

*Regulations and other Statutory Instruments*

in the way which Parliament contemplated it should act when Parliament passed the legislation. If the government is dissatisfied with the way Parliament wrote the law, if it believes the wording proposed to and passed by Parliament was defective in some way, if it believes circumstances have changed such that it is necessary to have a change in the law as it stands, then it has the responsibility to come back to Parliament, to put legislation before Parliament and ask Parliament to make an amendment.

Again, Mr. Speaker, the concern of the committee is not with the policy being followed, the question of whether or not the right to harvest during some periods can be suspended; rather it is the question of the process being followed and whether it is in conformity with the rule of law. The committee found that it was not.

It is essential, Mr. Speaker, that we realize what the government was trying to do. Initially what it left out was a procedure whereby no time period was specified for a prohibition. In the finding of a court in a similar case, that meant that the prohibition could be indefinite. In that instance the court found that that was not contemplated by Parliament and consequently was an illegal action as conducted by the government. Then, rather than changing the act to bring it into conformity with what the minister would like it to be, he chose instead to try and find a subterfuge which would achieve the same effect, an indefinite suspension, without having to change the law. What he did was to specify the period from the first day of the year to the last day, automatically renewing itself on New Year's Day for the following year. So in fact we have a period of indefinite suspension.

There is a long-standing principle in law, which has been followed by Parliament in the past, that governments should not attempt to do indirectly what they are forbidden to do directly. It might be instructive to the House if I were to quote briefly from a decision made in a similar case by Mr. Justice Addy of the Federal Court of Canada. The case involved the Dantex Woollen Co. Inc. and the Minister of Industry, Trade and Commerce. The issue was very similar, having to do with whether or not the government would have the right to suspend people's rights for an indefinite period of time when it was expected that there would be a limitation on the amount of time these rights would be suspended. Mr. Justice Addy deals with it on page 5 of his decision, where he said:

As to the goods mentioned in item 47, it is clear on the evidence that at no time was their importation, in so far as any order of the Governor in Council is concerned, made subject to any limitation as to extent, quantity or time. The first question which arises is therefore whether, since there is no limitation of the extent to which the goods will be restricted or any limitation as to the period for which the limitation will be imposed, the Governor in Council has failed to exercise the judgment and control which Parliament might have directed him to exercise under the above-mentioned subsection 5(2) of the Act, and whether, as a result of such failure, item 47 might have been improperly and illegally included on the Import Control List and, therefore, not subject to import control. The Applicant argues in other words that, when an item is put on the List pursuant to section 5(2), it is absolutely essential that the order in council state to what extent and for what time or period the importation of the goods in that item is to be limited and that, failing this, the item is to be considered as if it had not been included on the List, because the Governor in Council has not properly limited the importation as required by Parliament.

He goes on to deal with the history of the legislation and then comes back to the issue on page 9, where he says:

The Governor in Council was not obliged to accept the Board's recommendations following the two enquiries. But to say, as the counsel for the Respondents does, that from the mere fact that no limit as to duration has been mentioned in the order-in-council, one is to imply that the Governor in Council in fact exercised his discretion in favour of the restriction being imposed for an indefinite period, is a completely unacceptable argument: it flies in the face of all of the evidence as to how the List is in fact being administered. Furthermore, if failure to specify a time restriction means an indefinite period, then, failure to specify the extent means either an indefinite extent or amount or an absolute prohibition. Either of these two interpretations would directly contradict the express wording of the last paragraph of section 5(2).

Finally, where a statute restricts a basic right recognized by common law and is capable of two interpretations, the strict interpretation, that is, an interpretation against the restriction and in favour of the citizen must be given the statute. Since such a rule of interpretation is used against enactments by Parliament, it must apply *a fortiori* against legislative enactments of the Governor in Council, which complete restrictive legislation.

Orders-in-council issued pursuant to the Export and Import Permits Act are capable of greatly restricting and limiting the fundamental right of every citizen to fully engage in legitimate trade and business as he may deem fit. Its application in many cases might well remove from an importer, his sole means of livelihood or cause him very considerable losses.

Very clearly, Mr. Speaker, an analogy can be drawn between this and the situation of the harvesting of some marine plants off the east coast. Mr. Justice Addy continues:

Unlike some legislation such as customs and excise which is intended to provide a more permanent type of protection for local industries and producers, the Export and Import Permits Act, from its tenor, obviously appears to be legislation enacted to permit controls for a limited time and for specific and very limited purposes and by reason of the existence of certain special circumstances and conditions or international commitments or undertakings which outweigh the rights of certain citizens to trade as they wish. Notwithstanding its effects, which are potentially highly restrictive, Parliament has chosen to delegate to the Governor in Council power to legislate in this area by enacting section 5, because of the time ordinarily required to enact detailed regulatory legislation in both Houses of Parliament and because of constantly changing international arrangements and commitments and continually shifting conditions of the international market and of Canadian production and markets. Parliament, however, has also attempted to provide the strict limitations to which I have already referred, on the exercise of that power. Any delegation by the Governor in Council to the Minister of the legislative power to decide for how long and to what extent importation of any goods must be restricted and subject to control, is *ultra vires* and of no effect.

● (1530)

That was the decision of Mr. Justice Addy of the Federal Court of Canada, Trial Division. We believe, and the committee believes unanimously, on the advice of its counsel, that this decision was directly applicable to the situation that was before us when we considered these harvesting regulations which were proposed by the minister.

The minister appeared to accept that argument. He appeared to agree with the committee that not to specify a time period was *ultra vires*, otherwise he would not have changed the regulations themselves. He chose instead to proclaim new regulations. But the form that he chose of specifying a period that ran from New Year's Day to New Year's Eve and which renewed itself again on New Year's Day was a means of achieving through the back door what he simply could not achieve through the front door. That is why when the committee looked at this issue it found that what the minister was trying to do was likely *ultra vires*.