

Ministers, Boards etc. are not, and can only make law within the confines of the authority delegated to them. That authority will not include a power to dispense from the subordinate laws made unless it is expressly conferred. This is, the Committee notes, the position accepted by all in the United Kingdom where no dispensations from subordinate legislation can occur unless expressly authorized by the enabling Act. It is also the position which obtained under the most famous enabling Act of all time the infamous Statute of Proclamations, 31 Henry VIII cap. 8, repealed by 1 Edward VI, cap. 6. The complete law making power was given into the royal hands, to the King in his Council, and yet it was thought necessary by that most puissant Prince, who drafted the Bill in his own hand, expressly to provide for a dispensing power. If so mighty a monarch more than a century before the Bill of Rights thought it necessary to take a dispensing power along with Parliament's delegated law making power, how much more necessary must an express dispensing power be to a delegate of Parliament's sovereign authority today? To remove all doubt, the Committee notes the text of the substantive portion of the Statute of Proclamations:

"Therefore it is enacted, that always the king, for the time being, with the advice of his council ... or the greater number of them, may set forth at all times by authority of this act, his proclamations, under such penalties, and of such sort as to his highness and his council, or the more part of them shall seem requisite. And that the same shall be obeyed, as though they were made by act of parliament, unless the king's highness dispense with them under his great seal."

It is in the light of this true position of a delegate of Parliament that section 26 (4) of the Interpretation Act must be construed:

"When a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, *amend* or *vary* the regulations and (*to*) make others."

Given the fundamental constitutional presumption against a power of dispensation this provision cannot amount to a blanket power to any and every delegate of a subordinate law making function to grant dispensations under cover of making "Variation Orders", as has been sought to be done in the case of licences granted under the Public Lands Leasing and Licensing and Public Lands Mineral Regulations and the Canada Oil and Gas Land Regulations. The words "amend" or "vary" will not extend to permit dispensations from a general rule in favour of individuals in particular circumstances. Such a power must be sought in each case in the enabling statute under which the delegation of rule making power is conferred. No delegate, without express authority from Parliament, can be in any better position than the successors of James II. Laws cannot be dispensed with by the authority of delegates when they cannot be by royal authority.

A second argument is that the only dispensing power outlawed by the Bill of Rights is that exercised in a fashion strictly analogous to the manner in which King James II

proceeded. That is to say, that the only dispensation forbidden is that made by someone other than the person who made the law. James II purported to dispense with laws made by Parliament by Letters Patent under his Great Seal. Therefore, a Minister or a Regional Director can not dispense with laws made by the Governor in Council in exercise of powers delegated by Parliament. (The Committee notes in passing that the power purportedly given to the Board of Steamship Inspection under section 1 of Schedule A to the Steamship Machinery Construction Regulations<sup>65</sup> takes just this outlawed form.) This argument would leave a Minister or the Governor in Council free to dispense from the regulations he himself makes, but suffers from the same defects of arrogation of 1343 non-subordinate status as were outlined in the preceding paragraph. Moreover, it ignores the effect of section XII of the Bill of Rights which must be taken to have outlawed any dispensation unless provided for in the enabling Act.

The final argument that has been addressed in support of the dispensing power is the claim that it is automatically conferred upon a delegate by the enabling Act itself, whenever the enabling power is cast in terms of a subject-matter, and commonly introduced by the word "respecting". This was the formula used in drafting section 400 (1) (b) of the *Canada Shipping Act*.

"The Governor in Council may make regulations respecting the construction of machinery."

It was this provision which was relied upon in giving a power of dispensation to the Board of Steamship Inspection. The Committee was told by the Legal Adviser to the Ministry of Transport:

"It has generally been assumed that the use of the word 'respecting' is wide enough to allow the Board to exempt from or dispense with any general requirement of the Regulations. In support of this assumption, the writings of Mr. (*sic*) Driedger are relied on, in particular the book "The Composition of Legislation", page 149."

The Committee can only reiterate that such a theory places the Governor in Council, or other subordinate, in exactly the same position as Parliament and asserts that he can do anything Parliament might do. This view of "respecting" ignores the consequences of the Bill of Rights and the fact that any delegate's powers, including those of the Governor in Council, are subordinate and their limits will be construed in the light of basic constitutional principles, one of which is that the dispensing power is illegal unless expressly granted. Reference to page 149 of the "Composition of Legislation" brings forward once more the argument by analogy to sections 91 and 92 of the *British North America Act*. As was mentioned in paragraph 90 of this Report this analogy is false.

<sup>1</sup> Third Report of the Special Committee on Statutory Instruments, Session 1968-1969.

<sup>2</sup> Third Report of the Special Committee on Statutory Instruments, Session 1968-69, chapter 9.

<sup>3</sup> XIX Howell's State Trials, 1044.

<sup>4</sup> (1971) S.C.R. 5.