# THE RED TAPE REDUCTION AND GOVERNMENT EFFICIENCY ACT, 2018

STATUTES OF MANITOBA 2018

Chapter 29

Bill 12
3rd Session, 41st Legislature

Assented to November 8, 2018

# LOI DE 2018 SUR LA RÉDUCTION DU FARDEAU ADMINISTRATIF ET L'EFFICACITÉ DU GOUVERNEMENT

LOIS DU MANITOBA 2018

Chapitre 29

Projet de loi 12
3e session, 41e législature

Date de sanction : 8 novembre 2018

## EXPLANATORY NOTE

**This note is a reader's aid and is not part of the law.**

This Act amends several Acts and repeals four Acts to reduce or eliminate regulatory requirements or prohibitions and to streamline government operations.

THE BUILDERS' LIENS ACT

Contracts and sub-contracts that are subject to *The Infrastructure Contracts Disbursement Act* are no longer subject to liens under this Act.

THE BUILDINGS AND MOBILE HOMES ACT

A simpler process is established for municipalities to issue permits for designated classes of buildings.

THE CHILD AND FAMILY SERVICES AMENDMENT AND CONSEQUENTIAL AMENDMENTS ACT

Unproclaimed provisions are repealed relating to a court application for the removal of a person's name from the Child Abuse Registry because they do not pose a risk to children.

THE CHILD AND FAMILY SERVICES AUTHORITIES ACT

An unproclaimed provision dealing with the relationship between authorities in the delivery of child and family services through an agency is repealed.

THE CITY OF WINNIPEG CHARTER

The City of Winnipeg no longer reports to the minister on its consultation with school boards about Plan Winnipeg.

THE CONSUMER PROTECTION ACT

Forms under this Act, such as an application form for a vendor, direct seller, payday lender or collection agent licence, may now be approved by the Director of the Consumer Protection Office. The forms no longer need to be set out in regulation.

THE DAIRY ACT

The statutory requirement for a dairy plant licence is removed.

## NOTE EXPLICATIVE

**La note qui suit constitue une aide à la lecture et ne fait pas partie de la loi.**

La présente loi modifie de nombreuses lois et en abroge quatre en vue de la réduction ou de l'élimination d'obligations ou d'interdictions administratives et de la simplification des activités du gouvernement.

LOI SUR LE PRIVILÈGE DU CONSTRUCTEUR

Les contrats et les contrats de sous-traitance auxquels s'applique la *Loi sur l'acquittement du prix des contrats de travaux d'infrastructure* ne sont plus visés par la *Loi sur le privilège du constructeur*.

LOI SUR LES BÂTIMENTS ET LES MAISONS MOBILES

Un processus simplifié est mis en place afin que les municipalités puissent délivrer des permis pour les catégories désignées de bâtiments.

LOI MODIFIANT LA LOI SUR LES SERVICES À L'ENFANT ET À LA FAMILLE ET MODIFICATIONS CORRÉLATIVES

Des dispositions non proclamées permettant aux personnes qui ne constituent pas un risque pour les enfants de demander au tribunal que leur nom soit radié du registre concernant les mauvais traitements sont abrogées.

LOI SUR LES RÉGIES DE SERVICES À L'ENFANT ET À LA FAMILLE

Une disposition non proclamée portant sur les relations entre les régies en ce qui a trait à la prestation de services à l'enfant et à la famille par l'intermédiaire d'un office est abrogée.

CHARTE DE LA VILLE DE WINNIPEG

La ville de Winnipeg ne soumet plus au ministre les résumés des consultations menées auprès des commissions scolaires portant sur son plan d'aménagement.

LOI SUR LA PROTECTION DU CONSOMMATEUR

Les formulaires utilisés dans le cadre de cette loi, notamment en vue de l'obtention de licences de marchand, de démarcheur, de prêteur et d'agent de recouvrement, peuvent maintenant être approuvés par le directeur de l'Office de la protection du consommateur; il n'est plus nécessaire d'établir ces formulaires par règlement.

LOI SUR LES PRODUITS LAITIERS

Les usines laitières ne sont plus obligées d'être titulaires d'un permis d'exploitation.

THE DANGEROUS GOODS HANDLING AND TRANSPORTATION ACT

A hazardous waste facility that is licensed under *The Environment Act* no longer requires a licence under this Act as well.

THE DRIVERS AND VEHICLES ACT

Certain notices may be sent by e-mail or by a communication method described in regulation. Amendments are also made to reflect that motor vehicle insurance premiums are no longer established by regulation under *The Manitoba Public Insurance Corporation Act*.

THE FIRES PREVENTION AND EMERGENCY RESPONSE ACT

A local assistant is able to delegate the performance of fire safety inspections to persons who have the qualifications set out in regulation.

THE HIGHWAY TRAFFIC ACT

Certain notices may be sent by e-mail or a communication method described in regulation.

THE HIGHWAYS AND TRANSPORTATION CONSTRUCTION CONTRACTS DISBURSEMENT ACT

This Act is renamed *The Infrastructure Contracts Disbursement Act* and applies to water control works contracts under *The Water Resources Administration Act*, which were previously subject to *The Builders' Liens Act*.

THE MUNICIPAL ACT

A borrowing of a municipality that is less than the threshold established in regulation no longer requires approval of the Municipal Board. Entities that receive grants from a municipality are no longer required to have their financial statements audited. While the minister continues to receive notice of a proposed closing of a municipal road, the minister does not need to pre-approve the closure.

THE OFF-ROAD VEHICLES AMENDMENT ACT

An unproclaimed requirement for identification decals on snowmobiles is repealed.

THE PHARMACEUTICAL ACT

The requirement for a majority of the members of the College of Pharmacists to approve a proposed regulation is removed.

LOI SUR LA MANUTENTION ET LE TRANSPORT DES MARCHANDISES DANGEREUSES

Sous le régime de cette loi, il n'est plus nécessaire d'obtenir une licence à l'égard d'une installation d'élimination de déchets dangereux déjà visée par une licence délivrée en vertu de la *Loi sur l'environnement*.

LOI SUR LES CONDUCTEURS ET LES VÉHICULES

Certains avis peuvent être envoyés par courrier électronique ou au moyen d'un mode de remise réglementaire. Des modifications sont également apportées à cette loi pour tenir compte du fait que les primes d'assurance des véhicules automobiles ne sont plus fixées par règlement sous le régime de la *Loi sur la Société d'assurance publique du Manitoba*.

LOI SUR LA PRÉVENTION DES INCENDIES ET LES INTERVENTIONS D'URGENCE

Les représentants locaux peuvent déléguer les attributions qui leur sont conférées en matière de visites de prévention aux personnes ayant les compétences réglementaires.

CODE DE LA ROUTE

Certains avis peuvent être envoyés par courrier électronique ou au moyen d'un mode de remise réglementaire.

LOI SUR L'ACQUITTEMENT DU PRIX DES CONTRATS DE CONSTRUCTION CONCLUS AVEC LE MINISTÈRE DE LA VOIRIE ET DU TRANSPORT

Cette loi se nomme dorénavant *Loi sur l'acquittement du prix des contrats de travaux d'infrastructure*. Elle s'applique aux contrats visant des ouvrages d'aménagement hydraulique conclus sous le régime de la *Loi sur l'aménagement hydraulique*, lesquels étaient auparavant régis par la *Loi sur le privilège du constructeur*.

LOI SUR LES MUNICIPALITÉS

Les emprunts que contractent les municipalités ne sont plus assujettis à l'approbation de la Commission municipale s'ils sont inférieurs au plafond fixé par règlement. Les états financiers des entités qui reçoivent des subventions municipales n'ont plus à être vérifiés. Bien que le ministre continue à être avisé des propositions visant la fermeture de chemins municipaux, de telles fermetures ne sont plus soumises à son approbation.

LOI MODIFIANT LA LOI SUR LES VÉHICULES À CARACTÈRE NON ROUTIER

Une disposition non proclamée portant sur les autocollants d'identification pour les motoneiges est abrogée.

LOI SUR LES PHARMACIES

Il n'est plus nécessaire qu'une majorité des membres de l'Ordre des pharmaciens approuve les projets de règlements.

THE PLANNING AND LAND DEDICATION FOR SCHOOL SITES ACT (VARIOUS ACTS AMENDED)

Unproclaimed provisions concerning land for school sites are repealed.

LOI SUR LA PLANIFICATION ET LES AFFECTATIONS DE BIENS-FONDS CONCERNANT LES EMPLACEMENTS SCOLAIRES (MODIFICATION DE DIVERSES DISPOSITIONS LÉGISLATIVES)

Des dispositions non proclamées portant sur les biens-fonds destinés à des emplacements scolaires sont abrogées.

THE MANITOBA PUBLIC INSURANCE CORPORATION ACT

Motor vehicle insurance premiums are no longer established by regulation, but the premiums for universal compulsory automobile insurance continue to be subject to the approval of the Public Utilities Board.

LOI SUR LA SOCIÉTÉ D'ASSURANCE PUBLIQUE DU MANITOBA

Les primes d'assurance des véhicules automobiles ne sont plus fixées par règlement. Les primes du régime universel obligatoire d'assurance-automobile continuent toutefois à être soumises à l'approbation de la Régie des services publics.

The Automobile Injury Compensation Appeal Commission may, without a hearing, dismiss an inactive and abandoned appeal about benefits.

La Commission d'appel des accidents de la route peut, sans tenir d'audience, rejeter les appels qui n'ont pas été poursuivis et qui portent sur les prestations.

Certain documents may be sent by ordinary mail or e-mail instead of by registered mail.

Certains documents peuvent être envoyés par courrier ordinaire ou électronique plutôt que par courrier recommandé.

THE PUBLIC SCHOOLS ACT

Unproclaimed provisions from the 1980s relating to home schooling and screening assessments are repealed.

LOI SUR LES ÉCOLES PUBLIQUES

Des dispositions non proclamées remontant aux années 1980 et portant sur l'éducation à domicile et l'examen des capacités sont abrogées.

THE REAL ESTATE SERVICES ACT

An unproclaimed provision relating to the reimbursement fund is amended to restrict its scope to fraud, criminal misconduct and bankruptcy claims.

LOI SUR LES SERVICES IMMOBILIERS

Une disposition non proclamée est modifiée de manière à ce que les sommes du Fonds d'indemnisation en matière foncière ne soient prélevées qu'en cas d'actes frauduleux ou criminels ou de faillites.

THE REGULATED HEALTH PROFESSIONS ACT

An unproclaimed requirement for a majority of the members of the College of Pharmacists to approve a proposed regulation under this Act is repealed.

LOI SUR LES PROFESSIONS DE LA SANTÉ RÉGLEMENTÉES

Une disposition non proclamée au titre de laquelle la majorité des membres de l'Ordre des pharmaciens doit approuver les projets de règlements pris en vertu de cette loi est abrogée.

THE RESIDENTIAL TENANCIES ACT

Requirements imposed on landlords for abandoned property disposal are simplified. In addition, a tenant may object only to rent increases above the maximum permitted by regulation.

LOI SUR LA LOCATION À USAGE D'HABITATION

Les exigences imposées aux locateurs en vue de la disposition des biens abandonnés sont simplifiées. De plus, un locataire peut uniquement s'opposer aux augmentations de loyer qui sont supérieures à l'augmentation maximale permise par les règlements.

THE STEAM AND PRESSURE PLANTS ACT

The frequency for inspecting steam plants and pressure vessels and the duration of inspection certificates are to be established in regulation. Inspection certificates are issued by the chief inspector, and the chief inspector is given a delegation power. Requirements concerning records and notices related to inspections are simplified or eliminated.

LOI SUR LES APPAREILS SOUS PRESSION ET À VAPEUR

Les intervalles auxquels doivent avoir lieu les inspections à l'égard des installations et des appareils à pression ainsi que la durée des certificats d'inspection sont établis par règlement. Les certificats d'inspection sont délivrés par l'inspecteur en chef et ce dernier a le droit de déléguer ses pouvoirs et ses responsabilités. Les exigences relatives aux registres et aux avis concernant les inspections sont simplifiées ou éliminées.

THE STUDENT AID ACT

An annual report on Manitoba's student aid program is to be included in the annual report of the department.

LOI SUR L'AIDE AUX ÉTUDIANTS

Un rapport annuel concernant les activités du Programme manitobain d'aide aux étudiants doit être inclus dans le rapport annuel du ministère.

THE THRESHERS' LIENS ACT

A provision that requires a copy of the Act provided by the Queen's Printer to be affixed to every threshing machine operating anywhere in Manitoba is repealed.

THE WATER RESOURCES ADMINISTRATION ACT

Contracts entered into by Manitoba Infrastructure are no longer required to be sealed with the departmental seal.

THE WORKER RECRUITMENT AND PROTECTION ACT

The statutory requirements for an employment agency business licence and temporary help agency licence are repealed.

OTHER AMENDMENTS

Eleven Acts are amended to change the auditor appointment process. An auditor of the particular government body may now be appointed by the Minister of Finance instead of by Cabinet.

ACTS REPEALED

*The Hospital Capital Financing Authority Act*, the unproclaimed *Consumer Protection Amendment Act (Contracts for Distance Communication Services)*, *The Dauphin Boys' and Girls' Band Act* and *The Trade Practices Inquiry Act* are repealed.

CONSEQUENTIAL AMENDMENTS

Three Acts are amended to remove references to a repealed Act.

LOI SUR LE PRIVILÈGE DES EXPLOITANTS DE BATTEUSE

Une disposition exigeant qu'un exemplaire de cette loi, fourni par l'Imprimeur de la Reine, demeure apposé sur chaque batteuse exploitée dans la province est abrogée.

LOI SUR L'AMÉNAGEMENT HYDRAULIQUE

Il n'est plus obligatoire que les contrats passés par Infrastructure Manitoba revêtent son sceau.

LOI SUR LE RECRUTEMENT ET LA PROTECTION DES TRAVAILLEURS

Les dispositions rendant obligatoires les licences autorisant la fourniture de services de placement et les licences d'exploitation d'agences de placement temporaire sont abrogées.

AUTRES MODIFICATIONS

Onze lois sont modifiées afin que des changements soient apportés à la nomination des vérificateurs. Dorénavant, le ministre des Finances — plutôt que le Cabinet — peut nommer un vérificateur au sein de l'organisme gouvernemental en question.

LOIS ABROGÉES

La *Loi sur l'Office de financement des immobilisations hospitalières*, la *Loi modifiant la Loi sur la protection du consommateur (contrats de services de communication à distance)* (non proclamée), la *Loi sur la fanfare des garçons et des filles de Dauphin* et la *Loi sur les enquêtes relatives aux pratiques de commerce* sont abrogées.

MODIFICATIONS CORRÉLATIVES

Trois lois sont modifiées afin que les renvois à une loi abrogée soient éliminés.

**CHAPTER 29**

**THE RED TAPE REDUCTION AND GOVERNMENT EFFICIENCY ACT, 2018**

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## THE RED TAPE REDUCTION AND GOVERNMENT EFFICIENCY ACT, 2018

(Assented to November 8, 2018)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

### THE ARTS COUNCIL ACT

*C.C.S.M. c. A140 amended*

*1* *Section 12 of* ***The Arts Council Act*** *is amended by striking out* "appointed by the Lieutenant Governor in Council" *and substituting* "appointed by the Minister of Finance".

### THE BUILDERS' LIENS ACT

*C.C.S.M. c. B91 amended*

*2(1)* ***The Builders' Liens Act*** *is amended by this section.*

## CHAPITRE 29

## LOI DE 2018 SUR LA RÉDUCTION DU FARDEAU ADMINISTRATIF ET L'EFFICACITÉ DU GOUVERNEMENT

(Date de sanction : 8 novembre 2018)

SA MAJESTÉ, sur l'avis et avec le consentement de l'Assemblée législative du Manitoba, édicte :

### LOI SUR LE CONSEIL DES ARTS DU MANITOBA

*Modification du c. A140 de la* ***C.P.L.M.***

*1* *L'article 12 de la* ***Loi sur le Conseil des Arts du Manitoba*** *est modifié par substitution, à «* nommé par le lieutenant-gouverneur en conseil *», de «* nommé par le ministre des Finances *».*

### LOI SUR LE PRIVILÈGE DU CONSTRUCTEUR

*Modification du c. B91 de la* ***C.P.L.M.***

*2(1)* *Le présent article modifie la* ***Loi sur le privilège du constructeur****.*

**Approval of regulations**
**74(2)** A regulation under subsection 73(1) does not come into force until it is approved by the Lieutenant Governor in Council.

**Approbation des règlements**
**74(2)** Les règlements pris en application du paragraphe 73(1) n'entrent en vigueur que s'ils sont approuvés par le lieutenant-gouverneur en conseil.

## THE PLANNING AND LAND DEDICATION FOR SCHOOL SITES ACT (VARIOUS ACTS AMENDED)

*S.M. 2011, c. 38 (unproclaimed provisions repealed)*
*29 The following provisions of **The Planning and Land Dedication for School Sites Act (Various Acts Amended)**, S.M. 2011, c. 38, are repealed:*

*(a) section 5 insofar as it enacts section 259.1;*

*(b) sections 11 to 13;*

*(c) section 14 insofar as it enacts section 137.1;*

*(d) sections 15, 16 and 18;*

*(e) section 19 insofar as it enacts section 68.1;*

*(f) subsections 21(2) and 22(2).*

## LOI SUR LA PLANIFICATION ET LES AFFECTATIONS DE BIENS-FONDS CONCERNANT LES EMPLACEMENTS SCOLAIRES (MODIFICATION DE DIVERSES DISPOSITIONS LÉGISLATIVES)

*Modification du c. 38 des **L.M. 2011** (abrogation de dispositions non proclamées)*
*29 Les dispositions indiquées ci-dessous de la **Loi sur la planification et les affectations de biens-fonds concernant les emplacements scolaires (modification de diverses dispositions législatives)**, c. 38 des **L.M. 2011**, sont abrogées :*

*a) l'article 5, dans la mesure où il édicte l'article 259.1;*

*b) les articles 11 à 13;*

*c) l'article 14, dans la mesure où il édicte l'article 137.1;*

*d) les articles 15, 16 et 18;*

*e) l'article 19, dans la mesure où il édicte l'article 68.1;*

*f) les paragraphes 21(2) et 22(2).*

## THE MANITOBA PUBLIC INSURANCE CORPORATION ACT

*C.C.S.M. c. P215 amended*
*30(1) **The Manitoba Public Insurance Corporation Act** is amended by this section.*

## LOI SUR LA SOCIÉTÉ D'ASSURANCE PUBLIQUE DU MANITOBA

*Modification du c. P215 de la **C.P.L.M.***
*30(1) Le présent article modifie la **Loi sur la Société d'assurance publique du Manitoba**.*

*30(2) Subsection 1(1) is amended*

*(a) by repealing the definition "basic premium"; and*

*(b) by adding the following definition:*

**"plan premium"** means a premium paid or to be paid for an owner's certificate under a plan of universal compulsory automobile insurance or extension insurance, and includes any discount or additional amount established under subsection 6.1(3); (« prime du régime »)

*30(2) Le paragraphe 1(1) est modifié :*

*a) par suppression de la définition de « prime de base »;*

*b) par adjonction de la définition suivante :*

« **prime du régime** » Prime exigible en vue de l'obtention d'un certificat de propriété au titre d'un régime universel obligatoire d'assurance-automobile ou d'une assurance complémentaire. La présente définition vise notamment les réductions ou les surprimes établies en vertu du paragraphe 6.1(3). ("plan premium")

*30(3) The following is added after section 6:*

**Plan premiums**

**6.1(1)** For the period after February 28, 2019, the corporation must establish plan premiums for the plans it operates and administers under clause 6(1)(b).

**Classes**

**6.1(2)** Without limitation, the corporation may establish plan premiums with reference to the type, use, operation and age of motor vehicles and trailers, including their use within a region, and for that purpose may

(a) create classes and sub-classes of motor vehicles and trailers, and regions; and

(b) establish different plan premiums for different classes, sub-classes or regions.

*30(3) Il est ajouté, après l'article 6, ce qui suit :*

**Primes des régimes**

**6.1(1)** La Société est tenue de fixer, à l'égard de la période postérieure au 28 février 2019, les primes des régimes qu'elle administre en vertu de l'alinéa 6(1)b).

**Catégories**

**6.1(2)** La Société peut fixer les primes de régimes en fonction du genre, de l'utilisation, du fonctionnement et de l'âge des véhicules automobiles ou des remorques, y compris en fonction de leur utilisation à l'intérieur d'une région. Elle peut, à cette fin, prendre les mesures suivantes :

a) établir des catégories et des sous-catégories de véhicules automobiles et de remorques ainsi qu'établir des régions;

b) fixer des primes de régimes différentes en fonction des catégories, des sous-catégories ou des régions.

**Discounts and additional amounts**
**6.1(3)** The corporation may establish discounts from the plan premiums otherwise payable, and may establish additional amounts that must be paid as part of plan premiums, by an insured or an applicant for insurance, based on the driver safety rating system established by the regulations.

**Publication**
**6.1(4)** The corporation must ensure that its plan premiums are

(a) published on a website maintained by the corporation; and

(b) made publicly available through other reasonable means.

**Premiums are not regulations**
**6.1(5)** For certainty, the corporation's plan premiums are not regulations within the meaning of *The Statutes and Regulations Act*.

**Transition**
**6.1(6)** The *Automobile Insurance Certificates and Rates Regulation*, Manitoba Regulation 23/2017, is repealed on March 1, 2019.

**Premium payable**
**6.2** The premium payable for an owner's certificate is the plan premium established by the corporation for the owner's certificate for the applicable motor vehicle or trailer, as determined by the corporation.

**Separation of compulsory and extended businesses**
**6.3** The corporation must ensure that the revenue from its plans of universal compulsory automobile insurance and its other revenues are not used to subsidize the corporation's plans of extension insurance.

**Réductions et surprimes**
**6.1(3)** La Société peut accorder aux assurés ou aux proposants des réductions à l'égard des primes de régimes normalement exigibles ou leur imposer des surprimes en fonction du système de cotes de conduite établi par règlement.

**Publication**
**6.1(4)** La Société veille à ce que les primes de régimes soient à la fois :

a) publiées sur son site Web;

b) diffusées au public d'autres manières raisonnables.

**Non-assimilation à des textes réglementaires**
**6.1(5)** Les primes de régimes ne sont pas des règlements au sens de la *Loi sur les textes législatifs et réglementaires*.

**Disposition transitoire**
**6.1(6)** Le *Règlement sur les certificats et les tarifs*, *R.M.* 23/2017, est abrogé le 1er mars 2019.

**Prime exigible**
**6.2** La prime exigible à l'égard d'un certificat de propriété correspond à la prime de régime que fixe la Société pour le certificat visant le véhicule automobile ou la remorque en question, selon ce que détermine la Société.

**Séparation des recettes provenant des régimes obligatoires et complémentaires**
**6.3** La Société veille à ce que les recettes provenant entre autres de ses régimes universels obligatoires d'assurance-automobile ne servent pas à subventionner ses régimes d'assurance complémentaires.

**PUB approval of plan premiums for universal compulsory automobile insurance**

**6.4(1)** The corporation's plan premiums for its plans of universal compulsory automobile insurance must not be changed, and no new plan premiums for such insurance may be established by the corporation, except in accordance with this section.

**Application for review by the PUB**

**6.4(2)** The corporation must apply to The Public Utilities Board for approval before changing an existing plan premium, or establishing a new plan premium, for its plans of universal compulsory automobile insurance.

**Board may approve or vary plan premiums**

**6.4(3)** The Public Utilities Board may either approve or vary the plan premiums applied for by the corporation, and must make its decision in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*.

*30(4) Subsection 14(2) is amended by striking out* "for which premiums are prescribed in the regulations".

*30(5) Subsection 17(1) is amended by repealing the part after clause (b).*

*30(6) Subsection 17(3) is amended by striking out* "appointed by the Lieutenant Governor in Council" *and substituting* "appointed by the Minister of Finance".

**Approbation par la Régie des primes des régimes universels obligatoires d'assurance-automobile**

**6.4(1)** Sous réserve des autres dispositions du présent article, il est interdit à la Société de modifier les primes des régimes universels obligatoires d'assurance-automobile ou d'en établir de nouvelles.

**Autorisation de la Régie**

**6.4(2)** La Société est tenue de demander l'autorisation de la Régie des services publics avant de modifier les primes existantes des régimes universels obligatoires d'assurance-automobile ou d'en établir de nouvelles.

**Décision de la Régie**

**6.4(3)** La Régie des services publics peut soit approuver les primes de régimes proposées, soit les modifier. Elle est tenue de rendre sa décision conformément à la partie 4 de la *Loi sur la gouvernance et l'obligation redditionnelle des corporations de la Couronne*.

*30(4) Le paragraphe 14(2) est modifié par suppression de «* à l'égard de laquelle les règlements prescrivent des primes *».*

*30(5) Le passage qui suit l'alinéa 17(1)b) est supprimé.*

*30(6) Le paragraphe 17(3) est modifié par substitution, à «* est nommé par le lieutenant-gouverneur en conseil *», de «* est nommé par le ministre des Finances *».*

*30(7) Clause 33(1)(c) is replaced with the following:*

(c) establishing classes and sub-classes of drivers, by regions or otherwise, and prescribing the base driver premiums and additional driver premiums payable by drivers according to their class or sub-class;

*30(7) L'alinéa 33(1)c) est remplacé par ce qui suit :*

c) créer des catégories et des sous-catégories de conducteurs, selon les régions ou autrement, et fixer des primes de base pour conducteurs et des primes de pénalité pour conducteurs en fonction des catégories et des sous-catégories;

*30(8) Subsection 33(1.1) is replaced with the following:*

**Review by PUB**

**33(1.1)** No regulation changing the amount of an additional driver premium, a base driver premium or a discounted driver premium — together being the premiums charged by the corporation for compulsory driver insurance — may be made under subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board in accordance with Part 4 of *The Crown Corporations Governance and Accountability Act*.

*30(8) Le paragraphe 33(1.1) est remplacé par ce qui suit :*

**Modifications concernant les primes**

**33(1.1)** Aucun règlement modifiant les primes de pénalité pour conducteurs, les primes de base pour conducteurs ou les primes réduites pour conducteurs — soit les primes qu'exige la Société pour l'assurance-automobile obligatoire —, ne peut être pris en vertu du paragraphe (1) à moins que le lieutenant-gouverneur en conseil ne soit convaincu que la Régie des services publics a approuvé la modification projetée conformément à la partie 4 de la *Loi sur la gouvernance et l'obligation redditionnelle des corporations de la Couronne*.

*30(9) Subsection 36(2) is amended by striking out* "either personally delivered or forwarded by registered mail to the last known address of the insured a copy of such notice" *and substituting* "sent a copy of the notice".

*30(9) Le paragraphe 36(2) est modifié par substitution, à «* , soit à personne, soit par courrier recommandé à la dernière adresse connue de l'assuré, une copie de cet avis, l'assuré », *de «* à l'assuré une copie de cet avis, celui-ci ».

*30(10) The following is added after subsection 36(2):*

**Sending notice**

**36(2.1)** A notice may be sent for the purpose of subsection (2) by ordinary mail or e-mail to the last known address of the insured that appears in the corporation's records.

*30(10) Il est ajouté, après le paragraphe 36(2), ce qui suit :*

**Envoi de l'avis**

**36(2.1)** Pour l'application du paragraphe (2), l'avis peut être envoyé par courrier ordinaire ou électronique à la dernière adresse connue de l'assuré qui figure dans les dossiers de la Société.

# ⚠ *Steve Dart Co. v. Canada (Board of Arbitration), [1974] F.C.J. No. 132*

Federal Court Judgments

Federal Court of Canada

TRIAL DIVISION

ADDY J.

MONTREAL, JUNE 17; OTTAWA, JUNE 28, 1974.

Court File No. T-1307-74

**[1974] F.C.J. No. 132** | *[1974] A.C.F. no 132* | *[1974] 2 F.C. 215* | *[1974] 2 C.F. 215* | *46 D.L.R. (3d) 745*

Steve Dart Co. (petitioner) v. Board of Arbitration created by the Produce Licensing Regulations established by P.C. 1967-2265 and the members thereof (respondents)

## COUNSEL

J. Ruby for petitioner. G. Côté for respondents.

## SOLICITORS

Orenstein, Ruby, Michelin & Orenstein, Montreal, for petitioner. Laing, Weldon, Courois, Clarkson, Parsons, Gonthier & Tetrault, Montreal, for respondents.

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The following are the reasons for judgment delivered in English by

**1 ADDY J.**: The petitioner, a Quebec corporation, carries on business in the City of Montreal, Province of Quebec, as an importer of fruit and vegetables for the purpose of resale to the public and to other dealers.

**2** It is applying for a writ of prohibition to restrain the respondent Board from hearing a claim filed against the petitioner by M.J. Duer & Company, a broker, dealer and shipper of fruit and vegetables and other agricultural products, of the State of Virginia, U.S.A., for alleged failure to pay the sum of $3,992.10 for a shipment of some 862 crates of corn, which were received in Montreal on or about the 16th of July, 1973. The other relevant facts are set out in the affidavit of the petitioner, the respondent Board not having filed any affidavit herein.

**3** The petitioner is licensed as a dealer in agricultural products for shipment to and from the Province of Quebec pursuant to section 6 of the Canada Agricultural Products Standards Act, R.S.C. 1970, c. A-8 (hereinafter referred to as the "Act") and under the Produce Licensing Regulations (hereinafter referred to as the "Regulations") which were issued pursuant to the said Act under P.C. 1967-2265.

**4** The petitioner, on receipt of the above-mentioned corn, claimed that it was not in good condition, advised the shipper by telegram and requested an inspection of same by officers of the Department of Agriculture. The petitioner also claimed damages in excess of the price of the goods. An inspection was immediately carried out by an inspector of the Department of Agriculture and, subsequently, the shipper, by letter dated the 11th of January 1974, filed the formal complaint with the Department of Agriculture pursuant to section 20 of the Regulations, claiming non-payment to it of the aforesaid sum of $3,992.10. On the 21st of January 1974, the respondent Board

formally advised the petitioner by letter that, in accordance with section 26 of the Regulations, it must either pay the claim or file a notice contesting the claim within thirty days. It also advised the petitioner that it would be required in any notice contesting the claim to set out in writing the reasons why it was resisting the claim and forward to the respondent Board two copies of every letter or document in its possession relating to the subject-matter of the claim.

**5** The petitioner's application for a writ of prohibition is founded on the argument that the Regulations issued pursuant to the Act, in so far as they purport to set up the respondent Board and to provide for its composition, for the granting to it of judicial or quasi-judicial powers and, more particularly, for the making by it of findings as to issues of liability arising between individual parties and for the enforcement of such findings, are ultra vires in that the Act does not provide authority for any such Regulations to be made.

**6** The general purpose of the Act is obviously to establish standards for agricultural products and to regulate international and interprovincial trade in these products. The Act makes specific provisions for Regulations governing agricultural products to be issued by the Governor General in Council for the following specific purposes:

a) the terms and conditions of grading, marking and inspecting of products, and fees and regulations pertaining thereto (refer Act section 3);

b) the prohibition of importation into or of exportation out of Canada, or the conveying or sending of such products from one province to another, and regulating the carriage of such goods (refer Act section 5);

c) the licensing of agricultural products dealers in any province or the importation into or exportation out of that province from any point outside of the province, and the cancellation and suspension of such licences and the prescribing of fees payable for same (refer Act section 6);

d) the seizing, detention and disposal of any agricultural products (refer Act section 10(4)).

**7** The only other authority contained in the Act providing for the issuing of Regulations is contained in section 8 of the Act, which grants a general power to make regulations to carry out the purposes and provisions of the Act. Section 8 reads as follows:

> 8. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and for prescribing anything that by this Act is required to be prescribed. 1955, c. 27, s. 8.

**8** Section 31 of the Regulations provides that there shall be a board of arbitration consisting of three members -- two of which are to be appointed by outside bodies, namely, the Canadian Horticultural Council and the Canadian Wholesalers Association, and one member, namely the Chairman, to be appointed by an employee of the Department, that is, by the Director of the Fruit and Vegetables Division of the Products and Marketing Branch of the Department of Agriculture, referred to in this Act as "the Director".

**9** Nowhere in the Act is there, in my view, any specific provision for the setting up of any such board and, a fortiori, is there any such provision for delegating to any outside body or to an employee of the Department the right to determine the composition thereof. The only specific provision for administrative personnel with any specific functions is contained in section 7(1) of the Act which gives the right to appoint inspectors, graders and "other persons necessary for the administration and enforcement of this Act, [who are to] be appointed or employed under the Public Service Employment Act".

**10** It may well be that a board consisting of three persons might be considered as being among those "persons necessary for the administration and enforcement of the Act". But, in order for such persons to be invested with any such powers, specific authority must be provided to allow the Governor General in Council by regulation to delegate the appointment of any such persons to outside bodies or even to an employee of the Department, namely, the Director. The application of the principle delegatus non potest delegare to such cases is too well known to warrant the citing of any authority in support thereof. For the same reason, it is equally obvious that section 8 of the Act,

above quoted, is not of any use to the respondent since it contains no such specific power. That section grants the additional right to make regulations to carry out the purposes and provisions of the Act, but such purposes and provisions must be clearly expressed in or contained within or flow by necessary implication from other sections of the Act. It would permit the making of ejusdem generis Regulations as those authorized in the other sections of the Act providing for the issuing of Regulations. It would also permit a Regulation required to carry out effectively a clearly expressed provision of the Act not falling within one of the other sections authorizing the making of Regulations; it certainly does not provide the right to make Regulations covering a matter which is not even remotely referred to in the Act. (See Procureur Général de Québec v. Dame Lazarovitch[1]; Campbell's Trustees v. Police Commissioners of Leith[2].) The power to establish a board of arbitration and to establish it from among people to be designated by outside bodies cannot be fairly regarded as incidental to or consequential upon those things which Parliament has authorized in this Act. (See The Attorney-General & Ephraim Hutchings (Relator) v. The Directors, etc., of the Great Eastern Railway Company[3] and Minister of Health v. The King (on the Prosecution of Yoffe)[4].) Delegated authority must be exercised strictly and within the strict limits of the statute. (See The King v. National Fish Company, Ltd.[5]; Gruen Watch Co. of Canada Ltd. v. Attorney-General of Canada[6]; and Pulp & Paper Workers of Canada v. Attorney-General for British Columbia[7].)

**11** Since there is no statutory authority for the constitution of the respondent Board, prohibition should issue against it on this ground alone. As section 18 of the Federal Court Act gives this Court the power to issue a writ of prohibition against "any federal board, commission or other tribunal", I find no difficulty in coming to the conclusion that, by necessary implication, this Court has a power to grant such relief against a body which, although not legally constituted, purports to be and to act and exercise powers as a federal board or tribunal pursuant to federal regulations and a federal act. I do not find difficulty either in concluding that prohibition is a proper remedy in such a case.

**12** I would, however, be remiss in my duty if I failed to deal with the extensive arguments presented by counsel pertaining to the powers which the respondent Board purports to exercise under the Regulations and pertaining to the various procedures provided for in the Regulations for the functioning of that Board.

**13** The Regulations provide that a person may file a complaint with the Director to the effect that a licensee has failed to account in respect of any transaction (refer Regulations section 20(1)(c)) and provide also that a person shall be deemed to have failed to account where he fails to pay money due in respect of an agreement for the sale of produce (refer Regulations section 20(2)(c)). They also provide that, where the Director feels that there is sufficient evidence for the Board to hear a claim, he is obliged to submit it to the Board (refer Regulations section 30: "... the Director shall submit the claim and any counterclaim to the Board.") The Board is then obliged to examine the evidence submitted by the Director and to render a decision thereon. Before coming to any decision the Board is also entitled to request that any witness attend (refer Regulations section 32).

**14** The Regulations (section 34) then provide that the respondent shall, within thirty days of the decision, either satisfy the award or forward to the Director a cheque in satisfaction thereof or file a notice of appeal in accordance with section 33 of the Regulations, which incidentally requires the appellant to pay the sum of $73.00 as security for costs and also to deposit a certified cheque in the full amount of the "award or damages payable to the claimant". There is also a mandatory provision to the effect that, where a licensee fails to pay an award or otherwise to comply with section 34 of the Regulations, the Minister must cancel the licence (refer Regulations section 42(2)). There is provision for appeals to be heard before another board called the Board of Review consisting of five members. The Regulations also make provision for security in the form of a bond in double the amount claimed where the claimant is a non-resident. Throughout the various Regulations there is a constant reference to damage or loss sustained by a claimant over which the Board would have jurisdiction.

**15** All of the above sections of the Regulations set up a trial tribunal and an appeal tribunal, and a procedure to try the merits of any complaint lodged by "any person who may choose to lodge a complaint against a licensee to the effect that the latter might, among other things, have "failed to account in respect of any transaction" or "without reasonable cause rejected or failed to deliver any produce, bought, sold or consigned in accordance with the terms of a contract" (refer Regulations section 20(1)(c) and (a)) to grant awards of damages arising out of such claims

and to enforce the awards by means of an automatic forfeiture of licence in the event of non-compliance with an award.

**16** There is no statutory authority whatsoever for the setting up of any such system of trial and appeal tribunals or for determining the issues which the above Regulations purport to have determined. The provisions of section 8 of the Act, which I have quoted above, do not come anywhere near to providing any such authority even by remote implication. Counsel for the respondent Board argued that, in effect, the Board would be merely deciding whether a licence was to be cancelled pursuant to the Regulations in this respect which were issued under the authority granted by section 6(1) of the Act which reads as follows:

> 6. (1) The Governor in Council may make regulations for the licensing of dealers to deal in any agricultural product shipped from or to a place outside the province in which such dealer carries on business, and for the issue, cancellation and suspension of licences including the prescribing of fees for the issue thereof.

**17** The exercise of a power to revoke a licence in order to enforce a finding as to a claim between individuals which the Board has no statutory power to make is an abusive and illegal use of such power and is subject to being restrained when its use is threatened, regardless of the fact that section 6(1) does provide authority for the making of regulations dealing with the cancellation or suspension of licences.

**18** What was attempted by the Department, in effect, was to create a tribunal or court by means of order in council. Under section 101 of the British North America Act, the power to create courts rests strictly with Parliament. It would be a sorry day indeed if tribunals with jurisdiction to determine the issues between citizens could be set up by mere order in council.

**19** Even if all of the provisions contained in the Regulations were actually embodied in the Act, it might possibly still be argued successfully, having regard to the fact that such extensive powers in a board of arbitration would not really be required to properly administer the provisions of the Act, that the purported granting of such powers might constitute an infringement of the property and civil rights provisions contained in section 92 of the British North America Act (see In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919[8]). But I am, of course, refraining from considering this point as it is not required in order to decide the issue before me.

**20** The penalty which is automatically imposed if a licensee does not pay a debt which the Board of Arbitration finds to be due by him to another, is much more harsh on the defendant than the possible effects of a writ of execution issued out of a civil court. Debtor's prison has disappeared several years ago, but an automatic and obligatory cancellation of a person's licence for debt and, therefore, the removal of that person's livelihood is a most drastic and a most severe penalty to be suffered for non-payment of a debt; it is not too far removed from debtor's prison.

**21** For these reasons, as well as on the original grounds that there was no statutory authority whatsoever to constitute the Board of Arbitration, the motion is granted and prohibition shall issue.

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1 (1940) 69 Que. K.B. 214 at 227.

2 (1870) L.R. 2 Sc.& Div. 1.

3 [1879-80] 5 A.C. 473 at 476.

4 [1931] A.C. 494.

5 *[1931] Ex.C.R. 75* at 82.

6 *[1950] 4 D.L.R. 156* at 165, 166, 176 and 177.

7 *(1968) 67 D.L.R. (2d) 378* at 383 and 384.

8 *[1922] 1 A.C. 191* at 197 and 198.

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**End of Document**

# *Smith v. Canada (Attorney General), [1999] F.C.J. No. 1751*

Federal Court Judgments

Federal Court of Canada - Trial Division

Ottawa, Ontario

Blais J.

Heard: October 4, 1999.

Judgment: November 9, 1999.

Court File No. T-1296-97

**[1999] F.C.J. No. 1751** | *[1999] A.C.F. no 1751* | *179 F.T.R. 134* | *22 C.C.P.B. 229* | *93 A.C.W.S. (3d) 164*

Between Sydney Jean Smith, applicant, and The Attorney General of Canada, the President of Treasury Board and the Minister of National Defence, respondents

(38 paras.)

## Case Summary

**Government programs — Veterans' pensions — Entitlement — Surviving spouse, benefits — Statutes — Operation and effect — Delegated legislation — Regulations — Validity of, ultra vires, whether purpose authorized by empowering statute.**

Application by Smith for judicial review of a decision by the Crown denying her application for a division of pension benefits. Smith's husband had been a member of the Canadian military. Smith and her husband separated, and Smith signed a property settlement in which she gave up her entitlement to a share of his pension in exchange for a lump sum support payment. Smith's husband died in 1993 without having collected his pension. Smith was in dire financial circumstances and brought an application for a division of benefits under the Pension Benefits Division Regulations. Section 6(1)(b) of the Regulations set a time limit for applications for benefits. Smith's application was rejected on the basis that she had missed the deadline. Smith argued that section 6(1)(b) of the Regulations was ultra vires because it conflicted with the Pension Benefits Division Act.

HELD: Application allowed.

Section 6(1)(b) of the Regulations was ultra vires. The purpose of the Pension Benefits Division Act was to provide a mechanism for making payments out of the pension funds, not to fix the value of the pension between spouses in a property settlement. Section 6(1) (b) defeated the purpose of the Act because it acted as a bar to the pension benefits provided for in the Act. Had the legislature intended to provide a limitation period it would have done so in the Act.

## Statutes, Regulations and Rules Cited:

Pension Benefits Division Act, ss. 4, 5, 5(3), 6, 6(1), 7, 8.

Pension Benefits Division Regulations, ss. 6, 6(1)(b), 14(3).

## Counsel

Lucie Laliberté, for the applicant. Brian Saunders, for the respondent.

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## BLAIS J. (Reasons for Order and Order)

1 This is an application for judicial review of the decision of Lise Guevremont of the Department of National Defence, dated May 15, 1997 wherein the applicant's application for division of pension benefits was denied.

2 The applicant, Sydney Jean Smith was married to Garnet William Smith, a member of the Canadian Military in 1963. In 1989, the applicant signed a property settlement wherein she gave up her entitlement to her husband's pension, his severance pay and any entitlement to support, for the sum of $14, 000.00.

3 Mr. Smith died in 1993, without ever retiring or collecting pension. The minimum death benefits was paid out to his son Duane Smith.

4 Due to her dire financial situation, the applicant brought an application for support under the Succession Law Reform Act to allow a division of pension.

5 On March 19, 1996, the applicant's counsel wrote to Ms. Guevremont, Officer-in-charge at the Directorate of Pay Services, requesting that no further pension benefits be paid out pending the outcome of the applicant's application. The applicant learned that no further benefits were payable since they had already been paid out to Duane Smith in early 1996.

6 The applicant received the application for division of pension on March 27, 1996 and sent it on April 2, 1996. According to the respondent, the application was incomplete. By letter dated July 26, 1996, from Ms. Guevremont, the applicant was informed that her application for a pension division could not be processed because she applied too late, the deadline was March 31, 1996.

7 On October 3, 1996, Mr. Justice Sirois ordered the division of pension.

8 On January 13, 1997, the applicant sent a letter to Ms. Guevremont asking her to reconsider her decision. By letter dated May 15, 1997, Ms. Guevremont refused the application.

THE APPLICANT'S SUBMISSIONS

9 The applicant submits that the purpose of the Pension Benefits Division Act (PBDA) is to facilitate the division of the pension when ordered by the court or agreed upon for property settlement. She submits that section 6 of the Pension Benefits Division Regulations (PBDR) is in conflict with the provisions and purpose of the PBDA and is therefore invalid.

**10** She argues that there is no authority under the PBDA to refuse to divide the pension because the application was received after March 31, 1996.

THE RESPONDENTS SUBMISSIONS

**11** The respondents submit that paragraph 16(m) of the PBDA, authorizes the Governor in Council to prescribe the time limit under section 6 of the PBDR.

**12** They explain that at this point in time and at the time that the applicant applied for division, under the general valuation rule provided for under subsection 14(1) of the PBDR, there were and would be no pension benefits to value, and a division under the PBDA could not occur. The value of the pension benefits after payment for the children, was zero.

**13** However, subsection 14(3) of the PBDR creates an exception, it creates a value for the member's pension benefits when all of the pension benefits have been paid and there would ordinarily have been nothing left to value. This value represents an unfunded benefit and represents an additional liability to the pension plan.

**14** The respondent submit that the time limit provides some finality in determining pension payments payable in respect of deceased members, since a division of pension benefits affects the value and payment of other benefits under various pension plans. The imposition of a limitation period is not arbitrary. Rather, it is a reasonable and necessary feature of the legislation in question which essentially establishes administrative procedures.

**15** They raise the issue of the application being incomplete. It wasn't until a court order was provided, on April 15, 1997, one year after the 18 month period prescribed by the PBDR has expired, that the application was according to the PBDA.

ISSUE

**16** Is paragraph 6(1)b) of the PBDR ultra-virès?

ANALYSIS

**17** The applicant is a widow who was refused pension division after 26 years of marriage, due to a regulation adopted in 1994.

**18** In Steve Dart Co. v. Canada (Board of Arbitration), *[1974] 2 F.C. 215*, the Court held :

> That section grants the additional right to make regulations to carry out the purposes and provisions of the Act, but such purposes and provisions must be clearly expressed in or contained within or flow by necessary implication from other sections of the Act. It would permit the making of ejusdem generis Regulations as those authorized in the other sections of the Act providing for the issuing of Regulations. It would also permit a Regulation required to carry out effectively a clearly expressed provision of the Act not falling within one of the other sections authorizing the making of Regulations; it certainly does not provide the right to make Regulations covering a matter which is not even remotely referred to in the Act.

**19** In order to determine whether the Regulations were adopted in conformity with the Act. It is imperative to examine the purpose of the Act.

**20** The purpose of the Act as set out in the Regulatory Impact Analysis Statement is to provide a mechanism for making payments out of the pension funds, not to fix the value of the pension as between spouses in property settlement made upon the breakdown of their relationship.

**21** Therefore, the Act's primary and only purpose is to act as a mechanism for pension division. Since the member makes pension contributions all his life, the act was set to facilitate the division of the pension as stipulated to the interested parties.

**22** In Dubé v. Canada (Superannuation Directorate), *[1996] A.C.F. no 341*, Justice Nadon held :

> In my view, the purpose of an application submitted under subsection 4(1) is not to ask the Minister to divide the pension benefits but to ask the Minister to approve the division ordered, in the case at bar, by the Superior Court of Quebec.

**23** In the present case, the division of pension benefits was approved by Justice Sirois, but the Minister refused to approve it pursuant to the Regulations.

**24** The respondent raises the cases of CKYO Ltd. v. The Queen, *[1979] 1 S.C.R. 2*, and Re Westinghouse Electric and Duquesne Light Company et al *(1977), 16 O.R. (2d) 273*, to conclude that the regulation was made pursuant to the Act. However, these cases can be distinguished from the present case, since they were adopted according to the purpose and object of the Act, which was not the case here.

**25** It seems to me that paragraph 6(1)b) of the PBDR defeats the purpose of the Act, as it purports to act as a bar to the pension division stipulated in the Act.

**26** Furthermore, the Act provides for time limits such as the one found in subsection 5(3) in relation to the time the notice is deemed received. Another time limit is found in subsection 6(1), requiring a party who objects to the division to submit a notice within sixty days. These time limits do not act as an impediment to the right to divide the pension.

**27** Had the legislator intended to provide a time bar, he would have included it in the Act as he did in sections 5 and 6.

**28** In Canada (Attorney General) v. Canada (Public Service Staff Relations Board), *[1977] 2 F.C. 663* (P.S.S.R.B.) Justice Le Dain held :

> In my opinion there must be explicit statutory authority for the imposition, by regulation, of a time limit within which a right conferred by statute may be exercised.

**29** In Alvarez v. Minister of Manpower and Immigration, *[1979] 1 F.C. 149*, the Federal Court of Appeal held :

> Rule 19, ... purports to have been made in the exercise of this authority. It must be conceded that the Rule is broadly speaking one "governing the activities of the Board and the practice and procedure in relation to appeals", but in my opinion it is one that is inconsistent with section 7(3) in so far as it limits the time within which a request for reasons may be made, and as such is ultra vires. It abridges the right which is conferred in unqualified terms by section 7(3). Rule 19 suggests that a request for reasons may be made only after the disposition of an appeal. This in itself is clearly inconsistent with section 7(3), which implies no such limitation. Had Parliament intended that there be a time limit within which a request for reasons may be made it would presumably have expressly authorized the Board to fix such a limit as it did in section 19 of the Act with respect to notice of appeal. It may well be desirable, from a practical point of view, that there be such a time limit, but the power to fix one cannot in my opinion be found in the terms of section 8(1).

**30** The respondents submit, firstly that the scope of the legislation is different in the P.S.S.R.B. and the Alvarez case, and that there is no consideration as to whether the statute is skeletal, that it was required to be filled in by the Governor in Council.

**31** I cannot accept this argument. The statute is not skeletal, it sets out specific details regarding the application for division, such as who can apply, the circumstances in which the application may be made, the calculation of period of separation, the form of the application etc... It provides specific details about the division, such as the approval of the division, the grounds upon which an application must be refused, the amount of the division, the adjustment, the determination of the period subject to division etc.

**32** It also sets out that the regulations are to prescribe the circumstances under which a person may apply or act on behalf of another, determine the terms and conditions for withdrawing an application, prescribe the qualified retirement savings vehicles and making the adaptations to the pension plans necessary because of a transfer.

**33** Secondly, the respondents submit that unlike the P.S.S.R.B and the Alvarez case, where a right created by a statute was being limited by the time set by Regulations, in the present case, the time set in the Regulations limits a right created by Regulations.

**34** In my view, the respondents fail to make a distinction between the right to a pension division as set out in sections 4, 7 and 8 of the Act and the value of the pension as set out in the Regulations. It is the right to a pension division that is being denied in this case, a right created by statute.

**35** Thirdly, the respondents submit that the provision found in paragraph 16m) in the present case is much broader than those found in P.S.S.R.B. and Alvarez. They argue that the words used in the present case, namely "as the General in Council may consider necessary" is broader than the wording used in section 19 of the P.S.S.R.B case or section 8 of the Alvarez case.

**36** The fact that one provision is broader than the other does not justify the fact that the regulation adopted pursuant to it, is contrary to the purpose of the Act.

**37** I find the paragraph 6(1)b) of the PBDR to be ultra-virès.

**38** For these reasons, the application for judicial review is granted and the matter is referred back for reconsideration.

BLAIS J.

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End of Document

# *Sobeys Group Inc. v. Nova Scotia (Attorney General), [2006] N.S.J. No. 386*

Nova Scotia Judgments

Nova Scotia Supreme Court

Halifax, Nova Scotia

K.P. Richard J.

Heard: August 30-31, 2002.

Judgment: October 4, 2006.

Docket: S.H. No. 268169

**[2006] N.S.J. No. 386** | *2006 NSSC 290* | *248 N.S.R. (2d) 149* | *152 A.C.W.S. (3d) 71*

Between Sobeys Group Inc., et al., Applicant, and The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the province of Nova Scotia, Respondents, and Atlantic Wholesalers Ltd., et al., Intervenors

(40 paras.)

## Case Summary

**Government law — Crown — Orders in Council — Application for declaration that certain sections of a regulation made pursuant to the Retail Business Uniform Closing Day Act were ultra vires the Governor-in-Council allowed — The Act did not provide legislative authority to the Governor-in-Council to make such regulations — The Act did not grant authority to discriminate between businesses on the basis of size — The Governor-in-Council exceeded its authority in enacting the regulations — Order in Council 2006-315, N.S. Regulation 98/2006, ss. 3(1) (a)(ii), 3(2), 3(3), 3(4).**

**Statutory interpretation — Regulations and Orders in Council — Validity — Application for declaration that certain sections of a regulation made pursuant to the Retail Business Uniform Closing Day Act were ultra vires the Governor-in-Council allowed — The Act did not provide legislative authority to the Governor-in-Council to make such regulations — The Act did not grant authority to discriminate between businesses on the basis of size — The Governor-in-Council exceeded its authority in enacting the regulations — Order in Council 2006-315, N.S. Regulation 98/2006, ss. 3(1)(a)(ii), 3(2), 3(3), 3(4).**

**Commercial law — Trade regulation — Retailers — Licensing and regulation — Application for declaration that certain sections of a regulation made pursuant to the Retail Business Uniform Closing Day Act were ultra vires the Governor-in-Council allowed — The Act did not provide legislative authority to the Governor-in-Council to make such regulations — The Act did not grant authority to discriminate between businesses on the basis of size — The Governor-in-Council exceeded its authority in enacting the regulations — Order in Council 2006-315, N.S. Regulation 98/2006, ss. 3(1)(a)(ii), 3(2), 3(3), 3(4).**

**Administrative law — Legislative powers or function — Application for declaration that certain sections of a regulation made pursuant to the Retail Business Uniform Closing Day Act were ultra vires the Governor-in-Council allowed — The Act did not provide legislative authority to the Governor-in-Council to make such regulations — The Act did not grant authority to discriminate between businesses on the basis of size — The Governor-in-Council exceeded its authority in enacting the regulations — Order in Council 2006-315, N.S. Regulation 98/2006, ss. 3(1)(a)(ii), 3(2), 3(3), 3(4).**

Application for declaration that certain sections of a regulation made pursuant to the Retail Business Uniform Closing Day Act were ultra vires, in that the Act did not provide the required legislative authority to the Governor-in-Council to make them. The applicant did not challenge the power of the legislature to pass legislation regarding Sunday shopping; the challenge focused entirely on the validity of the regulations that had been passed. The regulations specified that stores of a specific size fell under the ambit of the regulation.

HELD: Order issued declaring the relevant sections ultra vires and of no force and effect.

The Retail Business Uniform Closing Day Act was properly enacted and was within the authority of the Nova Scotia government. However, the regulations were discriminatory against the applicant, intervenors, and any other retailer not falling within the store-size provisions of the regulations. The Governor-in-Council could not discriminate on the basis of the size of the retailer without the express legislative authority to do so, which was not granted under the Act. In obiter, the court commented that had the provisions of the regulation been enacted as part of the Act, they might have been found valid.

## Statutes, Regulations and Rules Cited:

Labour Standards Code, *R.S.N.S. 1989, c. 246*

Ontario Retail Business Holidays Act, R.S.O. 1980, c. 453, s. 8

Order in Council 2006-315, N.S. Regulation 98/2006, s. 3(1)(a) (ii), s. 3(2), s. 3(3), s. 3(4)

Retail Business Uniform Closing Day Act, *R.S.N.S. 1989, c. 402*

**Court Summary:**

*Ultra vires* of Governor-in-Council Regulations.

Sunday closing regulations re major stores remaining open.

**Issue:** Are subject Regulations *ultra vires*?

**Result:** Regulations not made in accordance with powers granted under the Act and therefore are *ultra vires*.

*[Note: This summary does not form part of the Court's judgment. Quotations must be from the judgment, not this summary.]*

## Counsel

David P.S. Farrar, Q.C., Sherri Conlon and Donn Fraser for the Applicant

Edward Gores, Q.C., Glenn Anderson, Q.C., Alex Cameron, for the Respondents

John A. Keith, Colin J. Clarke, W. Harry Thurlow, for the Intervenors

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[Editor's note: An erratum was released by the Court October 5, 2006; the correction has been made to the text and the erratum is appended to this document.]

## K.P. RICHARD J.

**1** In this application Sobey's Inc. et al. (Applicants) and Atlantic Wholesalers Ltd. et al. (Intervenors) seeks a declaration that certain regulations made pursuant to the *Retail Business Uniform Closing Day Act* (the Act) are ultra vires in that the Act does not provide legislative authority to the Governor-in-Council (the Cabinet) to make such regulations. Counsel for the applicant, in oral submission put the matter quite succinctly in his opening remarks:

> Well, what this application is about is not about social or political considerations. It's not about the appropriateness of Sunday shopping, nor is it about the power of the legislature to pass an Act dealing with Sunday shopping. This case, this application is about one fact and it is about the scope of the Cabinet's power to pass Regulations pursuant to the Act.

**2** Neither the Applicant nor the Intervenor suggested that the province lacked the constitutional authority to enact legislation respecting these matters and it was implicit throughout the hearing that had the impugned sections been incorporated into the Act, rather than the Regulations, this hearing probably would not have taken place. This point will become clearer in the later discussion of the Ontario Act upon which, according to the Respondent, the Nova Scotia Act was patterned.

**3** The specific sections to which this application refers are underlined in the following:

> *3(1) The goods and services provided by a retail business in any of the following categories are prescribed as goods and services to which Section 3 of the Act does not apply*:
>
> (a) a store
>
> (i) whose principal business is selling groceries, and
>
> (ii) that at no time operates a retail sales area greater than 4000 sq.ft.
>
> (2) For the purposes of clause 1(a), 2 or more stores that are owned, occupied or operated by related persons are deemed to be one store if they are (a) in the same building; or (b) adjacent or in close proximity to each other.
>
> (3) For the purposes of subsection (2), "related persons" has the same meaning as in the Income Tax Act
>
> (4) Subsection (2) does not apply to a store if that store was regularly open to the public on Sunday before June 1, 2006.

**4** The nature of the challenge to the validity of these regulations is set our at page 1 of the Applicant's pre-hearing Memorandum as follows:

> (a) It exceeds the jurisdiction of the Governor in Council and is thus ultra vires on the basis that (i) it is outside the scope of the purpose and intent of Act; and (ii) it unlawfully discriminates against the Applicants

(b) it was enacted for an improper purpose and was based on arbitrary, irrelevant and extraneous considerations, amounting to bad faith.

**Legislative Review**

**5** The various parties, in written and oral submissions, traced the history of holiday closing legislation back to those times when such legislation had definite religious overtones. Such names as *Sunday Desecration Act, An Act for the Better Observation of the Lord's Day, Sunday Observance Act, Offences Against Religion Act and The Lord's Day Act* - all denote a certain Christian sense of origin. The religious nature of this sort of legislation was the subject of a constitutional challenge in 1985 in the Supreme Court of Canada case of *R. v. Big M Drug Mart (1985), 18 D.L.R. (4th) 321*. This case challenged the constitutionality of the Federal *Lord's Day Act* . The Act was struck down as being in conflict with s. 2(a) of the *Charter of Rights and Freedoms*. The resulting void in Sunday closing legislation prompted the provinces to enact "secular" legislation. There is no dispute that the provinces had the constitutional authority to enact such legislation. For the purposes of this decision there is no need to go back further than the original "secular" Act in Nova Scotia.

**6** The original Nova Scotia legislation directed to this subject started with Bill 70 which was passed through the Legislature in 1985. The Bill was originally entitled *An Act Respecting the Operation of Retail Businesses on Holidays* but in the process of going through the Legislature the name was changed to *Retail Business Uniform Closing Act*. The original Act provided that municipalities could enact by-laws pursuant to the act.

> *(4) A by-law made pursuant to this section shall provide for the issuing of permits pursuant thereto and may*
>
> *(a) limit the number of permits that may be issued for any class or classes of business;*
>
> *(b) prescribe the classes or types of business*
>
> *with respect to which permits may be issued;*
>
> *(c) designate an area of the municipality as a tourist area;*
>
> *(d) prescribe the hours during which any class or classes of business may be operated on a uniform closing day;*
>
> *(e) prescribe fees for permits;*
>
> *(f) provide for the suspension or cancellation of permits;*
>
> *(g) prescribe the term or duration of permits.*

**7** Several years later the Act was amended to remove this authority from municipalities since it was generally determined that the existing Act made for a "patchwork" of store hours throughout the province. The store closing powers were assumed by the province and the Act now contained the following clause respecting the delegation of authority to the Cabinet to make regulations:

> *8. The Governor in Council may make regulations*
>
> *(a) defining a word or expression used in this Act and not defined herein;*
>
> *(b) determining or modifying the meaning of a clause of subsection (2) of Section 3;*
>
> *(ba) permitting a retail business to operate on Sunday between one o'clock in the afternoon and six o'clock in the afternoon in order to implement the result of the plebiscite held pursuant to Section 10;*
>
> *(c) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.*

**8** The regulations challenged in this application were enacted pursuant to powers which the Cabinet assumed

under the terms of the above delegation clause. In this context, counsel for the Intervenors attacked the entire regulation making power that the Cabinet had assumed under the provisions of the Act. In his oral submission counsel said:

> *The important thing my Lord is, this regulation that started this whole mess was completely invalid. They [Cabinet] took a power that belonged to the municipality and they assumed if for themselves and they did it by pretending that the word business didn't mean business even though the Act says what a business was, they said it means a good and service. So what you have my Lord, is you have a very strange situation in December, 1986 where the Governor in Council created a regulation province-wide shutting down grocery stores over 8,000 sq. feet at the same time the Legislature has said that the municipalities have that power. They [Cabinet] took away a legislative power and gave it to themselves with no statutory power.*

**9** Counsel then expanded this argument so as to call into question the entire regulatory regime set out in the Act. This is a much broader attack on the regulations and goes beyond what both the Applicant and the Intervenor are seeking in this Application. For this reason, I find it unnecessary to consider this aspect of the argument. Perhaps that will be left for a future Application by other interested parties.

**10** Pete's Frootique, a large grocery business located in a Bedford Shopping Mall (later opening a branch on Spring Garden Road in Halifax) re-configured its corporate structure to provide for separate incorporated businesses, each with a square footage equal to, or less than, the maximum allowable under the Regulations. In 1999 the province laid charges against Pete's Frootique for being in breach of the Regulations under the Act. The matter went to trial in Provincial Court and resulted in an acquittal. In his brief decision, Judge Curran found that the legislation and regulations made pursuant thereto constituted penal legislation and ought be given strict interpretation. Judge Curran interpreted the Regulations strictly and found against the province. He found that the corporate structure of Pete's Frootique was in compliance with the Regulations. This finding is consistent with the authorities on this point. In Sullivan and Driedger on the Construction of Statutes Butterworths 2000 at page 384 the author states the principle as follows:

> *Penal legislation is legislation that creates offences punishable by fine, loss of freedom or curtailment of a privilege or right. Because of the potential for serious interference with individual rights, penal legislation is strictly construed.*

**11** Surprisingly, this acquittal was not appealed by the Crown. At this hearing, counsel for the Respondent (Crown) asserted that this decision was "bad law". On questioning by the court, counsel offered no explanation as to why the province had not appealed. One may conclude from this case that, by not appealing the decision, the province at least acquiesced in it. As a logical extension of this it is reasonable to suggest that others who followed the same procedure could do so without fear of prosecution.

**12** In the Spring of 2006 both the Applicant and the Intervenor moved to re-configure their respective corporate structures to comply with the provisions of the *Retail Business Uniform Closing Day Act* ... and its regulations. In the result the re-structured corporations opened separate corporate entities to operate businesses on Sundays, commencing on 11 June 2006.

**13** Halifax police investigated stores of both the Applicant and the Intervenor for alleged violations of the Act. On 10 August 2006 the HRM Police issued a release which stated in part:

> *After a thorough review of the evidence and extensive consultation with the Public Prosecution Service, police have determined there are insufficient grounds at this time to lay charges. Police are satisfied that the current openings are within the law.*

**14** In response to this finding by the police and prosecutor Cabinet then moved to amend the regulations by adding sub sections (2), (3) and (4) to Section 3(1)(a) of the Regulations. It is the challenge to these sections which comprise the substance of this application.

**15** The province also moved to provide relief to retail workers respecting work on Sundays. A press release dated 10 July 2006 spoke to a Bill which was introduced to amend the *Labour Standards Code*. The release stated in part:

> *The bill will use a two-step approach to protecting the existing rights of retail employees not to work on Sundays. First, it will amend the Labour Standards Code to give every retail employee the right to refuse to work on a uniform closing day as defined in the Retail Business Uniform Closing Day Act - Sundays and Holidays. Then, through regulation, cabinet will create exemptions similar to those in the Retail Business Uniform Closing Day Act.*

**16** The wording in the *Code* is strikingly similar to the wording in the *Retail Business Uniform Closing Day Act.*

**17** It is somewhat revealing that the power given to the Governor in Council in the Labour Standards Code states in part *The Governor in Council may make regulations concerning any matter or thing which appears* ***to him*** *necessary or advisable for the effectual working of this Act.* This introduces a subjective element into the power given by the legislation, whereas, in the Retail Business Uniform Closing Day Act this power is defined as - *respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.* The difference between these two approaches is substantial as stated in Driedger in *Construction of Statutes* (2d, 1983) at 328:

> *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 no doubt be the judges of necessity. Wider authority is conferred if a subjective test of necessity is prescribed. This 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 ... 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. (Underscoring mine) There is, therefore a vast difference between the two following examples and the extent of the power conferred:*
>
> > *May make such regulations as may be necessary for carrying out of the provisions of this Act*
> >
> > *May make such regulations as he deems necessary for carrying out the provisions of this Act.*

**18** It appears from this analysis that had the Minister or Cabinet (the regulating authority) been granted the power to make such regulations *as he deems necessary* then this court would be hard pressed to find the legal authority to question such decision. In the absence of such a subjective authority it is open to the Courts to objectively review the challenged regulations to determine if they were made under the authority of the Act, or, whether such regulations exceeded the specific authority and are thus *ultra vires* the Cabinet.

**Respondent's Position**

**19** The respondent places great emphasis on the Supreme Court of Canada case of *Edwards Books and Art Ltd. v. The Queen (1987), 35 D.L.R. (4th) 1*, and the comments of Dickson C.J. contained therein. In his opening comments, Dickson C.J.:

> *In this appeal the court is called upon to consider the constitutional validity of Sunday-closing legislation enacted by the Province of Ontario sub nom. Retail Business Holidays Act, R.S.O. 1980, c. 458.*

**20** The constitutional questions which the court was asked to consider were as follows:

> *1. Is the Retail Business Holidays Act, R.S.O. 1980, c. 453, within the legislative powers of the Province of Ontario pursuant to s. 92 of the constitution Act, 1867?*

*2. Does the Retail business Holidays Act, R.S.O., 1980, c. 453 or any part thereof, infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, and/or 15 of the Canadian Charter of Rights and Freedoms and, if so, to what extent does it infringe or deny these rights?*

*3. If the Retail Business Holidays Act, R.S.O. 1980, c. 453, or any part thereof, infringes or denies in any way ss. 2(a), 7 and/or 15 of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights protected by these sections be justified by s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?*

**21** In addressing these questions Dickson C.J., in his usual articulate and comprehensive manner considered the reasons for the legislation and the social and economic backdrop in which the legislation was promulgated. He examined in detail the Ontario: Law Reform Commission "Report on Sunday Observance Legislation" as well as the text of the impugned legislation and the legislative debates relating thereto. In considering the thrust and social imperatives implicit in the legislation, Dickson C.J. at page 42 quoted the following passage from the Ontario Law Reform Commission report:

> *Thus while our productive capacity and economic standard of living continue to increase in Ontario, our collective opportunity for the more intangible benefits of participation in leisure activities together [emphasis of the report] with family, friends and others in society continues to decrease. It is in the light of this continuing erosion of statutory holidays and evening hours that we consider it absolutely essential [emphasis added] that the government now attempt to preserve at least one uniform day each week as a pause day, before it is too late.*

**22** He then went on to say:

> *The opinion of the commissioners in reaching this conclusion was influenced by a number of studies summarized in c. 6 of the report, but, in my view, it is unnecessary to resort to these studies in order to understand the importance of a common pause day. I regard as self-evident the desirability of enabling parents to have regular days off from work in common with their child's day off from school, and with a day off enjoyed by most other family and community members. I reiterate the view expressed in Big M. Drug Mart at p. 353:*
>
> > *I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America."*

**23** Clearly, Dickson C.J. and the other members of the court in *Edwards Books*, shared the concerns of the Law Reform Commission in protecting the rights of those workers who were particularly vulnerable to the pressures of large retail operations - see page 46 et seq. of the decision. The court seems to have no difficulty in finding that the impugned legislation was intra vires the provincial legislature. At page 49 Dickson C.J. stated:

> *When the interests of more than seven vulnerable employees (seven being the maximum number permitted to work in those exempted retail operations) in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail. This is not to say that the Legislature is constitutionally obligated to give effect to employees interests in preference to the interests of the store owner for large operations, but only that it may do so if it wishes". (underscoring mine)*

**24** The court went on to find that the impugned legislation was within the legislative powers of the province.

**25** In my view, the Edwards Books case confirms the constitutional validity of "Sunday shopping" legislation aimed at protecting the rights of those more vulnerable employees. One must bear in mind, when considering this case in the context of the present discussion, that the relevant provisions were found in the Act itself and not in regulations passed by the Governor-in-Council under the authority of the Act. There was no question in Edwards Books of the

appropriateness of regulations or whether the subject legislation gave specific authority to prescribe such regulations.

**26** For these reasons I fail to see how Edwards Books can be of assistance in determining the validity of Regulations made pursuant to the Nova Scotia Act.

**Ontario Legislation**

**27** The Respondent places emphasis upon the similarities between the *Ontario Retail Business Holidays Act* and the Nova Scotia *Retail Business Uniform Closing Day Act*. After discussing the purported objectives of the Ontario legislation the Respondent, at page 21 of the brief said:

> *64. Those objectives of Ontario's Retail Business Holidays Act were described by the Supreme Court of Canada. Since Nova Scotia's Retail Business Uniform Closing Day Act was "patterned after" indeed, "copied directly from" Ontario's legislation, Chief Justice Dickson's analysis is, with respect, binding on this Court. In fact, the Nova Scotia legislation was before the Court in Edwards Books and Art (p. 66)*
>
> *65. Indeed, Chief Justice Dickson's description of the objects of the legislation are on all fours with the Attorney General of Nova Scotia's description of those objects when the Retail Business Uniform Closing Day Act was introduced at second reading in the Nova Scotia House of Assembly.*
>
> *This legislation, quite frankly, Mr. Speaker, is patterned after the 1975 Ontario legislation. Quite some time ago, I was aware of the case that was coming up from Alberta. In anticipation of this possibility we had looked at alternative forms of legislation in an attempt to devise ways and means by which we could still maintain some degree of control over the opening hours of retail businesses on holidays, and to attempt to deal with the issue in a secular manner, so that we would not be trespassing on the Charter of Rights.*

**28** In my view, it is somewhat of a "stretch" to state that the Nova Scotia legislation was before the Supreme Court of Canada in the *Edwards Books* case. A closer reading of the case shows that La Forest, J.A., at page 66 in his dissenting opinion, made mention of several such Acts in the context of the constitutionality of those Acts. Also, this Court would be bound by this decision of the Supreme Court of Canada - if this court was asked to interpret similar legislation. Such is not the case. At the risk of repetition, this Court is asked to determine whether or not Cabinet had the legislative authority to enact the impugned regulations.

**29** Is it accurate to state that the Nova Scotia Act was "patterned after" or "copied directly from" the Ontario legislation? In the context of this application that is very much open to question. There are several substantial differences between the two Acts which bear heavily on this case and militate against a conclusion that the Act was "copied directly from" the Ontario statute:

1. - The blanket prohibition respecting holiday shopping is set out in s. 2 of the Ontario Act which is followed by a series of exemptions including a retail business employing three or less employees serving the public and has a total area less than 2,400 square feet. These provisions are set out in the Act and not in Regulations made pursuant to the such Act.
2. - The power to make regulations under the Ontario Act are circumscribed by s. 4(3) and (4) of the Act as follows:

   *(3) the Lieutenant governor in Council may make regulations providing that section 2 does not apply to any class of retail business establishment in territory without municipal organization or any part thereof in respect of the sale by retail of such goods or services on such holidays for such periods of time and under such conditions as are specified in the regulations.*

   *(4) A by-law or regulation made under this section may classify retail business establishments by Size, number of persons employed, character of business, location or any other criterion.*

**30** Clearly, the power to make regulations is restricted to the specific provisions of s. 4 of the Act and more particularly to s. 4(2) *"Where it is essential for the maintenance or development of a tourist industry ...".*

**31** Here, the clauses in dispute are in the Regulations passed by Cabinet pursuant to the power given to Cabinet under the "omnibus" section of the Act which is cited earlier in this decision.

**32** It is clear from this analysis that there are substantial differences between the Ontario Act and the Nova Scotia Act. And these are differences which go to the very root of the application before me.

**Employees**

**33** The Respondent takes the position that the Act, and regulations have, as their principle goal, the protection of a "day of rest" for that vast number of retail employees who are non union and therefore have no formal body to protect their rights. The Applicant and the Intervenor, on the other hand argue that the Act is silent respecting employees and its sole thrust is to regulate businesses. In contrast, the Ontario Act refers to "Retail Holidays" and states the maximum number of employees who can be working on those days. And other restrictions are found in the Ontario Act. Additionally, the Applicant and Intervenor say that the Province of Nova Scotia elected to provide protection to employees by amending the provisions of the *Labour Standards Code* as earlier discussed. Therefore, there would be no need to provide additional protection in the *Retail Business Uniform Closing Day Act.* These arguments seem to weaken the position of the Respondent in this respect. However, that is not determinative of the issues before the Court in this Application.

**Summary and Conclusions**

**34** In order to put this entire matter in the proper perspective I will repeat, yet again, what this application is NOT about. It is not about any social or political considerations respecting the appropriateness of Sunday shopping; nor is it about the constitutional authority of the legislature to enact legislation dealing with Sunday shopping; nor is it about the protection of vulnerable retail employees being required to work on Sundays. This application is simply about the scope of the authority or power granted to the Governor in Council (Cabinet) to make regulations pursuant to the Act.

**35** By enacting the *Retail Business Uniform Closing Day Act* the province exercised its undisputed constitutional power to control business operations on selected holidays, including Sunday. Had the province (as did Ontario) passed the restrictive measures as part of the Act there would probably be no question as to the validity of such laws.

**36** By electing to place the power with Cabinet by way of the impugned Regulations it became the responsibility of Cabinet to make certain that such power was exercised in accordance with the powers delegated to it by the Legislature through the Act. It is trite to say that Cabinet can only do that which it is expressly, or impliedly permitted or authorized to do by the Legislature. This delegated power could have been greatly enhanced by the use of subjective discretionary provisions such as those found in the Labour Standards Code. Such a subjective power may even be sufficient to withstand any challenge based upon allegations of discrimination since the Cabinet would be the sole judge of "necessity or reasonableness".

**37** It is the finding of the Court that the impugned Regulations are discriminatory as against the Applicants and the Intervenors, and indeed against any other retailer not falling within the restrictive provisions of such Regulations. Objectively considered, these regulations do not give to Cabinet the power to discriminate in the manner which it did in this case. Cabinet cannot discriminate either as to the size of the retail outlet or the corporate structure of it without the requisite regulatory power. Such power is neither express or implied in Section 8 of the Act. It logically follows that the impugned regulations are *ultra vires* the Governor in Council (the Cabinet) and are therefore of no force and effect.

**38** I decline to make any ruling with respect to the allegations of bad faith since such a finding is not necessary to the disposition of this matter.

**39** Accordingly, an order will issue declaring that s. 3(1)(a)(ii), s. 3(2), s. 3(3) and s. 3(4) of the Order in Council 2006-315, N.S. Regulation 98/2006 dated June 28, 2006, enacted pursuant to the *Retail Business Uniform Closing Day Act*, R.S.N.S. 1989, c. 402 are invalid, *ultra vires* and of no force and effect.

**40** Judgment accordingly.

K.P. RICHARD J.

* * * * *

Erratum

Released: October 5, 2006.

On the first page of the original judgment where it states Counsel: David P.S. Farrar, Q.C., Sherri Conlon for the Applicant, it should read as follows: Counsel: David P.S. Farrar, Q.C., Sherri Conlon **and Donn Fraser** for the Applicant.

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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,

*Special lecture given to the law students of Queen's University, Kingston, on October 26, 1959.

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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-

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[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,

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[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.

# R. v. CKOY Ltd., [1978] S.C.J. No. 64

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

1978: May 17 / 1978: October 3.

**[1978] S.C.J. No. 64** | [1978] A.C.S. no 64 | [1979] 1 S.C.R. 2 | [1979] 1 R.C.S. 2 | 90 D.L.R. (3d) 1 | 24 N.R. 254 | 43 C.C.C. (2d) 1 | 40 C.P.R. (2d) 1

CKOY Limited, Appellant; and Her Majesty The Queen on the relation of Lorne Mahoney, Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

## Case Summary

**Statutes — Subordinate legislation — Authority of C.R.T.C. to make regulation in furtherance of its objects — Objects defined as including promotion of high standards of programs and programming — Prohibition of broadcasting certain telephone interviews without consent of person interviewed — Jurisdiction of Court to determine whether regulation is intro vires — Broadcasting Act, R.S.C. 1970. c. B-11, ss. 3, 15, 16; Radio (A.M.) Broadcasting Regulations, SOR/64-49 am. SOR/65-519, s. 1; SOR/70-256, s. 3.**

**Broadcasting — Validity of C.R.T.C. regulations prohibiting the broadcasting of certain telephone interviews without the prior consent of the person interviewed — C.R.T.C. empowered to make regulations for furtherance of objects — Broadcasting Act, R.S.C. 1970, c. B-11, ss. 3, 15, 16 - SOR/64-49 am. SOR/65-519, s. 1; SOR/70-256, s. 3.**

CKOY broadcast a telephone interview with a person from the Federation of Students of Ottawa University without that person's consent, written or oral, having been obtained prior to the broadcast. The Canadian Radio-Television Commission had pursuant to s. 16 of the Broadcasting Act enacted Regulation 5 which purported to prohibit stations or network operators from broadcasting such telephone interviews or conversations or any part thereof without such consent unless the person had telephoned the station for the purpose of participating in a broadcast. The Provincial Court Judge dismissed the charge against CKOY after holding that para (k) of subs. 1 of s. 5 of the Radio AM Broadcasting Regulations was not authorized by the Broadcasting Act, s. 16(1) of which provides that in furtherance of its objects the CRTC may make regulations applicable to all persons holding broadcasting licences. The Crown appealed by way of stated case. Reid J. dismissed this appeal but was reversed by the Court of Appeal.

Held (Laskin C.J. and Martland and Estey JJ. dissenting): The appeal should be dismissed.

Per Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ.: The grant of power to enact regulations is given to the Commission by s. 16 of the Act, the opening words of which provide that the exercise of the power shall be in furtherance of the objects of the Commission, i.e. the implementation of the broadcasting policy enunciated in s. 3 of the Act. The validity of any regulation enacted in reliance upon s. 16 must therefore be tested by determining whether the regulation deals with a class of object referred to in s. 3. The confidentiality implied in the impugned regulation can be regarded as an element in providing a "reasonably balanced opportunity for the expressing of differing views" which the Commission might have concluded as hindered if confidentiality were not granted to the persons interviewed. Further the Commission is responsible for the standard of programme and it is self-evident that an undesirable broadcasting technique may well affect the high standard of programming.

Programming extends to more than the mere words which go out over the air and embraces the total process of gathering, assembling and putting out programmes and in this context it was open to the Commission to enact s. 5(k) to secure programme standard.

Per Laskin C.J. and Martland and Estey JJ. dissenting: The words "program" and "programming" used in s. 3 refer to the actual program broadcast to the public, anew reinforced by the terms of s. 3(c) which clearly refers to programs, broadcast and received. As Dubin J.A. in his dissent in the Court of Appeal said, the impugned regulation here does not relate to the standards of programs. What is here prohibited is the broadcasting of telephone interviews without the consent of the person being interviewed being obtained prior to the broadcast. This has nothing to do with the standard of the program. The respondent also sought to rely on para. 16(1)(b)(ix) taking the position that it is for the Commission to determine what regulations are necessary for the furtherance of its objects. Parliament did not grant such powers to control every phase of the activities of broadcasters. The Commission is an administrative body and can only legislate pursuant to s. 16 within the express limits defined by the Act. To find the wide legislative powers claimed would require very clear language which is not found here.

As in the case of other types of subordinate legislation it is for the Courts to decide whether a regulation is intro vires and in furtherance of the objects of the Commission as defined in the Act.

## Cases Cited

[Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commission et al., *[1978] 2 S.C.R. 141*; Canada Metal Co. v. Canadian Broadcasting Corporation *(1974), 3 O.R. (2d) 1* referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario [*(1976), 13 O.R. (2d) 156*, *70 D.L.R. (3d) 662*.] from a judgment of Reid J. [*(1975), 25 C.C.C. (2d) 333*, *9 O.R. (2d) 549*, *19 C.P.R. (2d) 1*.] dismissing an appeal from an acquittal on a charge under the Broadcasting Act, R.S.C. 1970, c. B-11, and regulations made thereunder. Appeal dismissed, Laskin C.J. and Martland and Estey JJ. dissenting.

Gordon Henderson, Q.C., and Wayne B. Spooner, for the appellant. Claude Thomson, Q.C., and Gavin MacKenzie, for the respondent.

Solicitors for the appellant: Gowling and Henderson, Ottawa. Solicitors for the respondent: Campbell, Godfrey and Lewtas, Toronto.

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The judgment of Laskin C.J. and Martland and Estey JJ. was delivered by

## MARTLAND J. (dissenting)

**MARTLAND J.** (dissenting):— The course of the proceedings leading to the present appeal has been set out in the reasons of my brother Spence. The Court of Appeal directed the registration of a conviction against the appellant on a charge of having committed a breach of the provisions of para. (k) of subs. (1) of s. 5 of the Radio

A.M. Broadcasting Regulations. That regulation provides as follows:

> 5. (1) No station or network operator shall broadcast:
>
> ...
>
> (k) any telephone interview or conversation or any part thereof, with any person unless
>
> (i) the person's oral or written consent to the interview or conversation being broadcast was obtained prior to such broadcasting or
>
> (ii) the person telephoned the station for the purpose of participating in a broadcast.

It was not contested that the appellant had broadcast a telephone interview with Lorne Mahoney without obtaining her oral or written consent prior to such broadcast. The appellant contends that the enactment of this regulation was beyond the powers of the Canadian Radio-Television Commission, hereinafter referred to as "the Commission".

The power of the Commission to regulate is defined in s. 16 of the Broadcasting Act, R.S.C. 1970 c. B-11. I will cite only those portions of the section which are relevant to this appeal:

> 16. (1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may
>
> ...
>
> (b) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences of one or more classes,
>
> (i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3(d).
>
> ...
>
> (ix) respecting such other matters as it deems necessary for the furtherance of its objects;

The objects of the Commission are set out in s. 15 of the Act:

> 15. Subject to this Act and the Radio Act and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act.

Section 3 of the Act appears under the heading "Broadcasting Policy for Canada". Paragraph (a) of that section, to which reference is made in s. 16(1)(b)(i), states:

> 3. It is hereby declared that
>
> ...
>
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

The majority of the Court of Appeal were of the opinion that the Commission was empowered to make the regulations now in issue by subpara. 16(1)(b)(i), being of the view that this paragraph enabled the Commission to regulate "programming technique". With respect, I do not agree with this conclusion. The paragraph relates to regulations respecting "standards of programs" to give effect to para. 3(a). Paragraph 3(a) says that "the programming provided by each broadcaster should be of high standard using predominantly Canadian creative and other resources".

In my opinion the words "program" and "programming" used in s. 3 refer to the actual program broadcast to the public. This view is reinforced by para. 3(c) which declares that:

> 3. It is declared that
>
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

This paragraph clearly refers to programs broadcast and received and para. (a) refers to the same subject matter, i.e. the transmission of programs, which are to be of high standard. I agree with what was said by Dubin, J.A., in his dissenting reasons:

> In my respectful opinion, the impugned regulation here does not relate to the standards of programs. S. 16(1)(b)(i) authorizes the Commission to make regulations respecting standards of programs for the purpose of giving effect to s. 3(d). The authority granted to the Commission by s. 16(1)(b)(i) pertains to what is seen or heard on air. What is prohibited by the regulation in issue is the broadcasting of a telephone interview or any part thereof without the consent of the person being interviewed agreeing to the interview or conversation being broadcast, or unless the person telephoned the station for the purpose of participating in a broadcast. The requirement that the person being interviewed must consent to the interview being broadcast has nothing to do, in my opinion, with the standard of the program. The interview may or may not be of high standard, but whether it is or is not has nothing to do with the consent of the person interviewed having been obtained.

The respondent also relied upon subpara. (ix) of para. 16(1)(b), which empowers the Commission to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects". This submission raises an issue of some importance because counsel for the respondent took the position "that it is for the Commission, and not for the Court, to determine what regulations are necessary for the furtherance of its objects". In other words, the Commission has carte blanche to make any regulation which it sees fit to enact provided it, the Commission, is of the opinion that it is desirable in order to further its objects.

I am not prepared to accept this submission. I do not agree that Parliament has granted to the Commission autocratic powers to control every phase of the activities of broadcasters. Section 16 confers on the Commission certain powers of subordinate legislation. The Commission is an administrative body and can only legislate within the express limits defined by the Act. To clothe the Commission with the wide legislative powers claimed by it would require very clear language and I do not find it here.

Subparagraph (ix) is one of nine subparagraphs, all of which are subject to the opening words of s. 16 "In furtherance of its objects, the Commission, on the recommendation of the Executive Committee may". In my opinion, as in the case of other types of subordinate legislation, it is for the Courts to determine whether or not a regulation made by the Commission is within its powers. It is for the Courts to decide whether a regulation is in furtherance of the objects of the Commission as defined in the Act. The objects of the Commission, defined in s. 15, are to implement the broadcasting policy enunciated in s. 3. It is the Courts which must interpret s. 3 and determine whether a regulation is in furtherance of the policies enunciated in that section.

The only paragraph of s. 3 which has any relevance here is para. (a) which I have already discussed. The duty of the Commission under that paragraph is to insure that programs broadcast in Canada are "of high standard". It is not the duty of the Commission nor within its power to control program content.

I agree with the view expressed by Dubin, J.A., in the following paragraph in his reasons:

> As my brothers have observed, the regulation in issue purports to strike down an undesirable broadcasting technique. The fact that the object of the regulation may very well be a laudatory one is quite irrelevant. The broadcast in issue in this case may have been one of considerable public interest, or may have been one which was quite offensive, but the regulation in question here would prohibit it, whatever quality it may have, if no consent is obtained to it being broadcast. It is only one step removed to contemplate the regulation reading that no such interview could be broadcast without the consent of the Commission itself. It could then equally be said that the Commission was thereby seeking to establish a high standard of programming, but looked at in that way it cannot be anything other than a form of censorship.

In my opinion, the appeal should be allowed and the judgment of Reid, J., should be restored. The appellant should have its costs in this Court and in the Court of Appeal.

The judgment of Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ. was delivered by

SPENCE J.-- This is an appeal from the judgment of the Court of Appeal for Ontario pronouns on January 12, 1976.

> The appellant had been charged in a summons as follows:
>
> That CKOY Limited, on or about the 5th day of March 1974, at the City of Ottawa in the Judicial District of Ottawa-Carleton did violate Section 5 of the Regulations passed pursuant to Section 16 of the Broadcasting Act by broadcasting a telephone interview or conversation with a girl from the Federation of Students of the University of Ottawa, without her oral or written consent to the interview or conversation having been obtained prior to such broadcast.

The accused was acquitted by the Provincial Court Judge and the Crown appealed by way of stated case. The Provincial Court Judge in the case stated asked two questions:

1. Did I err in law in holding that paragraph (k) of subsection 1 of section 5 of The Radio AM Broadcasting Regulations is not authorized by The Broadcasting Act?
2. Did I err in law in failing to convict the accused on the charge against it having made the findings as set out above?

> DATED at Ottawa this 2nd day of January, 1975. (Signed) R.B. Hutton PROVINCIAL JUDGE.

Reid J. dismissed the appeal answering both questions above in the negative. The appeal by the Crown to the Court of Appeal for Ontario was allowed. It was ordered that the questions pro-pounded in the Stated Case be answered in the affirmative and the proceedings were remitted to the Provincial Court Judge to register a conviction and impose an appropriate sentence. Dubin J.A., dissenting, would have dismissed the appeal. Leave to appeal to this Court was granted by this Court on April 5, 1976.

The Broadcasting Act, R.S.C. 1970, c. B-11, provides in part:

> 3. It is hereby declared that
>
> (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;
>
> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

...

5. (1) There shall be a commission to be known as the Canadian Radio-Television Commission, consisting of five full-time members and ten part-time members to be appointed by the Governor in Council.

...

15. Subject to this Act and the Radio Act and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act.

...

16. (1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may

(b) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences of one or more classes,

(i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3(d),

(ii) respecting the character of advertising and the amount of time that may be devoted to advertising,

(iii) respecting the proportion of time that may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character and the assignment of such time on an equitable basis to political parties and candidates,

(iv) respecting the use of dramatization in programs, advertisements or announcements of a partisan political character,

(v) respecting the broadcasting times to be reserved for network programs by any broadcasting station operated as part of a network,

(vi) prescribing the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs,

(vii) with the approval of the Treasury Board, fixing the schedules of fees to be paid by licensees and providing for the payment thereof,

(viii) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify, and

(ix) respecting such other matters as it deems necessary for the furtherance of its objects;

The Canadian Radio-Television Commission enacted Regulation 5 which, in its relevant parts, provided:

5. (1) No station or network operator shall broadcast:

...

(k) any telephone interview or conversation or any part thereof, with any person unless

(i) the person's oral or written consent to the interview or conversation being broadcast was obtained prior to such broadcasting or

(ii) the person telephoned the station for the purpose of participating in a broadcast.

This is a regulation which the Provincial Court Judge found to have been beyond the power granted to the Commission by the Broadcasting Act. Reid J. on the appeal by way of Stated Case and Dubin J.A. in the Court of Appeal for Ontario were of like view. The majority of the Court of Appeal for Ontario determined the said regulation was within the power granted to the Commission by s. 16 of the Broadcasting Act, particularly in subs. 1(b)(i), as a regulation carrying out the broadcasting policy for Canada as enunciated in s. 3(a) and (g)(iv). Evans J.A. giving reasons in the Court of Appeal for Ontario did not rely on s. 16(1)(b)(ix).

The grant of power to enact regulations is given to the Commission by s. 16 of the statute. By its opening words, such a power is directed to be exercised "in furtherance of its objects". Section 15 is entitled "Objects of the Commission". For our purposes, the said objects may be briefly stated in the last words of s. 15, "with a view to implementing the broadcasting policy enunciated in section 3 of this Act". Therefore, I agree with the courts below that the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively. However, I also agree with Evans J.A. when he states:

> It is obvious from the broad language of the Act that Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created.

Therefore, whether we consider that the impugned regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in s. 3. I should add that as Evans J.A. noted there is no suggestion that the Commission acted capriciously. Of course, no allegation of bad faith has been advanced.

Therefore, I turn to a consideration of the provisions in s. 3 setting out the Broadcasting Policy for Canada. Section 3(b) declares the policy as to ownership of "the Canadian broadcasting system" so as to "strengthen the cultural, political, social and economic fabrics of Canada". [The underlining is my own.] The statute thereby exhibits the expected interest in such subject and a regulation aimed at such strengthening, whether in our view successfully or not, would be within the power granted by s. 3.

Section 3(a) expresses the policy that programming should provide reasonably balanced opportunity for the expression of differing views on matters of public concern and should be of high standard. The Commission might well have concluded that a broadcasting station canvassing members for their views upon a matter of public concern could not provide a "reasonably balanced opportunity for the expression of differing views" unless it granted confidentiality to the person interviewed. Moreover, the expressed policy is that "programming provided by each broadcaster should be of high standard ...," With respect, I am not in agreement with Dubin J.A. who would confine that policy to the content of such programming or, to put it in another way, to the mere words which go out over the air. There is a certain lack of preciseness in Regulation 5(k) but "conversation" might be considered to cover more than conversation over the telephone and to cover perhaps idle words of the person met on the street who would not even know that he was speaking to a reporter let alone that his words were being recorded. With respect, I agree with Brooke J.A. when he said:

> In my view, the purpose of the impugned regulation is to prohibit an undesirable broadcasting technique, one which does not reflect the high standard of programming which the Commission must, by regulation of licensees, endeavour to maintain.

That "an undesirable broadcasting technique" may well affect the high standard of programming is, I think, self-evident. I am in agreement with counsel for the respondent that the word "programming" extends to more than the mere words which go out over the air but the total process of gathering, assembling and putting out the programmes generally which is covered by the requirement of a high standard of programming. The Commission might well have concluded that the enactment of s. 5(k) was necessary to prevent development of programming which was the opposite of "high standard".

I find a basis for the enactment of Regulation 5(k) also in s. 16(1)(b)(ix) of the statute. It is to be noted that its very broad words are not, as are those of s. 16(1)(b)(i), confined to the policy expressed in s. 3(a) and, therefore, authorize one enactment of regulations to further any policy outlined in the whole of s. 3. It was submitted that s. 16(1)(b)(ix) should be confined to matters of procedure since it followed s. 16(1)(b)(viii) enabling the Commission to require licensees to submit information. But the information which may be required under (viii) is very broad covering not only the licensees' financial affairs but "programs" and "the conduct and management of their affairs." Therefore, the information obtained under a regulation enacted by virtue of s. 16(1)(b)(viii) may well provide the basis for a regulation which the Commission might deem necessary under s. 16(1)(b) (ix). Such regulation would, of course, have to be to further the "Broadcasting Policy of Canada" but it might be difficult to fit it under any of the other numbered paragraphs of s. 16(1)(b). I find it of some importance that the broad words appearing in s. 16(1)(b)(ix) "as it deems necessary" emphasize the discretion granted to the Commission in determining what is necessary for the furtherance of its objects. Therefore, even if the word "programming" were to receive the narrow meaning advanced by counsel for the appellant, then s. 16(1)(b)(ix) would authorize the enactment of Regulation 5(k). So, the said regulation may well be in furtherance of the policy set out in, for instance, s. 3(c), that is, responsibility for the programmes which the licensee broadcasts.

I note that the Chief Justice of this Court gave a broad interpretation to the Commission's powers under s. 15 of the Broadcasting Act in Capital Cities Communications Inc. et al v. Canadian Radio-Television Commission et al. [*[1978] 2 S.C.R. 141*.], at p. 171, when he said:

> In my opinion, having regard to the embracive [sic] objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

The appellant also urges s. 2 of the Canadian Bill of Rights, R.S.C. 1970, Appendix III (enacted as 8-9 Elizabeth II, c. 44). It is urged that to interpret Regulation 5(k) as being intra vires of the Canadian Broadcasting Act would infringe the provisions of s. 2 as it would result in the abridging of freedom of speech recited in s. 1(f) of the said statute. I am ready to assume that the broadcasting media may be presumed to be defined within the word "press". However, as has been stated on many occasions, the freedom of the press is not absolute and the press, as all citizens, is subject to the ordinary law and has no more freedom of expression than the ordinary citizen. I do not stop to recite authority. The principle was lately declared in Canada Metal Co. v. Canadian Broadcasting Corpn. [*(1974), 3 O.R. (2d) 1*.], cited by the appellant in its factum. The limitation is referred to in s. 3 of the Canadian Broadcasting Act which makes the "freedom of expression" subject to "the generally applicable statutes and regulations". I am unable to understand how Regulation 5(k) in any way abridges the freedom of the press. It does not hinder or prevent either the broadcaster or an interviewed person from making any comment whatever. It simply prevents the interview being broadcast without the consent of the interviewed person. Indeed the regulation protects and confirms another fundamental freedom set out in the same s. 1 of the Canadian Bill of Rights in para. (a), that of freedom of speech, for the interviewed person may grant or withhold his consent to the broadcasting of

his comments. Therefore, I am of the opinion that the Canadian Bill of Rights does not prevent the said Regulation 5(k) being found to be intra vires.

For these reasons, I would dismiss the appeal. The order of the Court giving leave to bring this appeal provided that costs of the application should be in the appeal. The prosecution was by summary conviction and s. 758 of the Criminal Code permits the award of costs upon the appeal. Costs were awarded by Reid J. in dismissing the Crown's appeal by way of stated case but the Court of Appeal for Ontario set aside that order and allowed the Crown's appeal making no order as to costs. I would simply affirm the judgment of the Court of Appeal and would, likewise, make no order as to costs.

Appeal dismissed, LASKIN C.J. and MARTLAND and ESTEY JJ. dissenting.

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# R. v. Nowegijick, [1983] S.C.J. No. 5

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

1982: June 10 / 1983: January 25.

File No.: 15833.

**[1983] S.C.J. No. 5** | *[1983] A.C.S. no 5* | *[1983] 1 S.C.R. 29* | *[1983] 1 R.C.S. 29* | *144 D.L.R. (3d) 193* | *46 N.R. 41* | *[1983] 2 C.N.L.R. 89* | *[1983] C.T.C. 20* | *83 D.T.C. 5041* | *18 A.C.W.S. (2d) 2*

Gene A. Nowegijick, Appellant; and Her Majesty The Queen, Respondent; and The Grand Council of the Crees (of Quebec), the Cree Regional Authority, the Cree School Board, the Cree Board of Health and Social Services of James Bay, the Cree Bands of Mistassini, Waswanipi, Nemaska, Rupert House, Eastmain, Old Factory, Fort George and Great Whale River and Chief Henry Mianscum, Chief Peter Gull, Chief George Wapachee, Chief Sidney Georgekish, Chief Rusty Cheezo, Chief Walter Hughboy, Chief Sam Tapiatic and Chief Robbie Dick, the respective Chiefs of the said bands, and Grand Chief Billy Diamond, Executive Chief Philip Awashish and Abel Kitchen and The National Indian Brotherhood, Interveners.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

## Case Summary

**Income tax — Indians — Tax exemption — Wages paid on reserve by corporation located on reserve — Work done outside the reserve — Whether wages subject to income tax — Whether taxable income personal property — Whether exemption applies both to taxes on property and taxes on persons — Indian Act, R.S.C. 1970, c. I-6, s. 87 — Income Tax Act, 1970-71-72 (Can.), c. 63, ss. 2(1), (2), 5(1).**

Appellant, a registered Indian living on a reserve, objected to the income tax assessment on his wages. He was employed by an Indian corporation having its head and administrative offices on the reserve and was paid at the corporation head office. The actual work was done off the reserve. Appellant claimed that that income was exempted from taxation by virtue of s. 87 of the Indian Act. That section provides that personal property of an Indian situated on a reserve is exempt from taxation and that no Indian is subject to taxation in respect of any such property. The Income Tax Act makes tax payable upon taxable income -- i.e. income minus deductions. The Federal Court Trial Division ruled in appellant's favour but the Court of Appeal reversed the judgment holding that the tax imposed under the Income Tax Act was not taxation in respect of personal property within the meaning of s. 87 of the Indian Act.

Held: The appeal should be allowed.

Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. The Crown conceded that the situs of the wages was on the reserve. The primary task in this case is to construe the words "no Indian ... is ... subject to taxation in respect of any such [personal] property". Income is personal property; taxable income is equally personal property. A tax in respect of wages is a tax in respect of personal property. The effect of s. 87 is not only to exempt what can properly be described as direct taxation on property; it also exempts persons from taxation.

## Cases Cited

Bachrach v. Nelson, 182 N.E. 909 (1932), adopted; Minister of National Revenue v. Iroquois of Caughnawaga, *[1977] 2 F.C. 269*, overruled; R. v. National Indian Brotherhood, *[1979] 1 F.C. 103*; McLeod v. Minister of Customs and Excise, *[1926] S.C.R. 457*; Kerr v. Superintendent of Income Tax, *[1942] S.C.R. 435*; Sura v. Minister of National Revenue, *[1962] S.C.R. 65*; Alworth v. Minister of Finance, *[1978] 1 S.C.R. 447*; Attorney General of British Columbia v. Canada Trust Co., *[1980] 2 S.C.R. 466*, distinguished; Jones v. Meehan, 175 U.S. 1 (1899); Greyeyes v. The Queen, *[1978] 2 F.C. 385*; Harel v. Deputy Minister of Revenue of Quebec, *[1978] 1 S.C.R. 851*, referred to.

APPEAL from a judgment of the Federal Court of Appeal, *[1980] 1 F.C. 462*, *[1979] C.T.C. 441*, *79 D.T.C. 5354*, *[1981] 2 C.N.L.R. 146*, setting aside a judgment of the Trial Division, *[1979] 2 F.C. 228*, *[1979] C.T.C. 195*, *79 D.T.C. 5115*, *[1979] 3 C.N.L.R. 82*. Appeal allowed.

Micha J. Menczer, for the appellant. Wilfrid Lefebvre and Fred Caron, for the respondent. James A. O'Reilly, for the interveners The Grand Council of the Crees (of Quebec) et al. William T. Badcock, for the intervener The National Indian Brotherhood.

Solicitors for the appellant: Mattar, Menczer, Savage, Fraser and Falsetto, Ottawa. Solicitor for the respondent: R. Tassé, Ottawa. Solicitors for the interveners The Grand Council of the Crees (of Quebec) et al.: O'Reilly & Grodinsky, Montreal. Solicitor for the intervener The National Indian Brotherhood: William T. Badcock, Ottawa.

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The judgment of the Court was delivered by

**DICKSON J.**

**DICKSON J.**:— The question is whether the appellant, Gene A. Nowegijick, a registered Indian can claim by virtue of the Indian Act, R.S.C. 1970, c. I-6, an exemption from income tax for the 1975 taxation year.

I

The Facts:

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The facts are few and not in dispute. Mr. Nowegijick is an Indian within the meaning of the Indian Act and a member of the Gull Bay (Ontario) Indian Band. During the 1975 taxation year Mr. Nowegijick was an employee of the Gull Bay Development Corporation, a company without share capital, having its head office and administrative offices on the Gull Bay Reserve. All the directors, members and employees of the Corporation live on the Reserve and are registered Indians.

During 1975 the Corporation in the course of its business conducted a logging operation 10 miles from the Gull Bay Reserve. Mr. Nowegijick was employed as a logger and remunerated on a piece-work basis. He was paid bi-weekly by cheque at the head office of the Corporation on the Reserve.

During 1975, Mr. Nowegijick maintained his permanent dwelling on the Gull Bay Reserve. Each morning he would leave the Reserve to work on the logging operations, and return to the Reserve at the end of the working day.

Mr. Nowegijick earned $11,057.08 in such employment. His assessed taxable income for the 1975 taxation year was $8,698 on which he was assessed tax of $1,965.80. By Notice of Objection he objected to the assessment on the basis that the income in respect of which the assessment was made is the "personal property of an Indian ... situated on a reserve" and thus not subject to taxation by virtue of s. 87 of the Indian Act.

Mr. Nowegijick also brought an action in the Federal Court, Trial Division, to set aside the Notice of Assessment. Mr. Justice Mahoney of that Court ordered that Mr. Nowegijick's 1975 income tax return be referred back to the Minister of National Revenue for re-assessment on the basis that the wages paid him by the Gull Bay Development Corporation were wrongly included in the calculation of his taxable income.

The Crown appealed the decision of Mr. Justice Mahoney. The Federal Court of Appeal allowed the appeal and restored the original assessment.

The proceedings have reached this Court by leave. The Grand Council of Crees of Quebec, three Cree organizations, eight Cree bands and their respective Chiefs have intervened to make common cause with Mr. Nowegijick.

II

The Legislation

Mr. Nowegijick, in his claim for exemption from income tax relies upon s. 87 of the Indian Act:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
>
> (a) the interest of an Indian or a band in reserve or surrendered lands; and
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, on or in respect of other property passing to an Indian.

Section 83 of the Indian Act, referred to in s. 87 has no application. Section 87(2), also mentioned, was repealed in 1960 by 1960 (Can.), c. 8, although the reference to it in what was formerly subs. (1) remains.

> Stripped to relevant essentials s. 87 reads:
>
> Notwithstanding any other Act of the Parliament of Canada ... the following property is exempt from taxation, namely:
>
> (a) the interest of an Indian or a band in reserve or surrendered lands; and
>
> (b) the personal property of an Indian or band situated on a reserve;
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property ...

Further distilled, the section provides that (i) the personal property of an Indian situated on a reserve is exempt from taxation; (ii) no Indian is subject to taxation "in respect of" "any" such property.

It is arguable that the first part of the quoted passage which exempts from taxation (a) the "interest of an Indian or a band in reserve or surrendered lands" and (b) the "personal property of an Indian or band situated on a reserve", is concerned with exemption from direct taxation of land or personal property by a provincial or municipal authority. The legislative history of the section lends support to such an argument. But the section does not end there. It is to the latter part of the section that our attention should primarily be directed.

The short but difficult question to be determined is whether the tax sought to be imposed under the Income Tax Act, 1970-71-72 (Can.), c. 63 upon the income of Mr. Nowegijick can be said to be "in respect of" "any" personal property situated upon a reserve .

We need not speculate upon parliamentary intention, an idle pursuit at best, since the antecedent of s. 87 of the Indian Act was enacted long before income tax was introduced as a temporary war-time measure in 1917.

One point might have given rise to argument. Was the fact that the services were performed off the reserve relevant to situs? The Crown conceded in argument, correctly in my view, that the situs of the salary which Mr. Nowegijick received was sited on the reserve because it was there that the residence or place of the debtor, the Gull Bay Development Corporation, was to be found and it was there the wages were payable. See Cheshire and North, Private International Law (10th ed., 1979) at pp. 536 et seq. and also the judgment of Thurlow A.C.J. in R. v. National Indian Brotherhood, *[1979] 1 F.C. 103* particularly at pp. 109 et seq.

The other piece of legislation which bears directly on the question before us is the Income Tax Act. I would like to refer to several sections. The first is found in Part I, Division A, of the Act, entitled "Liability for Tax". Section 2(1) and (2) provides:

> 2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.
>
> (2) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

Thus, income tax is paid upon the taxable income (income minus deduction] of every person resident in Canada.

Section 5(1) of the Act is worth noting. It defines the taxpayers income from employment as the salary, wages and other remuneration received. The liability is at the point of receipt. The section reads:

> 5. (1) Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by him in the year.

The only other section is s. 153(1) which provides that every person paying salary or wages to an employee in a taxation year shall deduct the prescribed amount, and remit that amount to the Receiver General of Canada on account of the payee's tax for the year.

III

The Federal Court Judgments

I turn now to the conflicting views in the Federal Court. The opinion of Mr. Justice Mahoney at trial was expressed in these words:

> The question is whether taxation of the plaintiff in an amount determined by reference to his taxable income is taxation "in respect of" those wages when they are included in the computation of his taxable income. I think that it is.
>
> The tax payable by an individual under the Income Tax Act is determined by application of prescribed rates to his taxable income calculated in the prescribed manner. If his taxable income is increased by the inclusion of his wages in it, he will pay more tax. The amount of the increase will be determined by direct

> reference to the amount of those wages. I do not see that such a process and result admits of any other conclusion than that the individual is thereby taxed in respect of his wages.

The Federal Court of Appeal concluded that the tax imposed on Mr. Nowegijick under the Income Tax Act was not taxation in respect of personal property within the meaning of s. 87 of the Indian Act. The Court, speaking through Mr. Justice Heald, said:

> We are all of the view that there are no significant distinctions between this case and the Snow case (Snow v. The Queen *[1979] C.T.C. 227*) where this Court held: "Section 86 (of the Indian Act, R.S.C. 1952, s. 159[1]) contemplates taxation in respect of specific personal property qua property and not taxation in respect of taxable income as defined by the Income Tax Act, which, while it may reflect items that are personal property, is not itself personal property but an amount to be determined as a matter of calculation by application of the provisions of the Act".

IV

Construction of section 87 of the Indian Act

Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".

There is little in the cases to assist in the construction of s. 87 of the Indian Act. In R. v. National Indian Brotherhood, supra, the question was as to situs, an issue which does not arise in the present case. The appeal related to the failure of the National Indian Brotherhood to deduct and pay over to the Receiver General for Canada the amount which the defendant was required by the Income Tax Act and regulations to deduct from the salaries of its Indian employees. The salaries in question were paid to the employees in Ottawa by cheque drawn on an Ottawa bank. Thurlow A.C.J. said (at pp. 108-09):

> I have already indicated that it is my view that the exemption provided for by section 87 does not extend beyond the ordinary meaning of the words and expressions used in it. There is no legal basis, notwithstanding the history of the exemption, and the special position of Indians in Canadian society, for extending it by reference to any notional extension of reserves or of what may be considered as being done on reserves. The issue, as I see it, assuming that the taxation imposed by the Income Tax Act is taxation of individuals in respect of property and that a salary or a right to salary is property, is whether the salary which the individual Indian received or to which he was entitled was "personal property" of the Indian "situated on a reserve".

The other case is Greyeyes v. The Queen, *[1978] 2 F.C. 385*. The question was whether an education scholarship paid by the federal government to a status Indian was taxable in the Indian's hands. Mahoney J. held that it was not taxable, by reason of s. 87 of the Indian Act.

Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation: per de Grandpré J., Harel v. Deputy Minister of Revenue of Quebec, *[1978] 1 S.C.R. 851* at p. 859. During argument in the present appeal the attention of the Court was directed to Revenue Canada Interpretation Bulletin IT-62 dated August 18, 1972, entitled: "Indians". Paragraph 1 of the Bulletin reads:

> This Bulletin does not represent a change in either law or assessing policy as it applies to the taxation of Indians but is intended as a statement of the Department's interpretation and policies that have been established for several years.

Paragraph 5 reads:

> While the exemption in the Indian Act refers to "property" and the tax imposed under the Income Tax Act is a tax calculated on the income of a person rather than a tax in respect of his property, it is considered that the intention of the Indian Act is not to tax Indians on income earned on a reserve. Income earned by an Indian off a reserve, however, does not come within this exemption, and is therefore subject to tax under the Income Tax Act.

Counsel for the Crown said the Bulletin was simply "wrong".

The prime task of the Court in this case is to construe the words "no Indian ... is ... subject to taxation in respect of any such [personal] property". Is taxable income personal property? The Supreme Court of Illinois in the case of Bachrach v. Nelson, 182 N.E. 909 (1932) considered whether "income" is "property" and responded (at p. 914):

> The overwhelming weight of judicial authority holds that it is. The cases of Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300, Tax Commissioner v. Putnam, 227 Mass. 522, 116 N.E. 904, L.R.A. 1917F, 806, Stratton's Independence v. Howbert, 231 U.S. 399, 34 S. Ct. 136, 58 L. Ed. 285, Doyle v. Mitchell Bros. Co., 247 U.S. 179, 38 S. Ct. 467, 62 L. Ed. 1054, Board of Revenue v. Montgomery Gaslight Co., 64 Ala. 269, Greene v. Knox, 175 N.Y. 432, 67 N.E. 910, Hibbard v. State, 65 Ohio St. 574, 64 N.E. 109, 58 L.R.A. 654, Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196, and State v. Pinder, 7 Boyce (30 Del.) 416, 108 A. 43, define what is personal property and in substance hold that money or any other thing of value acquired as gain or profit from capital or labour is property, and that, in the aggregate, these acquisitions constitute income, and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.

I would adopt this language. A tax on income is in reality a tax on property itself. If income can be said to be property I cannot think that taxable income is any less so. Taxable income is by definition, s. 2(2) of the Income Tax Act, "his income for the year minus the deductions permitted by Division C". Although the Crown in paragraph 14 of its factum recognizes that "salaries" and "wages" can be classified as "personal property" it submits that the basis of taxation is a person's "taxable" income and that such taxable income is not "personal property" but rather a "concept", that results from a number of operations. This is too fine a distinction for my liking. If wages are personal property it seems to me difficult to say that a person taxed "in respect of" wages is not being taxed in respect of personal property. It is true that certain calculations are needed in order to determine the quantum of tax but I do not think this in any way invalidates the basic proposition.

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

Crown counsel submits that the effect of s. 87 of the Indian Act is to exempt what can properly be classified as "direct taxation on property" and the judgment of Jackett C.J. in Minister of National Revenue v. Iroquois of Caughnawaga, *[1977] 2 F.C. 269* is cited. The question in that case was whether the employer's share of unemployment insurance premiums was payable in respect of persons employed by an Indian band at a hospital operated by the band on a reserve. It was argued that the premiums were "taxation" on "property" within s. 87 of the Indian Act. Chief Justice Jackett held that even if the imposition by statute on an employer of liability to contribute to the cost of a scheme of unemployment insurance were "taxation" it would not, in the view of the Chief Justice, be taxation on "property" within the ambit of s. 87. The Chief Justice continued (at p. 271):

> From one point of view, all taxation is directly or indirectly taxation on property; from another point of view, all taxation is directly or indirectly taxation on persons. It is my view, however, that when section 87 exempts "personal property of an Indian or band situated on a reserve" from "taxation", its effect is to

exempt what can properly be classified as direct taxation on property. The courts have had to develop jurisprudence as to when taxation is taxation on property and when it is taxation on persons for the purposes of section 92(2) of The British North America Act, 1867, and there would seem to be no reason why such jurisprudence should not be applied to the interpretation of section 87 of the Indian Act. See, for example, with reference to section 92(2), Provincial Treasurer of Alberta v. Kerr, *[1933] A.C. 710*.

There is a line of cases which hold that taxes imposed pursuant to various income tax acts are taxes "on a person" and not taxes on property: McLeod v. Minister of Customs and Excise, *[1926] S.C.R. 457*; Kerr v. Superintendent of Income Tax, *[1942] S.C.R. 435*; Sura v. Minister of National Revenue, *[1962] S.C.R. 65*. More recently, in Alworth v. Minister of Finance, *[1978] 1 S.C.R. 447* and in Attorney General of British Columbia v. Canada Trust Co., *[1980] 2 S.C.R. 466*, this Court again had occasion to consider the distinction in the case law between a tax on persons and a tax on property or upon income.

In the McLeod case the question was whether a fund accumulating in the hands of a trustee under the deceased's will was income accumulating in trust for the benefit of unascertained persons, or persons with contingent interests, within the meaning of s. 3(6) of the Income War Tax Act, 1917. In the Kerr, Alworth and Canada Trust Co. cases the issue was one of constitutional law. The Sura decision turned on the position under the Income Tax Act of persons domiciled in Quebec who did not enter into a prenuptial contract stipulating separation as to property and were therefore, under the provisions of the Civil Code, married under the regime of the community of property.

With all respect for those of a contrary view, I cannot see any compelling reason why the jurisprudence developed for the purpose of resolving constitutional disputes or for determining the tax implications of Quebec's communal property laws, or for interpreting the phrase "unascertained persons or persons with contingent interests" in the Income War Tax Act should be applied to limit the otherwise broad sweep of the language of s. 87 of the Indian Act.

With respect, I do not agree with Chief Justice Jackett that the effect of s. 87 of the Indian Act is only to exempt what can properly be classified as direct taxation on property. Section 87 provides that "the personal property of an Indian ... on a reserve" is exempt from taxation; but it also provides that "no Indian ... is ... subject to taxation in respect of any such property". The earlier words certainly exempt certain property from taxation; but the latter words also exempt certain persons from taxation in respect of such property. As I read it, s. 87 creates an exemption for both persons and property. It does not matter then that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property.

We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section. A person exempt from taxation in respect of any of his personal property would have difficulty in understanding why he should pay tax in respect of his wages. And I do not think it is a sufficient answer to say that the conceptualization of the Income Tax Act renders it so.

I conclude by saying that nothing in these reasons should be taken as implying that no Indian shall ever pay tax of any kind. Counsel for the appellant and counsel for the interveners do not take that position. Nor do I. We are concerned here with personal property situated on a reserve and only with property situated on a reserve.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal and reinstate the judgment in the Trial Division of that Court. Pursuant to the arrangement of the parties the appellant is entitled to his costs in all courts to be taxed as between solicitor and client. There should be no costs payable by or to the interveners.

Appeal allowed with costs.

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Now section 87 of R.S.C. 1970, c. I-6.

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