REPORT TO PARLIAMENT

SECOND REPORT

of the

STANDING JOINT COMMITTEE

OF THE

SENATE AND OF THE HOUSE OF COMMONS

on

REGULATIONS AND OTHER STATUTORY INSTRUMENTS

Joint Chairmen

SENATOR EUGENE A. FORSEY

MR. ROBERT McCLEAVE, M.P.

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The Standing Joint Committee on Regulations and other Statutory Instruments has the honour to present its

SECOND REPORT

1. In accordance with its permanent reference, section 26, the Statutory Instruments Act, 1970-71-72, c. 38, your Committee has reviewed and scrutinized statutory instruments issued since January 1, 1972, This has proved to be an interesting and on many occasions difficult task. Your Committee has been helped in its work by two exceptionally able counsel, G. C. Eglington and Lise Mayrand, and their efficient secretary, Mrs. Helen Leroux.

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A.—INTRODUCTION

2. The purpose of this Report is to acquaint both Houses of Parliament with the work of the Committee between January 1974 and January 27, 1977, and to present to both Houses particular issues and problems that confront the Committee. In this Report matters arising from divers individual statutory instruments considered by the Committee will be used as illustrations only.

3. The Committee's primary function is to maintain a watch on the subordinate law made by delegates of Parliament. In the modern era Parliament has been forced by considerations of time and lack of technical and scientific expertise to leave to subordinates the making of detailed rules and regulations and to confine itself increasingly to setting the main structures of legislative interventions in society. However, Parliament retains responsibility for the law of the land and to the extent that those detailed rules and regulations are not subject to Parliamentary scrutiny Parliament is forfeiting its effective right to settle the laws that must be obeyed by the people. Parliamentary scrutiny of all such subordinate or delegated law is now an accepted part of the Parliamentary tradition in the Commonwealth. Its advent in Canada owes much to the Report of the MacGuigan Committee [1] which led to the passage of the Statutory Instruments Act. The Standing Joint Committee is aware of its serious responsibility in maintaining parliamentary sovereignty and supremacy.

4. The Committee has not to date reported on any particular statutory instruments partly because many instruments to which it has taken objection have been amended to remove the objectionable features. Similarly, undertakings to effect amendments or to take account of the Committee's objections in the next general review of a particular set of regulations or other statutory instruments have in many instances been accepted. Yet the principal reason for the Committee's delay in reporting on any particular instruments lies in the preoccupation of the Committee with legal problems, problems relating to its jurisdiction, the meaning of certain provisions of the Statutory Instruments Act, the powers contended for by the Crown as flowing from enabling powers in common use, and the refusal of legal officers of the Department of Justice serving in departments in certain circumstances to enter into significant correspondence with the Committee because they are aware of the Deputy Minister's original view, later supported by the present Minister, that the Committee should not be given any explanation or information because they were of the opinion that this would involve officers of the Department of Justice in the expression of legal opinions. To all these problems this Report will address itself.

5. The Committee wishes to assure both Houses that in accepting undertakings by departments of state and regulation-making authorities to repeal or to amend regulations and other statutory instruments the Committee does not compromise its independence, nor does it divest itself of jurisdiction. All statutory instruments stand permanently referred to the Committee by virtue of section 26 of the Statutory Instuments Act and every undertaking to repeal, to amend or to reconsider a regulation or other statutory instrument is kept under review to ensure that the undertaking is carried out. The Committee wishes to record its appreciation of the co-operation extended to it by many departments and regulation-making authorities.

6. The following general statistics as of 15th July, 1976, may serve to illustrate the extent and progress of the Committee's work.

Instruments Considered by the Committee (excluding Income Tax, Veterans Land Act, Immigration Special Relief Regulations)	1,348
(*a*) Instruments Committee has objected to, queried, asked for explanation	689
(*b*) Awaiting Reply from Departments	*202
Reply received and Committee satisfied	140
Reply received, further correspondence ensues	102
Reply received, remedial action promised and taken	108
Reply received, remedial action promised but not yet taken (including cases where Department will reconsider in light of experience; will do in future)	53
Reply received and Committee not satisfied	24
Reply received but not yet considered by Committee	19
Instruments involving points relating to drafting of enabling powers	3
Defect cured by subsequent indemnifying and validating legislation	2
Dispensations of a type that have been superseded by general regulations	11
Enabling Powers amended or other legislative action taken	3
Total of (*b*)	637

Note: The figures in (*a*) and (*b*) do not correspond because of the holding of files in connection with Dispensation, Definition of a Statutory Instrument and Delegation without any specific action having been taken in respect of each file individually

Instruments awaiting consideration by the Committee 332

* 84 of these Instruments are included in one enquiry directed to the Department of Industry, Trade and Commerce April 13/76

7. The Committee's manner of proceeding may be of interest to Honourable Senators and Members of the House of Commons as it differs somewhat from the procedure adopted by like Committees in Great Britain and in Commonwealth countries where instruments are in most instances scrutinized either as part of the very process of their making or are subject to negative disallowance and positive affirmation procedures. Your Committee sees instruments only after they have already been made (and published, in those cases in which they are published) and there were in 1969 only 11 Statutes of Canada which provide for disallowance or affirmation procedures in the Houses. [2]

8. Instruments, as published, or as they come to the attention of the Committee or its counsel, are first perused by counsel who submit the instruments to the Committee with any pertinent comments or explanatory material elicited from departments and regulation-making authorities. The Committee, which meets weekly in public while the Houses are sitting, and monthly otherwise, to deal with its permanent reference, considers the instruments and accompanying material and if it finds any feature of a particular instrument questionable as appearing to transgress any of its Criteria for scrutiny, the relevant department or authority is informed of the Committee's views through its Designated Instruments Officer and invited to offer an explanation or to give assurances either as to the meaning and operation of an instrument or as to amendment of the instrument. In many instances the explanations or assurances received from departments are entirely acceptable to the Committee upon its further consideration of the instruments and nothing further need be done unless promised action is not taken. In cases in which the Committee regards the explanation as not disposing of the objection the department or authority is informed of the Committee's views and of the Committee's suggestions as to the remedial action which should be taken. As will appear from the statistics in paragraph 6, this procedure has resulted in many amendments to and undertakings to amend instruments. Unfortunately, the Committee's manner of proceeding has been frustrated in a considerable number of other instances by the refusal of some Designated Instruments Officers, who are lawyers in the service of the Department of Justice, to give explanations which involve any points of law or to accept the Committee's invitation to give reasons why some feature of an instrument which appears to the Committee to be ultra vires the enabling power is in truth intra vires. Further, there have been instances of a refusal to express any view on the interpretation of words in an instrument or to affirm or to deny that they are obscure or ambiguous or otherwise in need of clarification. This causes serious difficulties to the Committee. This matter receives a separate treatment in section G of this Report: "The Withholding of Information from the Committee".

B.—CRITERIA FOR SCRUTINY OF STATUTORY INSTRUMENTS

9. In order to assess statutory instruments in the exercise of its permanent reference the Committee has adopted fourteen criteria. These were adopted by the Senate on November 14, 1974 (English text) and December 4, 1974 (French text) and were concurred in by the House of Commons in both languages on December 13, 1974.

10. The criteria are as follows:

Whether any Regulation or other Statutory Instrument within its terms of reference that, in the judgment of the Committee:

(1) (*a*) is not authorized by the terms of the enabling statute, or, if it is made pursuant to the prerogative, its terms are not in conformity with the common law, or

(*b*) does not clearly state therein the precise authority for the making of the Instrument;

(2) has not complied with the provisions of the Statutory Instruments Act with respect to transmittal, recording, numbering or publication;

(3) (*a*) has not complied with any tabling provision or other condition set forth in the enabling statute; or

(*b*) does not clearly state therein the time and manner of compliance with any such condition;

(4) makes some unusual or unexpected use of the powers conferred by the enabling statute or by the prerogative;

(5) (*a*) tends directly or indirectly to exclude the jurisdiction of the Courts without explicit authorization therefor in the enabling statute; or

(*b*) makes the rights and liberties of the subject dependent on administrative discretion rather than on the judicial process;

(6) purports to have retroactive effect where the enabling statute confers no express authority so to provide or, where such authority is so provided, the retroactive effect appears to be oppressive, harsh or unnecessary;

(7) appears for any reason to infringe the rule of law or the rules of natural justice;

(8) provides without good and sufficient reason that it shall come into force before registration by the Clerk of the Privy Council;

(9) in the absence of express authority to that effect in the enabling statute or prerogative, appears to amount to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment, and not merely to the formulation of subordinate provisions of a technical or administrative character properly the subject of delegated legislation;

(10) without express provision to the effect having been made in the enabling statute or prerogative, imposes a fine, imprisonment or other penalty, or shifts the onus of proof of innocence to the person accused of an offence;

(11) imposes a charge on the public revenues or contains provisions requiring payment to be made to the Crown or to any other authority in consideration of any licence or service to be rendered, or prescribes the amount of any such charge or payment, without express authority to that effect having been provided in the enabling statute or prerogative;

(12) is not in conformity with the *Canadian Bill of Rights*;

(13) is unclear in its meaning or otherwise defective in its drafting;

(14) for any other reason requires elucidation as to its form or purport.

The Committee recommends that its criteria for scrutiny be written into the Statutory Instruments Act so that they will not need to be adopted and concurred in anew by the two Houses at the commencement of every Session and Parliament. The Committee believes that an additional criterion should be added, namely, whether a statutory instrument trespasses unduly on the rights and liberties of the subject.

11. The following examples of regulations and other statutory instruments that have been found by the Committee to transgress or to illustrate the above criteria may assist in an understanding of the Committee's work.

Criterion 1 (a)—is not authorized by the terms of the enabling statute, or, if it is made pursuant to the prerogative, its terms are not in conformity with the common law.

1. The Committee draws attention to its remarks upon subdelegation of rule-making power and the pretended power of dispensing with regulations in sections H, I and J of this Report.

2. SOR/74-49, Kesler Loan Regulations

At the time of the making of these Regulations, section 34.15 (3) of the National Housing Act did not permit of regulations being made to dispense with the existing regulations governing the minimum number of persons to occupy premises in respect of which loans were made. The number was set at not less than two occupants, one an adult and one a dependent child of that adult. (Section 97.3 of the National Housing Loan Regulations—SOR/73-461). Notwithstanding that provision, SOR/74-49 purported to dispense with that requirement and to allow a loan to be made in respect of a housing unit to be occupied by two named adult persons resident in Lethbridge, Alberta. In the course of correspondence with the Legal Division of Central Mortgage and Housing Corporation, it became apparent that the attempt by SOR/73-461 to specify the "composition" of the minimum number of occupants was itself ultra vires. Subsequently, section 34.15 (3) of the Act was amended by 23-24 Eliz. II cap. 82, section 3, to give the Governor in Council power both to specify the composition of the minimum number of occupants and to make regulations specifying different numbers of occupants for different family housing units.

3. SOR/72-402, Public Service Employment Regulations, amendment

The Committee considered section 7 (2) of the Regulations to be both ultra vires the Public Service Employment Act and inconsistent with sections 10 and 33 of the same Act, for it constituted an attempt to alter the basic system of recruitment laid down in mandatory terms in section 10 in substituting the opinion of a responsible staffing officer in other than cases of urgency for a "process of selection designed to establish the merit of candidates." The Committee also considered section 7 (2) of the Regulations to be inconsistent with section 11 of the Act in that the opinion the subsection refers to is not that of the Commission, as called for by section 11, but of a "responsible staffing officer".

The Public Service Commission appears to have accepted the force of the Committee's views. The Commission is currently preparing amendments to the Act and the Committee has informed the Commission that what is required is a retroactive amendment to the Act validating the appointments made under section 7 (2) of the Regulations (which is still purportedly in force) and indemnifying all involved in the paying of salary and fringe benefits to all those so appointed.

4. SOR/74-8, Indian Off-Reserve and Eskimo Housing Regulations

The authority for these Regulations rests in a series of votes in Appropriation Acts. (This method of authorizing subordinate legislation is discussed fully infra, section K.) Originally confined to making loans to Indians, the purposes of the earlier votes were extended by Vote L51a, Appropriation Act No. 7, 1967 to include loans to Eskimos "on the same terms and conditions, for the same purposes and subject to the same provisions ... as loans made to Indians ...". However, section 3 (1) (*b*) of the Regulations imposes a restriction on a loan to an Eskimo which does not apply in the case of a loan to an Indian, namely that the location of the house in respect of which the loan is to be made must be acceptable to the Minister.

The Designated Instruments Officer of the Department of Indian Affairs and Northern Development declined to advance any argument to the Committee justifying this provision as intra vires the enabling power on the grounds that to do so would involve him in the expression of a legal opinion to the Committee which the Deputy Minister of Justice has opined is not a proper function for an officer of the Department of Justice. This withholding of information from the Committee is considered infra, section G.

Criterion No. 1 (b)—does not clearly state therein the precise authority for the making of the Instrument.

1. While all Departments and authorities, with the exception of the Honourable the Treasury Board, appear now to be prepared to disclose all the authority on which they are relying in making regulations, the Committee draws attention to the non disclosure of the place of publication of some authority (Sections D and E infra) and the failure to shew when and where enabling sections in statutes have been amended since the last revision of the statutes in 1970 (section F infra).

2. SOR/73-548, Copyright Fees Order, SOR/73-549, Industrial Design Fees Order

These two Orders were headed respectively Copyright Act and Industrial Design Act. They were expressed to be made

pursuant to unpublished Orders in Council. The Committee considers that, where the authority for a piece of subordinate legislation is an Order in Council which has not itself been treated as a regulation, it should nonetheless be published for otherwise no one can determine whether or not the subordinate legislation is in truth intra vires and all conditions in the Order have been observed.

In the case of both these Orders, the true enabling authority was section 13 of the Financial Administration Act, under which the unpublished Orders in Council were made authorizing the Minister to set fees. In the case of the Copyright Act, section 41 (1) does provide a power to impose higher charges than those imposed under the Act, but there is no such provision in the Industrial Design Act. The Privy Council Office has agreed that in future cases section 13 of the Financial Administration Act will be cited as the enabling authority along with the Order in Council made thereunder, which will in future be published as a matter of public interest in Part II of the Canada Gazette.

3. SI/73-48, Schedule to the Narcotic Control Act, amendment

This addition of a substance to the Schedule was accomplished in an Order which recited the incorrect enabling authority. The Privy Council Office has relied upon the dismissal of leave to appeal by the Supreme Court of Canada from a conviction for possession of the substance so added, for the proposition that an instrument is not rendered invalid by a misrecital of enabling authority. The Committee has this proposition under advisement but considers, nonetheless, that this statutory instrument should be revoked and a new addition to the Schedule made reciting the correct authority. It would appear that the Privy Council Office is not prepared to comply with the Committee's views.

Criterion No. 2—has not complied with the provisions of the Statutory Instruments Act with respect to transmittal, recording, numbering or publication.

The Committee has had no occasion to invoke this Criterion. However, the Committee is of the view that many statutory instruments have not been treated as such because of the view taken by the Department of Justice of the definition of a statutory instrument in section 2 of the Statutory Instruments Act. This matter is considered in detail in section E infra.

Criterion No. 3 (a)—has not complied with any tabling provision or other condition set forth in the enabling statute.

SOR/72-261, Direction to the Canadian Radio-Television Commission Respecting ineligibility to hold Broadcasting Licences

Section 27 (2) of the Broadcasting Act imposes a tabling requirement which applies to this Direction. It did not appear to the Committee that the tabling requirement had been met, an impression that was confirmed by the Department of Communications by letter of July 30, 1975. Despite reminders the Department took over one year to examine the legal status of the untabled Direction only to advise on September 1, 1976 that it was the Department's views that "the failure to have the order tabled before Parliament, as is required under Section 27 of the Broadcasting Act, does not invalidate it". To date the Direction has not been tabled. Nor has it been remade and tabled within due time. The Committee has the Department's view as to the consequences of failure to table under advisement.

Criterion No. 3 (b)—does not clearly state therein the time and manner of compliance with any such condition.

1. SOR/74-596, Cranberries Duty Order, 1974

Section 11 of the Customs Tariff empowers the Governor in Council to reduce duties on goods imported into Canada "from any country or countries as may be deemed reasonable by way of compensation for concessions granted by any such country or countries". The Cranberries Duty Order, 1974 did not reveal upon its face that some concession or concessions had been granted which led to the reduction of duties on cranberries. The Designated Instruments Officer for the Department of Finance has advised the Committee that in future Orders issued pursuant to section 11 of the Customs Tariff will refer to the fact of concessions having been granted by other countries to Canada justifying the duty reductions provided for in the Orders.

2. SOR/73-14, SOR/73-128, SOR/73-244, SOR/74-122, SOR/74-550, Federal Court Rules

Section 46 (4) of the Federal Court Act requires that notice be given in the Canada Gazette of any proposal to amend, vary, revoke or add to any rule or rules of the Court at least sixty days before implementing the proposal with the consent of the Governor in Council, either as originally drafted or altered in light of representations received as a result of publication of the notice in the Gazette. The form of notice must invite interested persons to submit written representations. While the Committee's searches revealed that the requirements had been complied with, compliance did not appear on the face of the amending Orders. The Director of Legal Services to the Privy Council Office acquiesced in the Committee's views that compliance with the terms of section 46 (4) of the Act should appear in all future amendments.

Criterion No. 4—makes some unusual or unexpected use of the powers conferred by the enabling statute or by the prerogative.

1. SOR/73-604, Pacific Tariff of Wharf Charges, section 15 (4)

Section 15 (1) provides for two circumstances in which free time shall be allowed. Yet section 15 (4) confers upon the National Harbours Board a discretion to extend or to limit the free time so provided for. The National Harbours Board advised the Committee that the reason for the discretion was to accommodate unforeseeable circumstances, such as labour

problems, which can delay processing of documents on handling of cargo. Given this explanation, the Committee could not see why the Board should require a discretion to limit free time. The National Harbours Board has agreed and will be revising the Regulations at an early date. The Committee notes that in SOR/76-190, Montreal Harbour Railway Tariff, a similar provision (section 4.1) has been confined to the extension of free time.

2. SOR/75-291, Port Alberni Harbour Small Vessel Facilities

The Port Alberni Harbour Commission has, in certain circumstances, power to require a small vessel to vacate its position at a small vessel facility before the time contracted and paid for has expired. Pursuant to section 7 of these Regulations the Commission has a discretion whether or not to refund rates paid in advance in respect of the period for which a vessel is required to vacate its berth. The Committee considered that there should be an obligation to make such a refund and that, if the Commission wished to have authority to set off against such a refund any other sums owing to it by a vessel owner, it should be given that authority expressly. The Ministry of Transport advised that refunds are made subject to deductions for liabilities incurred during the actual periods of berthage, for example utility services. It had been considered that a provision specifically covering such deductions would be too complex. The Ministry has agreed to reconsider the matter when the next amendment to the Regulations is processed.

3. SOR/75-384, Petroleum Import Cost Compensation Regulations, section 10 (a)(ii)

The Committee has questioned this provision on the grounds of vires as being made under an enabling power introduced by the word "respecting", a matter discussed more fully infra section H, paragraph 84 and section I, paragraphs 89, 90, 91 and 92. The provision also strikes the Committee, even if intra vires, as obnoxious as amounting to a gross interference with the liberties of the subject and as an attempt to force importers to countenance the re-creation of the General Warrant, declared to be illegal in *Entick* v. *Carrington* (1765).[3] The provision reads:

> "10. No payment shall be made under these Regulations to an eligible importer unless he has
>
> (*a*) given an undertaking in writing to the Board that ...
>
> (ii) he will allow any person designated by the Board to enter any premises of the importer in order to examine, take copies of or extracts from, any records, books, papers or other document found thereon that, in the opinion of that person, relates to the payment of import compensation to that importer,"

It is observed that this provision does not confine the right of entry to reasonable times of the day. It also gives the designated person an unfettered discretion to decide what documents do and do not relate to the payment of import compensation. This necessarily carries with it the "right" to inspect any and all papers or records of an importer (including, for example, his personal records, income tax records, etc.) for the purpose of classifying them. There is no let whatever on the classification arrived at by the officer and hence on the documents he may copy. Such extraordinarily wide powers of entry and inspection are thoroughly undesirable.

4. SOR/72-407, Explosives Regulations, amendment

While power to make regulations governing the sale of explosives is provided for by section 4 (n) of the Explosives Act, the Committee objected to the new section 108.1 (2) of the Regulations, added by this amendment, in that it prohibited the sale of fireworks to a person who *appears* to be under the age of eighteen years. The Committee considered that the subsection could be given effect to in this wise: even if you are over the age of eighteen years, if you appear to be under eighteen years, you may not buy fireworks.

The Department of Energy, Mines and Resources agreed that the subsection should be replaced by more equitable wording, a result accomplished by SOR/75-557 so that the subsection now reads:

> "108.1 (2) No person shall sell any fireworks to a person who appears to be under the age of eighteen years and does not produce evidence that he is of the age of eighteen years or over."

Criterion No. 5 (a)—tends directly or indirectly to exclude the jurisdiction of the Courts without explicit authorization therefor in the enabling statute.

1. The Committee draws attention to its remarks on subjectively worded tests infra, section T.

2. SOR/74-59, Northwest Atlantic Fisheries Regulations, section 16 (4)

This subsection provides that:

> "(4) Where any vessel or goods have been seized under subsection (1) and proceedings in respect of the offence have been instituted, the court or judge may, with the consent of the protection officer who made the seizure, order the vessel or goods to be returned to the person from whom they were seized upon the giving to Her Majesty of security by bond, with two sureties, in an amount and form satisfactory to the Minister."

Thus, an order of a court or judge, which might be thought beneficial to the subject, is made to depend upon the giving of consent by the fisheries protection officer who effected seizure. The Committee regards it as objectionable in principle that the jurisdiction of a court and of Her Majesty's judges should be dependent upon the discretionary decision of an investigative and administrative officer, especially the very officer who, having effected seizure, initiated that exercise of jurisdiction and may well appear to have an interest in the hearing at the conclusion of which an Order may be made. The Committee notes that a similar consent of an officer is not required under section 58 (7) of the Fisheries Act.

The Committee's concern was made known to the Designated Instruments Officer at the Department of the Environ-

ment in June, 1975, but to date the Committee has had no response.

Criterion No. 5 (b)—makes the rights and liberties of the subject dependent on administrative discretion rather than on the judicial process.

1. The Committee draws attention, in this context also, to its comments infra, section T on the granting of powers in discretionary form.

2. SOR/72-263, Sale of Postage Stamps Regulations

Section 14 of these Regulations gives to any Postmaster an unfettered power to cancel any licence at any time issued under the Regulations. While the Committee is exercised by the authority for the sub-delegating of such power to Postmasters, it is more concerned by the fact that no grounds or criteria are spelled out as justifying cancellation and by the lack of any provision for a hearing or any opportunity for the licensee to be heard or of any obligation to assign a cause for cancellation. Even if it should be that, contrary to the view of the advisers to the Privy Council Office, an action for review of the decision to cancel a licence will lie under section 28 of the Federal Court Act in the event that the rules of natural justice are ignored, the Committee feels that the subject should not necessarily be forced to litigation. Given the uncertainty which seems to surround the availability of jurisdiction under section 28, the Committee considers that the requirements of natural justice should be included in the regulations, not only to protect the subject but also to ensure jurisdiction in the Federal Court under section 28 of the Federal Court Act. To the extent that the decision to cancel is a purely administrative one, thus precluding review under Section 28, the elemental safeguards of natural justice are the more necessary.

Criterion No. 6—purports to have retroactive effect where the enabling statute confers no express authority so to provide or, where such authority is so provided, the retroactive effect appears to be oppressive, harsh or unnecessary.

1. SOR/74-259, Meat Inspection Regulations

Section 3 (2) of these Regulations provided that section 3 (1), which had the effect of increasing meat inspection fees in registered establishments, should come into force on April 1, 1974. However, the Regulations themselves were not made until April 23, 1974 and not registered until April 24, 1974, being published in the Gazette on the 8th of May in the same year. There is no authority in the Meat Ispection Act for the making of any retroactive Regulations or the increasing of fees retroactively. The Department of Agriculture replied to the Committee's expression of concern, explaining the delays that had occurred and assuring the Committee that the Departmental Legal Officers had already expressed their view that the increase in fees did not take effect until April 23, 1974 and that this conclusion had been made known to the departmental officers concerned in the implementation of the Regulations.

2. SOR/72-329, Science Education Sets Regulations

The above Regulations were made pursuant to the Hazardous Products Act. Section 3 (1) of the Regulations was expressed to commence on the 1st of April 1972. Yet the Regulations were not made until the 24th of August, registered on the 28th of August and published on the 13th of September 1972. The Department of Consumer and Corporate Affairs conceded that section 3 (1) of the Regulations was retroactive and advised that neither the officials of the Department nor the draftsmen of the Regulations intended this result. The Department further advised that no prosecution under the section had taken place and gave as its opinion that, since the supply of chemistry sets the importation of which predates 1972 was diminishing, it was unlikely that a prosecution would arise. The Department's Legal Officers had advised the officials concerned that should a violation arise concerning such a chemistry set they were not to consider prosecution. In this instance the Committee did not regard such advice to the departmental officials as sufficient and has requested that the purported retroactivity of section 3 (1) be removed by an amendment to the Regulations, in order to obviate any possibility of prosecution and any detriment to the rights of the subject.

Criterion No. 7—appears for any reason to infringe the rule of law or the rules of natural justice.

1.The Committee refers to its comments infra section S, on the powers of entry and of inspection of officers of agricultural and commodity boards.

2. SOR/76-181, Restrictive Trade Practices Commission Rules

Rule 13 (2) is so drafted as to give the Commission a discretion to give or to refrain from giving reasons for an Order. The Commission has advised the Committee that such a result was not intended and that reasons will always be given. What was intended was to acquire the power to make an Order, with the reasons to be published subsequently, except in the case of a consent Order. A provision that reasons would always be given was omitted from the Rules in the drafting stage. Steps are being taken to give effect to the Commission's intentions.

3. SOR/72-466, Hatchery Regulations

Sections 5 and 6 of these Regulations deal with the issuing of permits, without which it is unlawful to conduct hatcheries. Section 5 requires that an application for a permit be made to the District Supervisor who reports to the Minister on the acceptability of the proposed hatchery. Under section 6 the Minister has a complete power to grant or to withhold a licence notwithstanding the content of the District Supervisor's report. However, should an unfavourable report be submitted to the Minister, there is no requirement that the applicant be so informed, or that he be given an opportunity to be heard in rebuttal.

The Department of Agriculture advised the Committee that it is the invariable practice of Regional Directors to discuss any inadequacies in an applicant's facilities before a report is submitted to the Minister. The Department has, however, acknowledged that such processes of consultation and advice to applicants should be regularized and coupled with a right to

be heard in any applicant who considers the Regional Director to be wrong in his assessment.

4. The Committee has under continuing study *SOR/75-196, Public Service Inquiry Regulations*, which pose certain problems of procedural safeguards for public servants who have been suspended by the Governor in Council "in the interest of the safety or security of Canada or any state allied or associated with Canada" pursuant to section 7 (7) of the Financial Administration Act. Not least amongst these problems is the right of the public servant to know the case against him.

Criterion No. 8—provides without good and sufficient reason that it shall come into force before registration by the Clerk of the Privy Council.

While the Committee has attempted to ascertain the reasons why certain Regulations should come into force before being registered, it has not been successful. This matter is discussed in section E, paragraphs 33, 34 and 35 infra. Consequently, the Committee is unable to say whether any regulations have come into force before registration without good and sufficient reason therefor.

The Committee has noted instances of statutory instruments, not being regulations, coming into force many months before their registration, and this matter is also discussed in section E, paragraph 24 infra.

Criterion No. 9—in the absence of express authority to that effect in the enabling statute or prerogative, appears to amount to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment, and not merely to the formulation of subordinate provisions of a technical or administrative character properly the subject of delegated legislation.

1.The Committee wishes to refer to section K infra on the making of subordinate legislation under Votes in Appropriation Act and Items in the Estimates.

2. SOR/73-153, Trade Mark Rules, amendment

This amendment added a new Rule 12 to the Regulations. The old Rule 12 forbade the Registrar to furnish any information the giving of which required him to search his records or to express any opinion which concerned the interpretation of the Act or the Rules or the registrability of any trade marks not the subject of a pending application for registration. Parliament had itself provided for the opening of the Register in limited circumstances in section 28.

The new Rule 12 gives to the Registrar a discretion to furnish the information or express the opinions he was previously forbidden to furnish or express if in his discretion he considers this course to be in the public interest.

The Committee is still pursuing the vires of this new Rule and the desirability and scope of the discretion now given to the Registrar, but wishes now to report that it considers that the circumstances in which the Register should be open and opinions expressed as to the interpretation of the Act, the Rules or the registrability of trademarks should be specified by Parliament, as it already has in some degree in section 28 of the Act, and not by subordinate legislation.

3. SOR/75-558, National Energy Board Part VI Regulations, amendment

Section 17 of the National Energy Board Act reads:

"(1) Subject to subsection (2), the Board may review, rescind, change, alter or vary any order or decision made by it, or may re-hear any application before deciding it.

(2) The Board may *change*, *alter*, or *vary* a certificate or licence issued by it but no such change, alteration or variation is effective until approved by the Governor in Council."

Section 10 of the Regulations previously read simply:

"10. Every licence shall state

(*a*) in the case of gas, the total quantity of gas that may be exported or of gas that may be imported thereunder, and the maximum quantities for any daily, monthly, annual or other appropriate period, and

(*b*) in the case of electrical power and electrical energy, the quantities in terms of kilowatts and kilowatthours that may be exported thereunder, the quantities if any that may be imported as an offset to the export, and the maximum quantities for any daily, monthly, annual or other appropriate period with respect to both exports and imports."

Section 10 was then amended to read as follows:

"10.(1) *Subject to subsection (2)*, every licence shall state

(*a*) in the case of gas, the total quantity of gas that may be exported or of gas that may be imported thereunder, and the maximum quantities for any daily, monthly, annual or other appropriate period, and

(*b*) in the case of electrical power and electrical energy, the quantities in terms of kilowatts and kilowatthours that may be exported thereunder, the quantities if any that may be imported as an offset to the export, and the maximum quantities for any daily, monthly, annual or other appropriate period with respect to both exports and imports.

(2) Every licence for the exportation of gas is subject to the condition that where the Board has, pursuant to subsection 17 (2) of the Act, varied the quantity of gas stated in the licence that may be exported thereunder the licensee will, notwithstanding the quantity stated in the licence, export no greater quantity of gas than that specified in the order of the Board that varies the licence."

Counsel to the National Energy Board explained to the Committee the need for the amendment embodied in SOR/75-558 as flowing from the desire of the Board to reduce licensed quotas for the export of natural gas should such reductions appear to the Board to be in the public interest. It has been argued forcefully by some lawyers for licencees that a reduction in a gas export quota is not a change, alteration or variation of a licence which can be effected simply under section 17 (2) but rather a partial suspension or cancellation of a licence which can only be effected under section 84 (1) of the

Act for violation of a term or condition of the licence, with the attendant safeguards to the licensee of notice and an opportunity to be heard. In order, therefore, to allow for an unchallengeable reduction in a licensed quota it was decided to proceed by making every licence *subject to the condition* that if a change, alteration or variation were effected under section 17 (2) of the Act it would be obeyed, notwithstanding the fact that if such a condition did not form part of the licence it might be possible to challenge the change as ultra vires section 17 (2) of the Act and as not conforming to the grounds and procedural requirements for a suspension or cancellation specified in section 84 of the National Energy Board Act. Left at that, there would arise a situation in which *new* licences would be made subject to this condition but old licences would not, for otherwise the new section 10 (2) of the Regulations would be being given a retroactive operation for which there is no warrant. However, this obstacle in the Board's path is overcome by section 82 (3) of the Act itself which permits the new section 10 (2) of the Regulations to attach to licences both old and new, for it reads:

> "(3) Every licence *issued* under this Part is subject to the condition that the person to whom it is issued will comply with the provisions of this Act and regulations as in force at the date of the issue thereof *and as subsequently enacted, made or amended* and will comply with *every order* made under the authority of this Act."

By a process analogous to pulling itself up by its own bootstraps, the object of the Board has been achieved by subordinate legislation. Such an interference with established rights ought to be carried out under explicit statutory enactment.

4. SI/75-50, Representational Gifts Remission Order

This Order provides that "in recognition of international comity and practice that Heads of State, Heads of Government, Ministerial representatives of Government and Members of Parliament exchange gifts during official visits" customs duty, sales tax and excise tax shall be remitted on gifts received by the Prime Minister, Ministers and Members of Parliament on official visits to other countries or presented by visiting foreign donors in Canada. The enabling power is section 17 of the Financial Administration Act which empowers the Governor in Council "whenever he considers it in the public interest" to remit "any tax, fee or penalty". The Committee has commented on Remission Orders made under this section infra, section P. In this instance, the Committee considers the Order as one not concerned with administrative detail but constituting a substantive departure from established taxation law, incorporating into the law of Canada an aspect of "international comity and practice" and creating a class of privileged persons marked otherwise than by the conferring of titles or orders. As such, it seems appropriate for legislative action by Parliament.

Criterion No. 10—without express provision to the effect having been made in the enabling statute or prerogative, imposes a fine, imprisonment or other penalty, or shifts the onus of proof of innocence to the person accused of an offence.

The Committee has not had occasion to invoke this criterion.

Criterion No. 11—imposes a charge on the public revenues or contains provisions requiring payment to be made to the Crown or to any other authority in consideration of any license or service to be rendered, or prescribes the amount of any such charge or payment, without express authority to that effect having been provided in the enabling statute or prerogative.

1. SOR/74-98, Seaway Regulations

Section 75 (2) of these Regulations provided for the imposition of a surcharge when a toll account was not paid within fourteen days of the date shown on the account. It appeared to the Committee that neither section 20 of the St. Lawrence Seaway Authority Act, pursuant to which the Regulations were made, nor section 16 of the same Act relating to the establishment of tolls, conferred any authority for the imposing of such a surcharge or penalty. The remedy for an unpaid account provided for by the Act is detention and ultimately the sale of the ship and the cargo. After several exchanges of correspondence with the St. Lawrence Seaway Authority, which was acting in order to provide for uniformity with the equivalent American regulations, the Authority agreed to delete the surcharge provision, and such deletion was effected by SOR/76-225.

2. SOR/76-121, Olympic Stamp Draw Regulations

These Regulations, made under section 190 (1) (*a*) of the Criminal Code, permitted the Postmaster General to conduct a draw in the nature of a lottery amongst persons who affixed Olympic stamps to an entry card. The Regulations provided for prizes but there was no authority for the Postmaster General to expend public moneys upon such prizes. This was pointed out to the Designated Instruments Officer at the Post Office. Subsequently, by Order in Council P.C. No. 1976-1042 of 5th May 1976, which has not been registered and published as a statutory instrument or regulation, the Governor in Council, pursuant to section 52 of the Financial Administration Act, directed the Postmaster General to transfer public property, in the form of money, to prize winners. While section 52 provides that no transfer of public property shall be made to any person, except "on the direction of the Governor in Council or in accordance with regulations of the Governor in Council ..." the Committee entertained some doubt as to whether section 52 is anything more than a procedural requirement which only arises after actual authority exists for the transfer of the property. However, the Committee is now satisfied that section 52 authorizes Order in Council P.C. No. 1976-1042 and awaits only confirmation of a valid parliamentary appropriation covering expenditure by the Post Office on the airline tickets purchased as prizes.

Criterion No. 12—is not in conformity with the Canadian Bill of Rights.

SOR/75-525, Northwest Atlantic Fisheries Regulations, amendment

The only occasion on which the Committee has invoked this Criterion was a recent amendment to the Northwest Atlantic

Fisheries Regulations, SOR/75-525. The amendment inserted into the Regulations a new section 17 (1.1) which provides for forfeiture of fishing gear or fish, without conviction of any offence having been entered, in circumstances where the ownership of the gear or fish, having been seized pursuant to other provisions of the Regulations, can not at the time of seizure be ascertained by the seizing officer. This provision must have been thought necessary since the Fisheries Protection Officer could logically believe on reasonable grounds that fish had been caught contrary to the Regulations, or that gear had been used in connection with the commission of an offence under the Act or the Regulations, thus justifying seizure, without his being able at the moment of seizure to identify the owner or owners of the gear or the fish, who might be then charged and convicted.

This provision was inserted in the Regulations by way of exception to section 17 (1) which provides for forfeiture only after conviction of an offence. The Committee formed the tentative view that forfeiture of goods to Her Majesty without conviction was ultra vires the Northwest Atlantic Fisheries Convention Act and contrary to the Canadian Bill of Rights, section 1 (a), in particular "the right of the individual to enjoyment of property and the right not to be deprived thereof except by due process of law". The Committee does not believe that seizure upon "reasonable grounds of belief" and subsequent forfeiture without conviction accords with reasonably accepted notions of "due process of law". This view was made known to the Ministry of State (Fisheries and Marine) by letter of 24 March 1976. Despite a subsequent reminder the Ministry has yet to reply to the Committee's request for an explanation of this provision.

Criterion No. 13—is unclear in its meaning or otherwise defective in its drafting.

1. SOR/75-493 and SOR/75-552, Atlantic Crab Fishery Regulations, amendments

In examining the above regulations it appeared to the Committee that subsections (1) and (2) of section 13 as contained in SOR/75-493 were inconsistent. While subsection (1) permitted the fishing for, retaining, buying, selling and having in possession, and thus by implication the catching of a snow crab, in waters adjacent to the coast of Newfoundland, that is 3 3/4 inches or more in width, subsection (2) commanded the immediate return to the water of *any* snow crab caught in the waters adjacent to the coast of Newfoundland. It would be impossible to obey subsection (2) and have the benefit of subsection (1).

The Committee noted that section 13 was amended by SOR/75-552 by deleting the words "caught in the waters adjacent to the coast of Newfoundland", thus making the section of general application. Consequently, the words "in the waters referred to in subsection (1)" should have been deleted from subsection (2), for there were then no waters mentioned in subsection (1) to which reference can be made. Even if the words "in the waters referred to in subsection (1)" were deleted the inconsistency between subsections (1) and (2) would remain, for subsection (2) would read:

> "(2) Any snow crab or any soft-shelled crab caught shall be returned to the waters immediately."

The Committee wondered if this subsection should not read:

> (2) Any person catching a soft-shelled crab or a snow crab of less than three and three-quarters inches in width shall return the same to the water immediately.

or words to the like effect.

The Committee has not received a reply to its observations from the Ministry of State (Fisheries and Marine), but the Regulations were revoked by S.O.R.76-359 which made an entirely new set of Regulations in which the inconsistencies noted by the Committee were avoided.

2. The Committee considers it to be especially important to insist on clear drafting when offences are created. In two sets of fisheries regulations the Committee has objected to similar provisions making it an offence to fish for certain species, to catch and retain them or to have them in possession, without using clear terms to say so. The first example is found in section 12 (1) of the Northwest Atlantic Fisheries Regulations (SOR/74-59 and SOR/74-549) which states that "no person fishing ... shall fish for, catch or retain any sea scallops". The words of section 12 (1) suggest that catching sea scallops is as much an offence as fishing for them. This wording contradicts section 12 (3) which contemplates the return to the waters of the undersized scallops caught. The Committee then suggested that the following drafting be adopted for section 12 (1):

> "No person fishing in ... shall fish for, or catch and retain any sea scallops."

The Department of the Environment followed the Committee's suggestions in its drafting of the new section 11 (1) of the Northwest Atlantic Fisheries Regulations (SOR/75-99) which added to the proscription of fishing for haddock in certain areas a prohibition on catching and retaining haddock in excess of certain quantities. The Department has not yet amended section 12 of the same Northwest Atlantic Fisheries Regulations in the manner recommended by the Committee.

Another example of this type of offence was found in the Quebec Fishery Regulations (SOR/75-420 as amended) where section 11 (1) provides that "no person shall catch, take, or have in his possession an anadromous salmon of less than twelve inches ...". Section 30 (1) of these regulations affords the possibility to any person who has caught or taken a fish contrary to the Act or Regulations to return it alive to the waters. In order to reconcile section 11 (1) with the meaning of section 30 (1), the Committee suggested that the drafting be changed in the following way:

> "no person shall catch or take and retain, or have in his possession ..."

The Committee has been particularly exercised by these regulatory provisions because it would appear that as a result of *The Queen* v. *Pierce Fisheries Ltd.* [4] catching or having in possession pursuant to fishery regulation is an offence of strict liability of which mens rea is not an essential ingredient. It is, therefore, very important that the drafting of this type of offence be precise, because the subject should be able in reading the regulations to know precisely if it is an absolute

offence to fish for a prohibited species, or merely to catch it, or to catch it and retain it or to have it in possession. In the context of the new Atlantic Crab Fishery Regulations S.O.R. 76-359, the Committee has asked the Department of the Environment why a standard formula for offences can not be used.

3. SOR/75-472, Petroleum Administration Act, Part I Regulations

Section 4 of these Regulations stipulates that the return of information required under section 13 (1) of the Petroleum Administration Act "shall be in the form set out in the Schedule to the Regulations". Section 5 of the Regulations lists certain specific items of information which must be included in the return. However, the form of return prescribed in the schedule does not contain any space in which the information required by section 5 can be put.

4. SOR/76-80, Gasoline Excise Tax Refund Regulations

Section 4 of these Regulations provides that every application for a refund, in the form set out in the Schedule to the Regulations, shall shew one of five numbers issued by the Department of National Revenue (Taxation or Customs and Excise). Section 5 in the English text provides that "every application shall shew the same number on each *claim* submitted". From a reading of the French text and of the Regulations as a whole, the Committee concluded that what was meant was: "Every application submitted by the same applicant shall shew the same number, as determined under section 4 ...". The word "claim" did not appear in the enabling power or elsewhere in the Regulations and its use served only to confuse. The Department of National Revenue (Customs and Excise) has agreed to redraw section 5 as suggested by the Committee.

5. SOR/74-605, Urban Development and Transportation Plans Regulations

Section 3 of these Regulations reads as follows:

> "3. (1) The part of the costs that may be included in calculating the amount of any payment authorized pursuant to subsection 3 (3) of the Act are those costs that are, in the opinion of the Minister of Transport, in the case of a transportation plan, or the Minister of State for Urban Affairs, in the case of an urban development plan, incremental to the normal operating costs incurred in the preparation of the plan by the recipient of the payment.
>
> (2) Any interest on funds borrowed in respect of the preparation of a plan shall not be included in calculating the incremental costs referred to in subsection (1)."

The formula for determining the costs that may form the basis of a payment is expressed to be "those costs ... incremental to the normal operating costs incurred in the preparation of the plan by the recipient of the payment". It is easy to envisage what "costs incremental to the normal operating costs of the recipient" would be. But it is difficult to comprehend what are "normal operating costs incurred in the preparation of the plan." Taken literally that would restrict the relevant costs to those which are truly exceptional. At first sight this might be thought to include public relations work and so on. But then that would not be a cost incurred in the preparation of the plan.

It is possible that what was meant was:

> (*a*) those costs incurred in the preparation of the plan which are in addition to the normal operating costs of the recipient of the payment.

or somewhat differently expressed

> (*b*) those costs that are incurred in the preparation of the plans by the recipient and are incremental to its normal operating costs.

Under either (*a*) or (*b*) the costs are all those not normally borne by the recipient as part of carrying on its usual activities. Thus the recipient would not be able to apportion to the cost of preparing the plan its usual and continuing expenses for rent, secretaries, typewriters, draughtsmen, coloured inks, etc. but could only charge costs specially incurred for the projects, e.g. special staff hired, space rented, supplies purchased, etc. But whatever is meant it can be argued that it can not be "costs incremental to normal operating costs incurred in the preparation of the plan" if the preparation of the plan is not normal but rather extraordinary and the costs of preparing one cannot therfore be normal operating costs.

The section as it now stands gives the Minister the power, rather the discretion, to determine what are "incremental costs" and hence the costs to be refunded to the recipient. Section 3 (3) of the Act empowers the Minister to pay "part of the cost" and presumably the regulations "in that behalf" were to specify what that part of the cost was to be, subject to the 50% ceiling in subsection (4). By giving the Minister the power to form an opinion as to what is incremental cost the Governor in Council has in effect delegated to the Minister the power to determine the "part of the cost" which is to be paid. Admittedly whatever formula is set for determining the part of the cost to be paid someone must do the sums to produce the amount of refund. Yet the combination of the vague formula of incremental cost—the Committee can foresee the disagreement over apportioning heating bills when the planners work later than anyone else—and the Minister's unfettered discretion to determine its amount means that the purpose of subsection 3 (3) has been entirely subverted. Parliament might just as well have enacted:

> 3. Subject to subsection (4) and to such regulations as may be made by the Governor in Council, the Minister may authorize the payment out of moneys appropriated by Parliament therefor of such part as he considers reasonable of the cost of preparing such one or more transportation plans, in respect of a transportation study area, as he considers desirable for the transportation study area.

The Ministry of State for Urban Affairs advised the Committee that there did appear to be ambiguity in the words of section 3 (1) of the Regulations and that the *two* alternative meanings suggested by the Committee were being followed by

the Ministry. The Ministry wished to have more time and experience in operating these new regulations before deciding which interpretation it wished to adopt. Similarly, the Ministry wanted the advantage of practical experience before limiting ministerial discretion. These practical considerations were acceptable to the Committee in April 1975. The Committee considers that the Ministry should now be in a position to clarify these Regulations as it understands that eight schemes for relocation of railway undertakings are now in effect. However, the Director of Legal Services for the Ministry of State has advised the Committee that "experience to date does not warrant or justify putting forth changes to the Regulations at this time". The only crumb offered is that the Committee's comments will "be kept on file and, at such time as it is considered that amendments are warranted, will be given due consideration by this Department and by the Department of Transport". Meanwhile, the Minister's discretion continues unchecked.

Criterion No. 14—for any other reason required elucidation as to its form or purport.

1.The Committee has, under this criterion, consistently called attention to the granting in subordinate legislation of discretionary decision-making powers. The Committee draws attention to its remarks in section T infra.

2. SOR/75-413, Fishing Vessels Insurance Regulations

Section 27 of these Regulations deals with the return of premium paid in excess of the amount that is required by the Regulations and of a premium paid where "the Minister is of the opinion that the purpose for which the premium was paid has not been and cannot be fulfilled under these Regulations". Yet, in these circumstances the Minister is given a discretion to return the excess amount of the premium, or not to return it! This appeared to the Committee to call for an explanation which has not been forthcoming.

3. SOR/75-67, Unemployment Insurance Regulations amendment, amending section 145 (9) of the principal Regulations, as amended by SOR/72-221

This amendment provides that for certain purposes of the Act, a claimant fails to prove that he is available for work and unable to obtain suitable employment on each working day in a period "if he fails to prove that during that period he made reasonable and customary efforts to obtain employment".

The Committee wished to be informed as to how this test was applied and what criteria existed as to its use.

The Unemployment Insurance Commission made available to the Committee a copy of that part of its Guidelines which relates to the conduct of the Active Job Search Programme and explained the claimant's right of appeal to a Board of Referees and to an Umpire, who is a judge of the Federal Court of Canada. Upon further enquiry, the Commission advised that decisions of Umpires are automatically examined as a basis for changes in the Guidelines. With these answers the Committee felt justified in concluding that there were adequate safeguards for claimants. The position of Departmental Guidelines is commented upon in section E infra.

12. The Committee wishes to emphasize that in scrutinizing statutory instruments it is not limited in terms of its criteria, which have been approved by both Houses, to question of vires, lawfulness or simple invalidity through non-compliance with procedural requirements, conditions precedent or matters of form. To take but one stark example, the Committee is not bound by what is sometimes said to be the ratio of *In Re Gray* [5] and other cases arising under the War Measures Act in both World Wars "that the Governor in Council may under a general (regulatory) power legislate inconsistently with any existing statute and also take away a right acquired under a statute." [6] Any statutory instrument found to be inconsistent with an existing statute or which took away a right acquired under a statute (or another statutory instrument) would be scrutinized most rigorously by the Committee under criteria 4, 7 and 9.

13. The Committee's concern does not extend to the policy contained in or carried into force by statutory instruments. Nonetheless, in applying criterion 4, "unusual or unexpected use of enabling power", the Committee often desires to be informed of the reason for a particular statutory instrument and the manner in which it is implemented. The explanations offered by departments have on several occasions indicated that what was involved was not an unusual or unexpected use of the enabling power in carrying out a policy but rather the matter of policy itself, with which the Committee has no concern unless it contravenes one of the criteria for scrutiny.

C.—THE SUBORDINATE NATURE OF STATUTORY INSTRUMENTS

14. With the exception of statutory instruments made under the Royal Prerogative, which are original or primary legislation no less so than are statutes, all statutory instruments subject to the Committee's scrutiny fall into that class known as subordinate or delegated legislation. The Committee wishes to emphasize at the outset that subordinate legislation is, and must be regarded as being, subordinate, for otherwise Parliamentary supremacy will have been abandoned. The Committee can make this point no more clearly than did the Committee on Ministers' Powers (Donoughmore Committee) in 1932:

> "The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate. Parliament is supreme and its power to legislate is therefore unlimited. It can do the greatest things; it can do the smallest. It can make general laws ... it can make a particular exception out of them in favour of a particular individual. It can provide ... for the payment of old age pensions to all who fulfill the statutory conditions; it can also provide—and has in fact provided—for boiling the Bishop of Rochester's cook to death. But any power delegated by Parliament is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated." [7]

As will become apparent from this Report, the Committee has come upon many instances of denial of this basic proposition

that delegated legislation is necessarily subordinate. There seems to be an unwillingness to understand that a delegate simply can not do everything that Parliament could have done had it chosen to legislate in extenso.

15. The claim to give subordinate legislation a non-subordinate status is well illustrated by three recurring issues that have confronted the Committee: the claim to a power to dispense with regulations in favour of particular individuals, the claim to an unfettered power to sub-delegate the rule-making power conferred by Parliament and the claim to a plenitude of legislative power whenever the enabling authority confers power to make regulations "respecting" a specified subject matter. Each of these issues receives a separate treatment.

16. The Committee cannot accept that the actual decisions, or dicta, in *In Re Gray*,[8] *the Chemicals Reference*[9] or other cases arising under so exceptional a statute as the War Measures Act are any guide to the true nature of subordinate legislation or to the principles of construction and interpretation to be placed on other statutes and the enabling sections contained within them in normal times of external peace.

D.—AVAILABILITY OF SUBORDINATE LEGISLATION TO THE PUBLIC IN COMPREHENSIBLE FORM

17. It is, perhaps, not surprising that in Canada, which has made so late a start upon the scrutiny of subordinate legislation, there persists the view that statutory instruments need not be made generally available and need not be put in as simple, comprehensible and explicable form as is possible. This view rests on the assumption that ordinary folk will not concern themselves with statutory instruments and that those affected by them, or who need for their own protection to take account of them, lawyers, businessmen, fishermen, farmers and so on will take thought for themselves and make it their own business to find out what the law is, through lawyers, trade associations, commercial services and the like. While the Committee acknowledges that this may well be the case, the premisses of the argument are wrong. If once admitted, the conclusion must also follow that the statutes need never be revised, consolidated or published in compendious form, because those affected will themselves do all the necessary research and piecing together of amendments. And, however effective the commercial services may be, there is something fundamentally amiss when even officers of Government themselves depend on an outside commercial service for a consolidation of their own regulations.

18. The Committee believes that the law is directed to all Her Majesty's subjects. This is as true of subordinate legislation as it is of statute law. It is as true of statutory instruments as it is of the Acts under which they are made. This being so, statutory instruments should be as intelligible, as explicable and as little mysterious as man can devise.

19. Statutory instruments pose quite serious problems for the fulfillment of the Committee's views. First, they are not self-contained, as is a statute, and refer at least to the enabling Act and often to other documents as well. Secondly, there is a great number of them, large and small, and certainly far more than there are statutes. Thirdly, many of them are frequently amended so that over time a multiplicity of amendments collect around a single statutory instrument. Subsequent re-amendment and further re-amendment of the initial amendment is not uncommon.

20. Faced with these obstacles, which are far from negligible, the Committee realizes that the comprehension of a statutory instrument, its relation to its enabling power and its inter-relationship with other statutory instruments and prior amendments will never be an easy matter. But the Committee believes that it can and should be made much easier than it is at present. The recommendations contained in section F: "Matters Relating to the Form of Statutory Instruments" are designed to facilitate that increase in comprehensibility of statutory instruments, necessary so that in truth they will be directed to people and not to lawyers and officials only. The Committee feels strongly about its philosophy in this matter and trusts that the greater readiness recently shown by the officers of the Privy Council will lead to a dramatic improvement in the ease with which statutory instruments may be understood and in the information about the subordinate legislation and the enabling power which they disclose.

E.—DEFECTS IN THE STATUTORY INSTRUMENTS ACT, PRINCIPALLY THE DEFINITION OF A STATUTORY INSTRUMENT

21. The Committee wishes to place before both Houses the problems and difficulties which it has encountered as flowing from the text of the Statutory Instruments Act itself. Some of these problems are more serious than others, but by far the most important and difficult is the very definition of a statutory instrument which the Committee has found incomprehensible and unworkable, and productive of inconsistency in approach even by the Legal Advisers to the Privy Council Office with whose approach to the definition the Committee can not agree. Nevertheless, it is the Legal Advisers who are the persons who actually apply the definition and whose views are, therefore, complied with by Departments of State and regulation-making authorities.

22. Before this, and other problems, can be understood the general structure of the Statutory Instruments Act must be appreciated. The Act gives a definition of a statutory instrument and provides that all statutory instruments, except those which are lawfully kept secret—(9a) shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments".[10] From amongst this class of statutory instruments the Act defines a narrower class called "regulations", not to be confused with the word "regulation" as defined in the Interpretation Act. It is only a regulation as defined in the Statutory Instruments Act which must under that Act be scrutinized in draft by the Legal Advisers to the Privy Council Office, be registered and published in the Canada Gazette

Part II within certain time limits prescribed by the Act. A statutory instrument which is not a regulation need not be registered and need not be published unless registration and/or publication is specifically provided for in one of three ways:

(i) if it is required or authorized by statute to be published in the Gazette, and it is so published, it must also be registered; (no list of such statutory instruments is maintained by the Privy Council Office or by the Department of Justice.);

(ii) if it is required or directed to be published in the Canada Gazette by the Clerk of the Privy Council pursuant to regulations made under section 27 (g) of the Statutory Instruments Act;

(iii) if it is required to be published because it falls within a class of documents the publication of which in the Gazette is prescribed by regulation under section 27 (h) of the Statutory Instruments Act.

23. The classes of documents which must appear in the Gazette are defined by section 11 (3) of the Statutory Instruments Regulations as:

"(*a*) orders made by the Governor in Council under the Public Service Rearrangement and Transfer of Duties Act;

(*b*) orders made by the Governor in Council whereby any member of the Queen's Privy Council for Canada is designated to act as Minister for the purposes of any Act of parliament;

(*c*) proclamations; and

(*d*) orders made under section 17 of the Financial Administration Act that are of continuing effect or apply to more than one person or body."

It is not at all clear which documents from these classes are statutory instruments and the Legal Advisers to the Privy Council Office have declined to identify those which they consider to be statutory instruments. The Committee has never been told which types of statutory instruments the Clerk of the Privy Council has decided should be published in the public interest. The Committee has only been furnished with a list of those individual statutory instruments that have been so published.

24. It is unfortunately the case that a mere statutory instrument which is to be published in the Gazette need not be registered and published within any time limits. The Committee has seen instances of Proclamations published months, and in one instance eleven months, [11] after they were issued. By operation of section 6 of the Interpretation Act, as amended by the Statutory Instruments Act, it would seem that a statutory instrument not being a regulation comes into force "upon the expiration of the day immediately before the day" on which it was made, unless some other day is specified for entry into force. Thus, every statutory instrument which is not a regulation that is registered and published will come into force before registration and publication, except in the inconceivable case in which it is made, registered and published all in the one day. The Committee can not regard as satisfactory a law which on the one hand treats some statutory instruments as sufficiently important to be registered and published, yet allows them to come into force perhaps months beforehand when they are made. The Committee regards as highly desirable a general rule that no subordinate legislation should come into effect until registered *and* published. This general rule applies neither to regulations nor to mere statutory instruments under the Statutory Instruments Act.

25. The Committee is faced, then, with a situation in which undoubtedly many statutory instruments are "issued, made or established", to use the language of the Act, but are not published in the Canada Gazette or in some other central location, and are nowhere registered. This makes a mockery of the permanent reference of all statutory instruments to the Committee under section 26 of the Statutory Instruments Act. If the Committee does not know of statutory instruments, and has no means of knowledge of their existence, it can not scrutinize them. The consequence of this state of affairs is that while the Committee has the jurisdiction under section 26 of the Statutory Instruments Act and the references of the two Houses to scrutinize all but the "secret" statutory instruments, it has access only to those which are regulations (but not secret regulations) and to those statutory instruments which happen to be published in the Gazette, an event over which the Committee, of course, has no control. The Committee and its counsel occasionally stumble across other statutory instruments, and yet others are volunteered for scrutiny by Departments and governmental agencies, notably the Department of National Defence.

26. The Committee must report that in the absence of any legal requirement that *all* statutory instruments be either centrally registered and published or sent to the Committee by those who make them, the Committee is not able effectively to carry out the functions assigned to it by statute and by the two Houses.

27. The Committee has had neither the time nor the resources to step into the twilight world of unpublished statutory instruments. Consequently, it has the opportunity to scrutinize only those which come to its attention either by being volunteered, as is the case of the statutory instruments of the Department of National Defence, or by chance. The Directives of the Commissioner of Penitentiaries are a special case. They are unpublished, but have been made available to the Committee which considers them to be not only statutory instruments but regulations (Vide paragraphs 38-40 infra). A special study of these Directives has been commissioned by the Committee from the John Howard Society of Ontario.

28. The Committee also wishes it to be noted that its scrutiny is ex post facto only. Until a statutory instrument has been "issued, made or established" the Committee is not seized of it. Only regulations, and not other statutory instruments, are subject to a statutorily prescribed procedure for transmission in draft for scrutiny by the Crown's lawyers before making, registration and publication. While a regulation is thus scrutinized twice, by the Legal Advisers to the Privy Council Office before, and by the Committee after, it is made, a mere statutory instrument may never be checked, examined or scrutinized by anyone. It will not be seen by the Legal Advisers to the Privy Council Office and it will only

come before the Committee if it is published in the Gazette or by chance.

29. It may be noted in passing that the criteria by which the Legal Advisers to the Privy Council Office scrutinize draft regulations are set out in section 3 (2) of the Act as follows:

"(*a*) it is authorized by the statute pursuant to which it is to be made;

(*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards."

It will be readily seen that these criteria are both less numerous and more restricted than those used by the Committee for the subsequent scrutiny of the same regulations after they have been made (and almost invariably after they have already entered into effect).

30. The problem caused by the silence of the Statutory Instruments Act as to how statutory instruments, which are not regulations or are not published in the Canada Gazette, are to become known to the Committee would be serious enough if the Committee, on learning of the existence of a document, could determine readily whether it were a statutory instrument or not. But this the Committee can not do and the problem is accordingly critical. The definition of a statutory instrument provided in the Act is incomprehensible. The Committee has devoted a great amount of time and effort to trying to glean from the words of section 2 (1) (*d*) of the Statutory Instruments Act a clear meaning and a clear definition of a statutory instrument. The effort has been wasted and legislative action is necessary.

31. For expository purposes it is true that a statutory instrument may be taken as meaning a document which embodies subordinate legislation authorized by statute or a rule made in the exercise of the Royal Prerogative. It is equally true that, if a statute is the ultimate authority for a document, that document is potentially a statutory instrument. But the Committee needs to know with precision whether a document is a statutory instrument, for if it is not it has no business considering it. And if it is no one can attempt to deny or to thwart the Committee's scrutiny. Unfortunately, the definition of a statutory instrument is so hedged about with exceptions, at one and the same time explicit in nature but obscure in meaning, and with qualifications direct and indirect, and is so flawed with a triple negative that it is useless.

32. Section 2 (1) (*d*) of the Statutory Instruments Act reads as follows:

"(*d*) "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but does not include

(iii) any such instrument issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(iv) any such instrument issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(v) any such instrument in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(vi) an ordinance of the Yukon Territory or the Northwest Territories or any instrument issued, made or established thereunder."

The Committee's main concern has been with paragraph (i) but it must also note that it can give no clear meaning to the words following the words "exists by law" in sub-paragraph (v), a matter to which this Report will return.

33. Turning to sub-paragraph (i) of section 2 (1) (*d*) these words have been interpreted by the Legal Advisers to the Privy Council Office, a section of the Department of Justice, as meaning:

(i) No instrument can be a statutory instrument unless the enabling power under which it is made expressly names a type of document in the form of which the instrument is to be issued. This has come to be known to the Committee as the magic formula approach for unless an enabling power reads that the Governor in Council (Minister, Commission, etc.) may "*by Order*", "*by rule*", "*by regulation*", "*by warrant*", "*by tariff*" and so on, there can be no statutory instrument. This interpretation would remove from the class of statutory instruments, and hence from the Committee's scrutiny, instruments made under enabling powers now in very common use, for example: "... according to terms and conditions as the Governor in Council may prescribe ...", "...

the Minister may prescribe ...", "... the Board may regulate ... and may fix, impose and collect ...".

(ii) No instrument can be a statutory instrument unless it is a document which falls within the class common to the types of document catalogued in the opening words of section 2 (1) (*d*). The words "or other instrument" are to be construed as limited to the class indicated by the preceding types of documents. The Legal Advisers have been unable or unwilling to indicate what that class is. Hence, it is not possible to be sure when, in their eyes, any document, whose title is not specifically covered in the opening words of section 2 (1) (*d*), is utterly excluded from the class of statutory instruments from the outset without need of referring to the balance of the definition.

It is probably the case that an enabling power which authorized the Governor in Council "by statutory instrument to prescribe terms and conditions" would not, when exercised produce a document which was a statutory instrument in the eyes of the Department of Justice. And why? Because the name "statutory instrument" does not appear in the catalogue which forms the opening words of paragraph (*d*) of section 2 (1) and because there is no provision that "statutory instrument" includes any instrument described as a statutory instrument in any Act of Parliament. There is, however, in section 2 (1) (*b*) a provision that "regulation" includes any instrument described as a regulation in any Act of Parliament.

(iii) No instrument which confers upon another person the power, or purported power, to make delegated legislation or to act in some other way is a statutory instrument. This particular interpretation is not, however, consistently followed by the Crown, for some conferrals of authority are regarded as statutory instruments and regulations by the Privy Council Office, for example, Orders made under section 2 of the Agricultural Products Marketing Act empowering Commodity Boards to regulate commodities in inter-provincial trade and to raise levies on such commodities.

34. The Committee does not accept the validity or legal force of the foregoing interpretations of section 2 (1) (*d*) for the reasons set out in some detail in Appendix I to this Report. More importantly, however, the Committee regards such distinctions and exclusions as inimical to Parliamentary scrutiny of delegated legislation. Consequently, the Committee can not consider a lengthy debate with the Legal Advisers to the Privy Council Office over the true interpretation of the present statutory definition as productive of anything but more delay and confusion. The proper course is to amend the Statutory Instruments Act to afford a clear definition of a statutory instrument as a piece of subordinate legislation, with any exceptions, which will be the exceptions to Parliamentary scrutiny, being specifically and clearly enumerated.

35. Before the nature of any such new definition can be dealt with, several further problems flowing from the present Statutory Instruments Act must be noticed. As has been pointed out in paragraph 22, supra, the Act draws a distinction between a regulation and a statutory instrument, the former being a species of the latter. While a piece of legislation made under the Royal Prerogative, which is in no sense subordinate but rather original legislation, is a statutory instrument, it can not be a regulation, and, therefore, will not necessarily be registered or published. This is altogether unsatisfactory. The Royal Prerogative consists of those powers which the Common Law gives to the Crown. Amongst these Prerogative powers are those which relate to the Royal authority and rules having the force of law may be made under those powers within limits set by the Common Law, for example, rules relating to the issuing of passports. Where the matter within the Royal authority is made the subject of statute, for example, the recruitment regulation of the civil service, Prerogative lapses to the extent that the subject matter is covered by statute. Thus, if a Passports Act were to be passed, the issuing of passports would cease to be a Prerogative matter and any regulations made under such a Passports Act would be regulations within the Statutory Instruments Act, whereas the current Passport Regulations now made under the Prerogative, are not regulations within the Statutory Instruments Act and need not be registered and published, although they have been as SOR/73-36.

The only statutory instrument which can be a regulation is one which

"(i) is made *in the exercise of a legislative power* conferred by or under an Act of Parliament, or

(ii) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament." [12]

This definition too has caused the Committee trouble for, while it has so far proved easy enough to determine whether a "penalty, fine or imprisonment" is prescribed, the Committee has not been able to arrive at any clear meaning for the words "made in the exercise of a legislative power". (The Committee notes, however, that there may be difficulty in determining whether forfeiture of goods to the Crown, for example, is a "penalty" in terms of section 2 (1) (*b*).) There appears to be a strand of thought that a statutory instrument has been made in the exercise of a legislative power if it is "legislative in effect". Yet this advances the matter but little and it is equally difficult to ascribe a specific meaning to the newer phrase as it is to the statutory one. In any concrete case it can, of course, be very difficult to decide whether an instrument is "legislative in effect". The Legal Advisers to the Privy Council Office appear to have concluded that at least the following types of statutory instruments are not legislative in effect and, in consequence, are not regulations, since no penalties, fines or imprisonment are prescribed for their contravention:

(*a*) Regional Development Incentives Designated Regions Orders, made under section 3 of the Regional Development Incentives Act. (However, Special Areas Orders, made under section 6 of the Department of Regional Economic Expansion Act, which is identical in its substantive terms to section 3 of the Regional Development Incentives Act, are regarded as regulations.)

(*b*) Designated Areas Orders made pursuant to section 34.1 (1) (*a*)(ii) of the National Housing Act as amended by 21-22 Eliz. II cap. 18, section 12.

(*c*) Proclamations issued pursuant to section 98 (1) of the Indian Act proclaiming section 98 (2) of the Act in force in specified Indian Reserves. (But compare proclamations made under section 4 (2) of the same Act exempting Indian lands from portions of the Act, which are regarded as regulations.)

(*d*) Directives of the Commissioner of Penitentiaries. (But compare Standing Orders of the Royal Canadian Mounted Police which are regulations. These two sets of statutory instruments are considered further infra paragraphs 38-40).

36. The words "made in the exercise of a legislative power" or "legislative in effect" take on a more serious dimension when they are applied to statutory instruments which are issued in the form of rules the primary purpose of which is to direct servants of the rule maker in the execution of their duties. Such rules may take the form of Guidelines, Circulars, Directives or Manuals. The official view, both at the time of the MacGuigan Report and now, is that such documents do not constitute legal rules, but merely instructions to the staff, for the breach of which staff members may, of course, be subject to disciplinary proceedings within the service in which they are employed. The fact that such Directives or Guidelines affect also non-employees, for example inmates in the case of Directives of the Commissioner of Penitentiaries or would-be immigrants in the case of Immigration Guidelines, seems to be ignored.

As the Statutory Instruments Act now stands, a set of Departmental Guidelines, Circulars, Directives, etc. will be regarded by the Privy Council Office as being a statutory instrument if the enabling Act says that such documents under their respective proper titles may or shall be issued (e.g. Directives of the Commissioner of Penitentiaries, Standing Orders of the Royal Canadian Mounted Police Commissioner) but not otherwise. They will not be regarded as being regulations because they are considered to have no legislative effect (i.e., they do not constitute legal rules but simply instructions to the staff); and because they have no legislative effect they cannot be said to have been made in the exercise of a legislative power.

37. The Committee is not persuaded that the test of whether or not some document has been made in the exercise of a legislative power is necessarily that it has "legislative effect", whatever that phrase may mean. Nor is it persuaded that the fact that a document is in form, or in substance, an instruction to staff or to employees, means that no legal rules are made. It occurs to the Committee that an instruction which, if obeyed, is applied to the subject, or which, if breached, may lead to disciplinary proceedings against the member of the staff disobeying it, is just as much a legal rule as is a provision in the Race Track Supervision Regulations [13] directed to jockey clubs.

38. Putting the foregoing factors into a specific context, the Committee believes that the Directives of the Commissioner of Penitentiaries constitute a statutory instrument and a regulation, and as a regulation the Directives, and each amendment to them, should be transmitted in draft to the Legal Advisers to the Privy Council Office, registered and published in the Gazette, unless properly exempted under section 27 of the Statutory Instruments Act by an amendment to the Statutory Instruments Regulations. The Committee holds this belief for the following reasons:

(1) The enabling power in section 29 (3) of the Penitentiaries Act is identical in terms to section 21 (2) of the Royal Canadian Mounted Police Act which empowers the Commissioner of the Royal Canadian Mounted Police to make "standing orders". Those Standing Orders are universally acknowledged, by the Commissioner, the Legal Adviser to the Privy Council Office and the Department of Justice to be regulations within the meaning of section 2 (1) (*b*) of the Statutory Instruments Act. It is true that the Commissioner's Standing Orders are at present exempted from registration and publication by the Statutory Instruments Regulations, but that exempt status has been voluntarily surrendered by the Commissioner and Standing Orders will in the near future be dealt with fully as regulations under the Statutory Instruments Act, which necessarily means that they will be public documents unreservedly open to the public.

There is no dispute that, even on the very restrictive interpretation of section 2 (1) (*d*)(i) of the Statutory Instruments Act adopted by the Legal Advisers to the Privy Council Office, the Commissioner's Directives are statutory instruments. Section 2 (1) (*b*)(ii) of the Statutory Instruments Act provides that "'regulation' means a statutory instrument ...(ii) for the contravention of which a penalty, fine or imprisonment is prescribed *by or under* an Act of Parliament". Section 2.29 (h) and (*n*) of the Penitentiary Service Regulations, made *under* section 29 (1) of the Penitentiaries Act, provide that every inmate commits a disciplinary offence who

"(*h*) wilfully disobeys or fails to obey any regulation *or rule* governing the conduct of inmates;

(*n*) contravenes any *rule, regulation or directive* made under the Act."

Section 2.28 of the Penitentiary Service Regulations provides a code of penalties for the punishment of inmates convicted of disciplinary offences. Consequently, the test in section 2 (1) (*b*)(ii) of the Statutory Instruments Act is satisfied.

(3) The Directives are made in the exercise of a legislative power conferred *under* an Act of Parliament (section 29 (3) of the Penitentiaries Act) and are, consequently, regulations within the meaning of section 2 (1) (*b*)(i) of the Statutory Instruments Act. The Committee considers the Directives to be as legislative in effect—the only test yet suggested to it for giving a meaning to the phrase "made in the exercise of a legislative power"—as the Regulations, and is confirmed in this view by the knowledge that provisions have been taken out of the Regulations in recent years only to be then included in the Directives. The Committee is aware of the decision of the Ontario Court of Appeal in *Regina* v.*Institutional Head of Beaver Creek Correctional Camp, ex parte MacCaud* (1969) 1 O.R. 373, but considers it irrelevant to

the determination of whether instruments in general, or the Commissioner's Directives in particular, are "regulations" within the meaning of the Statutory Instruments Act, 1972. The reasoning of the Court of Appeal as to the person to whom a penitentiary employee owes the duty of adhering to the Directives, whether the inmate or the Commissioner, and as to the absence of any effect of an institutional head's disciplinary actions upon the rights of an inmate as a person or upon his statutory rights as an inmate, being directed as such reasoning was to the issue of whether certiorari would go against the institutional head, is not germane to the interpretation of section 2 (1) (*d*) or (*b*) of the Statutory Instruments Act.

39. The Committee has made its views known at length to the Penitentiary Service which has affirmed its position that the Commissioner's Directives are not regulations. The Committee understands that after the passing of the Statutory Instruments Act the Department of Justice gave a "ruling" that Commissioner's Directives were statutory instruments but not regulations. It is this ruling to which the Commissioner of Penitentiaries has adhered. The Committee observes that a so-called "ruling" of the Department of Justice is simply a legal opinion and is not a determination of any issue and, of course, binds neither the courts nor Parliament.

40. The Penitentiary Service has referred the Committee to a more recent case which concerns the status of Commissioner's Directives for the purpose of appeals under section 28 of the Federal Court Act: *Martineau and Butters* v. *The Matsqui Institution Inmate Disciplinary Board.* [14] There is nothing in the majority judgment of the Federal Court of Appeal which indicates that the nature of Directives as instructions to penitentiary staff is relevant to the provisions of the Statutory Instruments Act, but again only to whether in exercising a disciplinary function, said to be an administrative one, there was in the circumstances a duty to act quasi-judicially. Although the Court of Appeal rejected an application for review under section 28 of the Federal Court Act, it did say, in the context of decisions taken under Commissioner's Directive 213:

> "... any such decision that operates to affect the rights of an individual must be a bona fide exercise of the powers vested in the Penitentiary authorities, and anything done otherwise would have no validity by virtue of the governing statute and regulations."

The Commissioner's Directive 213 was made by the Commissioner pursuant to statutory authority, binds the staff of the penitentiaries and affects the lives of inmates, and the powers conferred under it must be exercised bona fide. It strikes the Committee as strange that whether that bona fide exercise should be carried out quasi-judicially or not should be thought to determine whether or not the statutory power under which the Directive is made is a "legislative power" for the purposes of the Statutory Instruments Act.

41. Other features of the elaborate definition of a statutory instrument have been the occasion for remark. The effect of sub-paragraph (iv) is that Criminal Appeal Rules made under the Criminal Code by provincial Supreme Courts are not statutory instruments, but those made by the Courts of Appeal for the Yukon and Northwest Territories are both statutory instruments and regulations because those courts, although a Provincial Court of Appeal, are vested with jurisdiction by a statute of the Parliament of Canada.

42. Sub-paragraph (v) has assumed importance because of the vexed matter of Departmental Guidelines and Manuals, notably those of the Department of Manpower and Immigration. Sub-paragraph (v) excludes from the definition of a statutory instrument any instrument "whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto". The Committee has not been able to form any definite view as to the meaning of these words and has come across no case in which an attempt has been made to exclude an instrument from the definition of a statutory instrument in reliance on this sub-paragraph. The Committee considers, without in any way being definite, that this provision might be thought to extend to the exclusion of Taxation Interpretation Bulletins and Departmental Procedure Manuals *which contain no rules or substantive provisions other than those already contained in some statutory instrument.* It has been a matter of some surprise, therefore, that the Committee has been met with the argument that Departmental Guidelines are excluded altogether from the definition of a statutory instrument, without need of reliance on the exclusion under paragraph (v). And why? Because the Guidelines have not been expressly authorized to be issued, made or established under that name. As appears from Appendix I, the Committee believes this to be an altogether erroneous test. The Committee considers that any Guideline or Manual which contains substantive rules not contained elsewhere in statutory instruments should be considered a statutory instrument and be subject to Parliamentary scrutiny and should not be excluded whether by the internal qualifications of the general definition of a statutory instrument, or by any express exclusion.

43. While some Departments, for example, the Departments of Regional Economic Expansion and National Revenue (Customs and Excise), have freely made their Guidelines available to the Committee, at least for the purpose of the Committee informing itself of the type of contents of such documents, the Department of Manpower and Immigration has refused to make available its Manual or Guidelines for Immigration Officers. Unless the Committee sees such a document it can not begin to assess whether the document is a statutory instrument on the present definition. The Statutory Instruments Act is clearly defective in that any Department can claim a document is not a statutory instrument and refuse to produce it. There must be some mechanism provided within the Act itself for a conclusive determination as to whether any particular document is a statutory instrument. The Committee notes that the British legislation provides for a Statutory Instruments Reference Committee for just this purpose.

44. Although the Committee has not seen the Immigration Guidelines, it has been given to understand by some who have seen portions of them that they do contain substantive rules, for example, a definition of the crime of moral turpitude, the

commission of which is grounds for exclusion from Canada. Such rules should not be contained in secret documents. The Committee is also concerned about the application of section 58 of the Immigration Act to the Immigration Guidelines.

> "58. The Minister may make regulations, not inconsistent with this Act, respecting ... the duties and obligations of immigration officers and the methods and procedure for carrying out such duties and obligations whether in Canada or elsewhere."

If indeed the Guidelines do relate to the duties and obligations of immigration officers and the manner in which they carry them out, the Committee can not conceive that the Department can render them other than regulations and statutory instruments by insisting on calling them Guidelines and denying any connection with section 58 of the Immigration Act.

Until the Immigration Bill introduced in the present Session of Parliament is passed and the Regulations under it have been made and published the Committee will not be able to determine whether the practice of issuing and using secret Guidelines will continue or whether what is now thought to be contained in Guidelines will appear in the Regulations pursuant to the enabling powers contained in clause 115 of the Bill

45. It is appropriate to summarize the defects in the present Statutory Instruments Act.

(i) Despite the widespread belief to the contrary, there is *no* system "whereby all orders that have legislative effect are tabled here in Parliament, are automatically referred to the standing joint committee and are also published so the public can know what is being done". [15] There is a system only for regulations and not for all statutory instruments, many of which are effectively hidden, are unpublished and are unknown even to the Parliamentary Committee to which they stand permanently referred.

(ii) The definition of a statutory instrument is obscure.

(iii) The definition of a "regulation" in terms of the exercise of a legislative power conferred by or under an Act of Parliament is equally obscure.

(iv) There is no provision for a body to give a definitive ruling on whether or not a document is a statutory instrument. There is a procedure by which the Department of Justice can determine whether or not a statutory instrument is a regulation, but this is open to the objection that the Parliamentary scrutiny committee is cut off from the decision.

46. What courses of reform of the Statutory Instruments Act are open?

One course would be to tinker with the present definition of a statutory instrument by attempting to clarify the wording of sub-paragraphs (i) and (v) of Section 2 (1) (*d*) of the Statutory Instruments Act, and to give some particularity to the phrase "made in the exercise of a legislative power". The Committee does not conceive of such an undertaking being a success. The several parts of the present definition, whatever they may mean, are so intertwined that to meddle with small portions may well lead only to more problems or to the need for further clarifying amendments. Moreover, there would still remain the problem of the opening words of the definition, the catalogue of types of document which are said to be capable of being a statutory instrument. It is not proper, in the Committee's view, to tie the definition to any particular names or types of document.

A variant of this first course would be to abandon the text of the present definition but to retain its concept. The task would then be to isolate precisely the documents or classes of documents one wishes to see subject to parliamentary scrutiny, and those which one does not, drawing a definition of "statutory instrument" which will include the former but exclude the latter. While this may be logically possible, it would be an exercise difficult in the extreme and almost certain to involve unforeseen omissions and to cause confusion. The present section 2 (1) (*d*) of the Statutory Instruments Act stands as an object lesson in this regard.

A second course would be to leave to the Queen-in-Parliament, in enacting any statute which confers any power of subordinate law making, the function of specifying whether or not the result of that law making will be subject to scrutiny. This is the approach of the United Kingdom Statutory Instruments Act as regards post-1947 legislation. If Parliament says the subordinate law making function is to be exercised "by statutory instrument" then parliamentary scrutiny of the subordinate legislation will follow. If Parliament omits the formula "by statutory instrument" then the subordinate legislation, while still remaining subordinate and open to attack in the courts, in appropriate circumstances, as ultra vires, would be removed from scrutiny. If this approach were to be adopted there would still be a serious problem in classifying the subordinate legislation which is already in existence and that which will be made in future under existing statutes in which, of course, the formula "by statutory instrument" does not appear. That this problem can be faced is evidenced by the United Kingdom legislation which dealt squarely with it. Yet, given the confusion caused by the existing section 2 (1) (*d*) of the Statutory Instruments Act, it could not serve the purpose and would in any event have to be amended. Given that need, it might well be considered better to scrap the present scheme of definitions entirely and to use a different approach. (A detailed summary of the British definition appears in Appendix I.)

The third course, and the course which the Committee broadly favours, is to proceed along the lines originally recommended by the MacGuigan Committee and to have *one* class of document, broadly defined. This would remove the distinction between "regulations" and "statutory instruments"; it would subject *all* documents of the class to uniform procedures as to registration, publication and restriction on retroactive effect; it would prevent the issue of whether or not a document is subject to Parliamentary scrutiny being thought to depend upon the use of a magic formula in an enabling Act whereby the particular name of the class or type which was to be issued was preceded by the preposition "by"; it would preclude the existence of a class of instruments, the number of which may be untold, which are unpublished and unregistered.

47. The MacGuigan Committee recommended [16] the following definition of "regulation", the only classification of documents proposed, viz:

"'regulation' means

(i) a rule, order, regulation, directive, by-law, proclamation, or any other document made in the exercise of a legislative power conferred by or under an Act of Parliament;

(ii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power conferred by or under the prerogative rights of the Crown and having force of law;

(iii) a rule, order, regulation, directive, by-law, proclamation or any other document made in the exercise of a legislative power coming within sub-paragraphs (i) and (ii) and which has been subdelegated;

(iv) a rule, order, regulation, directive, by-law, proclamation or any other document for the contravention of which a penalty or fine or imprisonment is prescribed by or under an Act of Parliament;

but does not include a rule, order, regulation, directive, or by-law or any other document of a legislative character of a corporation incorporated by or under an Act of Parliament, which is not a Crown Corporation, unless such a rule, order, regulation, by-law or document comes within sub-paragraph (iv)."

The Committee observed:

"This definition casts the net as widely as is reasonably possible. All exercises of subordinate law-making power are covered (except those of private corporations) and, so that the matter is put beyond doubt, all regulations, etc. for the contravention of which penalties are prescribed, are also covered."

The Committee further noted that its suggested definition would bring within its sweep many departmental guidelines and directives. Whether or not this would always be the case the Committee recommended that all such departmental directives and guidelines be published and subjected to parliamentary scrutiny. Although narrower than the word "regulation" as defined in the Interpretation Act, (paragraph 49 infra and Appendix I) it might have included Departmental Guidelines and Circulars to the extent that they embodied substantive or procedural rules, for such rules can only be issued by warrant either of statute, or of the Prerogative as limited by statute and as defined by the common law. Neither the Crown nor its responsible advisers, either collectively or individually, have the power to make any rule otherwise than they are empowered either by statute or by the Prerogative, and no new offence can be created under the latter. (The Case of the Proclamations, 1610). [16A]

This definition would, however, still be bedevilled by the use of the phrase "made in the exercise of a legislative power" and the distinction thereby imported, by the Crown's advisers, between rules of law binding the Crown's subjects and rules binding only the Crown's servants or agents. This distinction has been adverted to above. If it were maintained it might well mean that the MacGuigan definition would not include Departmental Guidelines, Circulars and Directives.

48. The Committee concludes, therefore, that the solution is to take the sum of law making, and of rule making, exercised by the Crown and its agencies and by any other delegate or sub-delegate of Parliament, whether made pursuant to a statute or to the Prerogative, and to declare the whole, in principle, subject to Parliamentary scrutiny. This would seem to be in keeping with constitutional principle and the desire of Parliament to exercise some supervision over the Crown's subordinate and prerogative law making activities. If then it were desired to exclude any documents or classes of documents from scrutiny, those documents or classes would have to be defined, and, since they would be exceptions, they would be narrowly construed, any ambiguity being resolved in favour of scrutiny and against exclusion. If need be, a statutory direction to this effect could be included in the legislation.

49. The execution of this plan would appear to be in conformity with the thrust of the Interpretation Act, which defines an "enactment" as "an Act or regulation or any portion of an Act or regulation" and a "regulation" as *including*

"an order, regulation, Order in Council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council."

The Committee is aware that at the time the Statutory Instruments Bill was being considered in the Commons there were suggestions that, if the Bill were to prove successful after enactment, consideration would be given to amending the definitions of "enactment" and "regulation" in the Interpretation Act to accord with the definitions contained in Clause 2 of the Statutory Instruments Act. The Committee is, of course, now suggesting that the reverse pattern of amendment should be considered.

50. The Committee's proposal is predicated upon certain principles, some at least of which might not be regarded as non-controversial. It is only proper, therefore, that those principles should be stated.

(i) The Crown can only make rules, even rules binding its own servants, by dint of statutory authority or the Prerogative, including the prerogative right to operate the Civil Service in the absence of any controlling legislation, provided all statutes and the common law are observed.

(ii) Ministers of the Crown possess no greater law or rule making functions than the Crown itself possesses, unless a power to make law or rules is specifically conferred upon a Minister *eo nomine* by statute.

(iii) Consequently, even ministerial guidelines or instructions are as important, from the point of view of Parliamentary scrutiny of the Crown's law and rule making functions, as Orders in Council, ministerial regulations and the rest.

(iv) The Committee desires that, in principle, all subordinate law and rules made by the Crown and by those put in authority under the Crown, or by any other delegate or sub-delegate of Parliament, should be subject to Parliamentary supervision, unless specifically excluded.

(v) Any exceptions from such supervision should be made explicitly and be justified on some compelling grounds. (For examples of what may be considered as justifiable exclusion on such grounds see section 21 of the Statutory Instruments Regulations (reproduced as Appendix II to this Report).

(vi) All subordinate laws and rules should, unless again there are compelling reasons to the contrary, be registered centrally and published.

(vii) All subordinate laws and rules should, unless compelling reasons to the contrary are made out and exceptions are specifically provided for, be subject to the same general and statutory rules governing registration, publication, the time limits in which both must take place, and the possibility of retroactive effect.

51. As a final quirk of the Statutory Instruments Act, there stands the definition of a "regulation-making authority" which is stated in section 2 (1) (*c*) of the Act to mean:

> "any authority authorized *to make* regulations and, with reference to any particular regulation or *proposed* regulation, means the authority that made *or proposes to make* the regulation."

This clearly means that in respect of regulations which are authorized to be made by the Governor in Council, the regulation-making authority is the Governor in Council both in respect of regulations he has made and proposes to make, as for instance under the Motor Vehicle Safety Act, which provides for proposals for regulations to be published so that interested groups may make representations. Only after those representations have been considered may the regulations themselves be made.

Section 3 (1) of the Statutory Instruments however, provides that where a "regulation-making authority" proposes to make a regulation it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages". It is plainly nonsense to interpret this as meaning that the Governor in Council shall forward three copies to his Clerk. And in fact the section is not interpreted or applied in that way at all. It is the Department of State or other governmental agency, upon whose behalf a Member of the Privy Council will recommend the regulations to the Governor in Council, which is considered to be the regulation-making authority and which sends in three copies of its "proposed regulations" for scrutiny by the Legal Advisers to the Privy Council Office.

52. Turning next to section 9 (2) of the Statutory Instruments Act, the phrase "regulation-making authority" is used again, this time in the context of the coming into force of regulations (not statutory instruments). Section 9 (1) provides for an exception to the rule that a regulation shall not come into force on a day earlier than the day on which it is registered. It may do so if it expressly states that it comes into force on a day earlier than the day of registration *and* if it is registered within seven days after it is made (usually the date of the passing of the requisite Order in Council). Subsection 9 (2) provides that if this exception is made use of "the regulation-making authority shall advise the Clerk of the Privy Council in writing of the reasons why it is not practical for the regulation to come into force on the day on which it is registered". Again, it would seem nonsensical to suggest that the Governor in Council should so advise his own servant, the Clerk.

In applying section 9 (2) it has likewise been assumed in practice that the "regulation-making authority", in the case of a regulation made by the Governor in Council on the recommendation of a Minister of the Crown, is that Minister's Department or Ministry, that is to say, the Department of Ministry which proposed the draft regulation which, after scrutiny by the Legal Advisers to the Privy Council Office, became the basis of the recommendation to His Excellency in Council. To construe the provision otherwise would lead to the absurd result that the Governor in Council must advise his own servant, the Clerk, in writing as to the reasons why it was not practical for the regulation to come into force on the day on which it is registered, knowledge of which reasons would in any event be peculiar to the Ministry or Department concerned and be unknown to His Excellency in Council unless he were advised of them. Again, this is reflected in actual practice and the Assistant Clerk of the Privy Council always demands reasons from Departments and authorities which have inserted effective dates in regulations earlier than the day on which registration can be accomplished. The Committee understands that the Assistant Clerk is often dissatisfied with the reasons given and strikes out the earlier effective date before the draft regulation is submitted to the Council.

53. The Committee considers that it should be entitled to know why any particular regulation had to come into force before it was registered. This is important as it is an exception to a fundamental rule which itself is not above criticism in that it causes regulations to come into force before they are published. However, refuge has been taken in the definition of "regulation-making authority", and the information has either been given in the most general and therefore uninformative terms, or refused on the ground that the Governor in Council can not be required to give reasons for causing a regulation to come into effect before registration.

54. The Committee considers that the words "regulation-making authority" should be re-defined to make clear that in respect of regulations made by the Governor in Council they mean the Department, Ministry or other body which recommends the draft Order to the Governor in Council. It will be necessary also to provide that reasons furnished under section 9 (2) should be made available to the Committee, for otherwise as included in a submission to the Governor in Council they could be regarded as a secret matter within the confidence of the Privy Council. The amendment would also remove the Clerk of the Council from the untenable and improper position of requiring written reasons from the Council. The Committee understands that this approach is not now opposed in principle by the Privy Council Office.

55. It was only to be expected that in the drafting of the bill for an Act which marked an entirely new departure in Canadian law, there would be at least one omission. Section 32 of the Statutory Instruments Act provided that any regulation made before the passing of the Act, which was not published in the Canada Gazette and which is of a type which would not be exempted from publication if made after the commencement of the Act, would cease to have effect on lst January 1973 unless transmitted to the Clerk of the Privy Council, who was then bound to register it. There is, however, no provision in section 32 requiring the publication of such regulations when registered. The Committee can not believe that this omission was other than accidental.

One of the largest single groups of regulations required to be registered, but not published, under section 32, consists of the Regulations of the Royal Canadian Mounted Police. The Commissioner has volunteered the Regulations for publication but they have not appeared in the Canada Gazette.

When once a new consolidation of regulations appears the problem will disappear. Yet the consolidation may be delayed and there may well be statutory instruments registered under section 32 which will not be included in the consolidation. Therefore, the Committee believes that all the statutory instruments registered under section 32 should now be published and, if legislative authority is necessary, the Statutory Instruments Act should be amended accordingly.

F.—MATTERS RELATING TO THE FORM OF STATUTORY INSTRUMENTS

56. The Committee has consistently maintained from its inception that the enabling authority for subordinate legislation should be clearly and adequately identified to the end that ordinary folk may know whence comes the power to make the manifold rules which affect them. It is not enough that the identification of enabling authority should be a skill known only to competent lawyers versed in both the ways of the Canada Gazette and of the hundreds of enabling statutes. Similarly, the Committee has not thought it unreasonable that departments of state and regulation-making authorities which must surely be presumed to know the precise authority on which they rely, and its actual place of publication, should disclose this information on the face of regulations and other statutory instruments as they appear in public form, whether in the Canada Gazette Part II or in office copies available in some limited number of cases through the successors of the Government of Canada Bookstores.

57. Consequently, the Committee has insisted on the recital of the precise section or sections of enabling statutes which are relied upon for the authority to make a particular regulation or statutory instrument. This requirement extends to reciting the substantive provisions of statutes which are utilized under cover of such general enabling powwers as "... may make regulations prescribing anything which by this Act may be prescribed". It also includes the identification of chains of authority as where the Treasury Board is authorized by or under section 5 (2) of the Financial Administration Act to act in the stead of the Governor in Council for the purpose of making regulations under the several Superannuation Acts or under such provisions of any other Acts as specified by the Governor in Council which relate to matters specified in section 5 (1) of the Financial Administration Act.

58. The Committee is happy to report that clear identification of relevant sections of enabling statutes is now all but universally made by all departments and authorities. The Committee regrets that the Honourable the Treasury Board has adopted the new practice only intermittently.

59. The Committee has also required the disclosure of both primary and intermediate enabling authority. The Aeronautics Act, section 6 (2), for example empowers the Governor in Council to approve of regulations made by the Minister authorizing the Minister to make Orders or directions with respect to such matters coming within section 6 as the regulations may prescribe. This power has been exercised in section 104 of the Air Regulations. The Committee's view is that both the enabling section in the Act (section 6) and the enabling section of the Air Regulations (section 104) must be recited in any Order made by the Minister. This requirement is now almost always met by departments and other authorities

60. In other matters relating to the form of statutory instruments the Committee has not been sucessful in achieving improvements. The form of a statutory instrument is not at present prescribed or regulated except in the case of those instruments which take the form of Orders in Council, which include the bulk of the "regulations" as defined in the Statutory Instruments Act. The Clerk of the Privy Council has laid down guidelines for the form of recommendations to the Governor in Council. In addition, the officers of the Privy Council Office responsible for Part II of the Canada Gazette follow certain rules which affect the format of statutory instruments as published in the Gazette as also the information which those instruments disclose about the authority for their making, the prior state of the principal instrument about to be amended, and the place of publication of any other instrument referred to in the new instrument. The Legal Advisers to the Privy Council Office, who are officers of the Department of Justice, do not see themselves as having the power to force changes as to form on either departments or the Privy Council Office. It is said that the actual form of the content of an instrument is beyond the Legal Advisers' purview, and that the form is often settled after the draft of the contents has been scrutinized by them. The Committee, however, cognizant of the great influence, if not power, of the Department of Justice in all matters pertaining to statutory instruments, is not convinced that the further changes it desires could not readily be brought about if the Department so wished. Certainly it is clear that with respect to statutory instruments made by Order in Council the Clerk of the Privy Council can insist on changes in format, including the disclosure of the information just mentioned.

61. The Committee considers the present position deficient in several respects. The first relates to the giving of references, either by footnotes or direct mention in the text, to all the enabling authority and to all instruments mentioned in a

statutory instrument. The Committee believes that the most convenient method is the use of the footnote to show the place and date of publication and the registration number, if one exists. The former Registrar of Statutory Instruments at the Privy Council Office undertook to provide footnote references only for those instruments which can not be traced by reference to the Index to Part II of the Canada Gazette. (These are usually Orders in Council which were not regarded as regulations under the old Regulations Act or have not been regarded as statutory instruments after 1972 under the Statutory Instruments Act). The Committee does not accept that the subject must have access to and know how to use the Index to Part II of the Canada Gazette before he can ascertain the reference to another instrument mentioned in a statutory instrument. This knowledge is peculiarly within the competence of the departmental officials who draft statutory instruments and of the officers of the Registry of Statutory Instruments who are expert in the use of the Index. Consequently, the Committee believes that the trifling expense involved should be incurred so that footnote references are given for the Ontario Milk Order, for example, which is the intermediate enabling authority for numerous regulations made ultimately under the Agricultural Products Marketing Act. The newly appointed Assistant Clerk of the Privy Council (Orders in Council) and Registrar have agreed to review their Office's position.

62. Similarly, the Committee believes that where an enabling power in a statute has been amended since the last Revision of Statutes (1970) the preamble to the statutory instrument made in reliance on that power should recite not only the relevant section number or numbers and the name of the Act but also the reference to any amending statute which has amended that enabling power. The Committee is aware that in terms of section 32 of the Interpretation Act it is legally *sufficient* to recite only the name of the statute, leaving the subject to hunt for any relevant amendments in the Index to Part III of the Canada Gazette. But the Committee does not regard legal sufficiency as the relevant consideration. The Committee wishes statutory instruments, on their face, to be as comprehensible and self-contained and to reveal as much information about themselves as is possible. The governing consideration in the Committee's view is not whether a lawyer, or one well versed in the art of statutory instruments, will find all the relevant material he needs in the several indices and parts of the Gazette, but whether the layman will be able to identify not only all the relevant documents but their place of publication also.

63. The Principal Legal Adviser to the Privy Council Office has offered to suggest to the Registrar of Statutory Instruments that when next the guidelines for submission of recommendations to the Governor in Council are revised he might insert a provision that reference be given to any statute which amends an enabling power and which is subsequent to the then latest Index to Part III of the Gazette. The Committee can not regard this proposal as acceptable. First, it is merely an offer to suggest. Secondly, the guidelines, even if amended as suggested, relate only to Orders in Council and not to any other statutory instruments. Thirdly, it is still predicated upon the availabiity of the Index to Part III of the Canada Gazette to ordinary folk and the assumption that they will know how to use it. The Committee can not accept either assumption and notes the difficulties its own counsel have faced from time to time in procuring copies on a regular basis of the Canada Gazettes, whether Parts II or III, and the relevant indices.

64. In conformity with its view that a published statutory instrument should be as complete in its form as possible the Committee has requested that a different method be adopted of referring to the existing text of a statutory instrument in an amending instrument. The present practice is to give a footnote reference to the registration date and place of publication of the original statutory instrument and of the last amendment, whether or not that last amendment is relevant to that part of the statutory instrument to be amended. The problem posed, even to experienced legal practitioners and government officers, in ascertaining the present text of any statutory instrument, or of any part of it, can be immense as the last consolidation of the Regulations was in 1955 and even statutory instruments made well after that date may have been amended many times. The former Registrar of Statutory Instruments advised the Committee that it is up to the subject, in attempting to identify the present text of say section 4 of a particular instrument which is now to be amended to have resort to the Index to Part II of the Canada Gazette and to check every single amendment there listed to see which ones, if any, amended section 4. The reference to the latest amendment is given simply to put the subject on notice of the latest amendment to the entire instrument, whether relevant to section 4 or not, so that he can tell whether there is an amendment in existence published since the last quarterly index to the Gazette. The then Registrar, together with the then Assistant Clerk of the Privy Council, declined to make any change in policy (despite the Committee's repeated representations) citing expense and shortage of labour

65. The Committee finds this position totally unacceptable. Its view, put simply, is that the footnotes to an amending statutory instrument should disclose all the relevant amendments to the statutory instrument as originally made. Yet, only amendments relevant to the text now to be amended should be cited. If the last was in 1971, it should be the last one referred to. If the particular text is being amended for the first time, there should be no reference to amendments and the footnote to the words "as amended" should so state. Consequently, where there is a reference in an instrument to an earlier instrument which has been amended by one or more other instruments, the words "as amended" should be used as at present and there should be a footnote to those words on the following lines:

(i) If all the amendments are relevant to the matters dealt with in the new instrument, then they are all to be mentioned in the footnote

(ii) If not all of them are so relevant, then the footnote should read: "The relevant amending (regulation(*s*)) (instrument(*s*)) is(*are*) ...".

(iii) If there is no relevant amendment, the footnote should read:

"The amending (regulations) (statutory instruments) are not relevant to the subject matter of this Order, regulation ..."

OR

"There is no amendment which relates expressly to the subject matter of this regulation."

To give an illustration in an hypothetical case, if it were proposed to amend section 3 of the Swine Fever Control Regulations, the amending regulation might read, in part:

"... the Swine Fever Control Regulations [1], as amended [2]..."

(1) C 1955, 1216.

(2) The relevant amending regulations are SOR/67-237, SOR/72-417 and SOR/75-616

66. Again the Commitee believes that the subject should not be forced to juggle with indices and with numerous amendments, in some instances running literally into hundreds. The knowledge of the relevant amendment(*s*) must exist, otherwise departments would not know what they were amending and how the projected amendment would alter the law. This knowledge may not now be shared with the Registrar or the Privy Council Office, but the Committee can not see why departments and other regulation-making authorities should not be required to divulge it to the Registrar who could then insert the requisite footnotes at the added expense of a little more type-setting. The Committtee is anxious to enlist the co-operation of the Privy Council Office and realizes that the information it wishes to be given does not lie within the power of that Office, but of departments and authorities which should provide it when the draft Orders are forwarded for transmission to Council or when other statutory instruments are transmitted for registration. The Committee appreciates the fact that the present Registrar and Assistant Clerk of the Council are anxious to co-operate with the Committee and are reviewing their Office's position.

67. The Committee has also pressed upon the Privy Council Office its view that statutory instruments, and especially amending instruments, should be accompanied by Explanatory Notes. Such a Note is particularly desirable when, although the instrument may appear to be self-explanatory, the Note might help to avoid the necessity for reference to other instruments as, for example, when another instrument is being amended, and the effect of the previous instrument or the effect of the amendment, or both, are not apparent from the text. In such a case the Explanatory Note should describe the subject matter dealt with by the provisions amended in such a way as to indicate the point of the amendment. The Committee realizes that Explanatory Notes could not be argumentative, and could never seek to explain or to justify policy or, above all, purport to construe the law. But they could be used with great effect to describe simply what is to be done in a purely informative way. The object should be to help the reader who, the Committee again emphasizes, may not be an experienced civil servant or lawyer, to appreciate the object of the new subordinate legislation without unnecessary difficulty or research. The full effect of a legislative instrument often cannot be grasped without careful study. It is not always easy to see from the instrument itself whether it is of sufficient importance or interest to make such a study desirable. The Explanatory Note would guide the reader on that point. The test to be applied should be the point of view of a reader who is not familiar with the existing law on the subject, rather than that of the official administering the law. The Explanatory Note could also be used to indicate if an instrument is to have retroactive effect and the authority in the enabling statute for such retroactive operation. Without such authority, the validity of the provision will be in doubt and that point at least could be removed from the areas an interested reader must research.

68. Explanatory Notes of the type desired are published in the United Kingdom. They are made available to the Senate Committee on Regulations and Ordinances of the Commonwealth of Australia, but are not published. The Committee is aware that at least the rudiments of the material necessary for the drafting of Explanatory Notes are already required to be submitted in recommendations to the Governor in Council for statutory instruments made by that authority. The explanatory material now contained in recommendations to the Governor in Council has been witheld from the Committee on the grounds that it lies within the confidence of the Privy Council. The Committee can not see why the information should not be made public and the requirements extended to all statutory instruments, whether made by the Governor in Council or not. Again, the information lies peculiarly within the power of departments and authorities who propose statutory instruments to the Governor in Council and the Privy Council Office could not itself prepare the desired Explanatory Notes. However, it could be made a requirement that every recommendation to the Governor in Council should be accompanied by just such an Explanatory Note as the Committee desires. The requirement of the provision of an Explanatory Note should also be extended to all statutory instruments registered by the Privy Council Office.

69. The Committee understands that in the near future, perhaps even in 1977, a new Consolidation of the Regulations of Canada will appear, the first for over twenty years. The Committee believes that, even if its recommendations can not be implemented immediately because of administrative difficulty in dealing with so many existing amendments to statutory instruments, the issuing of the Consolidation provides a golden opportunity to introduce new ideas in dealing with the form and style of the new and amending instruments made after the date of the Consolidation. The Committee would regard the neglecting of that opportunity as a cause for grave concern. Yet a reasonable delay in implementing the Committee's suggestions will allow the Privy Council Office the time and the opportunity to undertake what will be a formidable task in explaining the new requirements to officers in departments and authorities who are, quite naturally, used to the present arrangements.

G.—THE WITHHOLDING OF INFORMATION FROM THE COMMITTEE

70. The Committee, having considered a particular statutory instrument and concluded that it is questionable as apparently

infringing any one or more of the criteria, feels obliged to afford to any department or regulation-making authority concerned in the making or implementation of the instrument the opportunity of furnishing an oral or written explanation in the light of which the Committee may well realize that its concerns were groundless, or may suggest to the department or authority that the instrument be amended, or report that the special attention of the Houses should be drawn to the instrument. The Committee considers that natural justice, not to mention common sense, dictates such a course of action.

71. Anxious though the Committee has been to elicit departmental and official explanations of the text or the manner of operation of instruments, it has in many instances been thwarted in this essential step in its proceedings. Almost all Designated Instruments Officers who are also legal officers are in fact officers of the Department of Justice and feel constrained, by the expressed views of the Deputy Minister of Justice, to refuse to afford to the Committee any explanation or information which they consider would involve them in the expression of legal opinions. The position taken by these officers, governing themselves by their Deputy Minister's views later supported by the present Minister of Justice, seriously hampers the Committee in any consideration of the vires of any instrument and severely restricts or impedes scrutiny in any case in which any legal matter arises for consideration. These other cases include those in which the Committee regards some of the wording of an instrument as ambiguous, or obscure, or as conveying a meaning at odds with the intent of Parliament in the enabling Act, or with the balance of the instrument. Instruments suffering from such apparent defects can not be assessed properly if departments refuse to give a view as to the meaning of the words—something they must have formed in any event in order to administer the instrument—or refuse even to say whether in their view the wording is clear and unambiguous, for particular reasons, or obscure and in need of justification. The Committee does not accept that criterion 13 approved by both Houses is to be ignored and that questionable wording is to stand until some hapless litigant becomes the cause of a judicial interpretation of the wording.

72. The problem of the withholding of "legal opinions" arises in a particularly acute form when the Committee asks for a particular instrument to be produced for its scrutiny only to be told that the instrument is not a statutory instrument. When the Committee asks why the instrument is not a statutory instrument it is merely told either that to say why would be the expression of a legal opinion or that the Department of Justice has given an opinion on the matter which can not be divulged.

73. The Committee wishes to emphasize that in asking for explanations which may involve the expression of legal reasoning and conclusions it is not seeking to invade the Crown's confidence or to cause untold difficulty. On the contrary, the Committee merely wishes to afford to departments the opportunity of showing that the Committee is wrong in its tentative invocation of one or more of its criteria in relation to a particular instrument. It simply wishes to give departments the right to demonstrate that a particular instrument is not a statutory instrument. And all by reasoned argument, and not by mere assertion or reliance on a secret opinion given by some officer of the Department of Justice at some point in the past.

74. It is to be noted that the difficulties encountered by the Committee have not arisen where the Designated Instruments Officer is a departmental official and not an officer of the Department of Justice. To date, complete explanations, including legal reasoning, have been forthcoming from these departmental officers who apparently obtain the legal portion of their explanations from the Department of Justice officers in their departments. The Committee is aware, however, that at any time such legal explanations might become inaccessible, either to the departmental Instruments Officer, or to the Committee.

75. The Committee has enquired into the practice of scrutiny committees in the United Kingdom and in the Commonwealth of Australia. While appreciating that overseas practice is not a sure guide in a Canadian parliamentary setting, the Committee notes that statements of legal reasons and, on occasion, even opinions of the law officers are made available in both the United Kingdom and Australia by Departments and authorities responsible for statutory instruments or regulations questioned by the scrutiny committees.

76. The impasse reached by November 1976 can best be explained in point form.

A.—Instruments the Committee sees

(i) The Committee could simply take its own Counsel's opinion as to vires, drafting or any other legal point, and, if it concurred, report accordingly to the two Houses, if it considered any provision ultra vires, obscure, ambiguous, etc. without even asking the opinion of the legal officers in the departments or authorities. The Committee considers this course inadvisable and likely to involve it in reporting matters to the Houses which turn out to be quite proper, since neither the Committee's members nor its counsel are infallible. The Committee would then appear foolish and would in short measure become either discredited, or over-cautious.

(ii) The Committee could ask for the opinion of outside counsel. This course would be expensive and would get the Committee very little further ahead, if at all. Faced with the opinion of the Committee and its counsel, even fortified by a concurring opinion from outside counsel, the Department of Justice officers could still refuse to explain anything leaving the Committee to report to the Houses as above, the Government continuing to abide by the Department of Justice's view. The same result would, of course, follow if opinions were sought from the Law Clerks to the two Houses.

(iii) If the Committee makes a series of reports on cases it sees as being infringements of one of the criteria and in which some legal point is involved, it will produce a great deal of paper, and demand a great deal of parliamentary time. If it submits a single report detailing a long list of questionable instruments, a great deal of harm to the public interest may take place while the list is accumulating. And even if the parliamentary time is made available for dealing with a large report, instance by instance, the Government may still simply assert that the Department of Justice

advises, for reasons unspecified, that the Committee's objections are unfounded.

B. Instruments the Committee does not see

(i) These are of two kinds: unpublished statutory instruments (or those published but unknown to the Committee) and documents which the Department of Justice considers are not statutory instruments and hence beyond the Committee's purview.

(ii) To any of the unpublished statutory instruments or to any that are published but in forms and places other than the Canada Gazette, and which actually get before the Committee, the points made under A, above, apply.

(iii) The most serious problem, however, is to get the documents where the Committee's right of scrutiny is denied by the Government on the ground that they are not statutory instruments. The Committee may want to see these documents, in order to decide whether, in *its* opinion, they *are* statutory instruments.

(iv) It requests production. The legal officer of the department or authority refuses. The Committee asks why. He says that the document is not a statutory instrument, but that he can not demonstrate this or give the reasons for his assertion because to do so would be to give a "legal opinion", that is to say, the application of section 2 (1) (*d*) of the Statutory Instruments Act to the document in question. Or, alternatively, he may say that the Department of Justice has given an opinion, which the Committee may not see, that the document in question is not a statutory instrument.

(v) The Committee asks why it may not see the Department of Justice's opinion, or why the officer may not show that the document lies outside the scope of section 2 (1) (*d*) of the Statutory Instruments Act. The officer refers to the Deputy Minister of Justice's views on the role of the Department of Justice which preclude the divulging of such information to the Committee.

(vi) The Committee, not being able to see the document for itself and being given no reasons, is utterly thwarted. Reference to outside counsel or to the Law Clerks is useless because the Department of Justice must surely not afford to them what it has withheld from the Committee.

(vii) A report to the two Houses is impracticable on a document the Committee has not seen and in respect of which the Government relies on an undisclosed opinion of the Department of Justice.

77. The Committee had by November 1976 reached the position in which its scrutiny of a number of documents [16B] which appeared to it as questionable in some one or more particulars, or as possibly constituting statutory instruments, was hampered by the actions of officers of the Department of Justice in declining to afford to the Committee what they considered to be "legal opinions" in response to requests by the Committee for information and reasons. In two instances—Immigration Guidelines and Divisional Instructions and Standing Orders of the Penitentiary Service—the Committee had been informed that these classes of documents were not statutory instruments, but had not seen the documents in question and could form no opinion as to their status for the purposes of the Statutory Instruments Act.

78. The Committee formed the view that all Instruments Officers who are officers of the Department of Justice should be replaced by departmental officers. The Committee regards it as essential that it be given complete explanations, including detailed reasons to support the position taken by the Department as to why any particular document is not a statutory instrument, that all documents the legal status of which is in doubt be produced to the Committee and that either the Committee itself, or some other body patterned on the Statutory Instruments Reference Committee at Westminster, be empowered to issue a definitive ruling as to whether any particular document or class of document is or is not a statutory instrument or statutory instruments.

79. The Minister of Justice and his Deputy Minister appeared before the Committee on 18th November 1976. Members of the Committee were at pains to make clear that they were not seeking the release of confidential legal opinions already given by Department of Justice officers, but rather the Committee wanted to be told the reasons which lay behind any assertion that a statutory instrument was intra vires, proper or clear and unambiguous in the same way that lawyers on behalf of their clients give grounds or reasons to support legal positions taken by their clients. The Minister undertook to have the existing instances of refusals of information by legal officers reviewed by a senior officer of the Department of Justice. The results of that review have in part been given to the Committee which has them under advisement as at the date of this Report.

80. By letter addressed to the Committee's Joint Chairmen on 13th January 1977 the Minister of Justice wrote:

"In discussing this matter with yourselves and the Committee, my mind has generally focussed on the narrow issue of the tabling of legal advice given by my Department to the Government. But my officials and I have considered more generally some of the difficulties which I understand the Committee is experiencing and as a result I have recommended to my colleagues in Cabinet a system which I believe is practical and will result in the Committee obtaining more complete information when it has questions related to statutory instruments.

I have proposed that departments and agencies nominate a senior official, perhaps at the deputy-minister level, to whom request for explanations concerning statutory instruments would be directed. This official would then provide the requested explanations having regard to the department's policy and legal position. Naturally, in many cases there will be consultation between the department concerned and the Department of Justice. It must, however, be understood that the explanations provided, including any explanation as to the legality of the instrument, would be the sole responsibility of the responding department and that legal advice given to those departments by the Department of Justice will not be disclosed. It is my hope that this system will provide for responses that will allow the Committee to perform its

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 works [17] 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 authorities [21] 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 Regulations [22], 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 is 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.

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 [24] (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),

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." [25]

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" [26]—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, [27] 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 [28] 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

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.[29] 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"[30] 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 confirmity 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-

scribing "the portion of the terms of imprisonment that inmates shall serve before parole may be granted". Since the word "portion" is singular, and not plural, and the words "terms" and "inmates" are plural, this power extends only to setting general rules applicable to all inmates, that is to say to promulgating portions of terms which will be of general application amongst inmates. Consequently, there is no power to set a portion of a term for a particular inmate or to provide by regulation that notwithstanding the Parole Regulations a particular inmate may be paroled before the term of imprisonment applicable to him under the Regulations has expired.

The Special Parole Regulations No. 1, 1973, which are the first and only such regulations to have been made, purported to dispense from section 2 of the Parole Regulations in favour of one Jacques LeBlanc, permitting his parole after a term of imprisonment not of ten but of "five years minus the time spent in custody from the day he was arrested and taken into custody ... to the day ... sentence was imposed". The Legal Adviser to the National Parole Board, who is not an officer of the Department of Justice, made freely available to the Committee all the background material to this matter, from which it appeared that this extraordinary course was adopted on the suggestion of one of the Legal Advisers to the Privy Council Office, who himself drafted the Special Regulations. It appeared that M. LeBlanc was convicted of complicity to commit murder and was sentenced to life imprisonment while those who were convicted of the murder itself, being juveniles, were sentenced to eighteen months in the Mt. St. Antoine Institution for Boys. The Quebec Court of Appeal, while rejecting M. LeBlanc's appeal, recommended that some action be taken by other authorities in light of the disparity between the sentences. The Associate Deputy Minister of Justice for Quebec made representations to the National Parole Board, which recommended to the Solicitor General that an exception be made to subsection 4 of section 2 of the Parole Regulations in M. LeBlanc's favour. That exception was duly purported to be made by SOR/74-29.

The Committee was unable to see this course of proceeding as anything but an unlawful dispensation from the Parole Regulations since the Parole Act confers no power of dispensation on anyone and section 9 (a) itself authorizes only general rules and not particular rules applying to individual inmates. The Committee is not, of course, unmindful of the hardship which it was sought to avert by making these Special Parole Regulations, but considers that the proper course—and a course possibly more beneficial to M. LeBlanc—would have been, and still is, an exercise of the Royal Prerogative of Mercy. (The Committee understands that M. LeBlanc, while originally on day parole, is still on full parole.) These views were pointed out to the National Parole Board which advised the Committee that it considered itself bound "by the procedure recommended to it and by the acceptance of that procedure by the Governor in Council". It was, of course, precisely that procedure and its consequent acceptance by the Governor in Council which the Committee objected to as amounting to an illegal act of dispensing with the law in favour of M. LeBlanc.

The Committee realizes that what is now critical is not the illegality of the manner in which M. LeBlanc was released from custody in 1973 but the gaining of an assurance that no further Special Parole Regulations will be made reducing the portions of terms of imprisonment that must be served by particular inmates before they may be granted parole. The Committee notes that the proposed section 9 of the Parole Act, contained in clause 22 of the Bill for a Criminal Law Amendment Act (No. 1) 1976 introduced in the last Session, reproduced the present phrase—"portion of the terms of imprisonment"—and that, even if that Bill is reintroduced and carried, precisely the same situation could arise in the future under the same statutory provision as applied in the case of M. LeBlanc.

(iii) SOR/73-439, Section 1 of Schedule A to the Steamship Machinery Construction Regulations, amendment

Section 1 of Schedule A to this amending regulation purports to give the Board of Steamship Inspection a power to dispense in individual cases with the properties of steel laid down in the balance of the Schedule as being of general application. In doing so, it simply echoes section 4 (1) of the principal Regulations which, being made in 1955, [31] lie beyond the Committee's reference. When advised of the Committee's concern at the granting by the Governor in Council to the Board of a power to dispense with a part of the regulations made by the Governor in Council, the Ministry of Transport replied that the power to grant a dispensation to the Board was conferred upon the Governor in Council by section 400 (1) (*b*) of the Canada Shipping Act which reads:

> "The Governor in Council may make regulations respecting the construction of machinery."

The Committee was told that the power to dispense flowed from the word "respecting". This the Committee can not accept, for reasons discussed at length in Appendix III.

The Committee is more than ever convinced that the word "respecting" and subject-matter enabling clauses have been given an interpretation by the Department of Justice wholly erroneous and dangerous. The Committee wishes to adopt the words of Chillingworth:

> "He that would usurp an absolute lordship over any people, need not put himself to the trouble of abrogating or disannulling the laws made to maintain the common liberty, for he may frustrate their intent, and compass his design as well, if he can get the power and authority to interpret them as he pleases, and to have his interpretation stand for laws."

100. Because of the tenacity with which the belief is held in the Department of Justice that such dispensations as have been described are lawful, the Committee has felt obliged to canvass this issue fully in Appendix III the more so since the power is being widely used (168 instances have come to the Committee's notice) and a great deal of ingenuity and mental effort appears to have been devoted to justifying this pretended power. The arguments in favour of its existence are diverse and each might have been addressed acceptably to the Court of King's Bench in the time of Charles I. They all, however, accord with the discredited reasoning of Lord Chief Justice Herbert in *Godden* v. *Hales* (1686). [32]

"There is no law whatsoever but may be dispensed with by the supreme law-giver; as the laws of God may be dispensed with by God himself; as it appears by God's command to Abraham, to offer up his son Isaac: so likewise the law of man may be dispensed with by the legislator, for a law may either be too wide or too narrow, and there may be many cases which may be out of the conveniences which did induce the law to be made; for it is impossible for the wisest lawmaker to foresee all the cases that may be, or are to be remedied, and therefore there must be a power somewhere, able to dispense with these laws."

Just as that polluter of the temple of justice, in his desire to facilitate administrative convenience, confused God's Regent with God himself, so too the Department of Justice appears to confuse a delegate or sub-delegate of Parliament with the supreme law giver.

101. In case it might be thought that it has become unduly excited about a trifle which facilitates the administration of the realm the Committee wishes it to be recalled that it was just such a facilitation of policy which cost James II his throne. And it was just such an insistence on supra-legal powers which in some small measure led to the execution of his father. The Committee believes that the laws are to be obeyed by all. The nature of a dispensation is to favour some, to set some at liberty from the obligations or restrictions of the law, but to leave others under those same obligations and restrictions, and in many instances liable to penalty if they transgress. Once given or assumed a power of dispensation knows no limit in time, number or reason.

If it is desired to have a power to exempt in hard cases, Parliament must be asked to grant it. Livy wrote:

"The laws alone are they that always speak with all persons, high or low, in one and the same impartial voice. The law knows no favourites."

It is to be regretted that certain laws of Canada appear otherwise, and in contradiction of Aristotle's precept:

"That the law is a mind without affection; that is, it binds all alike, and dispenses with none; the greatest flies are no more able to break through the cobwebs than the smaller."

102. Should there persist in any quarter the view that the dispensing power exists, the Committee conceives as the most expeditious remedy the passage of a Bill for a Dispensing Power (Abolition) Declaratory Act.

103. As a final point, the Committee wishes to note the extraordinary nature of the constantly appearing "Immigration Special Relief Regulations" which purport, under sections 57 and 27 (3) of the Immigration Act, to dispense with certain requirements of the Immigration Regulations in favour of named individuals. The number of persons so exempted runs into hundreds, even thousands, every year. The Committee rejects the argument that a power to exempt categories of persons from the Regulations extends to exempting individuals. Moreover, it is not convinced that there is power under the Act to exempt categories of individuals. It was on this point that the Committee was first refused a "legal opinion" by a Designated Instruments Officer who was an officer of the Department of Justice serving as Legal Adviser to the Ministry of Manpower and Immigration.

On humanitarian grounds there may be need of a power to waive certain immigration requirements in individual cases. The proper course is to take this power by statute and this is the course the Committee has urged upon the Department of Manpower and Immigration and upon the Joint Parliamentary Committee on Immigration. On an initial reading of the proposed new Immigration Bill (1976) now before Parliament—and recognizing that it has no direct mandate to debate that Bill in detail at this particular stage—the Committee cannot find in that Bill any explicit power to waive immigration requirements on humanitarian grounds in individual cases, otherwise than by Ministerial permit.

K.—ENABLING POWERS IN APPROPRIATION ACTS

104. In the review of statutory instruments the Committee has been struck by the number of instances of the use of Votes in Appropriation Acts as vehicles for the conferring of subordinate law-making powers, usually upon the Governor in Council. From 1st January 1972 to 30th June 1976 at least one hundred and four items of delegated legislation have to the knowledge of the Committee, been made pursuant to Votes. (The task of adding up the number is not easy since spent regulations are removed from the Index to Part II of the Canada Gazette at the end of each calendar year in which their effect became spent.) The Committee fears that many, many more examples exist which have not been classed by the Crown's legal advisers as statutory instruments and of the existence of which the Committee has neither knowledge nor the means of knowledge.

105. The type of power to which the Committee is referring arises when moneys are voted by Parliament to be disbursed for a stated purpose but *all* the rules governing that expenditure, the determination of eligible recipients and so on, are left to be made by a subordinate authority. Parliament simply hands a sum of money to a subordinate with authority to spend it for a particular purpose, often vaguely stated, as that authority sees fit. The authority then makes a set of rules, often very elaborate, governing the expenditure of the money and, in effect, defining the purpose and objects of Parliament's bounty. Often the financial basis which gives the legal justification for the use of a Vote in an Appropriation Act is a fiction since the money voted is only one dollar.

106. At first, though disquieted by the extent of the granting of enabling powers in Votes, and those in distressingly vague and all-encompassing terms, the Committee did not take a stand against this means of providing for delegated legislation. Rather, the Committee concerned itself with remarking upon clear abuses of the practice and in drawing its objections to the attention of the Legal Advisers to the Privy Council Office and of the President of the Privy Council.

107. The first of these abuses was the frequent drawing of the enabling power in terms which, in the view of the Crown, would exclude the delegated legislation from the definition of a

"statutory instrument" and hence from Parliamentary scrutiny. The phrase frequently encountered was "... subject to terms and conditions prescribed by the Governor in Council ...". This phrase lacks any magic formula, such as "prescribed by regulation" or "prescribed by order", necessary in the Crown's eyes to bring the terms and conditions, when made and set in writing, within the compass of the Statutory Instruments Act. While not accepting that a magic formula is necessary to constitute delegated legislation a statutory instrument, the Committee has naturally represented to those in authority that the jurisdictional problem would be better avoided altogether by conferring the subordinate law-making power in terms which the Government itself acknowledges will, when the power is exercised, produce a statutory instrument.

108. The Committee has also objected to a refinement of the formula mentioned in the preceding paragraph: "subject to terms and conditions approved by the Governor in Council". This particular form of enabling power has all the defects already described but also is completely lacking in specificity as to whom the power is given. Who is it who is to set or make the terms and conditions which His Excellency in Council may approve? The Crown's legal advisers appear to maintain that under this particular formula no more is meant than that the Governor in Council will set the conditions. The Committee is, understandably, not very sanguine about general understandings as to the result of particular statutory formulae and is of the view that every enabling power should specify Parliament's delegate with precision, along with any conditions precedent to the use of the power or procedural requirements Parliament sees fit to provide. All should be clear and admit of no argument.

109. The third abuse to which the Committee has objected is the "filling up" and extension of old Votes, and old enabling powers, under a series of Votes commencing at some point in the intermediate or distant past which are then amplified in scope or altered in some one or more particulars by succeeding Votes. These successive Votes are often expressed "to extend the purpose" of an earlier Vote and the extensions in some instances are but barely related to the particular objects of the original Vote. The combination of the accumulation of extensions and the extreme generality of language in which almost all enabling powers in Votes are expressed renders the task of the Standing Joint Committee so difficult as to negate any effective scrutiny. To the extent that scrutiny is rendered ineffective, Parliament's control of the purse is subverted. The Committee has seen instances of deplorable vagueness and uncertainty as to the true extent of enabling power arising from such constant tinkering. Moreover, the Committee concludes that this practice shows that normal, substantive legislation is necessary to cover the particular subject matter dealt with by the series of Votes. To take but one example, the Committee cannot see why the medical fringe benefits of public servants could not be settled by statute and regulation in the ordinary way, instead of under a series of Votes commencing in 1960. [33] This abuse amounts to an infringement of criterion 9 and the Committee considers that much of what appears in Votes to be dealt with by delegated legislation should be the subject of open and notorious legislation.

110. In delving into the intricacies of enabling powers under Votes, the Committee soon discovered that the enabling powers were often not found in the Votes themselves, but in Items in the Estimates to which individual Votes related. Again, to take one example, the Committee had occasion to consider two amendments to the Shipbuilding Temporary Assistance Programme Regulations. [34] The enabling authority for the principal Regulations [35] and the subsequent amendments was recited as being the Appropriation Act No. 3, 1970. A perusal of the Votes for the Department of Industry, Trade and Commerce, on the recommendation of whose Minister the amendments were made, revealed nothing which appeared to relate to temporary assistance for the shipbuilding industry. Upon enquiry of the Department, the Committee was informed that the authority lay in Vote 5 and "the item entitled 'Capital subsidies for the construction of commercial and fishing vessels in accordance with regulations of the Governor in Council' which is listed in the details of the Printed Estimates 1970-71 related to that Vote". Vote 5 of the Appropriation Act No. 3, 1970 reads as follows:

> "Trade-Industrial—The grants listed in the Estimates and contributions and to increase to $150,000,000 the commitments during the current and subsequent fiscal years for payments to develop and sustain the technological capability of Canadian defence industry, and to increase to $60,000,-000 the commitments during the current and subsequent fiscal years for payments to advance the technological capability of Canadian manufacturing industry by supporting selected civil (non-defence) development projects . $88,888,-500"

Apart from the fact that there did not appear to be any necessary connection between capital subsidies for the building of commercial and fishing vessels on the one hand and the terms of Vote 5, the Committee was struck by the fact that by the conjunction of Votes and Estimates in this fashion moneys appropriated by Parliament for what appear to be fairly closely defined purposes may be spent by the Crown on virtually any object it pleases, thus subverting Parliament's control of the purse and destroying the appropriation system in all but name.

111. As a further example of the uncontrolled power being granted to the Crown by way of delegated legislation under Appropriation Acts the Committee notes Vote 10b of the Department of Manpower and Immigration in Appropriation Act No. 2. 1973:

> "... to extend the purposes of Manpower and Immigration Vote 10, Appropriation Act No. 3, 1972, to authorize special travel payments *to or in respect of persons*, in accordance with regulations made by the Governor in Council, to enable such persons to avail themselves of the services provided by the Department of Manpower and Immigration $1."

This Vote has been used to make a Manpower Mobility Regulations, amendment, [36] permitting the making of travel grants to those who journey to take up seasonal agricultural work. But it could be used to make regulations relating to anything the department pleases.

112. The Committee notes that power to make subordinate legislation is not granted in Votes in Appropriation Acts in the United Kingdom or in the Commonwealth of Australia and has concluded that it should place on record its opposition, as a matter of principle, to the making of delegated legislation under Votes in Appropriation Acts, whether under substantive or "dollar" Votes or under Votes used in conjunction with items listed in the Estimates. The Committee has made this position known to the Auditor General, the President of the Privy Council, the President of the Honourable the Treasury Board and the Minister of Industry, Trade and Commerce and has invited each to place his observations on the problems and practices now reported before the Committee. The Auditor General has replied in terms which confirm the Committee in its disquiet.

113. The Committee endorses the views of the Auditor General. If enabling powers to make statutory instruments are to continue to be granted in Appropriation Acts, the vote texts should be specific and unequivocal, and contain all the wording having legislative effect, with none being contained in the Estimates. Legislating by means of dollar Votes and altering the purpose of previous Votes by a number of successive Votes are practices with which the Committee does not agree.

L.—SCRUTINY OF ENABLING POWERS

114. The Committee recommends that enabling clauses in Bills should be scrutinized with particular care to ensure that the problems pointed out in the several preceding sections of this Report are found and analyzed while the Bills are before Parliament. Such studies of enabling clauses could be carried out by the appropriate Standing Committees or could be added to the reference of the Standing Joint Committee on Regulations and other Statutory Instruments.

M.—THE TEXT OF INSTRUMENTS SUBJECT TO AMENDMENT

115. Ascertaining the text of a statutory instrument which has been amended is not an easy task, yet it is a task which has faced the Committee and its counsel frequently and which has been carried out in many cases only with the utmost difficulty. How much more difficult must the same task be for ordinary citizens lacking expertise and ready access to the necessary documentation!

116. Since the last Consolidation of the Regulations of Canada appeared in 1955, there is only one laborious means of ascertaining the present state of a regulation or other statutory instrument. One must refer to the enabling Act in the Index to Part II of the Canada Gazette to find listed thereunder the particular regulation and all its subsequent amendments. Each such amendment must then be looked at individually and fitted into the original text, as if it were all one giant jig-saw puzzle. The whole process is made worse by the apparent unwillingness of some Departments and of the Privy Council Office to cause heavily amended regulations to be revoked and remade in new and complete form in a single regulation. The Committee has urged this course, but to no avail. The Committee considers that, if a process of constant amendment is likely to continue, as appears to be the case with regulations made under section 34 of the Fisheries Act, the regulations should be revoked and remade in consolidated form at regular intervals, perhaps annually. The Committee cannot see that there can be any more work involved, or more expense, in processing an Order in Council for a fresh set of consolidated regulations than in processing an Order in Council for a further amending regulation. The consolidated text must be known to the Department or it would be unable to administer its own regulations. The Committee is concerned to see that the consolidated text is made known as simply and directly and intelligibly as possible to all citizens. The Committee cannot believe that those affected by regulations, however skilful they may be in keeping up to date with amendments, would not find it simpler to cope with a fresh set of regulations than with, say, the sixteenth amendment to an existing regulation which amends a subsection of the regulations already twice amended. The effectiveness of much amended regulations, other than as traps for the unwary, is much to be doubted.

117. The Committee understands that a new Consolidation of the Regulations will appear, possibly as early as mid-1977. While this is naturally to be welcomed, concern must be expressed as to the means of keeping abreast of the flood of amendments which will follow. The Committee is of the view that after 1977 revocation and re-issuing of amended regulations should be the course followed so that ordinary folk will not be forced to study an ever-increasing accumulation of individual amendments. There appears to the Committee to be nothing in Part II of the Statute Revision Act [37] which requires that the next Consolidation of the Regulations must be kept up to date by the looseleaf method of revision in respect of all "regulations, statutory instruments or documents that, in the opinion of the Commission, are of continuing effect or apply to more than one person or body ..."

118. It is perhaps appropriate to observe that when the new Consolidation appears, it is estimated that the Committee will be faced with upwards of ten thousand pages of text of statutory instruments to scrutinize. So great an undertaking, while new and amending instruments will continue to be made, can only be undertaken slowly and in stages.

N.—DEPARTURE FROM THE LANGUAGE OF THE STATUTES

119. One of the Committee's concerns has been the equivalence in meaning of the French and English texts of statutory instruments. In looking at the texts of instruments with this in mind, the Committee has noted many instances in which statutory language has been reproduced faithfully in the English text but has been subject to "improvement" in the French text. The Committee formed and has adhered to the view that where phrases which appear in an enabling Act are used in statutory instruments made under that Act, such phrases should be reproduced without modification. Consequently, the Committee disagrees with the practice, no doubt well meaning, of translators and draftsmen of statutory instruments in seeking to improve upon the English or French used in the statutes of Canada.

120. The Committee is aware, however, that there are deficiencies and errors in the language of the statutes. While attention seems more commonly drawn to problems in the French texts, the English texts are not without their blemishes. The proper course is not to improve upon the language Parliament has seen fit to use when drafting statutory instruments, a process to which there would be no limit, but to alter the language of the statutes. The Committee notes that the Statute Law Revision Commissioners have been empowered to prepare draft consolidations and revisions of statutes on this basis and, further, that the projected periodical Statute Law Revision (Miscellaneous Provisions) Bills provide a further vehicle for improving the quality of language of the statutes.

121. The Committee has, accordingly, insisted that "improvements" on statutory language in statutory instruments be revoked and replaced by the language of the enabling Acts. In cases where there would clearly seem to be a different or new shade of meaning arising from the abandonment of the statutory language, the Committee has requested immediate amendment of the offending statutory instrument. In other cases the Committee has been willing to let the language stand until the instrument in which it appears is next amended.

O.—SATISFACTION OF CONDITIONS PRECEDENT

122. Where authority to make the instrument depends, under the enabling Act, upon the fulfilment of some condition precedent which can be recited as a statement of fact, the fulfilment of that condition should normally be recited in the preamble. Examples are, that a certain notice or proposal has been published as required, or that the Governor in Council is satisfied that, or that certain bodies have been consulted as required by statute. Agreement has been reached with the Legal Advisers to the Privy Council Office that such material will appear in the recitals contained in the preamble to statutory instruments which are published in Part II of the Canada Gazette. Of course, the Committee has no means of seeing that this eminently sensible requirement is met in the case of statutory instruments that are not subject to the pre-registration scrutiny of the Legal Advisers to the Privy Council Office. Such instruments are unlikely, under the present Statutory Instruments Act, to come to the Committee's attention.

P.—IMPLEMENTATION OF INTERNATIONAL AGREEMENTS BY STATUTORY INSTRUMENT—REMISSION ORDERS UNDER SECTION 17 OF THE FINANCIAL ADMINISTRATION ACT

123. The Committee has noted several instances of the implementation of an international agreement by regulation or other statutory instrument made under a statute which does not show in any way Parliament's intention to make the content of the particular international agreement part of Canadian national law. The Committee will keep this practice under continuing study and review, reporting to the two Houses at a later date should it consider that step necessary.

124. The Committee is aware that the practice referred to is a longstanding one and is often effected by the issuing of a Remission Order under section 17 of the Financial Administration Act. It is known that it is the Crown's view that Remission Orders are not statutory instruments but those of general application are published under SI numbers in Part II of the Canada Gazette as documents of public interest only. The Committee does not accept that Remission Orders are not statutory instruments simply because the magic formula "by order" is not found in the text of section 17 of the Financial Administration Act. Remission of taxes, fees and penalties is made by Order in Council and the Committee regards each such Remission Order as a statutory instrument, although it is aware that it sees only those few published in the Canada Gazette Part II. The Committee is of the view that if any class of Remission Order is to be excluded from the definition of a statutory instrument, the Statutory Instruments Act should be amended so to provide. Similarly, if any Remission Orders, while being statutory instruments, are to be excluded from scrutiny by the Committee, the Statutory Instruments Act or the regulations made under section 27 of that Act should so provide.

125. The Committee is also concerned with the frequency and nature of the use of Remission Orders under section 17 of the Financial Administration Act to grant remissions of customs duty, excise and other taxes to individuals and classes of persons. What appears to the Committee to be a power intended for use in exceptional cases where the public interest so dictates, has become routinely used for the implementation of governmental policies. The fact that the Governor in Council considers it in the public interest to remit the particular tax, fee or penalty involved is not now even recited in the preamble to a Remission Order.

Q.—AMENDMENT OF THE STATUTORY INSTRUMENTS REGULATIONS

126. The Statutory Instruments Regulations have been thrice amended since they were first made on 9th November 1971. When considering the last of these amendments, the Committee concluded that, since it was peculiarly concerned with and affected by amendments to these Regulations, it would be desirable if further amendments were not made without prior consultation with the Committee. The Committee realized that it had no right to be consulted and that the Crown in Council could make regulations as it saw fit, leaving the Committee to protest about the amendments after they were made, should it feel so disposed. Nonetheless, the Committee thought that it would be sensible if it were consulted about proposed Statutory Instruments Regulations before they were made. The Committee's views were put to the President of the Privy Council, who replied:

"If by consultations are meant a formal process whereby proposed amendments to the Statutory Instruments Regulations would be subject to prior approval or rejection by the Committee, the Government would be unable to agree since we do not feel that we can avoid acceptance of our final

responsibility, bestowed by Parliament, for the content of these regulations by sharing on a formal basis the duty of defining them. If on the other hand, consultations refer to informal discussions with the Co-Chairmen, the Government would indeed be pleased to consider carefully their comments on existing or future regulations and any recommendations for amendments which the Committee may care to put forward."

The Joint Chairman, Senator Forsey, responded to the President's letter, in part as follows:

"I'm afraid I must have expressed myself obscurely. Of course nobody with any knowledge of constitutional practice would expect that proposed amendments to the Statutory Instruments Regulations should be subject to prior approval by the Committee. All that anybody had in mind was what you suggest at the end of your letter: that you might consider suggestions that the Committee might see fit to offer. This, I assume, would mean that when the Government was contemplating changes (at any rate changes of any importance), it would let us know so that we could offer any suggestions we had when they would be of most use."

R.—LEGISLATION BY REFERENCE

127. The incorporation into statutory instruments of external documents, for example standards of the Canadian Standards Association, is acceptable provided a fixed text is incorporated and not a text as amended from time to time by an outside body. The Committee insists that any such amendment be considered by Parliament's delegate and, if thought desirable, incorporated by positive amendment to the statutory instrument into which the original standard, document and so on was incorporated. To allow automatic amendment is to permit some one other than Parliament's delegate to make subordinate legislation and to acquiesce in the amendment of a statutory instrument, and hence the making of a new statutory instrument, outside the procedures prescribed by the Statutory Instruments Act.

Where subordinate legislation by incorporating or referring to external documents occurs, the Committee calls for the incorporation of a reference to a fixed text or for an undertaking that no amendment to the external document will be regarded as incorporated into the statutory instrument which contains the subordinate legislation, any amendment which it is desired to include in the statutory instrument being the subject of specific amending action.

S.—POWERS OF OFFICERS OF AGRICULTURAL AGENCIES

128. The Committee has viewed with the gravest concern regulations made under the authority of the Agricultural Products Marketing and Farm Products Marketing Agencies Acts which empower officials to enter premises and to demand information from primary producers. The Committee is aware of the wide powers granted to inspectors under section 35 of the Farm Products Marketing Act and under the several provincial Acts utilized by Commodity Boards authorized to regulate interprovincial and export trade by Orders made under section 2 of the Agricultural Products Marketing Act. The Committee believes that it is imperative for the preservation of the liberties of the subject that the regulations made under both Acts go not one jot beyond the powers given by the Farm Products Marketing Act and the provincial marketing Acts and that the procedures adopted in the regulations be such as scrupulously respect the rights of the subject and the basic presumptions of the common law.

129. Typical of the provisions objected to under the Farm Products Marketing Agencies Act was section 7 of the Canadian Turkey Licensing Regulations [38] which provided that:

"Every licence shall be issued subject to the following conditions:

(*a*) the licensee shall provide to the Agency such reports and information as the Agency may from time to time require;

(*b*) the licensee shall permit the Agency, its employees and agents to inspect the licensee's premises and records;

(*c*) the licensee shall at all times during the term of the licence comply with orders and regulations of the Agency."

The information that might be required was not defined in terms of the marketing of turkeys in interprovincial and export trade and could have included even the licensee's income tax records. Moreover, the activity of inspection was not confined to that carried out by properly appointed inspectors and in accordance with section 35 (1) of the Act. Section 7 of the Regulations has since been amended [39] to remove these objectionable features.

130. An example of the provisions objected to by the Committee under the Agricultural Products Marketing Act is provided by the Saskatchewan Hog Information (Interprovincial and Export) Regulations, [40] section 5 of which reads:

"5. (1) Any member or authorized representative of the Commission may, at any reasonable time, inspect any place or premises used for the marketing of hogs.

(2) Every person in possession or control of any place or premises referred to in subsection (1) shall

(*a*) permit any member or authorized representative of the Commission to inspect such place or premises; and

(*b*) furnish any member or authorized representative of the Commission with such information in respect of the marketing of hogs as he may reasonably require."

Here, the powers of inspection have been granted without any requirement that the inspecting officer show his authority and establish his indentity. Nor is any attempt made to define "reasonable time". Under section 5 (2) (*b*) a person in possession or control of any place or premises used for the marketing of hogs must "furnish such information in respect of the marketing of hogs as (the inspecting officer) may reasonably require". This provision would enable the inspector to arrogate to himself far more power than is enjoyed by a peace officer and to destroy the inspected person's basic right not to incriminate himself. A person who, in the maintenance of his basic liberty, defied an order to furnish information would be liable under section 4 (1) of the Act to a fine not exceeding $500, to imprisonment for a term of up to three months, or to both.

131. The Committee wishes to acknowledge the handsome co-operation of the Department of Agriculture in removing the objectionable features from so many regulations relating to agricultural marketing. The Committee trusts that the safeguards thus afforded to primary producers will serve as an example for similar subordinate legislation in the future, and that the wide and unchallengeable powers of entry given to various authorities in many sectors of the economy will not be uncritically accepted simply because they have become common.

T.—DISCRETIONARY ADMINISTRATIVE DECISIONS, THE RULES OF NATURAL JUSTICE AND A RIGHT OF APPEAL

132. Two issues which have been of concern to the Committee are the right of appeal from a decision taken under delegated legislation, which decision is prejudicial to a subject, and the conferring of discretions on Ministers, officers or boards to take or not to take some action at their discretion. These two matters, although theoretically separate, become intermeshed and together raise also the effectiveness of section 28 of the Federal Court Act. [41]

133. The Committee always looks closely at provisions empowering a Minister, officer or Board to take a decision at his or its discretion. Discretions are often conferred obliquely by the use of the word "may" or such phrases as "to his satisfaction" or "in his opinion". The Committee considers that as a general rule subordinate legislation should set some objective criteria governing the administrative decisions to be taken and that where tests are set for eligibility or as prerequisites for some action to be taken, such tests should be cast in objective and not in subjective terms. The objective test and the setting of objective criteria will permit an aggrieved person to take legal action where the tests or criteria have been improperly applied. Where subjective tests are employed, and phrases such as "where in his opinion such and such circumstances exist," virtually unchallengeable discretion is imported. Short of being able to conclude that the officer has governed the exercise of his discretion by totally extraneous considerations, a court cannot interfere, for to do so would be to substitute its opinion for that of the officer.

134. The Committee is aware that the granting of subjective discretionary powers in the regulations of Canada is common. The Committee is also aware that some Departments of State can make out a plausible case for many discretions or subjectively worded tests taken individually. Yet, the Committee is convinced that what is really involved is a cast of mind and the frequent occurrence of such provisions is not a good reason for continuing and perpetuating their use. An answer from a government department that the purposes of a particular set of regulations would not be furthered by the substitution of an objective for a subjective test is unacceptable.

135. In some instances, the Committee has been made aware that the enabling legislation is itself replete with discretionary powers and subjectively worded tests. Such an enabling act is the Department of Regional Economic Expansion Act. The Committee believes that if discretions are to be granted the enabling legislation is the proper vehicle. Subordinate legislation should preclude the possibility of discriminatory treatment of persons, and matters that are included in substantive legislation are not necessarily appropriate to subordinate legislation.

136. It often happens that statutory instruments govern the granting, suspension, and revocation of permits and licences, sometimes by one official acting after receipt of a report from another official. The Committee considers that, in general, any person aggrieved by a refusal to grant a licence or permit, or by a suspension, cancellation or revocation, should have a right to be heard in objection, a right to be given reasons and a right to be apprised of any adverse material in any report submitted to the determining official. These safeguards have been considered as basic and essential in natural justice since the Franks Committee Report, 1957, [42] and have been given expression in Ontario in the Statutory Powers Procedure Act [43] and the Judicial Review Procedure Act [44]. Even in situations in which an appeal is provided for, or review may be available under section 28 of the Federal Court Act, or action under section 18 of the same Act is possible, the Committee believes that subordinate legislation should provide for the rights mentioned, as those aggrieved should not necessarily be forced to litigation. When they are, they should not be disadvantaged by knowing nothing of the case against them.

137. The Committee is, in any event, far from clear as to the situations in which an application will be entertained under section 28 of the Federal Court Act for the review of any decision to suspend, cancel or revoke or refuse a licence or permit. Section 28 permits an application to review and set aside a decision or order, "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis ...". The meaning of this exclusion is far from clear and the decisions on it do not constitute a clear guide. The Committee cannot readily form a coherent principle out of *Howarth* v. *The National Parole Board* [45] *Lazarov* v. *Secretary of State* [46] and unreported decisions to which it has been referred by Designated Instruments Officers. When the existence of a right to review under section 28 in any set of circumstances is uncertain, the Committee is all the

more convinced that an aggrieved person should not be forced to rely on it in the absence of rights to be told the case against him, to be heard and to be given reasons reserved to him in subordinate legislation.

138. The effectiveness of action under section 28 is made even more doubtful when the powers to grant, suspend, review, revoke, etc. are given in discretionary and subjective terms. Provisions so expressed as to allow an officer to act according to his opinion or satisfaction of facts would seem, on the face of it, to put the decision taken beyond challenge, because an aggrieved person would, even after establishing that the officer had a duty to act quasi-judicially and had failed to do so, still have to abide by the officer's opinion when he decided the issue again. The Committee believes that administrative decisions which can greatly affect the rights, liberties and livelihood of individuals ought not to be put beyond legal challenge by the use of discretionary tests, and that the rules of natural justice should be included in grants of power to take such decisions, thus affording individuals initial safeguards and ensuring a right to review under section 28 of the Federal Court Act where the duty to act quasi-judicially, so created, has been disobeyed.

U.—EXEMPTIONS FROM CIVIL LIABILITY

139. The Committee has encountered twelve regulations [47] which attempt to exempt the National Harbours Board from all civil liability for the acts or omissions of itself, its employees and its agents in certain circumstances which vary from regulation to regulation. The Committee raised the question of whether these regulations were ultra vires section 14 (1) (*e*) of the National Harbours Board Act. A lengthy and reasoned reply has been received on this point from counsel to the National Harbours Board, which the Committee has under advisement. Beyond the question of vires, the Committee deplores attempts to exempt agencies by regulation from the legal consequences of their acts or defaults. They are an undue infringement of the rights and liberties of the citizen. Although it was common, and even thought acceptable, some decades ago to confer immunity of this nature upon statutory bodies, it is now regarded as not in accordance with accepted standards. The Committee notes that the Senate Committee on Regulations and Ordinances of the Commonwealth of Australia has, with success, taken a similar stand [48] against such exemption provisions.

V.—STATUTORY INSTRUMENTS MADE UNDER THE INCOME TAX ACT

140. Regulations of great length and complexity are made under the Income Tax Act. These have to date been given only a cursory examination by the Committee which is sensible of the fact that a thorough study would pre-empt its time and energies and those of its counsel. Aware that those affected by the Income Tax Act are often well organized and well represented by professional gentlemen and organizations making it their business to be aware of all matters affecting or lessening the incidence of the income tax, the Committee has invited the more prominent organizations to refer to the Committee any income tax regulation which in their view transgresses any of the Committee's criteria.

141. The status of the National Revenue Department's Interpretation Bulletins and Information Circulars is a matter of concern. They might not be statutory instruments at all. They may be excluded from that class by force of section 2 (1) (*d*)(v): "... whose contents are limited to advice or information intended only for use or assistance in the making of a decision". However, it cannot be gainsaid that these documents are issued and directed to the public, rather than to the Department's employees, and they do lay down rules which will be followed by the Department's assessors unless and until they are overturned by a competent tribunal. The Committee believes that the status of these documents, and their equivalents in other spheres, needs to be examined carefully when, as the Committee trusts, the Statutory Instruments Act is amended.

W. AFFIRMATION AND DISALLOWANCE OF STATUTORY INSTRUMENTS BY THE HOUSES OF PARLIAMENT

142. The Committee notes that very few statutes of Canada provide for statutory instruments to be subject to either affirmative or negative resolution procedures allowing either or both of the Houses of Parliament to control the coming into force of an instrument or to disallow it. The Committee regards the extension of such procedures as desirable and considers that they might be more widely adopted in the drafting of Bills if there were a statutory codification of the requisites for affirmative and negative resolutions so that there would be a clear understanding of the procedures to be followed, the number of Members of each House who would be required to put down a motion to disallow an instrument and so on. Section 28A of the Interpretation Act, added by section 28 (3) of the Statutory Instruments Act, goes only part of the way to meet such procedural requirements and could be amended to embody a complete code of procedure. Alternatively, each House, building on section 28A, could adopt Standing Orders (preferably identical) which would set out in detail the procedures to be followed in the Chambers.

SUMMARY OF RECOMMENDATIONS BY SUBJECT MATTER

B. THE COMMITTEE'S CRITERIA FOR SCRUTINY OF STATUTORY INSTRUMENTS

(Paragraphs 9-13)

1. The Committee's criteria for scrutiny should be written into the Statutory Instruments Act so that they will not need to be adopted and concurred in anew by the two Houses at the commencement of every Session and Parliament.

2. An additional criterion should be added, namely, whether a statutory instrument trespasses unduly on the rights and liberties of the subject.

E. DEFECTS IN THE STATUTORY INSTRUMENTS ACT, PRINCIPALLY THE DEFINITION OF A STATUTORY INSTRUMENT

(Paragraphs 21-55)

1. As a general rule no subordinate legislation should come into effect before it is published.

2. All subordinate legislation, unless expressly excepted by the terms of the Statutory Instruments Act, should be registered, published and transmitted to the Standing Joint Committee on Regulations and Other Statutory Instruments.

3. The definitions of "statutory instrument" and "regulation" at present contained in the Statutory Instruments Act should be repealed and replaced by a clear definition of a statutory instrument as a piece of subordinate legislation, with any exceptions from the definition, being also the exceptions to Parliamentary scrutiny, specifically and clearly set out.

4. The distinction between "regulations" and "other statutory instruments" provided for in the Statutory Instruments Act should be abandoned. There should be but one class of subordinate laws, called statutory instruments, broadly defined in accordance, in general terms, with the definition of "regulation" as contained in the Interpretation Act.

5. All documents contained within the single class of statutory instruments should be subject to uniform procedure as to registration, publication and restriction on retroactive effect.

6. The definition of a statutory instrument should not be made to depend upon the insertion in an enabling power of the name of any particular type of document or instrument preceded by the preposition "by".

7. The new definition of a statutory instrument should be arrived at by taking the sum of the law-making and rule-making exercised by the Crown and its agencies and by any other delegate or sub-delegate of Parliament, and whether made pursuant to or under a statute or to the Prerogative, and by declaring the whole to be subject to Parliamentary scrutiny. If it is then desired to exclude any documents or classes of documents from scrutiny, from registration and publication, those documents or classes of documents would need to be defined expressly. Such definitions should be construed narrowly and a statutory direction to this effect should be included in the Statutory Instruments Act.

8. The Statutory Instruments Act should provide for a Statutory Instruments Reference Committee having the authority to issue a conclusive determination for the purposes of Parliamentary scrutiny as to whether any particular document is a statutory instrument or not.

9. Any Departmental Guidelines, Directives or Manuals which contain substantive rules not contained in statutes or in other statutory instruments should be included within the definition of a statutory instrument and be subject to Parliamentary scrutiny. This inclusion should extend to Guidelines, Directives, etc. which constitute instructions to staff where the rules so made are applied to or in respect of non-staff members or where the breach of the rules can lead to disciplinary action against the staff member committing the breach.

10. Where any statutory instrument is to come into force before registration and publication, the reasons therefor should be provided to the Standing Joint Committee on Regulations and Other Statutory Instruments.

11. Should the distinction between "regulations" and "other statutory instruments" be retained, the words "regulation-making authority" in the Statutory Instruments Act should be re-defined to make clear that in respect of regulations made by the Governor in Council by Order in Council they mean the Department, Ministry or other body which recommends the draft Order to the Governor in Council.

12. Section 32 of the Statutory Instruments Act should be amended to require the publication of the regulations that have been registered under that section.

F. MATTERS RELATING TO THE FORM OF STATUTORY INSTRUMENTS

(Paragraphs 56-69)

1. Both the enabling authority for subordinate legislation and other documents or statutory instruments referred to within the body of a statutory instrument should be clearly and adequately identified with the actual place of publication being disclosed.

2. The references to intermediate enabling authority, not being statutes, and to all instruments mentioned within a statutory instrument, should be given by a footnote showing the place and date of publication, and registration number if one exists. The giving of footnote references should not be confined to instruments the details of whose registration and publication can not be traced through Part II of the Canada Gazette.

3. When a statutory enabling power has been amended since the last Revision of the Statutes of Canada, the preamble to a statutory instrument made in reliance on that power should recite not only the relevant section number or numbers and the name of the Act but also the reference to any amending statute which has amended the enabling power.

4. The footnotes to an amending statutory instrument should disclose all the prior amendments relevant to the provision or provisions of the statutory instrument now to be amended.

5. Statutory instruments should be accompanied by Explanatory Notes. This is especially to be desired in the case of amending statutory instruments. An Explanatory Note should describe the subject matter dealt with in such a way as to indicate the point of the statutory instrument in a purely informative way without entering into justification, argumentation or construction of the law.

G. THE WITHHOLDING OF INFORMATION FROM THE COMMITTEE

(*Paragraphs 70-80*)

Those Departments of State and Authorities which make, or propose to the Governor in Council the making of, subordinate legislation should explain to the Committee, if called upon, how it is that a particular piece of subordinate legislation does not infringe one or more of the criteria for scrutiny. An explanation should include legal reasons where such are called for as where the Committee has questioned the vires of a statutory instrument, the interpretation of some apparently obscure or ambiguous provision, or the status of a document as being or not being a statutory instrument.

H. SUB-DELEGATION OF RULE-MAKING POWER

(*Paragraphs 81-84*)

If it is desired or thought necessary to give to a delegate of Parliament power to sub-delegate rule-making power, the power should and must be conferred expressly by the enabling statute.

I. THE LANGUAGE OF DELEGATION

(*Paragraphs 85-95*)

1. The precise limits of subordinate law-making power should always be defined in clear language in the enabling statute.

2. Enabling powers cast in terms of subject matter, and commonly introduced by the word "respecting" should not be included in enabling statutes whilstever the view is held by the Crown that such powers permit both sub-delegation of rule-making power and a power of dispensation in favour of individuals.

3. No enabling power should confer upon Parliament's delegate the authority to determine or to declare the scope of his own delegated power or the true intention of the enabling statute.

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

(*Paragraphs 96-103*)

The pretended power of dispensing with the provisions of subordinate legislation in favour of individuals under colour of enacting further subordinate legislation, being illegal unless expressly authorized by the enabling statute, should be abandoned forthwith.

K. ENABLING POWERS IN APPROPRIATION ACTS

(*Paragraphs 104-113*)

1. The practice of using Votes, whether substantive or dollar Votes, and Items in the Estimates as vehicles for the conferring of enabling powers should come to an end. Subordinate legislation should be made under enabling authority contained in ordinary statutes.

2. Even if the practice is not terminated immediately, the following particular abuses should stop, viz:

(*a*) the conferring of subordinate law-making power in Votes and Items in terms which, in the view of the Crown, excludes the subordinate legislation, when made, from the definition of a "statutory instrument", and thus from Parliamentary scrutiny;

(*b*) the conferring of subordinate law-making power by use of the words "subject to terms and conditions approved by the Governor in Council";

(*c*) the extension and amplification of the purposes of old votes by a series of subsequent Votes.

L. SCRUTINY OF ENABLING POWERS

(*Paragraph 114*)

Enabling clauses in Bills should be scrutinized while the Bills are before Parliament by the appropriate Standing Committees or by the Standing Joint Committee on Regulations and Other Statutory Instruments.

M. THE TEXT OF INSTRUMENTS SUBJECT TO AMENDMENT

(*Paragraphs 115-118*)

Statutory instruments that have been much amended should be revoked and remade in complete form. An instrument in respect of which a process of constant amendment is forseeable should be revoked and remade in consolidated form at regular intervals, perhaps annually.

P. IMPLEMENTATION OF INTERNATIONAL AGREEMENTS BY STATUTORY INSTRUMENT—REMISSION ORDERS UNDER SECTION 17 OF THE FINANCIAL ADMINISTRATION ACT

(*Paragraphs 123-125*)

Remission Orders made pursuant to section 17 of the Financial Administration Act should be regarded as subordinate legislation and as subject to Parliamentary scrutiny. The exclusion of any class of such Orders from scrutiny should occur only if expressly provided for in the Statutory Instruments Act.

S. POWERS OF OFFICERS OF AGRICULTURAL AGENCIES

(*Paragraphs 128-131*)

1. Rights of entry, powers of inspection and of seizure and the power to demand or take information should be confined exactly within the limits provided for in enabling legislation.

2. The wide and unchallengeable powers of entry now being given in enabling Acts should not be uncritically accepted simply because they have become common.

T. DISCRETIONARY ADMINISTRATIVE DECISIONS, THE RULES OF NATURAL JUSTICE AND A RIGHT OF APPEAL

(*Paragraphs 132-138*)

1. As a general rule, subordinate legislation should set objective criteria governing the taking of decisions provided for in that legislation.

2. Where tests are set for eligibility or as prerequisites to the taking of some action under subordinate legislation, the tests should be cast in objective and not in subjective terms. Tests, prerequisites or criteria dependent upon the formation of opinions or the satisfaction of individuals should be avoided.

3. The granting of discretionary powers is properly the subject of a statute and not of subordinate law.

4. Any person aggrieved by a refusal to grant a licence or permit, or by a suspension, cancellation or revocation of a licence or permit, pursuant to subordinate legislation, should be accorded in the subordinate legislation itself a right to be heard in objection, a right to be given reasons and a right to be apprised of any adverse material in any report submitted to the determining official. These rights should be accorded even where a right of appeal might exist, for the subject should not be forced unnecessarily to litigation, and their presence will assist in guaranteeing jurisdiction in the Federal Court under section 28 of the Federal Court Act.

U. EXEMPTIONS FROM CIVIL LIABILITY

(*Paragraph 139*)

Subordinate legislation should not attempt to exempt governmental agencies from the legal consequences of their acts or defaults or of those of their employees in either tort or contract.

V. STATUTORY INSTRUMENTS MADE UNDER THE INCOME TAX ACT

(*Paragraphs 140-141*)

The status of the National Revenue Department's Interpretation Bulletins and Information Circulars, and their equivalents in other Departments of State and agencies, must be carefully examined when the definition of a statutory instrument is amended.

W. AFFIRMATION AND DISALLOWANCE OF STATUTORY INSTRUMENTS BY THE HOUSE OF PARLIAMENT

(*Paragraph 142*)

1. Greater use should be made of affirmative and negative resolution procedures in the drafting of Bills.

2. A complete code governing both affirmative and negative resolutions should be adopted either by the amendment of section 28A of the Interpretation Act or by the adoption by the two Houses of Standing Orders (preferably identical) setting out in detail the procedures to be followed in the two Houses.

APPENDIX I—DETAILED CONSIDERATION OF THE PRESENT DEFINITION OF A STATUTORY INSTRUMENT

I

In order to put the matter in a perspective which is both rational and historical, even if not one entirely *in pari materia* (in analogous cases), it is as well to look at the law before January 1, 1972 when the Statutory Instruments Act came into force, together with proposals for change, as also at the definition of a statutory instrument under the United Kingdom legislation, a definition which, so it appears, has not been without its effect locally.

The old Regulations Act, R.S.C. 1952 Cap. 235, for all the criticism levelled at it by the MacGuigan Committee [49] had at least the virtue of containing a fairly simple, even if not a broadly encompassing, definition of "regulation", the then term of art, the phrase "statutory instrument" being nowhere used. A "regulation", so the Act ran, meant:

> "a rule, order, regulation or by-law or proclamation,
>
> (i) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by the Governor in Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada; or
>
> (ii) for the contravention of which" (even if not made in the exercise of a legislative power by any of the designated persons or bodies) "a penalty or fine or imprisonment is prescribed by or under an Act of Parliament."

Four exceptions were specified, two of which have been continued in the present Statutory Instruments Act as exceptions to the definition of a statutory instrument (section 2 (1) (*d*)(iii) and (vi). The third exception, relating to the status of rules of courts, has been continued in modified form, and the fourth—"an order or decision of a judicial tribunal"—has been included within the third.

The MacGuigan Committee noted the potential restrictiveness of the test "made, in the exercise of a legislative power", as also the fact that in its view prerogative orders of a legislative character should be classified as delegated legislation in the negative sense that Parliament, by not abolishing the Prerogative, had permitted the making of law under it. Whatever may be thought of so Whiggish a view of the Prerogative, section 2 (1) (*d*)(ii) of the Statutory Instruments Act does at least make one thing clear, namely, that any rule, etc. made by virtue of the Prerogative by the Governor in Council is a statutory instrument.

Continuing in force during the era of the old Regulations Act (which ceased to have effect on December 31, 1971), and to the present day is the definition of "regulation" contained in the Interpretation Act. That Act defines an *enactment* as

> "an Act or regulation or any portion of an Act or regulation."

and a *regulation* as including

> "an order, regulation, order-in-council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (*a*) in the execution of a power conferred by or under the authority of an Act, or
>
> (*b*) by or under the authority of the Governor in Council."

While the catalogue of types of instrument is not identical with the opening words of section 2 (1) (*d*)(i) of the Statutory Instruments Act, it is substantially similar and paragraphs (*a*) and (*b*) above are identical with section 2 (1) (*d*)(i) and section 2 (1) (*d*)(ii) *with the limiting words excluded.* The genesis of the definition of statutory instrument in the definition of "regulation" adopted in the Interpretation Act in 1967-1968 C. 7 is readily apparent. The examination of this definition also confirms the view that all the words in section 2 (1) (*d*)(i) of the Statutory Instruments Act following "in the execution of a power conferred by or under the authority of an Act of Parliament" constitute a single limitation, a point whose significance will become apparent infra.

The overall picture then is this:

> (*a*) For the purposes of the Interpretation Act there is a definition of "regulation" which is considerably wider than that of "statutory instrument" in the Statutory Instruments Act. This wide definition is of importance in section 6 and 7 of the Interpretation Act concerning commencement, repeal and the making of regulations before an Act comes into force. Since the word "enactment" includes "regulation" the wide definition is also of importance in every provision of the Interpretation Act which refers to "enactment".
>
> (*b*) There is a definition of "statutory instrument" in section 2 (1) (*d*)(i) of the Statutory Instruments Act which is of importance primarily in delimiting the scope of parliamentary scrutiny, since the Act does not lay down any regime governing the registration and publication of statutory instruments as such. There are the further points that (i) a statutory instrument that is not published in the Canada Gazette may, perhaps, not be judicially noticed (section 23) and (ii) the right of public access under section 24 extends only to statutory instruments as defined in the Statutory Instruments Act. Only *some* statutory instruments must be registered. Vide section 6.
>
> (*c*) There is a species of statutory instrument known as a regulation, as defined by the Statutory Instruments Act, to which special rules as to registration and publication attach.

The overall result can best be shown by the use of the diagrams at the end of this Appendix

Turning to the United Kingdom legislation one finds that there is but one class of documents, that of "statutory instruments". There is no sub-class of "regulation" to which any special rules apply. However, the class *statutory instrument* is not as wide as the class *regulation* proposed by the MacGuigan Committee for adoption in Canada. The United Kingdom legislation also distinguishes between Acts passed before and those passed after the commencement of the Statutory Instruments Act, 1946 (1st January 1948). In the case of the latter a statutory instrument is defined in this wise:

> "Where ... power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown, then *if the power is expressed*
>
> (*a*) in the case of a power conferred on His Majesty, *to be exercisable by Order in Council*:
>
> (*b*) in the case of a power conferred on a Minister of the Crown *to be exercisable by statutory instrument*;
>
> *any document* by which that power is exercised shall be known as a 'statutory instrument' and the provisions of this Act shall apply thereto accordingly."

An example of the type of legislative drafting envisaged in the above provision is found in section 8 (1) of the Statutory Instruments Act itself which reads:

> "8 (1) The Treasury may, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, *by statutory instrument*, make *regulations* for the purposes of this Act, and such regulations ..."

It will be seen that the question of whether a document is, or is not a statutory instrument, depends on the express style of making declared by Parliament; that is to say, whether by Order in Council or by statutory instrument, and *not* upon the use of a formula "make regulations", "make orders", "make rules", etc. It can be seen, too, that if the Minister proceeds by statutory instrument the document he makes ("any document") is a statutory instrument even if, in the case, for example, of section 8 (1) of the Statutory Instruments Act the section were to read: "may ... by statutory instrument prescribe ...". This point may be summarized by saying that a document made in the exercise of a power conferred by an Act of Parliament is a statutory instrument if it is made by a Minister and the Act provides that the power is exercisable by statutory instrument, or if it is made by Her Majesty and is an Order in Council.

As to enabling Acts passed before the commencement of the Statutory Instruments Act, whether or not delegated legislation made under them are statutory instruments depends upon whether a power to make a *statutory rule* within the meaning of the Rules Publication Act 1893 was conferred on the body making the legislation. If such power had been conferred any document by which it is exercised is a statutory instrument, unless otherwise expressly provided in the Statutory Instruments Regulations. Under the Rules Publication Act *statutory rules* means rules, regulations or bye-laws made under an Act of Parliament by, amongst others, Her Majesty in Council, the judicial Committee, the Treasury, the Lord Chancellor of

Great Britain, or the Lord Lieutenant or Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland, or any other Government Department.

II

The Committee's unsuccessful attempts to grapple with the definition of a statutory instrument led it to ask the Department of Justice for its view of its meaning. A reply dated June 13, 1975, was received from Mr. H. McIntosh, Q.C., Director, Legal Services, Privy Council Office, in the following terms:

> Mr. Ross (Principal Legal Adviser to the Privy Council Office) has referred to me your letter of May 21st, informing him that it was felt that the work of the Committee would be greatly helped if he could put in writing the interpretation the Privy Council Office gives to a "statutory instrument" as defined in the Statutory Instruments Act.
>
> As I read the proceedings of the Committee, the main difficulty with the definition and the one on which it would like our views is as to the meaning of the words "by or under which such instrument is expressly authorized to be issued, made or established" in subparagraph (i). It is our reading of these words that in order for an instrument to be a statutory instrument, the enactment pursuant to which the instrument is made must expressly authorize its issuance, making or establishment. For example, a provision of an Act may provide that the Governor in Council may by order exempt persons from the application of the Act. In our view, the resulting order would be a statutory instrument because it would be an order made in the exercise of a power conferred by or under an Act of Parliament "under which such instrument (i.e., the order) is *expressly* authorized to be made". If the enactment had provided the Governor in Council may exempt persons from the application of the Act, then the resulting instrument of exemption would not, in our view, be a statutory instrument because no instrument is expressly authorized to be issued, made or established. The distinction is perhaps a fine one but it is, I suggest, one borne out by the words of the Act. We can think of no other construction to give to these words and, as you know, there is a presumption in the construction of statutes that Parliament intends meaning to be given to all words in a statute.
>
> In the case of the Nova Scotia Egg Order, the Commodity Board is authorized to make orders fixing, imposing and collecting levies and charges from persons in Nova Scotia who are engaged in the marketing of eggs. An order made by the Commodity Board would therefore, for the reasons mentioned above, be a statutory instrument as that term is defined in the Act. It was also our view that the order being made in the exercise of a legislative power conferred by the Act would be a regulation as that term is defined in the Statutory Instruments Act.
>
> I hope that this explanation will be of assistance to you and to members of the Committee and if I can be of any further assistance in this regard, please let me know.
>
> Yours truly,
>
> H. McIntosh,
> Director, Legal Services.

Section 2 (1) (*d*)(i), which lies at the root of the problem reads:

> "in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates;"

In his letter of 13th June 1975, Mr. McIntosh deals with the words "... by or under which such instrument is expressly authorized to be issued, made or established ...". The result of the view taken as to the meaning of those words can be seen in both the second and third paragraph of his letter and is illustrated further by examples of regulations, other statutory instruments and documents not being statutory instruments furnished for the Committee's meetings of 3rd, 10th and 17th July 1975 and now reproduced in Issues 34, 35 and 36 of the Committee's Proceedings. Mr. McIntosh subsequently appeared before the Committee on 30th October 1975 and as a result it became clear that the Crown's position on the interpretation of section 2 (1) (*d*)(i) was to the following effect, namely:

> (i) That an instrument is not expressly authorized to be issued, made or established unless it is authorized to be issued, made or established under the name or title of a class of instruments of which the particular instrument is one, i.e., an instrument is not a statutory instrument unless issued, made or established under an enabling power containing a magic formula consisting of the preposition "by" immediately followed by an abstract noun which is the name of a class of instruments;
>
> (ii) That an instrument issued, made or established in the execution of a magic formula will not be a statutory instrument, notwithstanding the magic formula, if its effect is to confer power on another person or body to do some further act or to make rules (On 30th October Mr. McIntosh was led to concede that this exclusion did not accord with the Privy Council Office's practice of regarding as statutory instruments Orders, issued by the Governor in Council under section 2 of the Agricultural Products Marketing Act, which confer on Marketing Boards powers of regulation and of imposition of levies and charges. Subsequently, in conversation with the Committee's counsel, Mr. McIntosh adhered to his interpretation and opined that the Privy Council Office had erred in regarding such Orders as statutory instruments. That they would thereby be removed from scrutiny was not regarded as of great consequence since they were formal docu-

ments. However, the Committee can not see that any good can be regarded as coming from removing documents from scrutiny. And it would say that the scrutiny of the regulations actually made by the Marketing Boards in the execution of the powers given to them by the Orders in question would be made impossible in terms of criteria l, 4, 6 and 11 unless the Orders are treated as regulations or as documents which should in the public interest be published in the Gazette under an SI number.);

(iii) That a document is not an instrument within the opening words of section 2 (1) (*d*) unless

(*a*) it is a document referred to in the magic formula in the particular enabling power in question; and

(*b*) it is one of the types of documents listed in the opening words of section 2 (1) (*d*) or is an "other instrument", that phrase being interpreted by the eiusdem generis rule. No common characteristic has been specified and without it the eiusdem generis rule cannot be applied.

The following points can be made about the interpretation adopted by the Privy Council Office.

1. The result is absurd and produces quite arbitrary results as between documents having precisely the same legal effect and made under the same enabling statute, for example, Levies Orders made under the Agricultural Products Marketing Act, section 2 (2). Levies Orders will be either regulations or documents not being statutory instruments at all depending on whether or not the intermediate enabling authority (e.g. a Milk Order) reads "... may *by order* fix, impose and collect ..." or "... may fix, impose and collect ...". Any interpretation which produces so absurd a result, especially under a piece of legislation, such as the Statutory Instruments Act, designed to enact a grand plan for the registration and scrutiny of statutory instruments, can only be accepted if it stands forth clearly from the very language of the Act. Such is certainly not the case with section 2 (1) (*d*)(i).

2. It can be accounted a strained interpretation as can be seen by testing it in the context of section 17 of the Financial Administration Act, which has become very familiar to the Committee. Section 17 empowers the Governor in Council to remit a tax in these words:

"The Governor in Council, on the recommendation of the Treasury Board, whenever he considers it in the public interest, may remit any tax, fee or penalty."

Section 17 does not read: "The Governor in Council ... may *by order* remit ...". Hence, in the Privy Council Office's view Remission Orders under section 17 cannot be statutory instruments. Yet, the Governor in Council can only act lawfully through the means permitted by the constitution or by statute, and that means is the Order in Council. If then an Order in Council is made and issued exempting X from some tax, how can it be said that the Order was not expressly authorized to be made and issued? The Committee notes that some Remission Orders, but by no means all, are published in the Canada Gazette Part II as a matter of public interest.

3. If the intention of Parliament had been that suggested by the Legal Advisers to the Privy Council Office one would have expected to find some clear and additional words, or a definition of statutory instrument couched in terms which defined it in terms of the particular type of instrument to be made, established or issued, e.g.:

"... by or under which such instrument is by that name expressly authorized to be issued, made or established."

OR

"... by or under which such instrument is expressed to be issued, made or established in that manner and form ..."

4. It may be thought that what Parliament was intending to do was to introduce in a compendious and more general form of words a test along the lines of the United Kingdom test for post 1948 statutorv instruments. Indeed, this view has been expressed. But such a view of Parliament's intention can not be sustained on the text of section 2 (1) (*d*) of the Statutory Instruments Act. The British legislation proceeds in an altogether different manner and deals primarily not with documents as does our Act ("any rule, order, regulation, ordinance, etc. etc.) but with power to make subordinate legislation and the manner of the exercise of that power. Hence, it is logical for that legislation to speak of a power being authorized to be exercised by Order in Council or by statutory instrument. If the power is to be exercised by statutory instrument, then no matter what title is given to a document made in the exercise of that power, it will be a statutory instrument. In other words for enabling legislation after 1948 Parliament settles definitional issues in advance by conferring a power to make subordinate legislation to be exercised by statutory instrument (the usual course) or by deliberately witholding that manner of making subordinate legislation by omitting the words "by statutory instrument" from the legislation.

Our legislation, being cast in entirely different terms, and starting not from the manner in which a power to make subordinate legislation is to be exercised but rather from a different point altogether—an apparently all emcompassing description of the possible documents by which subordinate legislation might be made—cannot be interpreted by analogy with the United Kingdom Act.

Any such analogy is faulty on the further ground that whereas the United Kingdom legislation is framed in terms of an advance *legislative* determination that a power is to be exercised *by statutory instrument*, the very thing sought to be defined, the Privy Council Office definition is based on the view that our legislation is framed on a legislative determination that a power is to be exercised by a document by title, be it any title at all, which is but one example of what is being sought to be defined.

The important point to grasp, however, is that the definitions in the United Kingdom Act and in the Canadian Statutory Instruments Act are not at all comparable, for the

former begins with a description of the manner in which Parliament has ordained that power be exercised whereas the latter proceeds by describing documents as members of the class "statutory instruments".

5. The Privy Council Office definition leaves altogether out of account the remaining words of section 2 (1) (*d*)(i):

> "... otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates."

It may well be that faced with such a concatenation of words, those in authority have concluded that the phrase as such is meaningless and have, therefore, decided to ignore it. However, as Mr. McIntosh himself points out, there is a presumption or canon of interpretation that Parliament does not act in vain and some meaning must be given to these vexed words.

Clauses introduced by the word "otherwise" are usually limiting or excluding clauses, an example of which clearly appears in section 2 (1) (*d*)(ii)

> "... any rule, order, etc. issued, made or established
>
> (ii) by or under the authority of the Governor in Council *otherwise than in the execution of a power conferred by or under an Act of Parliament*."

The "otherwise" clause here excludes from the totality of documents issued, made or established by the Governor in Council all those issued, made or established pursuant to statutes. Since the Governor in Council may act only pursuant to statute or the common law, which is to say the Royal prerogative, the subtraction leaves all documents issued, made or established pursuant to the Prerogative by the Governor in Council. (Any that may lawfully be issued, made or established by the Crown alone are not statutory instruments.) Whether or not it would have been simpler and more direct to have drafted section 2 (1) (*d*)(ii) in terms of

> "by or under the authority of the Governor in Council in exercise of the Royal Prerogative"

the use of the "otherwise" clause here does demonstrate that section 2 (1) (*d*)(i) relates to the class "documents issued, made or established pursuant to statute", a class from which some documents are to be excluded in terms of the "otherwise" clause. Just what documents are to be excluded? On the Privy Council Office interpretation the answer would be *all* documents issued, made or established pursuant to statute. That is to say, section 2 (1) (*d*)(i) would effectively produce a result of zero. This conclusion is reached in the following manner:

> (*a*) The Privy Council Office view of the opening words of section 2 (1) (*d*)(i) (those immediately preceding the "otherwise" clause) has already excluded all documents issued, made or established under powers which do not name the type of document to be issued, made or established. That is, the class has already been confined to instruments issued, made or established under a specific title or name, e.g. "by order", "make regulations", "by rule", "by warrant", "by by-law" and so on.
>
> (*b*) Now that class is to be cut down further by the "otherwise" clause. Consider again a Levies Order made under an enabling Order made pursuant to section 2 (2) of the Agricultural Products Marketing Act, which Levies Order does read "... may by Order, fix, impose and collect ...". This would be a statutory instrument in the Privy Council Office's view. But is not the Milk Board, as well as being a body issuing "Orders", also a body on which have been conferred powers or functions in relation to milk levies—their amount, manner of collection, etc.—levies which constitute matters to which the orders relate? The answer must be in the affirmative with the result that even Orders made pursuant to the power "by Order, fix, impose and collect levies", will not be statutory instruments.

This *reductio ad absurdum* demonstrates first, that the "otherwise" clause in section 2 (1) (*d*)(i) cannot be ignored, and, secondly, that once it is brought into operation its effect in combination with the interpretation given by the Privy Council Office to the preceding words of section 2 (1) (*d*)(i) is to vacate altogether the class of statutory instruments made pursuant to statute. In other words, one would exclude first all those instruments not made pursuant to powers which name the title of the document and, secondly, all those which are made by a body on which has been conferred powers or functions in relation to the subject matter of the instrument.

Although it was doubted supra, Mr. McIntosh's view could possibly be supportable if the "otherwise" clause were not there. However, it is there on the stairs and all the wishing in the world will not remove it.

6. The use of the eiusdem generis rule in interpreting the words "otherwise instrument" at the close of the catalogue which opens section 2 (1) is totally unsatisfactory. No common characteristic has been put forward. The only possible meaning to give to "other document" is any document issued pursuant to statutory or prerogative authority in which is exercised a subordinate law making function. The words cannot be construed in any other light, since if they are interpreted eiusdem generis with the preceding catalogue of documents the only common feature of all the documents listed is that they habitually are the means of exercising a subordinate law making power. Similarly, if the words "other instrument" are read noscitur a sociis with the words that precede them, an identical conclusion flows.

III

The Committee takes the view that while the wording of section 2 (1) (*d*)(i) of the Statutory Instruments Act is obscure, the Privy Council Office's interpretation of it is quixotic in operation and subversive of the Committee's functions and is an unwarranted attempt so narrowly to confine the

Committee's jurisdiction as to hamstring it. Unlike the President of the Privy Council [50], the Committee does not think that it is to be expected that there should be difficulty in defining a statutory instrument.

The crux of the matter lies in the words of section 2 (1) (*d*)(i) which read

> "..., by or under which (power) such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates ..."

Because of the absurd results which flow from splitting this phrase into two tests, producing, as was shewn in II(5) supra, a class of zero, it must follow that, notwithstanding the normal use of an "otherwise" clause as exemplified in section 2 (1) (*d*)(ii) as an independent limiting clause, in this one instance at least, the "otherwise" clause cannot stand independently of the words which precede it and that the entire phrase must be read as a single test or description of the type of statutory power which, if exercised to make an instrument, will render that instrument a "statutory instrument". In other words, not all *instruments* made in pursuance of a statutory power are statutory instruments. Perhaps the word "document" should be used as being more neutral than "instrument" and less perplexing. The mysterious words of section 2 (1) (*d*)(i) are consequently, intended to cut down the class of documents (i.e. the class of rules, orders, regulations, ordinances, directions, tariffs of costs of fees, letters patent, commissions, warrants, proclamations, by-laws, resolutions or other instruments) which can be statutory instruments to form a new class which may be further limited and cut down by the terms of section 2 (1) (*d*)(iii)-(vi).

What documents then are excluded by these mysterious words? This question should more properly be put: What documents made, etc. in pursuance of which statutory powers are excluded? It cannot be that what was sought to be excluded were documents of an administrative or executive, that is to say, a non-legislative character, for the distinction between documents made in the exercise of a legislative power and those not is the crux of the distinction between a statutory instrument and the species, regulations, a distinction so clearly drawn in section 2 (1) (*d*)(i) of the Act. Similarly, executive acts of the Governor in Council pursuant to the Prerogative are statutory instruments by force of sec. 2 (1) (*d*)(ii) of the Act. Nor can it be that the exclusion extends to working papers, or the giving of advice in any written forms, for these are expressly excluded from the definition by sec. 2 (1) (*d*)(v). The conclusion must be that the exclusion in sec. 2 (1) (*d*)(i) relates to documents made pursuant to some part of the powers conferred by statute to make non-legislative type documents. It cannot relate, as has been pointed out, to *all* documents containing non-legislative matter, but it does not follow from that conclusion that *all* documents made pursuant to statute but not in the exercise of a legislative power are statutory instruments. That is to say, all statutory instruments of a legislative character are regulations but not all instruments of a non-legislative character need be accounted statutory instruments.

Instruments or documents made pursuant to statute but of a non-legislative character take many forms and include everything from permits to sell postage stamps issued under the Post Office Act and Regulations to forms of contract drawn up by the Department of Supply and Services. Obviously, it cannot have been within the contemplation or intention of Parliament that such administrative documents be statutory instruments and subject to scrutiny. Such instruments, even if expressly authorized to be issued ("the Minister may grant permits") are clearly instruments relating to a matter in respect of which powers or functions have been conferred on a person or body.

Consider also the statutory provisions by which Departments of State or Ministries are established. Of course, Departments can be set up under the Prerogative but the legislative course is now followed. The statutory provisions are contained in individual statutes or in the Government Organization Act R.S.C. 2nd Suppl. C. 14. They proceed by legislating that there shall be a Department or Ministry of X over which the Minister of X shall preside. The powers and functions of the Minister are then set forth in compendious form. Consider:

External Affairs Act, section 4

> "The Minister, as head of the Department, has the conduct of all *official communications between the Government of Canada and the government of any other country in connection with the external affairs of Canada*, and is charged with such other duties as may be assigned to the Department by order of the Governor in Council in relation to such external affairs, or to the conduct and management of international negotiations so far as they may appertain to the Government of Canada."

and *Government Organization Act, sections 5 and 6*

> "5. The duties, powers and functions of the Minister of the Environment extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to
>
> (*a*) sea coast and inland fisheries;
>
> (*b*) renewable resources, including
>
> (i) the forest resources of Canada,
>
> (ii) migratory birds, and
>
> iii) other non-domestic flora and fauna;
>
> (*c*) water;
>
> (*d*) meteorology;
>
> (*e*) the protection and enhancement of the quality of the natural environment, including water, air and soil quality;
>
> (*f*) technical surveys within the meaning of the Resources and Technical Surveys Act relating to any matter described in paragraphs (*a*) to (*e*); and
>
> (*g*) nothwithstanding paragraph 5 (f) of the Department of National Health and Welfare Act, the enforcement of any rules or regulations made by the International Joint Com-

mission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, so far as they relate to pollution control.

"6. The Minister of the Environment, in exercising his powers and carrying out his duties and functions under section 5, shall

(*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada, that are designed to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution; and

(*b*) promote and encourage the institution of practices and conduct leading to the better protection and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organizations or persons, in any programs having similar objects."

If some limitation did not appear in sec. 2 (1) (*d*)(i) every document signed by or issued under the authority of the Ministers as to the operation and management of the Departments of External Affairs and the Environment respectively, would be statutory instruments a result which follows from their powers being conferred by statute, and not by the exercise of the Prerogative. Similarly, "official communications" between the Government of Canada and any other country ..." if in writing would be statutory instruments if sec. 2 (1) (*d*)(i) read simply "... or other instrument issued, made or established (i) in the execution of a power conferred by or under an Act of Parliament". And on the Privy Council Office's interpretation of the limiting words in sec. 2 (1) (*d*)(i) such "official communications" would still seem to be statutory instruments because the Minister has the power to conduct all "official communications" (including those in writing) by name pursuant to section 4 of the External Affairs Act. (Written official communications may not, however, be regarded as an "instrument".)

Thus, it would appear that the limiting words of sec. 2 (1) (*d*)(i) of the Statutory Instruments Act must relate to the mode of administration of a Department or regulation making authority, to the documents which relate to the manner of proceeding and to the result of proceeding, to everything from an instruction as to feeding the departmental cat to the actual permit (document) issued to an applicant to empower him to become a supplicant for some further governmental boon.

The foregoing analysis is meant as simply as is possible to show first, that the Privy Council Office interpretation of section 2 (1) (*d*)(i) is completely unsatisfactory from the point of view of parliamentary scrutiny and, secondly, that another interpretation is possible of the admittedly obscure text of section 2 (1) (*d*)(i). That other interpretation is simply that the limiting words, comprising one test and not two, exclude documents of an administrative kind, for example, organizational memoranda within Departments, and documents that are the end result of the administrative process such as permits, and administrative decisions taken in respect of individual cases, all of which may be open to review in the courts in appropriate circumstances.

To summarize the Committee's position:

1. It considers that section 2 (1) (*d*)(i) of the Statutory Instruments Act is not as narrowly confined in its application to documents issued pursuant to statutory authority as the opinion of the Department of Justice would have it. In particular, it considers that section 2 (1) (*d*)(i) does not exclude instruments made under statutory grants of subordinate law making power which do not contain a magic formula such as "by order", "by regulations", "by tariff", etc. That is to say, it does include instruments made under statutory powers which authorize their issuing, making or establishment whether by proper title or in general terms by conferring subordinate law making power without specifying the name of the document in which that exercise of subordinate law making power is to be embodied. Thus section 2 (1) (*d*)(i) includes Remission Orders made pursuant to section 17 of the Financial Administration Act and instruments issued under powers which authorize the prescribing of terms and conditions. What is important is what is issued, made or established and whether it is issued, made or established pursuant to statutory authority, not whether it is by specific title ordered or authorized to be issued, etc.

2. By "other instrument" the Committee understands any document issued pursuant to statutory authority in which is exercised a subordinate law making function.

3. Section 2 (1) (*d*)(i) when read together as a piece does exclude from the definition of a statutory instrument those Departmental Guidelines or Instructions or Manuals which are not made in the execution of, or pursuant to, any express statutory authority in that behalf, but under the general statutory power conferred on a Minister of the Crown under a particular statute, or the Government Organization Act, to have the administration of a Department of State, and which do not contain substantive rules (not already included in some other statutory instrument) which may affect the subject. The Committee is also of the view that many such Guidelines, Manuals, or Instructions are likely in any particular case, to be excluded from the definition of a statutory instrument by the terms of section 2 (1) (*d*)(v) (second branch) as documents "whose contents are limited to advice or information intended only for use or assistance in the making of a decision ...". Whether or not they are excluded on this ground also would vary from case to case as the document in question did or did not contain more than advice or information and as the effect of ignoring its terms would or would not lead to disciplinary proceedings against the officer so ignoring its terms.

However, the Committee is firmly convinced that any Guideline, Instruction or Manual or Directive which actually lays down rules not contained in some other statutory instrument which are to be or could be applied to subjects, whether or not the failure to apply those rules would lead only to disciplinary proceedings against the officer ignoring its terms, is not excluded but is a statutory instrument.

4. The Committee is not satisfied that the Immigration Guidelines and Manuals, discussed more fully in the body of this

Report at paragraphs 42-44, fall within the class of documents excluded by section 2 (1) (*d*)(i) and/or section 2 (1) (*d*)(v). The Committee considers that the Guidelines and Manuals could be considered to be made pursuant to the powers expressly conferred on the Minister by section 58 of the Immigration Act to make

> "... regulations not inconsistent with this Act, respecting ... the duties and obligations of Immigration Officers and the methods and procedure for carrying out such duties and obligations whether in Canada or elsewhere."

For the purposes of determining whether or not the Immigration Guidelines and Manuals are the regulations referred to in that section, the title given to them by the Department, and the authority or status claimed for them by the Department of Manpower and Immigration, or by the Department of Justice are, without more, irrelevant. It would certainly be odd if a regulation is valid, even if the authority for it is misrecited, so long as there is statutory authority, but, on the other hand, by the mere ascription of a title a document could be removed from the authority of section 58 of the Immigration Act. However, the Committee has not been vouchsafed either a perusal of the Guidelines or the detailed reasons which are said to govern their not being statutory instruments and is unable to give an opinion as to whether the Guidelines now in existence do or do not fall within section 58 of the Immigration Act, or do or do not lay down any rules applicable to subjects or immigrants.

IV

The Department of Justice has adopted a particular and certain interpretation of section 2 (1) (*d*)(i) and is now, after a certain initial hesitancy and inconsistency in practice, enforcing that definition amongst the divers agencies and authorities who make, or who propose the making of, subordinate legislation pursuant to Acts of the Parliament of Canada. The Committee disagrees with that interpretation. It realizes that, although the attribution of the true meaning of section 2 (1) (*d*)(i) is a matter for the courts, litigation in which the issue will arise for adjudication is not likely to occur. Consequently, the Committee can see no virtue in discussing the definition of a statutory instrument further with the Department of Justice. While reiterating its opinion that the interpretation of section 2 (1) (*d*)(i) adopted by the Department of Justice is misconceived, it can see no good purpose in contesting it further. It will be applied, as interpreted by the Department of Justice, until it is changed. The inconsistencies in practice which the Committee has noted from time to time will diminish and any new inconsistencies noted will simply lead to the exclusion in section 2 (1) (*d*)(i) being more widely construed and applied. The Committee can see no course other than the amendment of section 2 (1) (*d*) of the Statutory Instruments Act.

The Committee concludes, therefore, that the exclusion of the types of documents from its scrutiny that flows from the Department of Justice's interpretation of the definition of a statutory instrument does not accord with the concept of parliamentary control of subordinate legislation. The Committee appreciates that it would be helpful to Senators and Members of the Commons if it were to say precisely what documents or classes of documents are not statutory instruments in the eyes of the Department of Justice. However, it can not do so. It is simply impossible to categorize the documents excluded from the definition of "statutory instrument" without an exhaustive study of the enabling powers in all the statutes of Canada. While those enabling powers have been catalogued, first by M^me^ H. Immarigeon for the MacGuigan Committee and latterly by the Law Reform Commission, they have never been examined as to the application of section 2 (1) (*d*)(i) of the Statutory Instruments Act. Your Committee simply lacks the time and resources to do so.

All your Committee is able to say is that any document produced other than under an enabling power containing a magic formula will not be regarded as a statutory instrument; that any document by which one subordinate confers power to act or to make rules upon another subordinate will not be regarded as a statutory instrument; and that some documents will not be regarded as being instruments and, therefore, cannot be statutory instruments.

The Committee believes that it can logically report to the Senate and to the House of Commons that section 2 (1) (*d*)(i) is unsatisfactory and that amendments to the Statutory Instruments Act are desirable whether or not the Committee or the two Houses of Parliament accepts as legally correct the interpretation placed on section 2 (1) (*d*)(i) by the Department of Justice and whether or not the Houses consider the alternative construction of the Committee as in any way compelling.

The Committee is further of the opinion that it is necessary that the power be given to some body to issue a binding determination as to whether any particular document is a statutory instrument, as does the Statutory Instruments Reference Committee at Westminster. This matter should also be made the subject of legislative amendment.

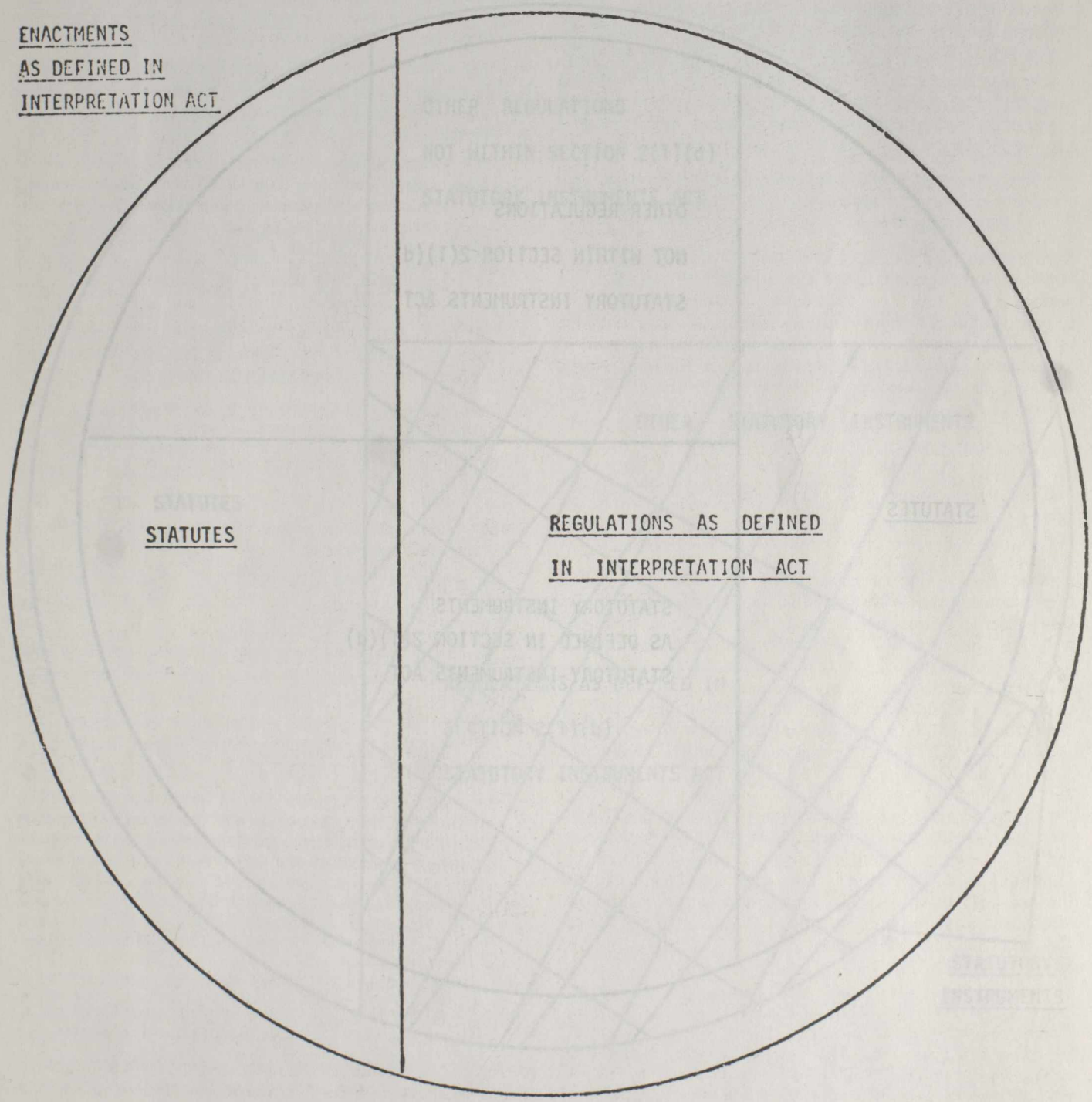
To conclude this survey of the definition of a statutory instrument, the Committee wishes to record just one example of the arbitrary and quixotic effects of the Department of Justice's definition. Section 25 (1) (*b*) of the Canadian Wheat Board Act, as amended by 21 Eliz. II cap 16, section 3, provides:

> "25. (1) The Board shall undertake the marketing of wheat produced in the designated area in interprovincial and export trade and for such purposes shall
>
> (*b*) pay to producers selling and delivering wheat produced in the designated area to the Board, at the time of delivery or at any time thereafter as may be agreed upon, a sum-certain per bushel basis in storage Thunder Bay or Vancouver to be fixed from time to time
>
> (i) by regulation of the Governor in Council in respect of wheat of a base grade to be prescribed in those regulations, and
>
> (ii) by the Board, with the approval of the Governor in Council, in respect of each other grade of wheat."

Orders in Council making the regulations referred to in section 25 (1) (*b*)(i) are statutory instruments and regulations and are

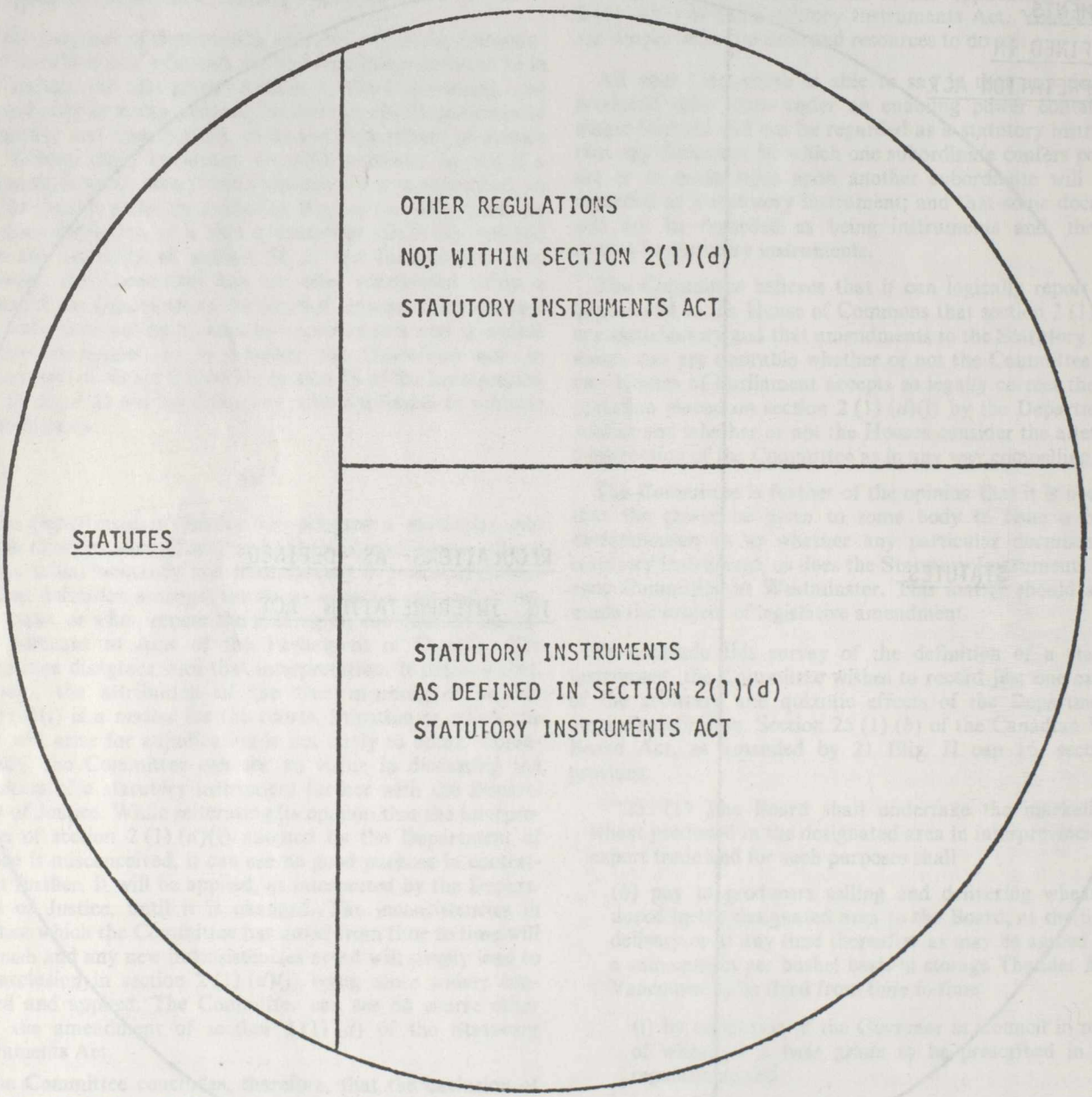
registered and published in the Canada Gazette Part II, and scrutinized by the Committee.

Neither the document of the Board fixing prices under 25 (1) (*b*)(ii), nor the Order in Council granting the approval of the Governor in Council to the prices fixed by the Board is considered to be a statutory instrument, and need not be registered anywhere, or published. And it is not. It is the Committee's understanding that the Board makes known its prices by copies sent to those concerned. Both powers are invoked at least once a year. How different the results!



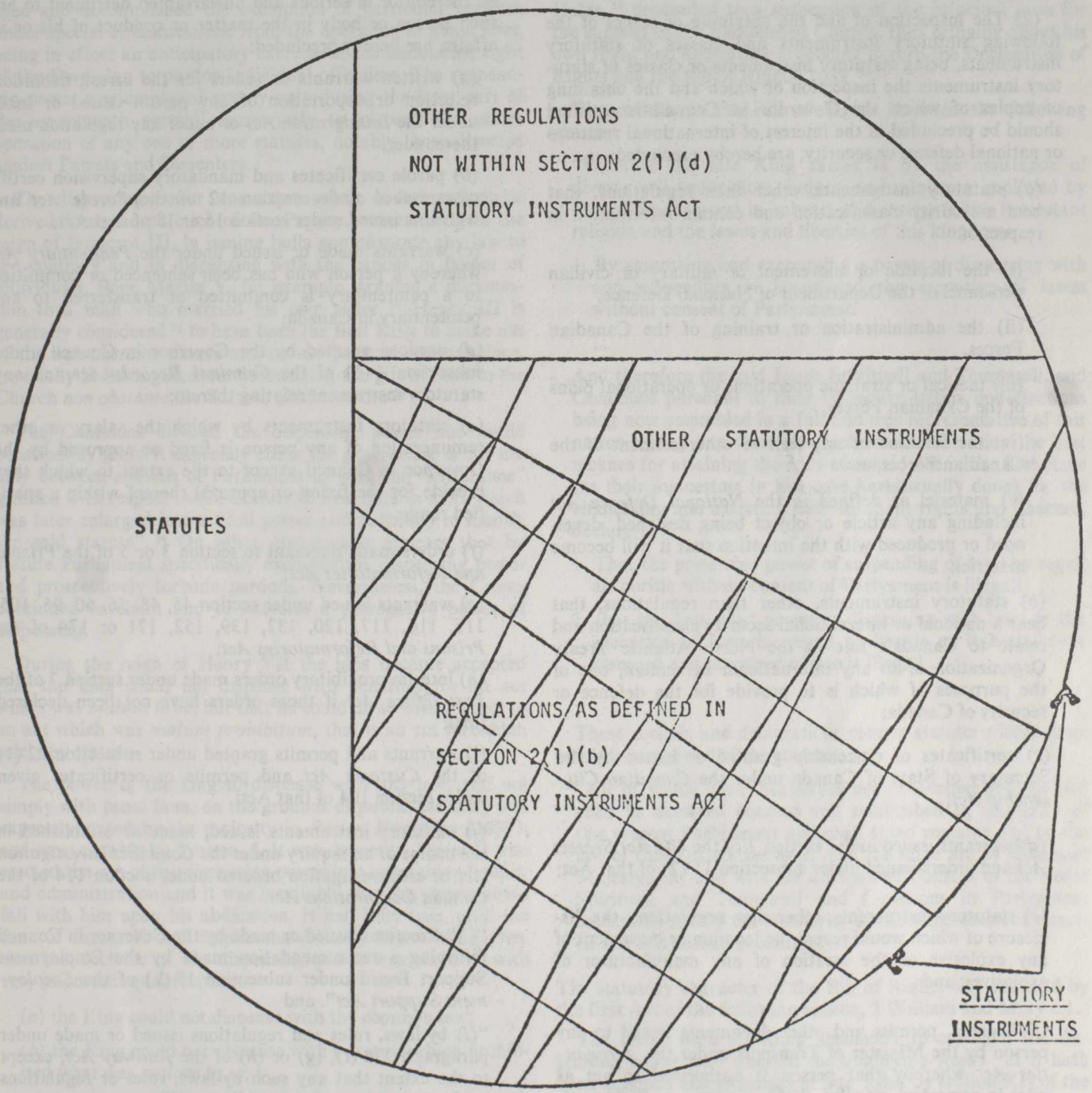
REGULATIONS UNDER
INTERPRETATION ACT

No. 2



OTHER STATUTORY
INSTRUMENTS AND REGULATIONS

No. 3



APPENDIX II

Extract from the Statutory Instruments Regulations, S.O.R. 71-592 as amended by S.O.R./72-94 and S.O.R. 72-527

"21. (1) The inspection of and the obtaining of copies of regulations and classes of regulations that have been exempted from publication pursuant to subsection 14 (3) are hereby precluded.

(2) The inspection of and the obtaining of copies of the following statutory instruments and classes of statutory instruments, being statutory instruments or classes of statutory instruments the inspection of which and the obtaining of copies of which the Governor in Council is satisfied should be precluded in the interest of international relations or national defence or security, are hereby precluded:

(*a*) statutory instruments, other than regulations, that bear a security classification and contain information in respect of

(i) the location or movement of military or civilian personnel of the Department of National Defence,

(ii) the administration or training of the Canadian Forces,

(iii) tactical or strategic operations or operational plans of the Canadian Forces,

(iv) the function of any unit or other element of the Canadian Forces, or

(v) materiel as defined in the *National Defence Act* including any article or object being designed, developed or produced with the intention that it will become materiel;

(*b*) statutory instruments, other than regulations, that bear a national or international security classification and relate to Canada's role in the North Atlantic Treaty Organization or to any international agreement, one of the purposes of which is to provide for the defence or security of Canada;

(*c*) certificates of citizenship granted or issued by the Secretary of State of Canada under the *Canadian Citizenship Act*;

(*d*) warrants issued under section 7 of the *Official Secrets Act* and orders issued under subsection 11 (2) of that Act;

(*e*) statutory instruments, other than regulations, the disclosure of which would reveal the location or movement of any explosive or the location of any manufacturer of explosives; and

(*f*) licences, permits and other documents issued to any person by the Minister of Transport under the *Aeronautics Act* whereby that person is authorized to act as pilot-in-command, co-pilot, flight navigator or flight engineer of an aircraft.

3) The inspection of and the obtaining of copies of the following statutory instruments and classes of statutory instruments, being statutory instruments or classes of statutory instruments in respect of which the Governor in Council is satisfied that the inspection or the making of copies thereof as provided for by the Act would, if it were not precluded by these Regulations, result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs, are hereby precluded:

(*a*) written warrants or orders for the arrest, detention, rejection or deportation of any person issued or made under the *Immigration Act* or under any regulation made thereunder;

(*b*) parole certificates and mandatory supervision certificates issued under section 12 of the *Parole Act* and warrants issued under section 16 or 18 of that Act;

(*c*) warrants made or issued under the *Penitentiary Act* whereby a person who has been sentenced or committed to a penitentiary is committed or transferred to any penitentiary in Canada;

(*d*) pardons granted by the Governor in Council under subsection 4 (5) of the *Criminal Records Act* and any statutory instrument relating thereto;

(*e*) statutory instruments by which the salary or other remuneration of any person is fixed or approved by the Governor in Council except to the extent to which they provide for the fixing or approval thereof within a specified range;

(*f*) orders made pursuant to section 3 or 5 of the *Prisons and Reformatories Act*;

(*g*) warrants issued under section 45, 48, 56, 60, 96, 105, 115, 116, 117, 120, 132, 139, 152, 171 or 174 of the *Prisons and Reformatories Act*;

(*h*) interim prohibitory orders made under section 7 of the *Post Office Act* if those orders have not been declared final;

(i) warrants and permits granted under subsection 22 (1) of the *Customs Act* and permits or certificates given under section 104 of that Act;

(*j*) statutory instruments issued, made or established in the course of an inquiry under the *Combines Investigation Act* or an investigation ordered under section 114 of the *Canada Corporations Act*.

"(*k*) directions issued or made by the Governor in Council following a recommendation made by the Employment Support Board under subsection 15 (1) of the *Employment Support Act*". and

"(*l*) by-laws, rules and regulations issued or made under paragraph 230 (f), (*g*) or (*h*) of the *Railway Act*, except to the extent that any such by-laws, rules or regulations apply to members of the public travelling upon or using a railway."

APPENDIX III

AN ANALYSIS OF THE PRETENDED POWER OF DISPENSING WITH THE LAW

In the times of the Plantagenet, Lancastrian, Yorkist, Tudor and Stuart dynasties the legislative authority of Parliament was subject to the exercise of the dispensing and suspending powers of the Crown. The dispensing power was frequently used and accomplished the exemption of particular persons, under special circumstances, from the operation of penal laws, being in effect an anticipatory exercise of the undoubted right of the Sovereign to pardon individual offenders. The suspending power was employed openly only during the later part of the seventeenth century temporarily to suspend the entire operation of any one or more statutes, notably those directed against Papists and Dissenters.

The dispensing power was expressed in a form of words derived from the practice of the Papacy, commencing in the reign of Innocent III, in issuing bulls *non obstante* any law to the contrary and in dispensing with the canons in favour of individuals. Pope Martin V, for example, granted a dispensation to a man who married his own sister. [51] Henry III is generally considered [52] to have been the first King to make use of the *non obstante* clause and its use became commonplace, especially in issuing licences authorizing the gift of land to the Church *non obstante* the Statute of Mortmain. [53]

The Commons disliked the dispensing power but would occasionally grant it expressly either for general use or for use only between sessions of Parliament as with the "sufferance" granted with respect to the Statute of Provisors in 1391 which was later enlarged into a "full power and authority to modify the said statute". [54] On other occasions it appears that by statute Parliament specifically excluded the dispensing power and prospectively forbade pardons. Nevertheless, the Crown continued to claim and to exercise a prerogative power of dispensing.

During the reign of Henry VII the idea became accepted that the king could not dispense with penalties for an act which was *malum in se*, but that he could do so with respect to an act which was *malum prohibitum*, that is an act forbidden solely by statute.

The power of the king to dispense with *any* law, and not simply with penal laws, on the grounds of public necessity was expressly stated by the majority in *Rex* v. *Hampden* (1637), and most notably by Vernon, J. It was, however, James II who erected the use of the dispensing power into an engine of policy and administration and it was inevitable that the power would fall with him upon his abdication. It had been true, until the time of James II and despite the dicta in *Rex* v. *Hampden*, that the doctrine of the dispensing power was received with very important qualifications:

(*a*) the King could not dispense with the common law;

(*b*) the King could not dispense with a statute which prohibited what was *malum in se*;

(*c*) Even *malum prohibitum* was not deemed universally dispensible. Some judges held that there could be no dispensation from an express or absolute prohibition, but only from ones *sub modo*.

(*d*) No-one contended that a dispensation could diminish or prejudice the property or private rights of a subject.

(*e*) Dispensations could not be general

James II, having procured the sanction of a judicial opinion to a dispensation with the Test Act in favour of Sir Edward Hales, [55] proceeded to a suspension of the principal laws for the support of the Established Church, thus bringing about his own flight and abdication producing in turn the Declaration of Rights and the Bill of Rights, 1689. [56]

The recitals to the Bill of Rights included the following clauses:

"Whereas the late King James II by the assistance of diverse evil councellors, judges, and ministers imployed by him, did endeavour to subvert and extirpate the Protestant religion and the lawes and liberties of this kingdome:

1. By assumeing and exerciseing a power of dispensing with and suspending of lawes and the execution of lawes without consent of Parlyament.

...

And therefore the said Lords Spirituall and Temporall, and Commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation taking into their most serious consideration the best meanes for attaining the ends aforesaid doe in the first place (as their auncestors in like case have usually done) for the vindicating and asserting their auntient rights and liberties, declare(*d*):

1. That the pretended power of suspending of laws by regall authoritie without consent of Parlyament is illegall

2. that the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall ...

...

These recitals and declarations receive statutory force from words near the end of the statute:

"All of which their Majestyes are contended and pleased shall be declared enacted and established by authority of this present Parlyament and shall stand remaine and be the law of this Realme for ever. And the same are by their said Majestyes by and with the advice and Consent of the Lords Spirituall and Temporall and Commons in Parlyament assembled and by the Authority of the same declared enacted and established accordingly."

The statutory character of the Bill of Rights was declared by the first Act of the following session, 2 William and Mary c.1.

The Lords were unwilling absolutely to condemn the dispensing power, and inserted the qualifying words "as it hath been assumed and exercised of late". But by section XII of the Bill of Rights the dispensing power was abolished absolutely, except in such cases as should be specially provided for by a

bill to be passed during the then current session. No such bill was, however, passed.

> "XII And bee it further declared and enacted by the Authoritie aforesaid, that from and after this present session of Parlyament noe dispensation by non obstante of or *to any statute or any part thereof* shall be allowed but that the same shall be held void and of noe effect except a dispensation be *allowed of in such statute* and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parlyament."

It is true that in the *Case of Eton College* [57] the words "as it hath been assumed and exercised of late" were to save the validity of old dispensations. But even if those qualifying words be taken as a parliamentary view that some sort of dispensing power did exist at common law, it is well settled that the courts are not bound by mere legislative assumptions as to the law. "The rule is that Parliament does not alter the law merely by betraying an erroneous opinion of it." [58] The *Case of Eton College* could if necessary be supported on the basis that the qualifying words in the Bill of Rights actually operated to give to some or all old dispensations a validity which they would otherwise have lacked. Despite the contrast between Parliament's unqualified condemnation of the suspending power and its qualified condemnation of the dispensing power, it would be open to the courts to hold that, at common law, both were equally abuses, and that, rightly understood, the common law admitted neither dispensing power nor suspending power.

In any event, section XII makes clear that for the future there was to be no dispensing power save under statutory authority. No such bill as contemplated ever having been carried, the only source for a dispensing power can lie in the terms of particular statutes which, as has been noted in paragraph 97 of this Report occasionally do grant such a power.

The application of the Bill of Rights throughout Canada is universally accepted [59] admits of no doubt and need not be considered.

It has to be observed at once that the dispensing power had been used in connection with statutes and that the substantive provisions of section XII of the Bill of Rights speaks only of statutes, no mention being made of delegated legislation which, though not unknown (Vide Statute of Proclamations 31 Hen. VIII C.8 1539), was not common. The outlawing of the dispensing power in clause 2 of what is commonly known as the Declaration of Rights, reproduced in the preamble to the Bill of Rights, refers to "laws" and not to statutes, but is qualified by the words "as it hath beene assumed and exercised of late ...". It would be possible, therefore, to put forward the argument that it remains lawful for the Crown to dispense with delegated legislation except in the classes of case in which James II exercised the power. It is submitted that such an argument can be safely set aside and the illegality of the dispensing power extends not only to dispensing with statutes, but also to dispensing with laws, however made. This is so for several reasons. First, the qualifying words "as it hath beene assumed and exercised of late" have been construed as being for the purpose of saving the validity of old dispensations granted before the evil events of the reign of James II: *Re Case of Eton College* (1815). Secondly, subordinate legislation, if validly made, has the full force and effect of a statute, [60] *Dale's Case*, [61] *Kruse* v. *Johnson*, [62] *Institute of Patent Agents* v. *Lockwood*, [63] *Reference Re Japanese Canadians*, [64] and it would be absurd to suggest that, although having the full force and effect of a statute delegated legislation is different in quality in being subject to a royal or other power of dispensation. Thirdly, the members of the Convention and of the first Parliament of William and Mary were necessarily legislating within the frame of reference of their own time in which law was almost always made by statute, and indeed, of a time in which Parliament legislated with a particularity and attention to detail which today would be regarded as picayune. The words of section XII of the Bill of Rights cannot, therefore be confined narrowly to statutes *strictu sensu* but extend to legislation made by or under the authority of a statute. Wherefore, the principle can be asserted that the Bill of Rights abolished entirely the Crown's right to dispense with laws in advance (as distinct from the right to pardon those who offend against laws) and that any dispensation, to be lawful, must be referable to an enabling power within a statute. Thus, it is that, as has been seen, some statutes do expressly provide that there shall be a dispensing power in connection with the provisions of the respective statutes, the regulations made under them or both.

Canada Shipping Act, section 482 (1)

> "Nothwithstanding anything in this part, the Minister, on the recommendation of the Chairman of the Board of Steamship Inspection, may relieve any Canadian ship or the owner of any such ship from compliance with any of the provisions of this Part or regulations made thereunder relating to steamship inspection ... in any specific case of emergency where the Minister may deem it necessary or advisable in the public interest ..."

Aeronautics Act, section 14 (1)

> "The Commission may make regulations
>
> ...
>
> (*g*) excluding from the operation of the whole or any portion of this Part or any regulation, order or direction made or issued pursuant thereto, any air carrier or commercial air service or class or group of air carriers or commercial air services."

How then can a power to dispense with subordinate legislation be thought to exist?

The first argument that is put is that because Parliament can dispense with the laws it makes, and can enact sections which read "nothwithstanding any law, or any section of this or any other Act ..." so too can the Governor in Council (or the Minister, Regional Director, etc.) dispense from the laws he makes. This is once again to assert that the delegate is in the same position as is Parliament, to assert that subordinate law is not truly subordinate at all. It is to give to the delegate all the powers that Parliament has. This is nonsense. The Queen in Parliament is sovereign. The Governor in Council,

Ministers, Boards etc. are not, and can only make law within the confines of the authority delegated to them. That authority will not include a power to dispense from the subordinate laws made unless it is expressly conferred. This is, the Committee notes, the position accepted by all in the United Kingdom where no dispensations from subordinate legislation can occur unless expressly authorized by the enabling Act. It is also the position which obtained under the most famous enabling Act of all time the infamous Statute of Proclamations, 31 Henry VIII cap. 8, repealed by 1 Edward VI, cap. 6. The complete law making power was given into the royal hands, to the King in his Council, and yet it was thought necessary by that most puissant Prince, who drafted the Bill in his own hand, expressly to provide for a dispensing power. If so mighty a monarch more than a century before the Bill of Rights thought it necessary to take a dispensing power along with Parliament's delegated law making power, how much more necessary must an express dispensing power be to a delegate of Parliament's sovereign authority today? To remove all doubt, the Committee notes the text of the substantive portion of the Statute of Proclamations:

> "Therefore it is enacted, that always the king, for the time being, with the advice of his council ... or the greater number of them, may set forth at all times by authority of this act, his proclamations, under such penalties, and of such sort as to his highness and his council, or the more part of them shall seem requisite. And that the same shall be obeyed, as though they were made by act of parliament, unless the king's highness dispense with them under his great seal."

It is in the light of this true position of a delegate of Parliament that section 26 (4) of the Interpretation Act must be construed:

> "When a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, *amend* or *vary* the regulations and (*to*) make others."

Given the fundamental constitutional presumption against a power of dispensation this provision cannot amount to a blanket power to any and every delegate of a subordinate law making function to grant dispensations under cover of making "Variation Orders", as has been sought to be done in the case of licences granted under the Public Lands Leasing and Licensing and Public Lands Mineral Regulations and the Canada Oil and Gas Land Regulations. The words "amend" or "vary" will not extend to permit dispensations from a general rule in favour of individuals in particular circumstances. Such a power must be sought in each case in the enabling statute under which the delegation of rule making power is conferred. No delegate, without express authority from Parliament, can be in any better position than the successors of James II. Laws cannot be dispensed with by the authority of delegates when they cannot be by royal authority.

A second argument is that the only dispensing power outlawed by the Bill of Rights is that exercised in a fashion strictly analogous to the manner in which King James II proceeded. That is to say, that the only dispensation forbidden is that made by someone other than the person who made the law. James II purported to dispense with laws made by Parliament by Letters Patent under his Great Seal. Therefore, a Minister or a Regional Director can not dispense with laws made by the Governor in Council in exercise of powers delegated by Parliament. (The Committee notes in passing that the power purportedly given to the Board of Steamship Inspection under section 1 of Schedule A to the Steamship Machinery Construction Regulations [65] takes just this outlawed form.) This argument would leave a Minister or the Governor in Council free to dispense from the regulations he himself makes, but suffers from the same defects of arrogation of 1343 non-subordinate status as were outlined in the preceding paragraph. Moreover, it ignores the effect of section XII of the Bill of Rights which must be taken to have outlawed any dispensation unless provided for in the enabling Act.

The final argument that has been addressed in support of the dispensing power is the claim that it is automatically conferred upon a delegate by the enabling Act itself, whenever the enabling power is cast in terms of a subject-matter, and commonly introduced by the word "respecting". This was the formula used in drafting section 400 (1) (*b*) of the *Canada Shipping Act*.

> "The Governor in Council may make regulations respecting the construction of machinery."

It was this provision which was relied upon in giving a power of dispensation to the Board of Steamship Inspection. The Committee was told by the Legal Adviser to the Ministry of Transport:

> "It has generally been assumed that the use of the word 'respecting' is wide enough to allow the Board to exempt from or dispense with any general requirement of the Regulations. In support of this assumption, the writings of Mr. (*sic*) Driedger are relied on, in particular the book "The Composition of Legislation", page 149."

The Committee can only reiterate that such a theory places the Governor in Council, or other subordinate, in exactly the same position as Parliament and asserts that he can do anything Parliament might do. This view of "respecting" ignores the consequences of the Bill of Rights and the fact that any delegate's powers, including those of the Governor in Council, are subordinate and their limits will be construed in the light of basic constitutional principles, one of which is that the dispensing power is illegal unless expressly granted. Reference to page 149 of the "Composition of Legislation" brings forward once more the argument by analogy to sections 91 and 92 of the *British North America Act*. As was mentioned in paragraph 90 of this Report this analogy is false.

[1] Third Report of the Special Committee on Statutory Instruments, Session 1968-1969.

[2] Third Report of the Special Committee on Statutory Instruments, Session 1968-69, chapter 9.

[3] XIX Howell's State Trials, 1044.

[4] (1971) S.C.R. 5.

[5] (1918) 57 S.C.R. 150.

[6] Driedger, E. "Subordinate Legislation" 38 C.B.R. 1 at p. 20.

[7] Report of the Committee on Ministers' Powers, Cmd 4060, section 3, p. 21.

[8] (1918) 57 S.C.R. 150.

[9] *Reference re Regulations (Chemicals) Under War Measures Act* (1943) S.C.R. 1; (1943) 1 D.L.R. 248.

[9A] Technically the exception covers those statutory instruments "the inspection of which or the obtaining of copies of which are precluded by any regulations made pursuant to paragraph (*d*) of Section 27".

[10] Statutory Instruments Act, section 26.

[11] SI/76-40, Proclamation Prescribing Designs, Dimensions and Composition of Olympic Coins, Series IV, Issued: May 13, 1975. Registered and published: April 14, 1976.

[12] Statutory Instruments Act, section 2 (1) (*b*).

[13] S.O.R./72-441, as amended.

[14] Federal Court of Appeal, 5 Feb. 1976, Cor: The Chief Justice, Ryan, J., and Sheppard, D.J.

[15] President of the Privy Council, 1st June 1976, H.C. Debates, 1404.

[16] Third Report of the Special Committee on Statutory Instruments, Session 1968-69, page 27.

[16A] 12 Co. Rep. 74.

[16B] SOR/74-431—Teslin Exploration Limited Order

SOR/74-8—Indian Off-Reserve and Eskimo Housing Regulations

SOR/75-107—Anglo American Corporation Dredging Regulations

SOR/74-178—Pension Benefits Standards Regulations, amendment

SOR/75-202—Protection of Securities (Loan Companies) Regulations

SOR/75-203—Protection of Securities (Trust Companies) Regulations

SOR/76-100—Protection of Securities (Co-operative Credit Associations) Regulations

SOR/74-79—Canso Zone Marine Traffic Regulations

SI/74-127—Commercial Samples Remission Order

SOR/75-35—Flying Accident Compensation Regulations, amendment

SOR/72-14, SOR/73-245, SOR/74-218, SOR/75-134, SOR/75-609—Manpower Mobility Regulations

Immigration Special Relief Regulations

Immigration Guidelines

[16C] See Minutes of Proceedings and Evidence, 27th January 1977, Issue No. 7.

[17] *Subordinate Legislation, The Construction of Statutes, The Composition of Legislation, Legislative Forms and Precedents.*

[18] "Subordinate Legislation" 38 C.B.R. 1 at p. 22.

[19] (1943) S.C.R. 1.

[20] (1956) S.C.R. 318.

[21] S.A. de Smith: *Judicial Review of Administrative Action* (3rd Ed) p. 63; Hood Phillips: *Constitutional & Administrative Law*, p. 485; S.A. de Smith: "Sub-Delegation & Circulars" (1949) 12 M.L.R. 37; *Allingham* v. *Minister of Agriculture* (1948) 1 All., E.R. 780; *Brant Dairy Co. Ltd. & Walkerton Dairies Ltd.* v. *Milk Commission of Ontario & Ontario Milk Marketing Board* (1973) S.C.R. 131; *Robertson* v. *The Queen* (1972) Fed. R. 80.

[22] S.O.R. 72-7 as amended. (None of the subsequent amendments is relevant to Section 19 (5)).

[23] "Subordinate Legislation" 38 C.B.R. 1 at p. 31.

[24] Proceedings, p. 257.

[25] The Construction of Statutes, p. 201.

[26] *Hodge* v. *The Queen*, (1883) 9 App. Cas. 117 at p. 132.

[27] "Subordinate Legislation" 38 C.B.R. 1 at p. 28.

[28] SOR/72-267, SOR/72-268, SOR/73-118, SOR/73-119, SOR/73-378, SOR/73-379, SOR/73-718, SOR/73-119, SOR/74-104, SOR/74-105, SOR/74-579, SOR/74-580, SOR/75-178, SOR/75-179.

[29] SOR/75-226.

[30] SOR/69-488, Baie des Cayes-Noires, Quebec Two Areas Exempt from S. 18, 19 & 20; SOR/65-120, Columbia River, British Columbia, Exempt from S. 20; SOR/63-190, Flora Lake, Newfoundland Exempt from S. 20; SOR/61-23, Labrador Water Lot Exempt from S. 20; SOR/54-249, Marmion Lake, Ont. Exempt from S. 18, 19 & 20; SOR/64-23, Portion of Strait of Juan de Fuca, B.C. Exempt from S. 19; SOR/61-196, Shoal Arm, Newfoundland Exempt from Section 19; SOR/69-273, Tasu Sound, British Columbia, Certain Waters Exempt from S. 18, 19 & 20.

[31] S.O.R./55-100

[32] XI Howell's State Trials, Cobbett, 1166 at p. 1196.

[33] See Public Service Health Insurance Regulations, SOR/72-101, as amended, grounded in Vote 124 in Appropriation Act No. 6, 1960.

[34] SOR/72-198 and SOR/73-400, Proceedings, Issue No. 65: 23-26.

[35] SOR/71-7. This principal regulation, having been made before 1 January 1972, lies outside the Committee's statutory reference.

[36] SOR/75-609.

[37] 23-24-25 Eliz. II cap. 20.

[38] SOR/75-5.

[39] SOR/75-686.

[40] SOR/75-222.

[41] R.S.C. 2nd Supp. cap. 10.

[42] Report of the Committee on Administrative Tribunals & Enquiries, Cmnd. 218. (U.K.).

[43] S.O. 1971 C. 47.

[44] S.O. 1971 C. 48.

[45] (1974) 50 D.L.R. (3d) 349.

[46] (1973) 39 D.L.R. (3d) 738.

[47] SOR/72-69, SOR/72-141, SOR/72-142, SOR/73-179, SOR/73-272, SOR/73-301, SOR/74-201, SOR/74-285, SOR/74-510, SOR/74-511, SOR/75-72, SOR/76-191.

[48] Fifty-first Report of the Standing Committee on Regulations and Ordinances, Canberra, 1975, section 9, page 3.

[49] Third Report of the Select Committee on Statutory Instruments, House of Commons Session 1968-1969.

[50] H.C. Debates, 14047, 1st June 1976.

[51] Discussed in *The Case of the Commendams*, Sir John Davy's Reports, fol. 69b.

[52] *Thomas* v. *Sorrel*, Vaughan's Reports, fol. 348, *Taswell-Langmead*: English Constitutional History (Plucknett Edn) p. 190 following the histories of Mathew Paris.

[53] When one of these patents was produced in the Common Pleas, one judge, Roger de Thurkeby, is said to have explained in prophecy:

"*Ab alto ducens suspira. De Praedictae adjectionis appositione. Heu! heu! has ut quid dies expectavimus ecce jam Civilis Curia exemplio Ecclesiasticae Coinquinatur et a Selphureo fonte Rivulus intoxicatur.*"

[54] *Taswell-Langmead*: op. cit., p. 191.

[55] *Godden* v. *Hales*, XI Howell's State Trials (Cobbett) 1166.

[56] *An Act declaring the Rights and Liberties of the Subject and Settling the Succession to the Crowne*, Wm & Mary, sess. 2, c.2. This statute is known as the Bill of Rights by force of the *Short Titles Act* 1896, (U.K.). It is dated 1688 old style, 1689 new style.

[57] (1815); Special Report by Peere Williams.

[58] *Maxwell on the Interpretation of Statutes*, 12th ed. (London 1969) p. 271, and authorities there cited.

[59] *Ruding* v. *Smith* (1821) 2 Hagg. Cons. 371; F. Lareau, *Histoire du Droit Canadien* Thome II, Montreal 1889, page 54.

[60] It is true that technically a regulation is not a statute and therefore for the purposes of the Criminal Code offence of being in breach of a statute, breach of a regulation is irrelevant: *The King* v. *Singer* (1941) S.C.R. 111. Yet for other purposes the distinction between the two seems to have been obliterated by the *Japanese Reference* (1947) A.C. 87.

[61] (1881) 6 Q.B.C. 376.

[62] (1898) 2 Q.B. 91.

[63] (1894) A.C. 347.

[64] (1947) A.C. 87.

[65] S.O.R./55-100 as amended by SOR/73-439.

A copy of the relevant Minutes of Proceedings and Evidence (*Issues Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 49, 51, 54, 55, 56, 57, 58, 59, 60, 63, 65, 67, 68, 74, 75, 77, 78, 80, 81, 82 and 83 of the First Session, Thirtieth Parliament and Issues Nos. 1, 2, 3, 4, 5, 6, 7 and 9 of the Present Session*) is tabled.

(*The Minutes of Proceedings and Evidence accompanying the Report recorded as Appendix No. 13 to the Journals*).

Respectfully submitted,

EUGENE A FORSEY
Joint Chairman

ROBERT J. McCLEAVE,
Joint Chairman.