

the courts have little more than a theoretical power to strike down. (For example, *War Measures Act—Chemicals Reference*). The test whether the regulation falls within the Act is thus converted from objective to subjective.

#### 6. Sub-delegation

Whether a r.m.a. can delegate to another r.m.a. is largely a matter of construction. There is probably no valid argument against sub-delegation in Forms 2 and 3. A delegating regulation can be said to be for the purpose, or in relation to a subject, specified in the Act."

88. The views just quoted have been presented a trifle more elaborately but to the same effect by Professor Driedger in his famous works "Subordinate Legislation", "The Construction of Statutes", "The Composition of Legislation" and "Legislative Forms and Precedents".

89. The Committee has come to the conclusion that it can not agree with the views of the Privy Council Office. It is the Crown's claim, to put matters bluntly, that an enabling power cast in terms of subject matter, and most commonly introduced by the word "respecting", imports the widest possible regulation-making power, including an unfettered power to sub-delegate the rule-making power conferred, and the power to dispense from the regulations, when made, in favour of particular individuals. This is to set up the delegate as the equivalent of and with the same power as Parliament itself. It is to lose sight of the fact that the delegate is a subordinate law-making body and that delegated legislation is subordinate law. Only in the most extreme cases and under the most ample enabling powers conceivable can Parliament be considered to have given over to its delegate its whole power with respect to a stated subject matter, subject only to the recall of that power into its own hands at its will. This the Committee conceives is the rationale of the decision in *the Chemicals Reference*, arising under the War Measures Act, the case apparently relied upon for the great power of the word "respecting". If enabling powers cast in terms of subject matter are given the power, scope and amplitude contended for, delegated legislation has ceased to be subordinate.

90. For the same reasons, the Committee regards the purported analogy between enabling powers cast in terms of subject matter and the terms of section 91 and 92 of the British North America Act as false. This view has been put most strongly by Professor Driedger:

"Power to make regulations may be conferred by reference to subject-matter rather than purpose, as, for example, *respecting aerial navigation*. Here again, depending on the scope of the subject, there could be a wide power. So long as the regulation is in relation to the prescribed subject it is valid. A sub-delegating regulation would therefore be valid if it can be said to be in relation to the subject. Federal and Provincial statutes in Canada, although not in the category of subordinate legislation, are enacted under constitutional power to make laws "in relation to matters coming within" enumerated classes of subjects, and it is well established that these powers are full powers to make any laws on any matter coming within an enumerated subject."<sup>25</sup>

There can be no analogy or equivalence between the conferring of legislative powers upon the Parliament of Canada and the Legislatures of the provinces—"authority as plenary and ample within the limits prescribed by (section 91 and) section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow"<sup>26</sup>—and the conferring of powers to be exercised by delegation from the Parliament of Canada for the making of subordinate legislation. The scope of the delegation must be determined by the enabling Act as a whole and there can be no presumption that the conferring of a delegated power to legislate with respect to a subject matter gives the delegate, high or low, plenary power to act in all respects as Parliament itself could do.

91. The Committee is well aware of the entrenched position of the word "respecting" and its equivalents in the language of delegation. Because the Committee can not agree with the effect claimed for it, or with the reasons advanced for that effect, it wishes to place on record its total opposition to the continued use of subject related enabling clauses as long as the Department of Justice persists in its present views that they permit both sub-delegation of rule-making power and dispensations from statutory instruments in favour of individuals. This position has been made known to the Legal Advisers to the Privy Council Office and through them to the Assistant Deputy Minister of Justice (Legislative Programming).

92. The Committee is not so sanguine as to expect that the action it has taken will be sufficient to resolve the matter. The support of the two Houses is necessary to put an end to a construction of an enabling power, and to a practice, which is inimical to their rights and subversive of Parliament's supremacy. Such a form of enabling power is not in use in the United Kingdom and overseas experience in coping with it can not be called upon. The responsibility for safeguarding Parliament's rights, therefore, falls squarely on the Parliament itself.

93. The Committee has encountered statutory instruments made under enabling powers which are drawn in such a way as virtually to exclude the possibility of objection and effective scrutiny. Section 4 of the Electricity Inspection Act and Section 3 (c) of the Gas Inspection Act empower the Governor in Council to make regulations necessary for giving effect to the provisions of the statute and for "declaring its true intent and meaning in all cases of doubt". Apart from the blanket legislative power thus conferred, which is limited by specific following clauses in the case of the Gas Inspection Act, and may be limited to purely administrative matters as suggested by Professor Driedger,<sup>27</sup> these enabling powers give to the Governor in Council the power to declare the meaning of the statute, the function of the judiciary within our constitutional system. While the regulations<sup>28</sup> made under these powers are in the Committee's views unobjectionable, it feels obliged to report to the two Houses enabling powers of such a nature.

94. Similar objectionable and all-encompassing enabling powers are to be found in section 11 of the Fisheries Prices Support Act; section 12 of the Dominion Water Power Act (which also empowers the Governor in Council by regulation "to meet any cases that arise, and for which no provision is made in this Act"); section 7 (3) of the Canada Pension Plan