems it necessary to do so. The effect of language of this kind has been considered by the courts.

In *Thorneloe & Clarkson, Ltd.* v. *Board of Trade*[34] the Board of Trade was authorized to establish by order a development council for any industry but the order was not to be made unless the board or minister concerned was satisfied that the establishment was desired by a substantial number of persons engaged in that industry. It was held that it was for the Minister or the board to assess on grounds they thought fit whether the requirement had been fulfilled.

In *Chittambaram* v. *King Emperor*[35] the Act under consideration authorized the Governor to issue a proclamation if at any time he is "satisfied that a situation has arisen in which the government of Burma cannot be carried on" in accordance with the Act. A proclamation was issued in which it was recited that the Governor was so satisfied. Lord Wright[36] citing as authority *Liversidge* v. *Anderson* said "As no suggestion is made that the Governor acts otherwise than in good faith, this declaration cannot be challenged".

In *Liversidge* v. *Anderson*[37] the Secretary of State was empowered to detain if he had reasonable cause to believe any person to be of hostile origin, *etc.*, and that by reason thereof it was neces-

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[34] [1950] 2 All E.R. 245.
[35] [1947] A.C. 200.
[36] *Ibid.*, at p. 207.
[37] [1942] A.C. 207.

sary to exercise control over him. It was held that the Secretary of State could not be compelled to give particulars of the grounds on which he had reasonable belief. Viscount Maugham said that "there is no preliminary question of fact which can be submitted to the courts".[38]

It has been held in some cases that an express statement of facts is not necessary. For example, in *Jones* v. *Robson*[39] the court considered the Coal Mines Regulation Act which provided that "a Secretary of State on being satisfied that any explosive is or is likely to become dangerous may, by order . . . prohibit the use thereof in any mine". It was held that the fact that a Secretary of State made an order was sufficient evidence that he was so satisfied.[40]

If on the face of a regulation it is apparent that the regulation-making authority was not satisfied as to the existence of certain facts as required by the statute, the regulation would presumably be *ultra vires*.[41]

(iii) *Necessity for the exercise of legislative power.*

Where power is given to make "such regulations" as the subordinate authority "by reason of" certain facts "deems necessary" the question also arises whether the courts will strike down the regulations on the ground that they were not necessary. It would seem not. Thus, in *Rex* v. *Comptroller General of Patents, Ex Parte Bayer Products Limited*[42] the Emergency Powers (Defence) Act, 1939 authorized His Majesty in Council to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty might be engaged, and for maintaining supplies and services essential to the life of the community. Scott L.J. said ". . . the effect of the words 'as appears to him to be necessary or expedient' is to give to His Majesty in Council a complete discretion to decide what regulations are neccessary for the purposes named in the subsection. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes".[43]

[38] *Ibid.*, at p. 224.
[39] [1901] 1 Q.B. 673.
[40] See also *Liversidge* v. *Anderson, supra*, footnote 37; *Pugsley* v. *Garson* (1922), 50 N.B.R. 414.
[41] See the remark of Clauson L.J. in *Rex* v. *Comptroller General of Patents, Ex Parte Bayer Products Limited*, [1941] 2 K.B. 306, at p. 316.
[42] *Ibid.*
[43] *Ibid.*, at pp. 311, 312.

In *Point of Ayr Collieries* v. *Lloyd George*[44] the court considered the effect of Defence Regulations, which authorized the minister to make an order controlling an industry if it appeared to him that in the interests of public safety, the defence of the realm or the efficient prosecution of the war or for maintaining supplies . . ., it was necessary. It was held that no jurisdiction could interfere with the minister's decision, and that he was the sole judge whether or not a case for the exercise of the powers had arisen.

In the *Chemicals Reference*[45] the Supreme Court of Canada considered the War Measures Act, which provided that the Governor in Council "may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada." Chief Justice Duff said that "when Regulations have been passed by the Governor in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth".[46] In *Attorney-General for Canada* v. *Hallet & Carey Limited*[47] Lord Radcliffe quoted the foregoing passage from Chief Justice Duff's judgment in the *Chemicals* case as "the true answer to any invitation to the court to investigate the Order in Council on its merits".

In the *Japanese Reference*[48] Lord Wright said "Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers".[49]

(e) *Conditions subsequent.*

(i) *Publication.*

A statute takes effect upon Royal Assent, unless some other date for the coming into force of the statute is provided.[50] Subordinate legislation does not receive Royal Assent, so presumably a regulation takes effect from the moment it is made. However, in *Johnson* v. *Sargant & Sons*[51] an order was made on May 16th,

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[44] [1943] 2 All E.R. 546.
[45] *Supra*, footnote 3.
[46] *Ibid.*, at p. 12.
[47] [1952] A.C. 427, at p. 445.
[48] *Supra*, footnote 9, at p. 102.
[49] See also *Berney* v. *Attorney General* (1947), 176 L.T.R. 377 and *Attorney General for Canada* v. *Hallet & Carey Ltd.*, *supra*, footnote 47.
[50] Interpretation Act, *supra*, footnote 24, s. 7.
[51] [1918] 1 K.B. 101.

1917 and was published on May 17th. Mr. Justice Bailhache said "in the absence of authority upon the point, I am unable to hold that this Order came into operation before it was known, and . . . it was not known until the morning of May 17th."[52] This decision was followed in British Columbia in the case of *Rex* v. *Ross*.[53] The legal basis for these decisions is not clear. Other acts of the executive under statutory powers—appointments, for example—are also by order, and there is no doubt they are effective at once even though they were made without publicity. Why should regulations be any different? Sometimes a bill receives three readings in both Houses of Parliament and Royal Assent in one day or even in a few hours, so that in fact its passage may not have had any publicity.

The Regulations Act[54] provides for the publication of regulations in the Canada Gazette and makes provision also for tabling a regulation before Parliament. The Act does not prescribe a commencement date. Section 5, however, says that a regulation is not invalid by reason only that it was not published in the Canada Gazette, but goes on to provide that no person may be convicted for an offence under a regulation that was not published unless the regulation was exempt from publication or it is proved that before the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public or the persons likely to be affected by it, or of the person charged.[55] There is at least an implication in the Regulations Act that a regulation made under an Act of the Parliament of Canada comes into force when it is made, but if it contains penalty provisions its full operation may be dependent on publication.

(ii) *Laying before Parliament.*

Statutes sometimes provide that regulations should be laid before Parliament, and there is a general provision in section 7 of the Regulations Act to this effect. It would seem that failure to lay a regulation before Parliament does not affect its validity.[56]

In the United Kingdom provision is frequently made for parliamentary control of delegated legislation.[57] Regulations, or

[52] *Ibid.*, at p. 103.
[53] [1945] 1 W.W.R. 590 (B.C.).
[54] R.S.C., 1952, c. 235.
[55] For a discussion of similar provisions in United Kingdom legislation see *Simmonds* v. *Newell*, [1953] 1 W.L.R. 826 and *R.* v. *Sheer Metalcraft Ltd.*, [1954] 1 Q.B. 586.
[56] *Bailey* v. *Williamson* (1873), L.R. 8 Q.B. 118.
[57] See Craies on Statute Law, *op. cit.*, *supra*, p. 277; Griffith and Street, Principles of Administrative Law (2nd. ed., 1957), p. 126 *et seqq.*

drafts, are required to be laid before Parliament. In some cases, the regulations have no effect or cease to have effect unless approved by Resolution, and in other cases the regulations may be annulled by Resolution. Apart from a few exceptional cases, there is no similar machinery in Canada, at least in the federal field.

It is not intended to discuss here the question whether there ought to be greater parliamentary control—that is largely a political question. It would seem, however, that the arguments for parliamentary control founded on United Kingdom practices or experiences are not necessarily valid here. There is in Canada probably a greater degree of political control. Regulations are usually made by the Governor in Council, and it follows that the Government must take political responsibility for regulations so made. A parliamentary resolution annulling or refusing to confirm a regulation would be tantamount to a vote of non-confidence, and if the Government commands a substantial majority in the House of Commons it may be assumed that a government regulation would never be condemned. Moreover, under the Regulations Act, drafts of regulations are required to be submitted to the Privy Council office before they are made, and that office invariably refers them to the Department of Justice, with the result that the regulations are examined both as to policy and law. I am not suggesting that this is or is not sufficient, but at least regulations are subjected to scrutiny before they become law.

(f) *Implied restrictions.*

Is the exercise of legislative power subject to implied restrictions? In other words, can the language conferring the power be taken at face value, or must it be read subject to some implied restrictions or limitations?

(i) *Good faith*

All statutory powers must be employed in good faith for the purposes for which they are given.[58] A court of law may intervene if "powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden".[59] The right to intervene, however, is more theoreti-

[58] Per Duff C.J. in the *Chemicals* case, *supra*, footnote 3, at p. 13. See also *Liversidge* v. *Anderson*, *supra*, footnote 37.

[59] Per Lord Radcliffe in *A. G. for Canada* v. *Hallet & Carey Ltd.*, *supra*, footnote 47, at p. 444.

cal than real, and it would seem that bad faith must appear on the face of the regulation before the courts would hold it invalid on this ground.

In *Rex* v. *Comptroller General of Patents*[60] Lord Justice Clauson said "if on reading an Order in Council making a regulation, it seems in fact that it did not appear to be necessary or expedient for the relevant purposes to make the regulations, I agree that, on the face of the Order, it would be inoperative".

In the *Chemicals Reference*, Duff C.J. said[61] ". . . it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the Order in Council itself that the Governor General in Council had not deemed the measure to be necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in Council would be invalid as showing on its face that the essential conditions of jurisdiction were not present". Finally, in the *Hallet & Carey* case, Lord Radcliffe, after pointing out that the preamble recited the necessity for the impugned order, said "How, then, can a court of law decide that the vesting was for another and extraneous purpose or hold that what the Governor in Council has declared to be necessary is not in fact necessary for the purposes he has stated?"[62].

(ii) *Reasonableness.*

By-laws of corporations and local governments may be quashed by the courts on the ground that they are unreasonable. The leading case on the subject is *Kruse* v. *Johnson*[63]. Lord Russell explained this unreasonableness as follows: "If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'"[64] And in a Canadian case, *City of Montreal* v. *Beauvais*,[65] Duff J. said "The by-law in question is also impugned as unreasonable and oppressive. To establish this contention in any sense *germane* to the question of the validity of the by-law it was necessary that the respondents should make it appear either that it was not pass-

[60] *Supra*, footnote 41, at p. 316.
[61] *Supra*, footnote 3, at p. 13.
[62] *Supra*, footnote 47, at p. 444.
[63] *Supra*, footnote 5.
[64] *Ibid.*, at pp. 99-100.
[65] (1910), 42 S.C.R. 211, at p. 216.

ed in good faith in the exercise of the powers conferred by the statute or that it is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers."

It would appear that the "unreasonableness" is something less than bad faith. If, for example, a statute gave to a local authority power to regulate the hours during which shops may remain open, a by-law providing that all shopkeepers with red hair should close their shops at six p.m., while other shops could remain open, would probably be *ultra vires* on the ground that it was not made in good faith. The enactment of such a by-law would be an attempt to exercise the powers for wrong purposes. On the other hand, if the by-law provided that all shops must close at noon every day during the week, this might be held to be *ultra vires* on the ground that it was an unreasonable exercise of the power. The distinction between the two may be only a matter of degree. The difference would appear to be that in the case of bad faith the by-law does not fall within the words of the statute and therefore the legislature did not confer the power; in the latter case, the by-law comes within the words of the Act, but it is such an unreasonable exercise of the power that Parliament must be presumed not to have conferred it.

In *Association Provincial Picture Houses, Limited* v. *Wednesbury Corporation*[66] however, Lord Greene's definition of unreasonableness seems to differ little from bad faith. He said: "It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming".[67]

The purpose here is not to define the exact limits of the doctrine of unreasonableness as applied to the by-laws of municipal corporations. The question does arise, however, whether this principle, whatever it may be, applies to regulations made by other authorities. Evidently not. A number of unsuccessful attempts have been made to apply this doctrine to regulations made by or on behalf of the executive. Thus, in *Sparks* v. *Edward Ash*,

[66] [1948] 1 K.B. 223.

[67] *Ibid.*, at p. 230.

Limited[68] Lord Justice Scott said that the court had no power to declare regulations invalid for unreasonableness. On the argument in *Taylor* v. *Brighton Borough Council*[69] it was urged that the doctrine laid down in *Kruse* v. *Johnson* should apply to an order made under the Town and Country Planning Acts establishing a development scheme. Lord Greene asked "Has that case ever been held applicable to regulations made by a Minister under a statutory power?" Also, ". . . if Parliament confers on a Minister a power to make regulations how can the court inquire into those regulations beyond ascertaining whether they are within the power?" And in his judgment, Lord Greene[70] said that "In my judgment, the analogy of the by-law, even if it could carry the appellant as far as suggested, is quite out of place in the present circumstances. We are dealing with a totally different class of subject-matter and one in which the ultimate arbiter is the Minister himself."

In *Rex* v. *Halliday*[71] an internment order under Defence Regulations was challenged. It was not contended that the words of the statute were not in their natural meaning wide enough to authorize the regulation, but it was contended that some limitation be placed on them, because an unrestricted interpretation would invoke extreme consequences. Lord Finlay L.C. said "It appears to me to be a sufficient answer to this argument that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised."[72]

(iii) *Taxation.*

There would seem to be a presumption against the imposition of taxation. Thus, in *Attorney General* v. *Wilts United Dairies*[73] the Defence of the Realm Act empowered the Food Controller to make orders regulating the production, distribution, sale, *etc.*, of articles and to fix prices where it appeared to him to be necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply. Orders were made dividing the country into three areas, with different prices for milk, and prohibiting the movement of milk between the areas except under licence, which was to be granted only if the licensee

[68] [1943] 1 K.B. 223, at p. 230.
[69] [1947] 1 K.B. 736.
[70] *Ibid.*, at p. 748.
[71] [1917] A.C. 260
[72] *Ibid.*, at pp. 268, 269. But see *The King* v. *National Fish Co. Ltd.*, [1931] Ex. C.R. 75.
[73] (1922), 127 L.T. 822.

paid the price differential. The House of Lords held that the orders were *ultra vires* on the ground that the powers given did not include the power of levying money. The payment could only be described as a "tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."[74]

In the *King* v. *Wright*[75] the Special War Revenue Act imposed a five per cent tax on automobiles manufactured in or imported into Canada, payable by the importer or manufacturer. Under a power to make "such regulations as he deems necessary or advisable for carrying out the provisions" of the Act the Minister made a regulation that when a manufacturer of a body mounts it on a chassis belonging to a customer, the tax should be computed on the combined price of the body and the chassis. The regulation was held invalid on the ground that "the regulation . . . cannot extend the application of the statute so as to impose a liability not otherwise imposed, and if it purports to do so it is to that extent ineffective."[76]

(iii) *Existing rights.*

The validity of regulations has been challenged, and in some cases successfully, on the ground that they interfered with existing rights or that they were contrary to common law, statute law or fundamental justice.

Thus, in *Chester* v. *Bateson*[77] a statute authorized the making of regulations for the public safety ". . . and, in particular, to prevent assistance being given to the enemy or the successful prosecution of the war." The regulations provided that if the ejectment from their dwellings of workmen employed in manufacturing ". . . of war materials was calculated to impede, delay or restrict the work" the Minister of Munitions could declare the area to be a special area. The regulations then prohibited proceedings, without the consent of the minister, to recover possession so long as a workman paid rent and observed the conditions of his tenancy, and imposed a penalty for taking any such proceedings. Proceedings were taken to recover possession on the expiration of a lease. The court held the regulations *ultra vires*. Darling J. said "the regulation as framed forbids the owner of the property access to all legal tribunals in regard to this matter. This might,

[74] *Ibid.*, Per Lord Buckmaster, at p. 823.
[75] (1927), 59 N.S.R. 443.
[76] See also *The King* v. *National Fish Co. Ltd.*, *supra*, footnote 72.
[77] [1920] 1 K.B. 829.

of course, legally be done by Act of Parliament; but I think this extreme disability can be inflicted only by direct enactment of the Legislature itself, and that so grave an invasion of the rights of all subjects was not intended by the Legislature to be accomplished by a departmental order".[78] Avory J. said "Nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorize or justify it".[79]

Again, in *Re Gordon MacKay & Co. Ltd. and Dominion Rubber Co. Ltd.*[80] it was said that the common-law rights of the subject are not to be taken away or affected except only to such extent as may be necessary to give effect to the intention of Parliament when clearly expressed or when such result must follow by necessary implication, although in that case effect was given to an order prohibiting the determination of a lease because the intention to do so was "expressed in clear and unambiguous language".

And in *Re Landlord and Tenant Act; In Re Bachand and Dupuis*[81] a power was not construed to authorize interference with judicial process and accordingly the court held invalid an order to the sheriff not to enforce a writ of possession.

On the other hand, in *Berney* v. *Attorney General*[82] the argument was not successful. It was contended that rationing orders made under the Defence Regulations were *ultra vires* on the ground that they were repugnant to natural justice and to the common law of England. In holding the regulations valid, Lord Goddard C.J. did not expressly refer to this argument, but held it clearly within the authorizing regulations. He said "The regulation gives power to make orders for . . . regulating the acquisition, use or consumption of articles . . . and also for any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide, and if in the order one finds provisions of an incidental or supplementary nature which are clearly referable to the general scheme, it is not, in my opinion, for a court to consider whether they are expedient for the purposes of the order, for the regulation makes that a matter for the decision of the competent authority".[83]

In *R. & W. Paul Limited* v. *Wheat Commission*[84] the Wheat Commission was empowered to make by-laws for the final determination by arbitration of disputes. The by-laws provided that

[78] *Ibid.*, at p. 833.
[79] *Ibid.*, at p. 836.
[80] [1946] 3 D.L.R. 422 (Ont. C.A.).
[81] [1946] 1 W.W.R. 545 (B.C.).
[82] (1947), 176 L.T.R. 377.
[83] *Ibid.*, at p. 381.
[84] [1937] A.C. 139.

disputes were to be referred to a panel of referees appointed by the Minister and that the Arbitration Act should not apply. The by-laws were held to be *ultra vires*. Lord MacMillan said that when a statute provides for the reference of disputes to arbitration, "it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitration, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words".[85]

Although there are instances where the courts have refused to interpret a power as authorizing interference with rights, it is doubtful whether there is any presumption against the validity of regulations on any of the grounds enumerated above. In *Rex* v. *Halliday*, for example, Lord Atkinson said:[86]

> For myself, I must say that I never could appreciate the contention that statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it after another, that certain words should in the first class have a meaning put upon them different from what the same words would have put upon them when used in the second. I think the tribunal whose duty it is to interpret a statute of the one class or the other should endeavour to find out what, according to the well-known rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous, equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it. That is a wholly different matter.

The case of *In Re Grey*[87] and other decisions under the War Measures Act clearly hold that the Governor in Council may under a general power legislate inconsistently with any existing statute and also take away a right acquired under a statute. It may be that under emergency powers the courts are more willing to concede to Parliament an intent to authorize a subordinate authority to make regulations that interfere with rights or that are contrary to accepted standards of reasonableness or justice in normal times. Even so, it is doubtful whether different rules are applicable to different statutes—each must be construed

[85] *Ibid.*, at p. 154.
[86] [1917] A.C. 260, at p. 274.
[87] (1918), 57 S.C.R. 150.

for what it says. Of course, if a statute conferring a legislative power is inconclusive or ambiguous, it may well be that a court will construe it so as to deny power to interfere with existing rights, *etc.* But if the words are clear, the courts will give effect to them, as in the *Hallet & Carey* case, having regard, of course, to the object and purposes of the empowering Act. In that case Lord Radcliffe[88] said "Certainly there is no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so". And, referring to the *Wilts United Dairies* case[89] he said that it would be impossible to extract from the decision in that case "any general principle of construction that made general words in a statute incapable of authorizing the gravest possible inroads upon private rights".

(v) *Discrimination.*

In the case of *Ernest* v. *Commissioner of Metropolitan Police*[90] Defence Regulations prohibiting a person who is not a natural-born British subject from using any name other than that by which he was ordinarily known before the war were challenged. A naturalized British subject was convicted for using Ernest instead of Ernst. On appeal, he urged that the regulation was invalid because it took away his right to call himself by any name he pleased, and because it discriminated between naturalized and natural-born British subjects. Mr. Justice Darling said that the regulation was valid and that it was no objection to its legality that it discriminated between one class and another.

(vi) *Sub-delegation.*

Can a subordinate legislative authority delegate his powers to another? In *Attorney General of Canada* v. *Brent*[91] authority to sub-delegate was denied. Under the Immigration Act the Governor in Council had power to make regulations respecting the prohibiting or limiting of admission of persons by reason of certain things. A regulation prohibited admission "where in the opinion of a Special Inquiry Officer such person should not be admitted by reason of . . . ."The Supreme Court held the regulation *ultra vires* because the Governor in Council had no power to delegate. Kerwin C.J. said[92] ". . . Parliament had in contemplation the enactment of such regulations relevant to the named subject

[88] *Supra*, footnote 47, at p. 451.
[89] *Supra*, footnote 73.
[90] (1919), 35 T.L.R. 512.
[91] [1956] S.C.R. 318.
[92] *Ibid.*, at p. 321.

matters, or some of them, as in His Excellency in Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General in Council to delegate his authority to such officers".[93]

On the other hand, in the *Chemicals Reference* the Supreme Court held that the Governor in Council could, under the War Measures Act, delegate to subordinate agencies the power to make rules and orders, and refused to read any limitations into the general words of the authorizing statute. Duff C.J.[94] said "I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules . . . there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them".

The result would appear to be that there is no rule or presumption for or against sub-delegation, and that in each case it is a question of interpretation of the language of the particular statute.

(g) *Extent of power.*

Thus far it has been assumed that the words of the statute were in themselves wide enough to confer the power to make the impugned regulation, and I have considered whether they must be read subject to some limitation. There still remains the question, to be decided in all cases, whether the statute has conferred the power.

The problem is to ascertain whether a regulation falls within the authority conferred by the Act. If not, it is *ultra vires*. How is this to be ascertained? There is little difficulty where the Act expressly confers power to make the specific regulations. Thus, if the statute authorizes the making of regulations imposing fees, prescribing licences, prohibiting transactions, there can be little scope for argument that a regulation doing those very things is

[93] See also *Allingham* v. *Minister of Agriculture and Fisheries*, [1948] 1 All. E.R. 780.

[94] *Supra*, footnote 3, pp. 11, 12.

ultra vires. Neither is there much difficulty where the regulation is contrary to some provision in the Act. Thus, in the case of *Belanger* v. *The King*[95] a regulation under the Railway Act was held ineffective to the extent that it conflicted with the empowering statute. Again in *Booth* v. *The King*[96] the Supreme Court considered a regulation under the Indian Act, which authorized the grant of licences to cut trees "subject to such conditions, regulations and restrictions" as are established by the Governor in Council. It also provided that no licence should be granted for a longer period than twelve months. A regulation purported to give a right of renewal to licensees who had complied with existing regulations. It was held that the effect of the prohibition was to disable the Governor in Council from validly passing a regulation constituting a contract for renewal or a right to renew. Duff J. said ". . . the Governor in Council is powerless to attach to the grant of a licence any incident by regulation or otherwise having the effect of entitling the grantee as such to exercise the rights of a licensee for a longer term than a single year".[97]

Where an express power is conferred, the courts can compare a specific regulation with a specific power, and it is not too difficult to decide whether the regulation has been authorized. Thus, in the *King* v. *National Fish Co. Ltd.*[98] the Fisheries Act prohibited fishing (except under licence from the minister) with a vessel using an otter or trawl of similar nature, and prohibited such a vessel from carrying on fishing operations unless it was a British ship in Canada owned by a Canadian or a Canadian company. The Act authorized regulations fixing conditions of licences and making any other provisions respecting licences. The regulations provided that licences could be granted only to Canadian built vessels. The regulations were held *ultra vires* on the ground, amongst others, that the statute limited the licence to British ships in Canada owned by a Canadian, whereas the regulations "fix and settle the condition of the licence on the basis of a Canadian built ship or not. This is obviously beyond the scope of the Act and the delegated power".[99]

In *Re Immigration Act*[100] the Immigration Act authorized the Governor in Council to prohibit the landing of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada; also that immigrants should "possess in their own right money to a prescribed amount". An Order in Council

[95] *Supra*, footnote 13.
[96] (1915), 51 S.C.R. 20.
[97] *Ibid.*, at p. 30.
[98] *Supra*, footnote 72.
[99] *Ibid.*, per Audette J., at p. 83.
[100] (1913), 5 W.W.R. 686 (B.C.).

prohibited immigrants of "Asiatic origin", and also required immigrants to have two hundred dollars in "actual and personal possession". The British Columbia Supreme Court held that the order was *ultra vires* because it went beyond the statute. The word "origin" is wider than "race", and the statute did not require that the money be in actual and personal possession. Subsequently the regulations were amended to prohibit the landing of immigrants of any Asiatic *race*, and were held to be *intra vires* in *Re Munshi Singh*.[101]

The courts are also reluctant to concede power to make substantive law under an authority to regulate procedure or administration. Thus in the *King* v. *Henderson*[102] under the New South Wales Bankruptcy Act an act of bankruptcy could be committed by non-compliance with a bankruptcy notice. The rules provided for setting aside the notice. Lord Watson[103] said "Now the only power which the Court has to frame rules is conferred by section 119 of the principal Act, and it is strictly limited to rules 'for the purpose of regulating any matter under this Act'. In the opinion of their Lordships, a rule empowering the judge to make a declaration that no act of bankruptcy had been committeed under the notice is no such regulation either framed or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the Legislature withheld, it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice".[104]

In *MacCharles* v. *Jones*[105] the County Court Act authorized the judges to make rules regulating the pleading, practice and procedure in the courts. Rules were made authorizing garnishment of moneys paid into court, but they were held *ultra vires* because they dealt with and conferred a substantive right or remedy; the rules were not practice or procedure.

In *Frobisher Limited* v. *Oak, Canadian Pipelines*[106] the Mineral Resources Act authorized "such regulations and orders not inconsistent with this Act as are necessary to carry out its provisions according to their obvious intent . . . ." Regulations were made giving a right to claim compensation against a person

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[101] (1915), 29 W.L.R. 45. [102] [1898] A.C. 720.
[103] *Ibid.*, at p. 729.
[104] See also *Rex* v. *Housing Tribunal*, [1920] 3 K.B. 334.
[105] *Supra*, footnote 17.
[106] (1956-57), 20 W.W.R. (N.S.) 345 (Sask.).

wrongfully registering and continuing a caveat, such compensation to be not less than twenty-five dollars a day. It was held that the regulations were *ultra vires* because they purported to create a substantive right in law, and that the statute authorized only regulations for regulatory or administrative purposes as opposed to substantive law.

It would not, however, be correct to say that regulations affecting substantive law can never be made under a general power. Thus, in *Blackwood* v. *Bank of Australia*[107] the statute under consideration gave power to make regulations "for carrying it into full effect, so as to provide for all proceedings, matters, and things arising under and consistent with the provisions thereof, and not therein expressly provided for". Selborne L.C. said:[108]

> If these regulations, properly construed, are found to be reasonable and convenient regulations for carrying the Act into full effect, though they may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of leases; if they are found to relate to matters arising under the provisions of the Act, which they unquestionably do; if they are found to be consistent with the provisions of the Act, which they unquestionably are; and if they are not in the Act expressly provided for, then their Lordships cannot do otherwise than come to the conclusion that they are valid in law, and that there is no ground for the objection that they are *ultra vires*.

Difficulties arise where the power is not specifically conferred, and it becomes necessary to resort to general rules or principles of interpretation. Thus, in the *Lockwood* case[109] power to prescribe fees was not specifically conferred and it was necessary for the court to examine the statute as a whole to see whether Parliament contemplated that the regulation-making authority had power to impose fees. In *Starley* v. *New McDougall-Segur Oil Company*[110] the question was whether an order could be made under the Dominion Lands Act reserving mines and minerals from all patents. There was no express authority to make such an order, but the court, after examining the Act as a whole, came to the conclusion that the "true intent" was that there should be no homesteading on lands containing minerals and accordingly held the order valid.

The problem then of ascertaining whether a particular regulation is authorized by the statute under which it purports to be made is essentially one of statutory interpretation, and all the

[107] (1874), 30 L.T. 45. [108] *Ibid.*, at p. 47. [109] *Supra*, footnote 12.
[110] [1927] 2 W.W.R. 379, affd. [1927] 3 W.W.R. 464 (P.C.).

rules and principles of statutory interpretation as established by the courts may be applied. It is not intended to discuss here those rules and principles or their application, except to suggest that for practical purposes it may be helpful to divide them roughly into two categories.

First, there are the principles that may be described as methods or techniques, and into this category would fall the golden rule, the literal rule, the "mischief" rule and all the rules of language — the context rule, the *ejusdem generis* rule, and so on. These "rules" are not rules in the sense that they can be applied to produce a definite answer. They are rather methods or techniques of interpretation. They are neither precise nor conclusive and can serve only as guides to ascertain, in rather a general way, the so-called intention of Parliament.

Secondly, there are some principles of interpretation that come closer to being rules. Some are statutory and others have been established by judicial decision. For example, there is the rule that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms.[111] This is a definite rule that can be applied to produce a definite result. If, therefore, a statute does not expressly or by necessary implication indicate that property may be taken without compensation, then the statute must not be construed as authorizing the taking of property without compensation. It must therefore necessarily follow that any rule or regulation made under the authority of the statute cannot authorize the taking of property without compensation.[112] Again, it is a rule of interpretation that, in the absence of an indication to the contrary, a statute operates prospectively only and not retrospectively. This rule applies of course in the interpretation of a regulation. If there is nothing in the regulation to indicate the contrary, it will not be given retrospective effect.[113] It is not enough, however, to consider the terms of the regulation alone. Assuming that there is in the regulation a statement or indication that it should have retrospective effect, it must be remembered that the rule also applies to the authorizing statute, and if there is nothing in the statute to indicate that it should operate retrospectively in any way,

[111] *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Company Limited*, [1919] A.C. 744, at p. 752.

[112] This was so held in *Newcastle Breweries Limited* v. *The King*, [1920] 1 K.B. 854.

[113] *Anderson* v. *Lacey*, [1948] 2 W.W.R. 317; *Secretary of State* v. *Greenshields*, [1925] Ex. 29.

then it must follow that Parliament did not confer the power to make a retrospective regulation. What the statute has not done the regulations cannot do. Thus, in *Master Ladies Tailors Organisation* v. *Minister of Labour*[114] Devlin J. said that ". . . no statute *or order* is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the *Act*".[115] Another presumption—originally a common-law rule, but now a statutory provision—is that the Crown is not bound by a statute unless named. If a statute does not clearly provide that the Crown is bound, then obviously a regulation under that statute could not bind the Crown, and, if it purported to do so, it would to that extent be *ultra vires*. It is also said to be a presumption that legislation is to be so interpreted as not to be inconsistent with the comity of nations, or with established rules of international law.[116] An attempt to apply this presumption so as to cut down the general terms of the War Measures Act was made in the *Japanese Reference*.[117]

It may be that a power to make regulations may be governed by presumptions after all. We have seen that the courts have refused to cut down general words conferring legislative power by the application of any presumptions as to the grant of legislative power, except possibly as regards taxation. But there are presumptions of parliamentary intent—particularly negative presumptions—that do apply to all statutes, and the courts may well use those presumptions to restrict or confine the scope of the Act, and then hold a regulation-making authority within those limits. These presumptions operate in two ways in relation to subordinate legislation—first, to interpret the regulation itself and secondly, to limit the scope of the statute and thus to control the exercise of any legislative power it confers on a subordinate authority. This was, it seems, the basis for the decisions in *Chester* v. *Bateson*[118] and in the *Bachand and Dupuis* case.[119]

(h) *Terms of the power.*

The lawyer's technique is to cite legal precedents for his propositions, and in attacking or supporting a regulation, he wants to refer to legal decisions. We have, so far as I can tell, covered

[114] [1950] 2 All E.R. 525, at p. 528.
[115] See also *Howell* v. *Falmouth Boat Construction Co. Ltd.*, [1951] A.C. 837.
[116] Maxwell on Statutes (10th ed., 1953), p. 148.
[117] *Supra*, footnote 9.
[118] *Supra*, footnote 77.
[119] *Supra*, footnote 81.

the various grounds supported by traditional legal precedent, upon which the validity of subordinate legislation may be challenged, but, if they fail to answer the question of validity, what then? Is there anything else to which we can turn? There is, and it is almost too obvious to mention. But it is often overlooked. Having exhausted our store of legal precedent, why not look at the statute itself, and try to find out what the words mean, without worrying too much about what a judge may have said a long time ago, perhaps even in another country, about another statute. Can we find a clue to the extent or scope of a legislative power by looking closely at the words by which the power is conferred?

Many different forms may be used to authorize a subordinate authority to make laws, and a great variety is to be found in the statutes.

(i) *General forms.*

The form most commonly used now to confer a general power is:

> The Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

As I have stated, it is doubtful whether the foregoing form would authorize anything more than purely procedural or administrative regulations.

The following examples, although in different words, probably have the same effect.

> For carrying the purposes and provisions of this Act into effect.
> Providing for the effective carrying out of the provisions of this Act.
> For carrying out the provisions of this Act according to their true intent and meaning.
> To give effect to the provisions of this Act.
> For the better execution of this Act.

Sometimes authority is conferred to make regulations *not inconsistent with* the Act. These words would seem to be unnecessary. It has been shown that it is not permissible to make regulations contrary to or inconsistent with the Act itself.

Sometimes the authority is to make *such regulations as are necessary* for carrying out the Act. It is doubtful that the words *as are necessary* add anything. In their absence, the courts would no doubt strike down a regulation they thought unnecessary. In either case, the courts would presumably be the judges of necessity.

A wider authority is conferred if a subjective test of necessity

is prescribed. Thus, power may be conferred on the Governor in Council to make *such regulations as he deems necessary (advisable, expedient) for carrying out the purposes* of the Act. In such a case, as pointed out above,[120] the regulation-making authority is the sole judge of necessity and the courts will not question his decision, except possibly if bad faith were established. There is, therefore, a vast difference between the two following examples in the extent of the power conferred:

> May make such regulations *as may be necessary* for carrying out the provisions of this Act.
> May make such regulations *as he deems necessary* for carrying out the provisions of this Act.

(ii) *Purposes.*

In the foregoing examples the limits of the authority conferred are set by the purposes of the Act, which, in turn, must be gathered from the terms of the Act. There is no statement of express purpose.

Authority to make regulations may be conferred by defining a particular purpose:

> The Governor in Council may make regulations for the control and regulation of air navigation over Canada and the territorial waters of Canada.
> For the purpose of preventing the spreading of contagious or infectious diseases among animals.
> For the proper management and regulation of the sea-coast and inland fisheries.
> For regulating the export and import of agricultural products.

These examples constitute a wider authority than the general forms previously considered. In the case of a statute with power to make regulations for the better carrying out of the provisions thereof, Parliament has given at least partial effect to a legislative purpose by the enactment of the main principles of law essential to the implementation of that purpose, and has left it to others to fill in the details. But where Parliament authorizes regulations for a stated purpose, the regulation-making authority has a free hand to establish, not only the details, but also the main principles. The entire law is therefore to be left to the decision of subordinates. So long as the law is within the stated purpose, it cannot be challenged.

Even greater authority is conferred by authorizing a delegate to make such regulations *as he deems necessary* for a stated pur-

[120] *Rex* v. *Comptroller General of Patents, supra,* footnote 41 and *Berney* v. *Attorney General, supra,* footnote 82.

pose. We recall the remarks of the Chief Justice of Canada in the *Chemicals Reference*[121] approved by the Judicial Committee of the Privy Council in the *Hallet & Carey* case[122] when he said that he could not agree that it was competent to any court to canvass the considerations which had, or might have, led the Governor in Council to deem the regulations necessary or advisable for the objects set forth; that the words of the War Measures Act were too plain for dispute—the measures authorized were such as the Governor General in Council (not the courts) deemed necessary or advisable.

A statement of purposes may be introduced by expressions such as *for, for the purpose of, in order to, etc.*

(iii) *Subjects.*

Authority to make regulations may be conferred by assigning a subject-matter of legislation:

> May make regulations respecting the use, operation and supply of transport and storage facilities.
>
> May make regulations with respect to the export and import of animals.
>
> Relating to the construction and operation of factories.
>
> In relation to explosives.

This again is a wide authority, embracing any regulation for any purpose coming within the defined subject. A subject-matter of regulation may be assigned by expressions like, *respecting, with respect to, in relation to, relating to, etc.*

Outstanding examples of the grant of legislative power with reference to subjects are to be found in sections 91 and 92 of the British North America Act. Power to make laws in relation to bankruptcy, for example, is complete power.

(iv) *Specific powers.*

Authority to make regulations is frequently conferred, not by defining a legislative purpose or subject-matter, but by conferring power to make a specific regulation. There is an important distinction between the two forms. For example, authority to make regulations:

> For the purpose of restricting or prohibiting the export of agricultural products

sets forth the objective that may be attained by regulations. Any regulation having for its purpose the restriction or prohibition of exports would come within the powers conferred. Thus, regulations could provide for a multitude of ancillary or related matters.

On the other hand, authority to make regulations,

[121] *Supra*, footnote 3. [122] *Supra*, footnote 47.

Prohibiting or restricting the export of agricultural products,

is more restrictive. This is not a statement of objectives, but only a definition of a specific power—to prohibit or restrict. The language of the statute is in reality a description of the content of the particular regulation it authorizes. It would be open to doubt whether a regulation, for example, requiring dealers to make returns showing stocks on hand would be valid. Such a regulation might well be necessary *for the purpose of* restricting export, but it could hardly be described as a regulation that *restricts* export.

The distinction between purposes or subjects, on the one hand, and specific powers on the other, is also relevant in relation to sub-delegation. For example, if a minister had power to make regulations *respecting tariffs and tolls* he could probably authorize some other person to fix a tariff or toll; such a regulation would clearly be one *respecting* tariffs and tolls. But if the minister's authority is to make regulations *prescribing tariffs and tolls* then the minister must himself prescribe, because he is the only one who possesses the power. A regulation purporting to confer this power on another is not a regulation prescribing tariffs and tolls. Expressions commonly used to introduce specific powers are *prescribing, fixing, determining, prohibiting, requiring, establishing.*

In all but the simplest cases it is usual to include an omnibus provision, either before or after an enumeration of specific purposes, subjects or powers.

Where an enumeration follows the omnibus provision, it is usual to provide that the enumeration is not to be construed as restrictive.

Authority to make regulations is usually set out in tabular form. The tabulation may set out purposes only, subjects only, specific powers only, or may be a mixture of these various classes of authority. If the enumerations are all of one class, the governing participle or preposition is usually found in the general words preceding the enumeration:

May make regulations for the purpose of
(a) ....
(b) ....
May make regulations respecting
(a) ....
(b) ....

But where there is a mixture of classes, the governing participle, preposition or phrase is placed within each enumeration:

May make regulations

(a) in relation to....
(b) for the purpose of....
(c) respecting....
(d) prescribing....
(e) determining....

There may also be a fusion of the forms in which authority is conferred. Thus, the International River Improvements Act, provides in section 3 that:[123]

> The Governor in Council may, for the purpose of developing and utilizing the water resources of Canada in the national interest, make regulations
>
> (a) respecting the construction, operation and maintenance of international river improvements;

Here, power is conferred to make regulations in relation to a prescribed subject, but only for the prescribed purpose. The power is wide, but there is a double standard, and the courts could strike down a regulation, either because it was not in relation to the prescribed subject or, although in relation to the prescribed subject, it was not for the prescribed purpose.

The *Hallet & Carey* case[124] is a practical illustration of how a classification of statutory powers along the foregoing lines can be of assistance in considering the validity of a regulation. In that case an order under the National Emergency Transitional Powers Act of 1945 purported to vest in the Canadian Wheat Board all oats and barley "in commercial positions" in Canada. In the argument against the validity of the order a comparison was invited between the Act under which the order was made and the War Measures Act. In the War Measures Act a general power was conferred on the Governor in Council to make orders and regulations, followed by an enumeration that included the "appropriation, control, forfeiture and disposition of property".

> 3. (1)The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:
>
> (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

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[123] S.C., 1955, c. 47.

[124] *Supra*, footnote 47.

(b) arrest, detention, exclusion and deportation;
(c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
(d) transportation by land, air or water and the control of the transport of persons and things;
(e) trading, exportation, importation, production and manufacture;
(f) appropriation, control, forfeiture and disposition of property and of the use thereof.

In the National Emergency Transitional Powers Act there was also an enumeration but no mention of appropriation, control, forfeiture or disposition of property.

2. (1)The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of

(a) providing for and maintaining the armed forces of Canada during the occupation of enemy territory and demobilization and providing for the rehabilitation of members thereof;
(b) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace;
(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;
(d) assisting the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of the war; or
(e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

It was argued that if in the one Act Parliament expressly provided for the forfeiture of property, and in the other Act did not, it was clearly the intention of Parliament not to confer the power in the latter Act.

The Judicial Committee, however, held the order valid. They drew a distinction between "purposes" and "powers", and pointed out that the enumerated heads in the War Measures Act were not "purposes" but that the enumerated heads in the National Emergency Transitional Powers Act were "purposes". The enumerations in the two Acts, therefore, were not comparable. Lord Radcliffe[125] said "Purposes can be compared with purposes; but these sub-heads (a) to (f) of section 3 of the War Measures

[125] *Ibid.*, at p. 448.

Act are not purposes, and it is misleading to contrast their contents with the contents of sub-heads (a) to (e) of section 2(1) of the Act of 1945 and then to conclude that, because expropriation is not included among the purposes listed in those sub-heads (a) to (e), it is not a power covered by the Governor's authority to do whatever he deems necessary or advisable for those purposes."

The *purposes* for which orders and regulations may be made under the War Measures Act are "the security, defence, peace, order and welfare of Canada". The enumeration—which Lord Radcliffe called "powers", but which I have called "subjects" in the analysis suggested earlier—is but an enumeration of specific matters "for greater certainty" in relation to which orders and regulations may be made. In the words of Lord Radcliffe "They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done".

In the 1945 Act, however, the enumeration is one of purposes, and the authority is to make such orders and regulations as the Governor in Council deems necessary or advisable for the enumerated purposes. Any regulation, therefore, is within the terms of the statute if it is for those purposes, and it is not necessary that the particular regulation should be specifically described in the statute.

In considering whether a regulation is valid, it is important of course to examine legal principles and legal precedents. But in considering the nature and scope of a statutory power one must not overlook the words of the statute or the principles of language.