

86. It is unfortunately the case that many statutes of Canada do not on their face define clearly the extent of subordinate law-making power. And the problem is compounded by the views held by the Crown's lawyers and the parliamentary draftsmen of the effect of certain words or formulae when used in sections in Acts conferring subordinate law-making power.

87. The Crown's views were last put publicly in a submission by the Privy Council Office to the Special Committee on Statutory Instruments<sup>24</sup> (the MacGuigan Committee). Those views are so important as to justify their quotation in extenso. (In the quotation which follows, "r.m.a." means regulation making authority)

#### "1. Forms of Grant

There are three distinct major forms:

- (1) Power to make a particular regulation as described in the Act;
- (2) Power to make regulations for a specified purpose;
- (3) Power to make regulations in relation to a subject-matter.

Forms 2 and 3 are recognized (with slight difference in name only) in the Nolan case (P.C.). Form 1 is added to complete the picture.

There may also be combinations and fusions of these three distinct forms.

#### 2. Particular Regulation

This is a power to make a regulation the nature and content of which is described in considerable detail by Parliament itself. Thus, a regulation "to prohibit the import of used automobiles" leaves virtually no elbow room. The r.m.a., and only he, can do just that; nothing more.

The characteristics of this form of power are that in the normal case it is tightly limited and the terms of the regulation are predictable. There can seldom be any surprises.

The *Public Service Superannuation Act* is a good example of powers of this class.

#### 3. Specified Purposes

In this form the power given is to make regulations for the attainment of certain objectives or purposes. This is considerably wider than Form 1. The extent of the power depends on the statement of purposes.

The purposes may be governed by the "intent of the Act". Thus, the power may be to make regulations "for carrying the purposes and provisions of this Act into effect", or it may be for certain stated purposes that are clearly ancillary or subordinate to the "intent of the Act" as revealed by the other provisions in the Act. In both these cases, there is a degree of legislative control, enforceable by the courts. The courts can ascertain the "intention of Parliament" from the terms of the Act as a whole, and can say whether the

regulation is or is not for the stated purpose. Also, if the purposes of the Act as a whole govern, the nature and kind of regulations that may be made can be envisaged.

The purposes, however, may be stated independently, outside the umbrella of the Act as a whole. Thus, a single-section statute could empower a r.m.a. to make regulations "for promoting the economic welfare of Canada". Or, in an Act with broad purposes (e.g. emergency powers) a statement of purposes might have no discernible verbal relationship to any other provision of the Act. Powers of this kind can be extremely broad—the broader the purpose the greater the power. With a wide purpose, it is very difficult to say that a regulation is clearly outside the purposes, and it is difficult to imagine what kind of a regulation might be made. Hence, there is little legislative or judicial control.

#### 4. Specified Subject-matter

Power to make regulations may be in the form of power to make regulations *in relation* to a stated subject-matter. This is the broadest form, because a *relationship* to a general subject can easily be manufactured. Note that sections 91 and 92 of the B.N.A. Act take this form.

The characteristics of this form are that there is virtually no limitation on the power by the terms (purposes, intent, etc.) of the Act itself, but only by the words conferring the power. Since "relationships" can be almost anything, it is also difficult to predict with any degree of accuracy the range of regulations that might be made. Again, the broader the subject, the greater the power.

The courts do have control, for they can say that a particular regulation is not in relation to the stated subject, but the broader the subject or the more general the words describing the subject, the more difficult it becomes for the courts to strike down a regulation.

Two statutes illustrate how powerful these two forms, purposes and subjects, can be. *The War Measures Act* (purposes) and the *Fisheries Act* (subject).

#### 5. Judicial Control

In all three forms, the courts do have a degree of ultimate control. They can say that a regulation is not

- (1) of the kind described—class 1
- (2) for the purposes described—class 2
- (3) in relation to the subject described—class 3.

This power may be seriously eroded or even taken away by the familiar phrase "as he deems necessary, desirable, expedient, etc." Thus, where power is conferred to make regulations.

- (1) "prescribing such fees as he considers necessary" (class 1),
- (2) "as he deems necessary for the purpose of" (class 2), or
- (3) "as he deems to be in relation to" (class 3),