

important function, while preserving the confidentiality of lawyer-client communications. This proposal has now been approved by my colleagues and steps are being taken to have it implemented in the very near future."^{16c}

This would be a substantial improvement on the position faced by the Committee in the past. The Committee trusts that, as a result of the foregoing proposals, its difficulties in eliciting reasons to support the positions taken by Departments will now disappear.

H.—SUB-DELEGATION OF RULE-MAKING POWER

81. The principle of *delegatus non potest delegare* (a delegate cannot delegate) is fundamental to our law. It was with surprise that the Committee discovered that sub-delegation of rule-making power was achieved by statutory instrument and that the Department of Justice considered the practice quite proper even in the absence of statutory provision authorizing a delegate to sub-delegate his rule-making power.

82. The Department of Justice's view has been expressed by Professor Elmer Driedger, Q.C., sometime Deputy Minister of Justice, in several of his works¹⁷ which have been of great assistance to the Committee and its counsel.

"The result would appear to be that there is no rule or presumption for or against sub-delegation, and that in each case it is a question of interpretation of the language of the particular statute."¹⁸

The Committee has no quarrel with the latter part of this statement if it means that sub-delegation is permissible if and only if the enabling act authorizes it expressly or by necessary intendment. The Committee can not accept, however, that there is no presumption against sub-delegation of rule-making power for it can not accept that the one authority relied on, *The Chemicals Reference*,¹⁹ is not confined to its own particular facts, in its own particular and exceptional time and circumstances and under its own exceptional statute, the War Measures Act. The Committee is satisfied by reference to *Attorney General for Canada v. Brent*²⁰ and other relevant cases and authorities²¹ that the law is not neutral on the matter of sub-delegation, but that on the contrary it is only lawful if, and is therefore presumed to be unlawful unless, the enabling statute authorizes it expressly or by necessary intendment. The Committee cites as an example of necessary intendment the Canada Labour Standards Regulations²², section 19 (5), which sub-delegate power to the Minister to act by Ministerial Order. The authority for the sub-delegation, while not express, flows from the conjoint operation of sections 58, 59.1 (1) (d) and 74 of the Canada Labour Code. Such inferred powers to sub-delegate are to be deprecated and the Committee believes that such powers should be conferred expressly in enabling Acts.

83. The Committee realizes that this issue may one day come before the courts once again, but whatever the outcome of that litigation may be, the Committee will continue to scrutinize all sub-delegations of rule-making power in statutory instruments, not only to ensure that any such are intra

vires the enabling statutes but also to ensure that they do not amount to an unusual or unexpected use of the subordinate law making power conferred by Parliament, or otherwise infringe any other of the Committee's criteria.

84. The Committee is aware that it is also considered in some quarters that an enabling power cast in terms of subject matter and introduced by the words "respecting", "in respect of", "in relation to" carries with it the power to sub-delegate.

"The distinction between purposes or subjects, on the one hand, and specific powers on the other, is also relevant in relation to sub-delegation. For example, if a minister had power to make regulations *respecting tariffs and tolls* he could probably authorize some other person to fix a tariff or toll; such a regulation would clearly be one *respecting* tariffs or tolls. But if the minister's authority is to make regulations *prescribing tariffs and tolls* then the minister must himself prescribe, because he is the only one who possesses the power. A regulation purporting to confer this power on another is not a regulation prescribing tariffs and tolls."²³

The Committee can not accept this ascription of such power to the word "respecting" or to enabling powers cast in terms of subjects and purposes. The Committee notes that it was precisely such a subject power introduced by the word "respecting" which the Supreme Court of Canada held in *Attorney General for Canada v. Brent* gave the Governor in Council no power to sub-delegate power to a Special Inquiry Officer. Further, the Committee views the attempt to give to a delegate under an enabling power cast in terms of subject matter an automatic right to sub-delegate as simply another attempt to subvert the most fundamental proposition of all, namely that subordinate legislation is subordinate. The delegate of law-making power, whether he be a Minister, a Commissioner or the Governor General in Council, is a *subordinate* law-making authority and is not in the same position with respect to the subject matter named as is Parliament.

I. THE LANGUAGE OF DELEGATION

85. It is a principle of our constitution that whatever laws are passed by Parliament are binding, as the law of the land. But it is also a principle of our constitution that no one may be deprived of his liberty or of his rights except in due course of law. In the absence of a common law or a statutory authority, a subject can not be deprived of rights by an executive act of the Governor in Council and if the Governor in Council claims to have made a regulation entitling himself or some other subordinate, for example a Minister or a Regional Director, to interfere with that subject's rights, the Courts will in turn interfere to stop the Minister, the Governor in Council or the Regional Director, unless he can show by what authority, statutory or otherwise, he has made the regulation in question.

The Committee is, therefore, of the view that in order to safeguard the second of the principles just mentioned, the precise limits of the law-making power which Parliament intends to confer on the Governor in Council or on any other delegate should always be defined in clear language by the statute which confers it.