

Act (“... to make such other regulations to provide for the manner in which the provisions of this Act shall apply with respect thereto, and to adapt the provisions of this Act with respect thereto, as appear to the Governor in Council necessary to give effect to the regulations made under this section”; section 277 of the Customs Act.

95. The Committee believes that the precise limits of the law-making power which Parliament intends to confer on a delegate should always be expressly defined in clear language by the statute which confers it: when discretion is conferred, its limits should be defined with equal clarity. No statute should enable a delegate to declare the true intent of Parliament or the scope and nature of the delegation of law-making power.

#### J.—THE PRETENDED POWER OF DISPENSING WITH REGULATIONS IN FAVOUR OF INDIVIDUALS

96. It was with surprise that the Committee discovered that regulations are made by Parliament’s delegates purporting to dispense with existing regulations in favour of individuals and in particular circumstances, without any power in that behalf having been conferred by Parliament. The Committee has also encountered cases in which the delegate of Parliament’s powers has purported to confer upon a sub-delegate the power to dispense from the regulations made by the delegate. The Committee expresses its disagreement with such practices which it conceives to be both illegal and subversive of constitutional government.

97. Parliament can, of course, by express provision grant to a delegate the power to dispense from legislation, whether primary or subordinate. Thus, by section (6) g of the Whaling Convention Act the Governor in Council is authorized to dispense from the provisions of the Act and the Whaling Regulations in favour of Indians and Eskimos and that power has been exercised quite properly in making section 4 of the Whaling Regulations.<sup>29</sup> Other statutory provisions which permit of dispensations by delegates from subordinate legislation include section 482 (1) of the Canada Shipping Act, and section 14 (1) of the Aeronautics Act.

98. While Parliament can assuredly grant to its delegate power to dispense from the subordinate legislation he makes, the Committee feels it imperative to set down what is both the corollary and a fundamental constitutional principle, secured by the Revolutionary Settlement, namely that a delegate empowered to make subordinate law has no power to dispense from the law he makes in individual instances unless that power has been granted to him expressly. To admit of any other principle is both to allow the delegate to rise above his subordinate status—to deny the essential proposition that subordinate law is subordinate, and to allow the delegate to arrogate to himself the status of Parliament—and to seek to undo one essential feature of the Revolutionary Settlement, embodied in the Bill of Rights, 1689.

99. Three examples will suffice to make the Committee’s point.

#### (i) *SOR/74-157, Long Lake Area, Ontario Proclaimed Exempt from Sections 19 and 20 of the Navigable Waters Protection Act*

Section 21 of the Navigable Waters Protection Act reads as follows:

“21. The Governor in Council, when it is shown to his satisfaction that the public interest would not be injuriously affected thereby, may, from time to time, by proclamation, declare any rivers, streams or waters referred to in sections 19 and 20, or any part or parts thereof, exempt in whole or in part from the operation of those sections, and may, from time to time, revoke such proclamations.”

The sections from which exemption may be granted forbid the throwing or depositing etc. of sawdust, lumber wastes, stones, gravel, cinders, ashes and so on into navigable waters or waters which flow into navigable waters. From time to time private enterprises and official bodies, e.g. Hydro authorities, apply for an exemption in respect of a particular body of water. Section 21 provides for exemption in whole or in part for “any rivers, streams or waters ... or any part or parts thereof ...” and does not provide for an exemption in favour of a particular applicant. If a body of water is exempted then any one can dump the wastes referred to in sections 19 and 20 into the exempted waters. The words “in whole or in part” would refer to sections 19 and 20 and hence to the categories of waste.

In this instance Denison Mines Ltd. applied to dispose of tailings in Long Lake area. The proclamation purports to exempt the “Long Lake area” from the operation of sections 19 and 20 with respect to the disposal of tailings by Denison Mines Ltd. This is objectionable on two grounds. First, the exemption can, under section 21, not be limited to Denison Mines Ltd.: anyone must be permitted to dispose of tailings. It is noteworthy that none of the previous exemptions granted under section 21 have purported to limit the exemption to a particular applicant or “depositor”<sup>30</sup> Secondly, the section speaks specifically of declaring exempt “any rivers, streams or waters ... or any part or parts thereof”, yet this proclamation purports to apply not to any rivers, streams, waters or defined parts of them but to an area shown on Department of Transport map. Again, previous proclamations under this section have delineated the exempted waters with great particularity.

The Committee has concluded that this Proclamation is ultra vires as a purported dispensation from the Navigable Waters Protection Act in favour of Denison Mines Limited, no statutory authority for such a dispensation existing. The Committee also considers the Proclamation not in conformity with the enabling power in that it does not declare any specific rivers, streams, or waters, or any part or parts thereof, as exempt from the operation of sections 19 and 20 of the enabling Act. The Department of Transport has twice been advised of the Committee’s position but has to date merely indicated that it “has taken into advisement the comments made by the Committee” and that no further such exemptions have been granted.

#### (ii) *SOR/74-29, Special Parole Regulations No. 1, 1973*

The relevant enabling power, section 9 (a) of the Parole Act, empowers the Governor in Council to make regulations pre-