

“statutory instrument” and hence from Parliamentary scrutiny. The phrase frequently encountered was “... subject to terms and conditions prescribed by the Governor in Council ...”. This phrase lacks any magic formula, such as “prescribed by regulation” or “prescribed by order”, necessary in the Crown’s eyes to bring the terms and conditions, when made and set in writing, within the compass of the Statutory Instruments Act. While not accepting that a magic formula is necessary to constitute delegated legislation a statutory instrument, the Committee has naturally represented to those in authority that the jurisdictional problem would be better avoided altogether by conferring the subordinate law-making power in terms which the Government itself acknowledges will, when the power is exercised, produce a statutory instrument.

108. The Committee has also objected to a refinement of the formula mentioned in the preceding paragraph: “subject to terms and conditions approved by the Governor in Council”. This particular form of enabling power has all the defects already described but also is completely lacking in specificity as to whom the power is given. Who is it who is to set or make the terms and conditions which His Excellency in Council may approve? The Crown’s legal advisers appear to maintain that under this particular formula no more is meant than that the Governor in Council will set the conditions. The Committee is, understandably, not very sanguine about general understandings as to the result of particular statutory formulae and is of the view that every enabling power should specify Parliament’s delegate with precision, along with any conditions precedent to the use of the power or procedural requirements Parliament sees fit to provide. All should be clear and admit of no argument.

109. The third abuse to which the Committee has objected is the “filling up” and extension of old Votes, and old enabling powers, under a series of Votes commencing at some point in the intermediate or distant past which are then amplified in scope or altered in some one or more particulars by succeeding Votes. These successive Votes are often expressed “to extend the purpose” of an earlier Vote and the extensions in some instances are but barely related to the particular objects of the original Vote. The combination of the accumulation of extensions and the extreme generality of language in which almost all enabling powers in Votes are expressed renders the task of the Standing Joint Committee so difficult as to negate any effective scrutiny. To the extent that scrutiny is rendered ineffective, Parliament’s control of the purse is subverted. The Committee has seen instances of deplorable vagueness and uncertainty as to the true extent of enabling power arising from such constant tinkering. Moreover, the Committee concludes that this practice shows that normal, substantive legislation is necessary to cover the particular subject matter dealt with by the series of Votes. To take but one example, the Committee cannot see why the medical fringe benefits of public servants could not be settled by statute and regulation in the ordinary way, instead of under a series of Votes commencing in 1960.³³ This abuse amounts to an infringement of criterion 9 and the Committee considers that much of what appears in Votes to be dealt with by delegated legislation should be the subject of open and notorious legislation.

110. In delving into the intricacies of enabling powers under Votes, the Committee soon discovered that the enabling powers were often not found in the Votes themselves, but in Items in the Estimates to which individual Votes related. Again, to take one example, the Committee had occasion to consider two amendments to the Shipbuilding Temporary Assistance Programme Regulations.³⁴ The enabling authority for the principal Regulations³⁵ and the subsequent amendments was recited as being the Appropriation Act No. 3, 1970. A perusal of the Votes for the Department of Industry, Trade and Commerce, on the recommendation of whose Minister the amendments were made, revealed nothing which appeared to relate to temporary assistance for the shipbuilding industry. Upon enquiry of the Department, the Committee was informed that the authority lay in Vote 5 and “the item entitled ‘Capital subsidies for the construction of commercial and fishing vessels in accordance with regulations of the Governor in Council’ which is listed in the details of the Printed Estimates 1970-71 related to that Vote”. Vote 5 of the Appropriation Act No. 3, 1970 reads as follows:

“Trade-Industrial—The grants listed in the Estimates and contributions and to increase to \$150,000,000 the commitments during the current and subsequent fiscal years for payments to develop and sustain the technological capability of Canadian defence industry, and to increase to \$60,000,000 the commitments during the current and subsequent fiscal years for payments to advance the technological capability of Canadian manufacturing industry by supporting selected civil (non-defence) development projects . \$88,888,500”

Apart from the fact that there did not appear to be any necessary connection between capital subsidies for the building of commercial and fishing vessels on the one hand and the terms of Vote 5, the Committee was struck by the fact that by the conjunction of Votes and Estimates in this fashion moneys appropriated by Parliament for what appear to be fairly closely defined purposes may be spent by the Crown on virtually any object it pleases, thus subverting Parliament’s control of the purse and destroying the appropriation system in all but name.

111. As a further example of the uncontrolled power being granted to the Crown by way of delegated legislation under Appropriation Acts the Committee notes Vote 10b of the Department of Manpower and Immigration in Appropriation Act No. 2, 1973:

“... to extend the purposes of Manpower and Immigration Vote 10, Appropriation Act No. 3, 1972, to authorize special travel payments *to or in respect of persons*, in accordance with regulations made by the Governor in Council, to enable such persons to avail themselves of the services provided by the Department of Manpower and Immigration \$1.”

This Vote has been used to make a Manpower Mobility Regulations, amendment,³⁶ permitting the making of travel grants to those who journey to take up seasonal agricultural work. But it could be used to make regulations relating to anything the department pleases.