CANADIAN THESES ON MICROFICHE

THÈSES CANADIENNES SUR MICROFICHE

National Library of Canada
Collections Development Branch

Canadian Theses on
Microfiche Service

Ottawa, Canada
K1A 0N4

Bibliothèque nationale du Canada
Direction du développement des collections

Service des thèses canadiennes
sur microfiche

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30. Please read the authorization forms which accompany this thesis.

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30. Veuillez prendre connaissance des formules d'autorisation qui accompagnent cette thèse.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

Canada

NL 339 (r. 85/09)

Judicial Review of Delegated Legislation:

The Rule of Law and the Law of Rules

by

John Mark Keyes

Thesis submitted to the School of Graduate Studies in partial fulfillment of the degree of Master of Laws in Legislation

Judicial Review of Delegated Legislation:
The Rule of Law and the Law of Rules

Abstract

This thesis considers one of the most important and voluminous sources of law in Canada: delegated legislation. Essentially, this form of law consists of rules and standards made by authorities whose power to do so has been delegated from parliamentary or primary legislative bodies.

The growth of delegated legislation in the 20th century parallels the rise of the welfare state. In the first instance, it is a device for controlling administrative discretion and in this sense supports the rule of law. However, as a form of law-making, delegated from democratically responsible bodies, it must itself be controlled to ensure conformity with the intentions of the delegating bodies. This thesis examines the role of the courts in ensuring this control. Although the primary focus is on Canadian cases, consideration is also given to judicial pronouncements from Australia, the United Kingdom and the United States, particularly in those areas where the Canadian case law is sparse or in a developing state.

Part I of the thesis examines the definition of delegated legislation and reveals that, although it has a well established core of meaning, it is difficult in some instances to classify the nature of delegated powers. The importance of this classification rests in the fact that it may determine both the proper procedures for exercising a power as well as

the effect of that exercise of power.

Part II concerns the judicial review of formal and procedural constraints on delegated legislative powers, while Part III deals with the limits imposed on the substance and scope of these powers. These controls arise initially from the terms of statutory enabling provisions. However, the judicial interpretation of these provisions manifests a considerable degree of creativity and the numerous rules of construction that have been developed in respect of the construction of enabling provisions owe more to the bench than to parliaments or legislative assemblies.

The thesis argues for a continuation of the "judicial activism" inherent in the development of these rules of construction. It also advocates greater and more intensive appreciation of the nature of delegated legislative powers when they are under judicial review. Finally, the thesis identifies as the major force behind judicial review the "rule of law" in so far as it embodies the principle that those affected by governmental regulatory activity should be able to discover the nature of that activity and order their affairs accordingly. Delegated legislation is a means of publicizing and ordering governmental activity and constitutes one of the most important safeguards against the totalitarianism of unfettered administrative discretion.

Acknowledgements

First, to my wife, Nancy Spencer Keyes, who endured my impatience and accomplished the monumental task of typing this manuscript: I am in her debt, happily, forever.

Second, to my supervisor, Professor Archambault, and to my "silent" supervisor, Miles Pepper, for suffering through my drafts of this thesis, pointing out their manifold flaws and spurring me on to revision.

Finally, to my colleagues in the Legislative Drafting Programme, at the Aeronautics Act Task Force and in the Privy Council Section of the Department of Justice, for providing me with a congenial and stimulating environment for the cultivation of ideas.

Table of Contents (iv)

Appendices

Introduction

Division A - The Rule of Law and Delegated Legislation

Like the supremacy of God, the rule of law is hardly free of ambiguity. However, as a constitutional principle in Canada, it perhaps commands a greater measure of acceptability and embraces at least three elements over which there is very little debate. First, it requires the law to be democratically authorized; second, the law must be published in written form; third, the law must be applied equally to all subjects. In this thesis, the "rule of law" will be used to convey these three elements.

The rule of law is frequently invoked by those who decry a very common feature of modern government: vast administrative schemes, liberally sprinkled with discretionary powers exercised by non-elected officials. Lord Hewart's The New Despotism[1] in the 1930's is a classic example of the criticism heaped on the transformation of law from relatively complete legislative codes, sanctioned by a parliamentary body, to statutory shells enclosing an array of bureaucratic powers, often exercised on the basis of secret directives or unwritten administrative practices.

Much of this criticism is the product of 19th century liberalism and 20th century ultra-conservativism. Its

[1]Lord Hewart, The New Despotism (London: 1929).

aim, as expressed by the most avid proponents of de-regulation in the United States and Canada, is not merely to eliminate discretionary powers, but to minimize government regulation as a whole. Whatever the merits of this objective, the enormity of current regulatory activity, together with the inertia inherent in its existence, argue that de-regulation will not in the near future ensure the rule of law.

Accepting government regulation as a structural feature of modern society, one might advocate a more active role for primary legislative bodies in prescribing regulatory detail. However, this too is an unrealistic expectation given the strain under which these bodies already operate. Parliamentary time is at a premium and the expertise of elected members in complex, technical areas of regulation is very limited.

In order to meet the need for regulatory controls and at the same time respect the rule of law, it seems more useful to concentrate on techniques for injecting responsibility, openness and equality into regulatory activity. In common law jurisdictions, this has been pioneered by the courts through the concepts of natural justice and ultra vires. However, judicial review of administrative discretion has some substantial limitations, particularly in relation to powers that bear little or no resemblance to the judicial model.[2] For an illustration of this one need only turn to cases involving emergency powers

[2] Martin Loughlin, "The Crisis in Administrative Law Theory." (1978), U.T.L.J. 215.

legislation during the two world wars.[3]

In the U.S., Professor K. C. Davis has recognized a number of instances of discretion that was unnecessary, either because circumstances had changed since it was conferred or because it was conferred carelessly, with little regard for what was needed.[4] In order to confine or cut back these powers to necessary levels, he has suggested that standards and rules be developed, not by the traditional institutions for confining administrative powers, the legislatures and the courts, but by the administrators themselves. To Davis this technique, known as "rule-making" in the United States, offers the best of both worlds. On the one hand, it permits executive agencies to formulate rules gradually and on the basis of expertise developed in their regulatory areas. On the other hand, the rulemaking procedures of the Administrative Procedures Act[5], which he has described as "one of the greatest inventions of modern government," represent a rational guide

[3] See e.g. Re Gray (1918), 57 S.C.R. 150; Chemicals Reference [1943] S.C.R. 1. The grant of such vast, unstructured powers to the executive may well have opened the door to peace time legislation that conferred similarly broad authority in relation to very complex and developing activities such as aeronautics, broadcasting and nuclear power. (See e.g. the Atomic Energy Control Act, R.S.C. 1970, c.A-19 and the comments of Robins, J. in Re Westinghouse Electric Corporation and Duquesne Light Company (1977), 16 O.R. 2d 273 (H.C.) at p. 295.) Although subsequent technological advances and regulatory experience have defined in much greater detail the provisions necessary for the effective regulation of these areas, the authorities in question continue to hold discretionary powers that are as broad as ever.

[4] K. C. Davis, Discretionary Justice (Baton Rouge: 1969), p. 216.

[5] 5 U.S.C.

for and check on rule-making powers by giving interested parties an inexpensive, if somewhat limited, form of involvement in the formulation of rules.[6]

In the years following Professor Davis's comments, particularly during the late seventies and early eighties, the euphoria over the rule-making panacea evaporated to some extent. Legislators in the U.S. have become increasingly concerned by the exercise of rule-making powers by independent regulatory agencies that lack political accountability. By 1982 forty one state legislatures had adopted some form of legislative review. Of these, twenty six had granted themselves authority to suspend or veto rules, or otherwise to prevent them from taking effect.[7]

It is surely ironic that the American rule-making system, conceived and developed in the land of checks and balances, should be found lacking and that the solution should be drawn from the United Kingdom method of parliamentary scrutiny.[8]

[6] The "notice and comment" procedure is prescribed under s. 553 of the APA. This section requires agencies to publish a "general notice of proposed rule-making" in the Federal Register "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." The agency is then required to afford such persons an "opportunity to participate in the rule-making through submissions of written data, views or arguments with or without opportunity for oral presentation." More extensive procedural requirments are prescribed under ss. 556 and 557 for rules that are required to be made "on the record."

[7] National Conference of State Legislatures, Legislative Review of Administrative Rules: An Update (Denver:1982).

[8] For one of the earliest American articles advocating the English procedures, see B. Schwartz, "Legislative Control of Administrative Rules and Regulations: The American Experience," (1955), 30 N.Y.U.L.R. 1031.

Although comparisons between the two systems of government must be made with due regard for their differences, this cross-pollination suggests that the central attributes and difficulties of delegated legislation are found in both and have much to do with their common democratic heritage.[9]

The developments in the U.S. clearly demonstrate that delegated legislation is both a tool for improving the administrative process as well as a power that itself needs to be controlled. In this thesis, I propose to consider the role that judicial review plays in guiding the exercise of delegated legislative powers. Although the courts are by no means the only forums for the review of delegated legislation, they have provided the bedrock for its control. A glance at the review criteria of most administrative and parliamentary scrutinizing bodies in the Commonwealth confirms their debt to the courts.[10]

In addition, the case law generated by judicial review affects, if not determines, the legislative formulation of enabling powers and the executive exercise of those powers. Enabling powers are framed, and delegated legislation is ultimately made, by taking into account the possibility of judicial review, though this review is relatively rare when considered in terms

[9] See infra, pp. 170-5.

[10] See, e.g., the criteria of the Canadian Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments, set out in Appendix II to its Third Report to both Houses of Parliament in the Second Session of the Thirty-second Parliament, April, 1984.

of the volume of delegated legislation actually produced.

Division B - The Nature and Purposes of Judicial Review

Judicial review of not only delegated legislation, but all forms of delegated power, raises a fundamental tension that constantly manifests itself in the case law. This tension involves respecting the area of discretion conferred with the delegation of a power, while at the same time construing the legal limits of that discretion. Conceivably, the courts could construe these limits very narrowly and confine a power to the point where they dictate how it is to be exercised by the authority to whom it has been delegated. However, judicial decisions generally express a keen awareness of the dangers of such abuse. In fact, as I hope to demonstrate in the context of delegated legislative powers, this awareness often takes courts to the other extreme of relinquishing their scrutinizing rule and construing delegated powers with unnecessary breadth.

Decisions at either of the extremes just noted usually represent refusals to embark on any meaningful inquiry into the nature and purposes of delegated powers. This is particularly true of the latter extreme where courts tend too easily to classify a matter as one of "policy" and foreclose

any further inquiry.[11] In the context of delegated legislation, this classification arises quite naturally when one considers the nature of the powers involved. Their "legislative" character renders them untouchable by courts that subscribe to a doctrine of absolute separation of legislative, executive and judicial powers.

This doctrine is informed by a nineteenth century model of the legal system as a machine for applying law to facts and leaves little or no discretion as to the meaning of the law. Fortunately, it has been eroded by a good deal of twentieth century realism and it is now recognized that

[11] E.g., A. G. Can. v. Inuit Tapirisat (1980), 115 D.L.R.3d 1 (S.C.C.), discussed infra at pp. 87-90; Re Surrey Memorial Hospital and A.G.B.C. (1983), 149 D.L.R.3d 397 (B.C.S.C.), discussed infra at pp. 90-92; McEldowney v. Ford [1969] 2 All E.R. 1039 (H.L.), discussed infra at pp. 106-15.

policy-making is not a function alien to the courts.[12] The impetus for this recognition has come both from the development of a more purposive approach to statutory interpretation[13] as well as from the entrenchment of fundamental rights and freedoms in constitutional documents.[14] Particularly in cases involving the latter, courts find themselves grappling with

[12] This point has most recently been acknowledged by the Federal Court of Appeal in The Queen v. Operation Dismantle [1983] 1 F.C. 745. The court struck out a statement of claim alleging that the decision of the federal government to permit testing of the cruise missile in Canada infringed the right to "life, liberty and security of the person" guaranteed under section 7 of the Canadian Charter of Rights and Freedoms. Four of the five members of the court dealt with the matter on the basis of whether or not the statement of claim raised a "justiciable" issue. Ryan, J. quoted extensively from a decision of the House of Lords in Chandler v. D.P.P. [1964] A.C. 763, including the following from the judgement of Lord Radcliffe at p. 797:

> It (the court) is not debarred from doing so (considering an issue) merely because it is what is ordinarily known as "political". Such issues may present themselves in courts of law if they take a triable form. Nor, certainly, is it because Ministers of State have any inherent general authority to prescribe to the courts what is or is not prejudicial to the interests of the State.

In addition, Marceau, J. in the Operation Dismantle case stated:

> Le juge de première instance n'a pas voulu accepter la prétention que la décision en cause n'était pas susceptible d'attaque devant les tribunaux pour le seul motif qu'il s'agissait d'un décision politique et je ne crois pas qu'en cela il ait eu clairement tort. (p. 778)

[13] See Dennis Pearce, Statutory Interpretation in Australia (Sydney: 1974), pp. 136-42; John M. Kernochan, "Statutory Interpretation: An Outline of Method" (1976), 3 Dal. L.J. 331; John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1.

[14] See Mauro Cappelletti, "The Law-Making Power of the Judge and Its Limits: A Comparative Analysis" (1981), 8 Mon. U.L.R. 15; Leo D. Barry, "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms" (1982), 60 Can. Bar Rev. 237.

a policy-making role of enormous breadth. Constitutional rights are most often conceived as devices for protecting individuals from the excesses of legislative activity, thereby counter-balancing the expansion of the welfare state. As all-purpose antidotes to legislative or administrative injustice, they are phrased in very general language that leaves to the courts broad scope in weighing governmental measures against individual rights.

In The Politics of the Judiciary, J. A. G. Griffith has gone some distance toward demonstrating that the courts are in fact a policy-making branch of the government. He has also attempted to demonstrate a number of distinct attitudes that dominate the policy-making discretion of judges in the United Kingdom:

> The judicial conception of the public interest, seen in the cases discussed in this book, is threefold. It concerns, first, the interests of the State (including its moral welfare) and the preservation of law and order, broadly interpreted; secondly, the protection of property rights; and thirdly, the promotion of certain political views normally associated with the Conservative party.[15]

In the concluding pages of his book, he goes on to state:

> My thesis, then, is that the judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and that its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it.[16]

[15] J.A.G. Griffith, The Politics of the Judiciary (Oxford: 1977) at p. 195.
[16] Ibid. at p. 213.

Professor Griffith's conclusion that the judiciary is a policy-making branch of government is indisputable. Where questions arise is in the area of the scope and nature of this function. Professor Griffith's observation on the biases inherent in judicial decisions have not gone unchallenged[17] and I propose to test them here as well.

The need for judicial review of delegated legislative powers can perhaps be most amply demonstrated by considering the manner in which those powers are conferred. The formulation of statutory provisions to enable delegated legislation is subject to a tension similar to that noted above in relation to judicial review. On the one hand, the draftsman must shy away from too much detail, since the purpose of delegating legislative powers is to relieve the primary legislative authority of some aspects of its law-making functions:[18] the constraints of time and expertise argue that these are better and more expeditiously performed by delegated authorities. On the other hand, delegation of power implies supervisory responsibility for the manner of its use, responsibility that is most often exercised by prescribing limitations on their exercise and entrusting the courts with the role of ensuring that those limitations are respected. The drafting of an enabling provision

[17] Cappelletti, loc. cit., n. 14 at p. 32.
[18] See Patrice Garant, Droit Administratif (Montréal: 1981) at p. 284 for a summary of the reasons for the delegation of legislative powers.

in an unnecesarily broad fashion dilutes this responsibility.[19]

If Professor Davis has found unnecessary breadth in discretionary powers in the U.S., it should come as no surprise that the same is true in Canada and the U.K. In 1951, Professor Griffith surveyed a number of British statutes and found that many of the enabling powers contained in them were much broader than necessary.[20] He considered this to result from the fact that this legislation invariably originated with the government departments upon which the powers of delegated legislation were conferred. These departments viewed the statutes in question primarily as mechanisms for granting powers to themselves and, because of the difficulties in finding parliamentary time for amendments, preferred to err on the side of excess. Professor Griffith also found that Parliament did not adequately scrutinize the departmental pleas that broad powers were necessary and simply accepted justifications based on either the technical complexity of the subject matter or its susceptibility to unforeseeable change. The departments were, and still are, in a most powerful position to influence the formulation of delegated powers, being not only responsible for the introduction of enabling legislation, but very often in possession of the greatest resources for studying the regulatory subject matter.

[19] See e.g. Springbank Mun. Dist. v. Render [1936] 4 D.L.R. 193 at p. 198; cited with approval in Cie. Miron Ltée c. R. [1979] C.A. 36 at p. 38.

[20] J.A.G. Griffith, "The Place of Parliament in the Legislative Process" (1951), 14 Mod. L.R. 279.

In Canada, similar comments have most recently been made by both the federal Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments (the Joint Committee)[21] and the Commission d'Etude sur le Contrôle Parlementaire de la Legislation Déleguée of the Assemblée nationale of Québec.[22] Repeated attempts by the Joint Committee to broaden its mandate to cover review of enabling clauses in bills before Parliament have met with little success[23] and, although the Privy Council Office has issued guidelines to government departments for limiting the scope of enabling powers,[24] one cannot place too much confidence in such self-disciplinary measures.

If the vagueness of enabling provisions betrays a lack of scrutiny at the parliamentary level, an obvious remedy may lie with the judiciary. Accordingly, I propose to survey the case law dealing with the scrutiny of delegated legislation, emphasizing particularly those from Canada. This survey will divide into three parts. The first will consider the definition of delegated legislation and the concept

[21] Third Report, supra, n.10, paragraphs 66-74.

[22] Le contrôle parlementaire de la législation déléguée (Québec: 1983) at pp. (ii) and 14.

[23] Only once has the Committee been granted authority to study enabling clauses. This occurred in 1980 in respect of the Canada Post Corporation Bill: see the Committee's Sixth Report for the First Session of the Thirty-second Parliament. Most recently, the Committee has in its Third Report, supra, n. 10, paragraphs 66-74 recommended that a Regulatory Review Committee be established and charged with, inter alia, the review of enabling clauses.

[24] Government of Canada, Privy Council Office, The Preparation of Legislation (Ottawa: 1981).

of "rules" underlying it; the second part will review judicial scrutiny of the manner in which regulatory instruments are made and promulgated; the third will deal with the substantive scope of powers that enable delegated legislation. This survey is not intended to exhaust every aspect of judicial scrutiny. Rather, my object is to uncover its most significant principles and offer a critique of the manner in which they are applied.

Part I The Definition of Delegated Legislation

In order to analyse delegated legislation, it is necessary to have some notion of what it includes. A convenient place to begin examination of this issue is with legislation that governs the review and publication of delegated legislation. In these statutes one finds an expression of what parliamentary bodies generally consider to be embraced by this concept. These statutes also provide examples of an area within which the definition of delegated legislation has its most obvious practical importance.

Division A - Approaches in the United Kingdom and the United States

In the U.K. the Statutory Instruments Act 1946[25] initiated a new system for the publication and scrutiny of legislation made by authorities in the exercise of powers conferred by Parliament. It applied to "documents" made under powers that were specified in the enabling legislation to be exercisable "by Order in Council" or "by statutory instrument."[26] Thus, since 1948,[27] Parliament has determined in each instance whether the exercise of a delegated power should

[25] 9 & 10 Geo. 6, c. 36.
[26] Ibid., subsection 1(1).
[27] The Act was proclaimed in force on January 1, 1948 by the Statutory Instruments Act 1946 (Commencement) Order 1947, S. I. 1948, No.3.

be classified as "legislative" and be subject to the Statutory Instruments Act.

The Act could not, of course, deal in the same way with statutory powers conferred before 1948. Accordingly, ss. 1(2) applied to rules made under pre-1948 powers by incorporating the definition of rule contained in the Act's predecessor, the Rules Publication Act, 1893.[28] This definition was, however, of limited assistance since it merely referred to "rules, regulations or by-laws" relating to any court or made by one of a number of specified executive institutions. In order to provide more guidance in the identification of rules, section 8(1) of the 1946 Act authorized the Treasury to make regulations determining "the classes of cases in which the exercise of a statutory power by any rule-making authority constitutes or does not constitute the making of . . . a statutory rule." Thus, the Statutory Instruments Regulations, 1947[29] provided that "every document being of a legislative and not an executive character" constituted a "statutory rule".[30]

The terms "legislative" and "executive" have enjoyed extensive consideration, both from the courts and from academic writers. J.A.G. Griffith and H. Street discuss them specifically in relation to the Statutory Instruments Act, 1946, but with little in the way of conclusive results:

> The distinction between "legislative" and "executive"

[28] 56 & 57 Vict., c. 66.
[29] S.I. 1948; No.1.
[30] Ibid., section 2.

> is very difficult to draw. There are two tests which have been suggested. The first is institutional: that which the Legislature enacts is legislation. Since no subordinate legislation is strictly enacted by Parliament, this is of no value. If the meaning of the word "enacts" is extended to include that which is done by Parliamentary authority, all kinds of actions are let in and solution is no nearer. Secondly, the meaning of "legislative" and "executive" may be determined by reference to the nature of the action. By this test a power to make rules of general application is a legislative power and the rule is a legislative rule. A power to give orders in specific "cases" is, by the same test, an executive power and the order is an executive order. Similarly, a power to take specific action is an executive power and the action is an executive action. The difficulty here is that of distinguishing between what is "general" and what is "specific". These words, although they have some extreme and easily recognizable forms, do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary, to the old and comparable riddle: "How many sheep make a flock?"[31]

Professors Griffith and Street present a perhaps overly pessimistic view of the attempt to define "statutory rules". Their dismissal of the institutional test overlooks the influence that the character of a rule-making authority has had on judicial determinations of legislative powers.[32] In addition, their emphasis on the arbitrariness of decisions on this issue in "doubtful cases" belies the significance of a third test that they go on to note. This test was propounded by Sir Cecil Carr, the first counsel to the House of Commons committee established in 1948 to scrutinize statutory instruments:

> If a document is a statutory instrument, then it

[31] J.A.G. Griffith and H. Street, Principles of Administrative Law, 5th ed. (London: 1973), p. 48.

[32] See infra, pp. 20-22 and 88-92.

> is subject to the requirements of publication set out in the Act of 1946. The question whether any document is legislative or executive seems to be answered in practice by another question: "Is it desirable that this document should be published?" If the answer is "Yes", then it is called legislative.[33]

The most useful aspect of this test is that it suggests a functional approach[34] that is much less arbitrary than the flock riddle. Thus, it makes clear the importance of defining delegated legislation in light of the use to which the definition will be put.

The only judicial discussion of the U.K. Statutory Instruments Act definition of "statutory rule" is contained in two cases[35] upon which S. A. DeSmith commented in 1949.[36] These dealt with ministerial subdelegation through the issuance of circulars and "guidance notes" to administrative officials. Professor DeSmith disputed the conclusions reached by each court that the Act did not provide for the publication of such "subdelegated legislation". However, in asserting that any documents of a "legislative" nature came within the definition, he shrunk from embarking on a discussion of the term and merely noted the ink already spilt on the subject.

The definition of "delegated legislation" has been pursued in the U.S. under the rubric of "rules". In his Administ-

[33] Op. cit., n. 31, p. 49.

[34] A similar approach has been suggested in the U.S. by K. C. Davis, Administrative Law Treatise, 2nd. ed., v.II (San Diego: 1979), p. 5.

[35] Blackpool Corporation v. Locker [1948] 1 K.B. 349; Jackson Stansfield & Sons v. Butterworth [1948] 2 All E.R. 558.

[36] S. A. DeSmith, "Subdelegation and Circulars" (1949), 12 Mod. L.R. 37.

rative Law Treatise,[37] Professor Davis traces the history of this search back to a seminal article written by Ralph F. Fuchs in 1938.[38] There, Professor Fuchs employed the distinction between "legislative" and "adjudicative", rather than "executive", functions. After considering the elements of "futurity" and "generality" inherent in the former, he suggested:

> it is useful to define rule-making as the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.[39]

In a critique of Fuchs' approach, Professor Davis pointed out its weaknesses, noting, on the one hand, that legislative action sometimes has a very narrow focus, as in the case of private bills, while adjudicatory action can, by the same token, have a very broad impact through the doctrine of precedent.[40] However, much of Professor Fuchs' analysis has found its way into the definition of "rule" in the Administ-

[37] Op. cit., n. 34.
[38] Ralph F. Fuchs, "Procedures in Administrative Rule-making," (1938), 52 Harv. L.R. 259.
[39] Ibid., at p. 265.
[40] Op. cit., n. 34 at pp. 4-9.

rative Procedures Act,[41] forming the basis for the considerable case law generated on this subject in the U.S. In reviewing this definition and the interpretation that it has received, Davis has noted that various types of informal administrative documents, such as rulings, interpretations, policy statements, opinions and advisory letters, have escaped the provisions of the Act despite their often significant administrative, if not legal, effect.[42] He has concluded that

> creating definitions that will control the determination of issues that come to court may often be undesirable because no one has the capacity to create definitions that will measure up, and because results should rest more on understanding the consequences than on analysis of language.[43]

Division B - Approaches in Canada

In 1968, the Royal Commission of Inquiry into Civil Rights (McRuer Commission) was given the task of reviewing the exercise and control of statutory powers in Ontario.[44]

[41] Subsection 551(4) states:

> rule means the whole or a part of an agency's statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedures or practice and requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs or accounting, or practices bearing on any of the foregoing.

[42] [43] Op. cit., n. 34 at p. 9.

[43] Ibid., at p. 5.

[44] Royal Commission Inquiry into Civil Rights, Report No. 1, vol. 1 (Toronto: 1968).

After postulating that "legislative power, the statement of rules of law, involves an authoritative decision as to what the rules should be, arrived on grounds of policy",[45] its report acknowledged that this definition

> does not exhaust the modes of exercising legislative power. Legislative power may be exercised not only to make general rules but to prescribe specifically as a matter of policy particular rights or liberties to which persons are entitled, or legal penalties to which they are subject.[46]

This formulation introduces a species of legislative power not included in the definitions canvassed above. The specific, policy oriented legislative power turns on the nature of the authority exercising it and the breadth of discretion it contains. At first glance, its specificity seems inconsistant with the characteristic of generality that is fundamental to most of the other definitions. However, there is no contradiction if one recognizes the existence of situations where no general rule is possible. In a sense, the "policy" formulated by the governing authority in such circumstances is the "rule", notwithstanding its fragmented expression in a series of specific decisions. What distinguishes these powers from administrative powers is both the breadth of discretion and the level of public interest generated. These factors provide the crucial "policy" element and invest a power with a "legislative" character.[47]

[45] Ibid. at p. 20.
[46] Ibid. at p. 21.
[47] See the discussion of Inuit case, infra at pp.87-9.

The Canadian cases and statute law dealing with the determination of whether an instrument falls within the ambit of delegated legislation are not extensive. Most of the provincial statutes governing the procedures for delegated legislation employ the term "regulation"[48] and adopt the U.K. approach of defining it in terms of an instrument's "legislative

[48] Although the Newfoundland Statutes and Subordinate Legislation Act, S.N. 1977, c. 108, uses the term "subordinate legislation," most provincial statutes use the term "regulation". These statutes define the term as including a variety of concepts such as "rules", "orders", "by-laws", "proclamations" or "tariffs". Such catalogues might be taken to indicate a wide array of delegated legislation. However, see Re B.C. Teachers Federation and Board of School Trustees of School District No. 41 (Burnaby) (1978), 83 D.L.R. 3d 190 (B.C.S.C.), aff'd. (1979), 95 D.L.R. 3d 273 (B.C.C.A.), where Nemetz, J. ruled that an "agreement" between the provincial and federal governments for the application of the federal Anti-inflation Act S.C. 1974-75-76, c. 75 to the provincial public service was not a "regulation". Although the "agreement" was authorized and given effect under the Anti-inflation Measures Act, S.B.C. 1976, c. 1, Nemetz, J. stated

> . . . the Agreement is not a regulation, either in the ordinary sense of the word or under the definition quoted. Certainly it is not a rule, order, proclamation or by-law, nor was it a document designated to be a regulation for the purposes of the (Regulations) Act (S.B.C., 1973, c. 76). Further, the words "agreement", "regulation", "order", and "guideline" are separately employed in the Provincial (Anti-inflation Measures) Act to describe different things. There is no implication that an "agreement" is a sub-species of any of the other terms. (p. 193)

nature" or the "legislative" character of its enabling powers.[49] However, in Town of Truro v. McCulloch [49.1] The court considered that even without a definition phrased in these terms, "rule or regulation" itself imported the notion of an instrument "to guide the future conduct of individuals of which they should have notice in a certain way."

In Rose v. The Queen [50] the Ontario Court of Appeal construed "legislative" to include an order re-vesting title to a public highway in a municipality. The Court concluded:

> We think that to an extent generally applicable to the public or large segments thereof it (the order) alters rights and responsibilities and even the nature and extent of those responsibilities. Upon that ground alone we think sufficient has been said to indicate the legislative nature of the action taken by the Lieutenant-Governor in

49 The following employ the phrase "legislative nature"
Regulations Revision Act, R.S.P.E.I., c. R-11.1, para. 2(b);
Regulations Act, R.S.O. 1980, c. 446, para. 1(d);
Statutes and Subordinate Legislation Act, S.N. 1977, c. 108, para. 2(b);
The Regulations Act, R.S.M., c. R60, para. 2(1)(f);
The Regulations Act, R.S.S., c. R-16, para. 2(e);
Regulations Act, R.S.A., c. R-13, para. 1(1)(f);
Regulations Act, R.S.B.C. 1979, c. 361, s.1.

The Regulations Act R.S.N.S., c. R-12, para. 2(g) refers to the "legislative character" of the enabling powers while the Regulations Act R.S.N.B., c. R-7, s.1 does not use the term "legislative" at all.

49.1 (1971), 22 D.L.R. 3d 293 (N.S.S.C.).

50 [1960] O.R. 147 (C.A.).

> Council as set out in the order in council referred to . . In coming to a conclusion as to the nature of the act performed, not only must one look at the substance rather than the form but indeed in the inquiry upon which one must embark, all the surrounding circumstances must be looked at and by that I include the nature of the body enacting the order in question, the subject matter of the order, the rights and responsibilities, if any, altered or changed by the order. Significant in our opinion among these indicia to be considered in a determination of a legal question is the fact that the order here under review is an order made formally by the Lieutenant-Governor in Council upon the recommendation of one of the ministers of the Crown. That is to say, it is an order made by the executive of the government ...[51]

This emphasis on the character of the authority exercising delegated powers recurs throughout Canadian case law defining "legislative" powers.[52] Perhaps more significant, however,

[51] Ibid. at pp. 155-6.

[52] See infra at pp. 88-92. See too R. ex. rel. Mahlberg v. Green [1943] 2 W.W.R. 253 (Sask. Dist. Ct.) and Henry Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion" (1971), 18 McGill L.J. 310 at pp. 321-24.

is the willingness of the court in Rose to embark on a substantive examination of the order there in issue.

The approach taken in the Rose case seems to be reflected in the Canadian Statutory Instruments Act.[53] The groundwork for this statute was laid by the Special Committee of the House of Commons on Statutory Instruments (the MacGuigan Committee).[54] Its report, published in 1969, canvassed the attempts in various jurisdictions to define delegated legislation and adopted the following as a working definition:

> a regulation is a rule of conduct enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons.[55]

The report went on to consider the existing definition of "regulation" in the Regulations Act[56] as well as the exemptions that it contained, and concluded by recommending a very lengthy

[53]S.C 1970 71-72, c. 38.
[54]Note the comments of the Minister of Justice at second reading of the legislation: Proceedings of the House of Commons, 28th Parliament, Third Session, p. 2734.
[55]Report of the Special Committee on Statutory Instruments, (Ottawa: 1969), p. 14.
[56]R.S.C. 1970, c. R-5.

and comprehensive definition.[57] The committee's comments on the intent of this definition are most instructive:

> 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. Apart from private corporations, the identity of the regulation-making authority should be irrelevant, since we want to cover all such authorities.[58]

The impact of the MacGuigan Committee proposals on the definitions of "regulation" and "statutory instrument" in the ensuing Statutory Instruments Act is as mysterious

[57] Op. cit., n. 51 at p. 27:

"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 subparas. (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, 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 subpara. (iv).

[58] Ibid.

as the definitions themselves.[59] The definition of "regulation" incorporates that of "statutory instrument" so that the consideration of the scope of the Act becomes a two-step process. The first step, the definition of "statutory instrument" in

[59] When the Statutory Instruments Act was before Parliament as Bill C-182 in 1971, most of the debate dealt with the powers of the parliamentary scrutiny committee and the dearth of affirmative and negative resolution procedures: see Debates of the House of Commons, 28th Parliament, Third Session at pp. 2734-46 (second reading), pp. 4044-53, 4060-74 and 4143-53 (third reading), Proceedings of the Justice and Legal Affairs Committee of the House of Commons, 28th Parliament, Third Session, pp. 730-827 (second reading), pp. 994-6, 1006-7 (third reading), Proceedings of the Legal and Constitutional Affairs Committee of the Senate Issue No. 7, pp. 8-16. Although comment on the definitions was minimal, it bears out their obscurity. In the Justice and Legal Affairs Committee proceedings, two minor amendments to the definitions were introduced at the behest of the Minister of Justice. They were accepted, as were the definitions, without debate. In the Senate, rather more attention seems to have been paid to the definitions, though to little avail: see the remarks of Hon. Mr. Grosart, Debates of the Senate, 28th Parliament, Third Session at pp. 761-2.

paragraph 2(1)(d), involves a provision of labrynthine logic.[60] The lengthy enumeration of types of statutory instruments in the opening clause appears to follow the MacGuigan methodology and "cast the net as widely as possible." However, subparagraphs (i) and (ii) qualify the opening clause by requiring that

[60] The definition is as follows:

"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 procuction 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 determiniation 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 enumerated instruments be made "by or under" either statutory [subpara. (i)] or prerogative [subpara. (ii)] authority.

The complexity of subparagraph (i) is difficult to comprehend. Not surprisingly, it has received divergent interpretations from the federal Department of Justice and from the Joint Committee.[61] However, neither of these is particularly satisfying. The Department has construed the phrase "expressly authorized" as a restriction that limits the definition to instruments that are made under a power that specifies how it is to be exercised. This interpretation requires the inclusion of phrases like "by order" or "by regulation" and seems to draw its inspiration from the U.K. Statutory Instruments Act, discussed above. If a power is conferred merely to "order", "prescribe" or "establish" something, the resulting instrument is not "expressly authorized".[62]

The Department's interpretation contains a second limitation that springs from the words "otherwise than by the conferring . . . of powers or functions in relation to a matter to which such instrument relates . . . ." This clause is obscure, to say the least, and may have been taken from similar terminology in subsection 7(6) of the Financial Administration Act.[63] The problem in construing it involves determining what it relates to. There are three possibilities: it may

[61] Second Report of the Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments, Second Session, Thirtieth Parliament (1977).

[62] Ibid., pp. 43-45.

[63] R.S.C. 1970, c. F-10.

refer back to "power" (i.e. "power conferred . . . otherwise than by the conferring"), to "authorized" (i.e. "instrument expressly authorized . . . otherwise than by the conferring") or to "issued, made or established" (i.e. "an instrument . . . issued, made or established by the conferring").[64] The Department's interpretation hangs on the last of these three possibilities and results in the exclusion of instruments that merely confer powers on a subdelegate and do not themselves contain any substantial regulatory provisions.[65]

The Joint Committee has vigorously contested the correctness of the interpretation of the Department of Justice, maintaining that it is much too exclusive. The Committee has contended that "expressly authorized" does not require the presence of the "by order" or "by regulation" formula in the enabling provision. Taking the tax remission power of the Governor in Council under section 17 ot the Financial Administration Act as an example, the Committee has stated

> . . . the Governor in Council can only act lawfully through the means permitted by the constitution or by statute, and that means in 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

[64] The first and second of these possibilities have the same result. However, to be intelligible, they must be interpreted with some emphasis on the words "in relation to". When this emphasis is kept in mind the limitation results in the exclusion of instruments made under very general powers that are conferred "in relation to" a given subject. For the reasons expressed infra at p. 29, this interpretation should be rejected. It is far too broad and, for example, exludes powers to "make regulations in relation to" a subject.

[65] Supra, n. 61, p. 43.

and issued?[66]

The Committee's criticism of the narrowness of the Department of Justice interpretation of "expressly" finds support in the MacGuigan Report, from which the Statutory Instruments Act had its genesis, as well as in the catalogue of instruments at the beginning of the definition of "statutory instruments". Both of these suggest that the definition was intended to include instruments regardless of their particular form.[66.1] In addition, the Department's appeal to the U.K. Statutory Instruments Act as the model for the Canadian Act fails when the two are compared. The provisions of the former are unequivocal: statutory instruments result only if the enabling power "is expressed . . . to be exercisable by Order in Council . . . or to be exercisable by statutory instrument."[67] In contrast, the Canadian Act is worded much less clearly, and contains no transitional provisions for instruments made under pre-existing enabling clauses. Arguably, it represents a rejection of the U.K. approach on the basis of both the difficulty in identifying legislative powers without the benefit of experience in their exercise, as well as the general disinterest of parliamentarians in "technical" details.[68]

In its criticism of the Department of Justice interpretation of the second limitation in the definition of "statutory

[66] Ibid., p. 44.

[66.1] Note R. v. Webster (1982), 12 C.E.L.R. 147, discussed infra at p. 37.1.

[67] See supra, pp. 4-5.

[68] For a critique of the U.K. approach, see J. T. Craig, "The Reluctant Executive," [1961] P.L. 45.

instrument" (the "otherwise" clause), the Joint Committee seems to have misconstrued the interpretation. It characterized this interpretation as excluding not only instruments that subdelegate powers, but also instruments made pursuant to those subdelegated powers.[69] Yet, the latter class of instruments is not made "by the conferring . . . of powers or functions," but is itself an exercise of power.[70] Thus, the "otherwise" clause excludes only instruments that act solely as vehicles for the transfer of powers, with the basis for the exclusion being the absence of any regulatory content.

After rejecting the Department's interpretation of subparagraph (i), the Joint Committee proposed its own. However, it is not closely tied to the words of the provision. Although it concentrates on the "otherwise" clause, it flows from the Committee's analysis of what these limiting words

[69] Supra, n. 61 at p. 45.

[70] Unless there is a further subdelegation: a highly unlikely event because of the interpretive presumption against subdelegation. See J. Willis, "Delegatus Non Potest Delegare," (1943), 21 Can. Bar Rev. 257 and the discussion infra at p. 176ff.

cannot mean:[71]

> Thus, it would appear that the limiting words of section 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.[72]

This construction seems more apt as an interpretation of the "expressly authorized" phrase. In striving to find some class of instruments that are excluded, the Committee has excessively broadened the limiting words by excluding instruments that

[71] Supra, n. 61 at p. 46:

> What documents are then excluded by these mysterious words? . . . It cannot be that what was sought to be excluded were documents of an administrative or executive character, for the distinction between documents made in the exercise of 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 section 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 section 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 legislative character are regulations, but not all instruments on a non-legislative character need be accounted statutory.

[72] Ibid. at p. 47.

describe administrative procedures. As will become clear in the discussion of Martineau v. Matsqui Inmate Discipline Board,[73] infra, these instruments can have a considerable impact on the rights of persons outside an administrative structure and ought not to be excluded too hastily.

In searching for an interpretation that is more satisfying than those reviewed above, one would do well to consider the consequences of characterizing a document as a statutory instrument. Under the Statutory Instrument Act such instruments need only be registered and published when "required by or under an Act of Parliament to be published in the Canada Gazette." And although statutory instruments come under the scrutiny of the Joint Committee and must be judicially noticed, the sole administrative consequence of their characterization as such is that they may be inspected and copied under sections 25 and 26. It is difficult to think of any problems that a broad reading of the definition might produce particularly in light of the power of the Governor in Council under section 27 to exempt certain classes of instruments from these requirements.[74]

In construing subparagraph 2(1)(d)(i) of the Statutory Instruments Act, one must also recognize that other exclusory provisions are contained subparagraphs (iii) to (vi). These

[73](1979), 74 D.L.R. 3d 1 (S.C.C.), discussed infra at pp. 43-47.
[74]This exempting power relates to sensitive documents that, in the interests of national security, inter-governmental relations or individual privacy, ought to be kept secret.

exclude corporate by-laws, instruments other than rules of procedure issued by judicial or quasi-judicial bodies, territorial ordinances and instruments that are privileged or limited to "advice or information intended only for use or assistance in the making of a decision."

When one views the definition of "statutory instrument" in its entire context, there appear to be few reasons for interpreting it as narrowly as either the Department of Justice or the Joint Committee have done. Their interpretations, hinging on the phrase "expressly authorized", do not sufficiently take into account the rest of the terms of the definition and its function in the scheme of the Statutory Instruments Act. The Act provides public access to and scrutiny of "expressly authorized" instruments and only permits exclusion of that access and scrutiny under a series of specific provisions. The Act undoubtedly reflects a policy of removing unnecessary secrecy from government business, a policy that has most recently manifested itself in the passage of the Access to Information Act.[75] Because of its currency, this policy must inform any interpretation of the definition of "statutory instrument".

In forming an interpretation that is consonant with the spirit of the Statutory Instruments Act, one can perhaps broaden the meaning of "statutory instrument" even further than either the Department of Justice or the Joint Committee interpretations. If one does as the committee has

[75] S.C. 1980-81-82, c. 111, Sched. I.

suggested and combines the department's two part test, the complete phrase becomes "expressly authorized to be issued . . . otherwise than by the conferring . . . of powers or functions." The exclusion then relates only to instruments made under a power that is exercised by transmitting the power to a subdelegate. An example of this is provided in the Committee's Second Report, where it is noted that section 2 of the Agricultural Products Marketing Act[76] permits the Governor in Council to delegate interprovincial marketing powers to provincial marketing boards. The function of the word "expressly" is, then to narrow, not the definition of "statutory instrument", but rather the exception relating to subdelegation. Thus, if the subdelegation is "expressly authorized", then the resulting instrument is excepted; in all other cases, such as those involving implied powers of subdelegation or non-delegable powers, the resulting instrument is not excepted.

When one moves on to consider the definition of "regulation," the approach discussed above in relation to the U.K. and the U.S. appears.[77] Subparagraph 2(1)(b)(i) employs the phrase "legislative power" and presumably sweeps in the elements traditionally associated with it, investing the definition with as much scope as judicial creativity will warrant. Subparagraph (ii) approaches the definitional issue from the standpoint of penal provisions and embraces statutory

[76] R.S.C. 1970, c. A-7.
[77] See supra, pp. 14-19.

instruments that describe prohibited conduct, regardless of whether they are addressed to persons in general or to specific individuals.

The definition of "regulation" clearly acts as a further screening device in determining what instruments must be scrutinized and published. Its presence thereby undercuts the argument that the wording of statutory enabling powers conclusively determines whether the instruments through which they are exercised fall within the purview of the Statutory Instruments Act. If the Department of Justice interpretation were correct, there would be little point in introducing an additional, largely functional test that mirrors the approach advocated in the MacGuigan Report.

To date, there have been few cases discussing the definitions in the Statutory Instruments Act. These are, however, very recent and suggest a burgeoning recognition of definitional issues. The two earliest cases arose in the Federal Court and involved an order in council terminating passenger rail service under section 64 of the National Transportation Act; the plaintiffs argued that the orders in council were regulations and, as such, should have been registered and published.[78] However, the issue was largely defused when the order was subsequently registered and published,

[78] City of Melville v. A.G. Can (1983), 141 D.L.R. 3d 191 (Fed. C.A.); Jasper Park Chamber of Commerce v. Governor General in Council (1983), 141 D.L.R. 3d 54 (Fed. C.A.). See infra at pp. 50-54 for further discussion.

albeit long after the expiry of the time limits prescribed in the Act. At trial, then, the only remaining question in this respect was whether compliance with the time limitations was mandatory or directory.

The Statutory Instruments Act definitions have since come into play in other decisions, most of which construed the definitions very broadly. In R. v. Tenale[79] the British Columbia Court of Appeal concluded that an order of the provincial Minister of the Environment, exercising a power subdelegated from the federal Governor in Council under the Fisheries Act,[80] was a "regulation". The Court did not, however, engage in any analysis of the definition, though its conclusions quite sensibly run counter to the interpretation of the Joint Committee, noted above.[81]

The second and third decisions have come from the Federal Court. In Butler Metal Products Co. Ltd. v. Canadian Employment and Immigration Commission[82] the Court of Appeal concluded that a rule made under an unemployment insurance regulation was both a "statutory instrument" and a "regulation".[83] The rule purported to prescribe a time limit for making an application for the reduction of an employer's premium and, since a power to do so "by regulation" had been conferred in the enabling statute, the Court held that the rule was

79 (1983), 145 D.L.R. 3d 521 (B.C.C.A.).
80 R.S.C. 1970, c. F-14.
81 Supra at p. 30.
82 [1983] 1 F.C. 790 (C.A.).
83 For further discussion of this case, see infra at pp. 54-5.

in fact a regulation and should have been made in accordance with the Statutory Instruments Act.

A somewhat more radical approach appears in the third case, Salco Footwear Industries Ltd. v. Minister of National Revenue[84], where Dubé, J. in the Trial Division held that a direction issued under subsection 9(7) of the Anti-Dumping Act[85] fit within these definitions. He stated:

> Au départ, il est manifeste que la directive du Ministre est établie dans l'exercise du pouvoir législatif conféré par une loi du Parlement, en l'occurence la Loi antidumping et plus particulièrement le paragraphe 9(7) précité. Ensuite, il est visible que le législateur a prévu une définition très vaste et très comprehensive du mot "règlement", laquelle définition embrasse les termes connexes suivants: une règle, une ordonnance, un règlement régissant la pratique ou la procédure. L'expression "texte règlementaire" est encore plus large . . .[86]

The enabling provision in the Salco case did not employ the "by order" or "by regulation" terminology that the Department of Justice has contended is necessary to bring an instrument within the definition of "statutory instrument". Rather, Dubé, J. emphasized that the term "prescribe" in the enabling provision imported a "legislative" power[87] and construed it to require its exercise by regulation. This clearly weakens the Department of Justice interpretation of "expressly authorized"

84 [1983] 1 F.C. 664 (T.D.).
85 R.S.C. 1970, c. A-15.
86 Supra, n. 84 at p. 675.
87 This interpretation of "prescribe" is also found in Ministry of National Revenue v. Creative Shoes Ltd. [1972] F.C. 993 (C.A.), where the Court used this interpretation as its basis for denying a claim to natural justice, and in Jiminez Perez v. Ministry of Employment and Immigration [1983] 1 F.C. 164 (C.A.) discussed infra at pp. 166-7.

in the definition of "statutory instrument" and accords more fully with the considerations underlying the Statutory Instruments Act.[88]

In contrast to Tenale, Butler Metal and Salco, one finds in R. v. Webster[88.1] a refusal to extend the definitions to cover the document there in question. In considering the power of the Minister of Fisheries to "determine" whether a fish ladder was needed at a dam under subsection 20(1) of the Fisheries Act[88.2] the court stated:

> In the first place, it (the word "determination") does not fall squarely within any of those documents specifically listed under the definition of "statutory instrument" in section 2(1)(d) above.

The court then adopted the submission of counsel for the Crown that:

> The Statutory Instruments Act clearly was not intended to apply to the 'determination' to be made by the Minister under subsection 20(1) of the Fisheries Act. It is clear that a section 20(1) 'determination' could only be made with respect to one specific locality with respect to one specific structure. This 'determination' is clearly not a decision that should be subject to the fairly extensive provisions of the Statutory Instruments Act.

In Webster, the court construed the catalogue of instruments in the definition of "statutory instrument" to be exhaustive, overlooking the phrase "or other instrument" at the end of the catalogue. However, the decision is most probably correct on the basis that the "determination"

[88] Supra at pp. 23-4.

[88.1] (1982), 12 C.E.L.R. 147 (N.S.Cty. Ct.).

[88.2] Supra, n. 80.

was not a "regulation". It was obviously not "legislative" and the penalties in question were imposed for contravening subsection 20(1) of the Act, rather than the determination, the later being merely one element of the offence.

In light of the rather limited number of cases considering the definitional issues in Canada, it is hardly surprising that there has as yet been no judicial comment on one of the potentially most explosive of these: the status of documents incorporated by reference in delegated legislation. In holding that subdelegated legislation is subject to the Statutory Instruments Act, the Tenale case suggests that incorporated documents may be "regulations", particularly if the incorporation constitutes a form of subdelegation.

Two approaches to this issue are possible. First, one may argue that incorporated documents are part of the incorporating regulation and as such attract the requirements of the Act. This argument is considered further in Part II.[88.3] Second, an incorporated document may be a regulation in its own right. However, where the document is made by a body that is independent of the relevant regulation-making authority, it is not made "in the execution of a power conferred by or under an Act of Parliament". The status of an incorporated document made by the regulation-making authority itself is less clear and can only be resolved by considering the character of the document and the power under which it is made.

88.3 Infra at pp. 65.1-65.2.

Division C - Definition for the Purpose of Determining Effect

Up to this point I have reviewed the definition of delegated legislation strictly in terms of formal or procedural requirements. However, in two recent English cases, the definitional issue has arisen in the context of the effect to be given to rules made under subsection 3(2) of the Immigration Act, 1971.[89] These rules consisted of guidelines laid down by the Secretary of State "as to the practice to be followed in the administration of this Act regulating the entry and stay in the U.K. of persons required to have leave to enter." In R. v. Chief Immigration Officer, Heathrow Airport, ex. p. Salamat Bibi,[90] the applicant sought review of a deportation order on the ground that the immigration officials ought not to have followed the immigration rules, but should rather have acted in accordance with the European Convention for the Protection of Human Rights. The court held that the officials had acted properly and Roskill, L. J., commenting on the rules, stated:

In his reply this morning counsel for the applicant

[89] 20 Eliz. 2 c.77.
[90] [1976] 3 All E.R. 543.

> made, what I hope he will forgive me calling, a somewhat startling submission, namely that the rules made by the Secretary of State under section 3(2) of the Immigration Act, 1971, were not 'part of the law of this country.' He said they were but departmental circulars laying down no more than good administrative practice. With respect I profoundly disagree. If one looks at section 3(2), which empowers the Secretary of State to make these rules, one finds that he shall lay before Parliament, as soon as may be, statements of the rules or any changes in the rules laid down by him. These rules are just as much delegated legislation as any other form of rule-making activity or delegated legislation which is empowered by Act of Parliament. Furthermore, these rules are subject to a negative resolution . . . and it is unheard of that something which is no more than an administrative circular stating what the Home Office conceives to be good administrative practice should be subject to negative resolution from both Houses of Parliament. These rules, to my mind, are just as much part of the law of England as the 1971 Act itself.[91]

Shortly after this case, the status of the rules was again placed in issue before the Court of Appeal. This time, however, the Court took a much different stand. In R. v. Secretary of State for the Home Department, ex. p. Hosenball, Lord Denning vigorously asserted that the rules were not "strict rules of law," characterizing them as largely informative, laid down for the "guidance" of immigration officers and not as mandatory requirements.[92] Although he acknowledged the relevance of the rules to the determination of the level of procedural fairness demanded by the requirements of natural justice, he refused to grant certiorari merely on the ground that the Secretary of State had, contrary to the rules, refused

[91] Ibid. at p. 548.
[92] [1977] 3 All E. R. 450.

disclosure of a report upon which he had based his decision.

Geoffrey-Lane, L. J. was somewhat more equivocal, stating that the rules were "very difficult to categorize or classify" and emphasizing that they could "certainly be used as a touchstone in order to aid the discussion as to whether the Secretary of State has in all the circumstances acted fairly."[93]

Perhaps the most incisive remarks were those of Cumming-Bruce, L. J.:

> . . . although they are entitled, A Statement of Immigration Rules', they are a totally different kind of publication from the rules that usually come into being under the authority delegated to Ministers under Acts of Parliament; and for my part, having scrutinised them, and observed that curious amalgam of information and description of executive procedures, they are not in my view in any sense of themselves of legislative force. It is true that, by s. 19(2) of the Immigration Act, 1971, the rules are given legal effect in the field of appellate process to the adjudicator or the tribunal, which does not arise of course in connection with Mr. Hosenball's case. But the legal effect that the rules have in that limited field flows not from the fact that they have been published by the Minister and laid before both Houses of Parliament, but because by s. 19(2) the rules are given an effect which is in a certain field clearly legally enforceable, and that is a quite different matter.[94]

At first glance Salamat Bibi and Hosenball are inconsistant and appear to allow the Secretary of State

[93]Ibid., 463.
[94]Ibid., pp. 465-6.

to have his cake and eat it too.[95] However, this result springs from the fact that the Secretary of State's functions were both administrative and legislative. There are many examples of similar authorities that promulgate "guidelines" that suggest how they will exercise their discretionary powers, but do not limit their exercise.[96] The legality and effect of such "quasi-legislation" depends on the nature and scope of the powers delegated to these authorities.

In Hosenball, Cumming-Bruce, L.J. clearly recognized this by emphasizing that, notwithstanding the formal trappings of delegated legislation[97] and the characteristics of generality and futurity, an instrument may not be accorded

[95]This impression is strengthened when one considers a third, somewhat earlier immigration case, R. v. Secretary of State, ex. p. Mughal [1973] 3 W.L.R. 647 (C.A.). Here, Lord Denning, M.R. commented as follows on an immigration rule that required an applicant for entry to prove his residency:

> That rule is in entire accord with the previous law. It has statutory force. It says, as plainly as can be, that it is for the passenger to satisfy the immigration officer that he was settled here, that is, lawfully settled here. No argument can overcome the effect of the rule (p. 655)

[96]See Molot, op. cit., n. 52.

[97]E.g., by entitling a document as a "Statement of Rules" and subjecting it to parliamentary scrutiny procedures.

the same legal status or effect.[98]

When one considers the powers conferred on the Secretary of State under the Immigration Act there emerges one very serious obstacle to characterizing the "guidance rules" as regulations. Subsection 18(1) of the Act empowered the Secretary of State to make "regulations" governing proceedings under the Act. The latter clearly came within the ambit of the U.K. Statutory Instruments Act suggesting that the "guidance rules" were of a different sort. However, there remains the question of how the two were different. Although it seems clear that the Act did not apply to the rules, one can still question whether they should not have been binding on the Secretary of State when exercising his administrative powers.[99] The need for broad discretionary powers must be tempered by the considerations underlying the need for delegated legislation, considerations that should become clearer in Parts II and III of this thesis.

98 R. Dussault, Traité sur le droit administratif 2è ed.(Québec: 1984 Tome I at pp. 455-59, recognizes a further distinction involving the effect of delegated legislation. He differentiates between "la nature juridique de la loi et du reglement" and "l'effet juridique respectif de ces textes", pointing out that in R. v. Singer [1941] S.C.R. 111 the Court held that a regulation under the War Measures Act, R.S.C. 1927, c.206 was not a "law of the Parliament of Canada" for the purposes of the general offence section of the Criminal Code, R.S.C. 1927, c.36 s. 164. Thus, an instrument of delegated legislation may have binding legal effect, but it is not necessarily embraced by a general reference to "law". In the Singer case, the reference to the "Parliament of Canada" seems to have afforded the basis for excluding regulations made by the Governor in Council. The value of the distinction formulated by Professor Dussault is in how it emphasizes the subordinate nature of delegated legislation and overriding control exercisable by primary legislative bodies.

99See David Lloyd-Jones, "The Role of Habeas Corpus in Immigration Cases" (1979 , 95 L.Q.Rev. 171; Evelyn Ellis, "Deportation of a Community National After Imprisonment" (1981 , 97 L.Q.Rev. 533.

Questions relating to the effect to be given to instruments characterized as rules or regulations have arisen in a series of Canadian cases that are comparable to the immigration cases in the U. K. These have involved the procedural requirements on the conduct of parole and prison discipline hearings, and culminated in Martineau v. Matsqui Inmate Discipline Board (No.1).[102] Here, a majority of the Supreme Court of Canada distinguished internal directives to prison employees from regulations, denying them any direct legal effect on the rights of persons who were not part of the prison administrative structure, namely, inmates. The case was decided about the time as Hosenball[103] and accords with the dicta found there. Like the immigration rules, the prison directives were authorized by a statutory provision that differed from the usual form of regulation making power. The court focused on the question of whether the applicant, who claimed to have been denied natural justice in a discipline hearing, could bring his case within the terms of section 28(1) of the Federal Court Act.[104] This section gave jurisdiction to the Federal Court to review "a decision or order, other than an order of an adminstrative nature not required by law to be made on a judicial or quasijudicial basis." The crucial question was whether the directives were "law" for the purpose of conducting discipline hearings. The majority held that they were not.

102 Supra, n. 73.
103 Supra, n. 92.
104 R.S.C. 1970 (2nd Supplement), c. 10.

Pigeon, J. differentiated them from regulations where the "legislative activity of Parliament is still present at the time when the orders (i.e., regulations) are made." He went on to state:

> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. It appears to me that s. 29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided for by statute.[105]

Although Pigeon, J. did not mention the Statutory Instruments Act, these remarks clearly echo a number of elements in the definitions of "regulation" and "statutory instrument," thereby implying their relevance in deciding the effect to be given to an instrument. In particular, his assertion that directives issued in an "administrative capacity" may be made "without express legislative enactment" may lend some support to the Department of Justice interpretation of "expressly authorized" in the definition of "statutory instrument." On the other hand, Pigeon, J. was not necessarily suggesting that "legislative powers" could not be implied. Further, if the Act's definitions are behind the remarks of Pigeon, J., what is their relevance to the case: the Act deals with

[105] Supra, n. 73 at p. 9.

registration, publication and scrutiny of rules and is not a device for conclusively determining the effect to be given to such instruments.[106]

As in the U. K. immigration cases, there is a tension between the formal and substantive criteria for deciding what effect prison directives have. Pigeon, J. seems to have favoured the formal criteria, particularly when one considers the curtness with which he categorized the directives as "administrative." Admittedly, they were instruments of administration within the prison system; however, as Laskin, C. J. C., pointed out in his dissent, they need not all "necessarily be characterized as purely administrative."[107] His judgement inquired into the nature of disciplinary hearings, comparing them to proceedings before administrative tribunals generally and applying the principles of natural justice:

> The fact that the disciplinary board is charged with a duty to inquire into the validity of charges of flagrant or serious offences brought against inmates, with the consequent risk to them of punishment if the charges are proven does not stand alone; a formal procedure is prescribed for the benefit of inmates charged, a procedure which is very typically a prescription of natural justice, and the duty to follow it arises from its very prescription.[108]

These dissenting remarks of Laskin, C. J. C. came back to haunt the court in a second appeal brought by Mr. Martineau

[106] For a contrary opinion, see H. N. Janisch, "What is 'Law'?--Directives of the Commissioner of Penetentiaries and Section 28 of the Federal Court Act--The Tip of the Iceberg of 'Administrative Quasi-Legislation'" (1977), 55 Can B. Rev. 576.

[107] Supra, n. 73 at p. 5.

[108] Ibid.

where his counsel argued that he was entitled to certiorari under section 18 of the Federal Court Act.[109] Dickson, J., echoing the remarks of Lord Denning in Hosenball, recognized the relevance of the directives in determining the issue of procedural fairness:

> The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstances. The rules are of some importance in determining this latter question as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.[110]

The prison cases in Canada and the immigration cases in the U. K. recognize a middle ground between formal regulations and purely internal regulatory instruments. It is arguable that in Canada, however, the formal criteria for identifying the character of an instrument should be given less weight. For, although the Statutory Instruments Act is not a device for determining the effect of regulatory instruments, its use of the legislative and penal tests in determining the character of an instrument suggests that, in formulating enabling powers for such instruments Parliament does not, to the same extent as in the U. K., make any conclusive judgements about their character.[111] Thus, the functional, and not the formal, aspects of these instruments should be given the greater prominence. In Martineau (No. 1), the majority should have considered the purposes for which the directives were issued

[109] (1980), 106 D.L.R. 3d 385 (S.C.C.).
[110] Ibid. at p. 411.
[111] Supra, n. 61 at p. 44.

and inquired into the effect on prison administration of binding the discipline officials to compliance with the directives. Indeed, the decision in Martineau (No. 2) indicates that inmates did derive some benefit from the directives and that requiring compliance was not beyond the realm of possibility.

Division D - Conclusions (Definition of Delegated Legislation)

The foregoing survey of the definitional issue highlights both of the aspects of delegated legislation canvassed at the beginning of this thesis. The statutory requirements of form and scrutiny are mechanisms for controlling such legislation[112] while its classification as "law" gives it force

[112] In addition to the Martineau cases, see Garant, op. cit., n. 18 at pp. 289-90 where he discusses Sarachman c. La Commission des valeurs mobilières du Québec [1974] R.L. 462; Commission Scholaire Régionale Chambly et P.G. du Québec [1977] C.S. 143; Bureau des écoles protestantes du Grand Montréal c. P.G. du Québec (C.S., 1978, unreported); Freneco c. Ministère du Revenue [1977] C.P. 32.

in controlling administrative discretion. There are quite obviously many difficulties in determining both what ought to be controlled and what ought to control.[113] Perhaps the major problem is in appreciating the functional complexity of the definition of delegated legislation. It seems clear both that parliamentary bodies have little time or patience for detailed assessments of this sort and that a precise, all-purpose definition is not possible because of the complexity of the definitional task.

Hope for a solution to this problem springs from the fact that legislative and judicial pronouncements on the definition of delegated legislation point toward an essentially uniform concept. This concept embraces exercises of highly discretionary powers that have a broad, public impact and are general, rather than specific, in their application. In addition, it appears that the determination of whether a power is legislative depends on two factors: the public interest in knowing how the power is exercised and

[113] Re Phillips and Registrar of Mortgage Brokers Act (1978), 86 D.L.R. 3d 518 (B.C.C.A.) illustrates how both the considerations of delegated legislation procedure and fettering administrative discretion can appear at once. Here, a "memorandum" issued by the Registrar of Mortgage Brokers and requiring registrants to complete a course of instruction was struck down because it was not "an articulation of general policy, but clearly a regulation or order made by the Registrar without jurisdiction" (p. 521). However, the majority gave few reasons for its conclusions and a strong dissent by Craig, J. A. demonstrates the difficulties in separating policy guidelines from regulatory documents that fetter discretion. Craig, J. A. considered not only the memorandum, but also the administrative process towards which it was directed, finding that the Registrar's discretion was not foreclosed by the memorandum. He based this conclusion on the uncontradicted affidavit evidence of the Registrar as to his administrative practice and, in this respect, seems to have been on surer ground than the majority. Also note Molot, op. cit., n. 52.

the degree to which that exercise of power is binding on all who are affected by it. Arguably, the determination of whether a power is to be exercised legislatively should take place on the basis of these principles. Difficult determinations should be left to the courts, applying these principles after a thorough investigation of the nature of the powers in issue. This is hardly a radical proposition when one considers the importance of defining legislative powers in the procedural and substantive judicial review of delegated legislation. As Parts II and III should demonstrate, much of these aspects of review rest squarely on the meaning of the word "legislative".

Part II - Formal and Procedural Scrutiny

In this Part and in Part III I propose to concentrate on judicial review in Canada, The U.K. and Australia. In passing over the United States, I do not mean to discount the value of American law as an indicator of the directions in which Canadian law may develop.[114] However, the distinctions in constitutional and judicial traditions place analysis of judicial review in the U.S. well beyond the scope of this thesis. One striking point of contrast is that in the U.S. scrutiny of delegated legislation by the courts appears to lie almost entirely on a procedural footing.[115] This is quite possibly a major reason for the greater degree of judicial creativity in as much as procedural requirements go to the "how", and not the "what" of delegated legislation, thereby respecting the relevant authority's ultimate discretion over substantive content.

The procedural bent followed by the courts in the U.S. has not been taken up in Canada, where formal and procedural scrutiny takes on a much more limited form. To demonstrate this, I propose to examine separately the judicial enforcement of requirements of form, registration and publication, on the one hand, and the procedural safeguards that generally

[114] For a comparative analysis of the British and American judicial systems, see L. Jaffe, English and American Judges as Lawmakers (Oxford:1969).

[115] K. C. Davis, Administrative Law Treatise, 2nd ed., Suppl. (San Diego: 1982) at pp. 544-5.

fall under the heading of natural justice, on the other.

Division A -- Requirements of Form, Registration and Publication

The discussion in Part I of the concept of rules has covered much of the ground comprehended by this aspect of judicial scrutiny. The statutory definitions canvassed there serve to determine what instruments must be embodied in regulatory form. This formal requirement then attracts the further requirements of administrative scrutiny, registration, publication and legislative scrutiny.[116] One of the chief purposes of the formal requirements is to enable those affected by a regulatory instrument to discover its contents. This purpose is effected, not merely through publication, but through publication in an official document comprehending all such instruments, and thereby facilitating the task of finding the official version of a specific regulation.

There are few Canadian cases involving the review of the form, registration or publication[117] of regulatory instruments. However, there are enough cases to demonstrate a certain degree of ambivalence over the strictness with which such requirements are to be enforced. In City of Melville

[116] Under the Canadian Statutory Instruments Act, supra, n. 53, the Clerk of the Privy Council, in conjunction with the Deputy Minister of Justice, performs the administrative scrutiny (sections 3 and 4); the Joint Committee performs the legislative scrutiny (section 26).

[117] See Garant, op. cit., n. 18 at pp. 322ff.

v. A.G. Can. [118] and Jasper Park Chamber of Commerce v. Governor General in Council[119] the provisions governing the time limits for registering statutory instruments were held to be "directory." The decisions did not express any reasons other than to adopt those put forward by Collier, J. in the trial court decision in Melville.[120] The latter, in turn, relied on Montreal Street Railway v. Normandin[121], where Sir Arthur Channell accepted the principle that statutory provisions could be either mandatory or directory and then examined the cases to determine the factors relevant to deciding the issue. He concluded that,

> when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.[122]

Although Collier, J. cited the Montreal Street Railway case as his authority in Melville, he did not elaborate on the reasoning process by which he applied its principles. After stating that the registration provisions in the Statutory Instruments Act were merely "designed to compel regulation making bodies to make their regulations public,"[123] he concluded

[118] Supra, n. 78.
[119] Supra, n. 78.
[120] (1982), 129 D.L.R. 3d 488 (Fed. Ct. T.D.).
[121] [1917] A.C. 170 (P.C.). for a discussion of this and other mandatory-directory cases, see E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: 1983) at pp. 9-15.
[122] Ibid., at p. 175.
[123] Supra, n. 78, p. 497.

that the time requirements were directory and that non-compliance did not affect the validity of the order involved.

By giving such short shrift to this issue, the courts in Melville and Jasper seem to have overlooked a major point made in the Montreal Street Railway case: statutory requirements are only to be characterized as directory in exceptional circumstances, when to do otherwise would "work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty." In Melville and Jasper the mandatory-directory issue was not discussed in these terms, although an analysis of the circumstances of the cases reveals a number of unarticulated considerations that may have figured in the decisions. The most obvious is that the order for the discontinuance of the passenger rail service did not take effect until well after the case was heard at trial. Thus, even if the order had been ruled invalid, it could have been remade properly and still achieved the result originally intended.

Although this consideration is hardly a firm basis for the result in the cases, it nevertheless forms an interesting backdrop for several other, more legally pertinent factors. The first of these is the statutory context within which the time limitation in subsection 5(1) of the Statutory Instruments Act operated. Section 9 of the Act made clear the importance of the registration requirement by denying any effect before registration to all but a limited class of regulations. It

did not, however, deal with the possibility of non-compliance with the time limit. When one turns to the publication requirements of section 11, a significant contrast emerges: subsection 11(2) stated that non-publication did not invalidate a regulation and, in essence, provided that an offence creating regulation had effect where reasonable steps had been taken to bring it to the attention of an accused person. The expressio unius principle suggests that this preclusion of invalidity in respect of the breach of one provision of the Act should have entailed invalidity where any other provisions were breached.

The second factor in evaluating the intended effect of breaching subsection 5(1) is of a practical nature. Viewed on its face, the time limit appears to have had a largely administrative purpose insofar as it ensured that the steps involved in bringing a regulation into force were taken soon after it is made. If subsection 5(1) had been held to be mandatory, it would have effectively required rule-making authorities to register all instruments that could possibly be classified as regulations, since to do otherwise would risk having them ruled invalid. Such a result would increase both the burden of scrutiny under section 7 as well as the volume of published regulatory matter.

The question of whether such an increase was or is warranted returns one to the "quasi-law" issue,[124] an issue that, needless to say, was not canvassed in Melville or Jasper.

[124] Supra, pp. 17 and 38-47.

There are at least two arguments against using subsection 5(1) as a tool for unearthing unpublished regulatory material. The first is that, as these two cases show, disclosure is possible through other means, notably the court process and the Access to Information Act.[125] However, this argument ignores the costs and inconvenience of these routes and minimizes the purposes of the Gazette as the primary mechanism of disclosure of regulatory instruments.

The second argument maintains that the volume of material to be registered would swell to an unwarranted level if subsection 5(1) were considered mandatory. However, this argument too has an answer: if delegated legislative authorities would be forced to register instruments that need not be registered, then surely the problem lies in the definition of "regulation". The Jasper and Melville cases should not be taken as typical of judicial attitudes towards registration and publication requirements. When one views the case law generally in this area, they in fact appear to be rather exceptional. Much of this case law involves attempts by delegated legislative authorities to convert their powers into administrative discretion and employ informal or internal rules to direct the exercise of that discretion. A good example of this occurs in Butler Metal Products, noted above in relation to the definitional issue.[126] The rule in question was really a species of subdelgated

[125] Supra, n. 75.
[126] Supra, n. 82.

legislation and the regulation that purported to authorize it was struck down on the basis of the Brant Dairy principle.[127] However, the court also held that the rule itself was invalid for non-compliance with the formal requirements of the Statutory Instruments Act. Heald, J. stated:

> Thus it is clear that Parliament, by requiring that rules respecting premium reduction application be made by regulation, intended that the formalities attendant upon the adoption of a regulation be complied with. An important reason for such a requirement would be that the registration and publication of such a public document would ensure its availability to all those who may be affected by it.[128]

The avoidance of formal requirements also occurs in cases where an authority is given a delegated legislative power to do something, but attempts to do it under the guise of exercising another, usually administrative, power.[129]

These cases are most recently exemplified by Dale

[127] See infra at pp. 160ff.

[128] Supra, n. 82 at p. 803.

[129] See e.g. North Coast Air Services, v. Canadian Transport Commission (1968), 69 D.L.R. 2d 425 (S.C.C.); 65 D.L.R. 2d 339 (B.C.C.A.); Fralick v. Grand Trunk Railway Co. of Canada (1910), 43 S.C.R. 494; Brotherhood of Locomotive Engineers v. Canadian Pacific Railway (1920), 26 C.R.C. 321 (Bd. of Railway Comm.); Phillips, supra, n. 113. Also note Salco Footwear, discussed above. Here, Dubé, J. held a ministerial direction under subsection 9(7) of the Anti-Dumping Act to be invalid for non-compliance with the formal requirements of the Statutory Instruments Act. However, he also held that the Minister's discretion to make a preliminary determination of dumping was broad enough to allow the determination to be made in the absence of a direction under subsection 9(7). Thus, the determination was unaffected by the invalidity of the direction. In this respect, the case clearly seems to be a step backward from Butler in terms of both the publication of internal guidelines as well as the control of administrative discretion.

Corporation v. Rent Review Commission.[130] Here the Appeals Division of the Nova Scotia Supreme Court demonstrated a functional approach in reviewing an appeal from a rent review decision that had been based on internal guidelines used by the Rent Review Commission. MacDonald, J.A. considered the effect of the Commission having taken the guidelines into account in making its decision, ruling that by doing so it invalidated the decision. This result turned on subsection 11(2) of the Rent Review Act[131] which prescribed the matters that the Commission was required to consider. The last of these consisted of "such other matters as may be prescribed by regulations." MacDonald, J.A. construed this section to be exhaustive of the matters that the Commission could consider, rather than merely setting a minimum. His reasons for accepting the former interpretation rested on his regard for both procedural fairness and the preservation of the Commission's discretion:

> Certain types of guidelines that are not regulations may in many instances be extremely helpful and unobjectionable, i.e., the guidelines published to aid in the preparation of income tax returns. Non regulation guidelines become objectionable, however, if they have the effect of predetermining the matters in issue. To some extent the guidelines appear to have had that effect in this case . . . . Even assuming that the Commission was entitled to apply such guideline matters in this case it could not do so, in my opinion, without first making the guidelines available to the appellant. The necessity of such disclosure being, of course to allow the appellant to properly assess its position and properly prepare its case. On this ground alone the appellant is entitled to succeed.

[130] (1984), 58 N.S.R. (2d) 138 (S.C.A.D.).
[131] S.N.S. 1975, c. 57.

> In my opinion substantive matters should not be contained in guidelines because to do so affects the proper exercise by the Commission of its jurisdiction in considering the items set forth in s. 11(2) of the Rent Review Act--indeed, the use of such guidelines of necessity will result in decisions being made that are not based entirely on the evidence adduced and which are not made within the limited jurisdiction conferrred by the Act.
>
> In my opinion, unless and until the matters of substance contained in the guidelines are prescribed by regulations or by an amendment to the Rent Review Act they should not be considered in relation to applications for rent increases. Such applications must be considered and disposed of solely on a consideration of the relevant items set forth in the Act made in light of the evidence presented.[132]

The result in Dale Corporation is perhaps self-evident: when an authority is given power to prescribe relevant factors by regulations, it cannot do so by means of internal directives. Its striking feature is the Court's elaboration of the sound, practical reasons underlying the result and echoing an earlier publication case.[133] It also demonstrates the importance of statutory provisions as an anchor for judicial reasoning. Yet, these provisions do not explain why MacDonald, J.A. found subsection 11(2) to be exhaustive of relevant matters. Although he may have been applying the expressio unius principle, he was also relying on the reasons noted above, reasons that recognized the quasi-judicial character of the Commission and demanded that "substantive matters" relevant to its decisions be prescribed in delegated legislation.

[132] Supra, n. 130 at pp. 144-5.

[133] Re Michelin Tire Manufacturers (Canada) Ltd. (1976), 15 N.S.R. 2d 150 (C.A.); discussed infra at pp. 58-9.

Although the decisions just discussed illustrate the extent to which the issue of publication dominates the judicial treatment of the requirements of form and publication, they all depended on the presence of specific delegated legislative powers in the enabling legislation. These were used to characterize the instruments involved as regulations that were, in turn, subject to the formal requirements imposed by delegated legislation statutes. However, even in the absence of such statutory requirements, the courts have given effect to their distaste for "secret law," a distaste that is demonstrated in Re Michelin Tire Manufacturers (Canada) Ltd.[134] Here, Cooper, J.A. imposed a publication requirement on a common law basis,[135] stating:

> There was no statutory requirement at any relevant time that Ministerial orders required publication

[134] Ibid.

[135] The case arose out of a tax assessment under the Nova Scotia Health Services Act, R.S.N.S. 1967, c. 126. Section 1.0 of the Act stated:

> 1.0 The following classes of tangible personal property are specifically exempted from the provisions of this act:
> (h) machinery and apparatus as defined by the Minister, and parts thereof, which in the opinion of the Minister are to be used directly in process of manufacture or the production of goods for sale.

In 1963 the Minister of Finance promulgated a definition under this paragraph (the "Smith" definition). In 1969, his successor purported to replace this definition with another (the "Jones" definition) that was more restrictive. When Michelin was assessed tax in accordance with the Jones definition, it appealed, inter alia, on the basis that the new definition had not been published.

> in the Royal Gazette or elsewhere. There is, however, something repugnant to me in the notion than internal letter, such as was the Jones definition of July 9, 1969, which was not made known in any way outside of a Government department, can rise to confront a purchaser long after the purchases have been made and too late for a manufacturer so to arrange his affairs to take into account the incidents of tax under the so called definition.[136]

He went on to emphasize that the case involved the imposition of tax in a retroactive fashion[137] and held that the definition was not effective at the relevant time since no notice of it had been given to the taxpayer.

Division B - Incorporation by Reference

Most of the cases discussed thus far admit of few problems, either in terms of their legal or policy bases. However, the imposition of formal requirements becomes much more difficult when one confronts delegated legislation that incorporates external documents by reference. As a rule-making technique, its use has grown with the complexity of regulatory subject matter. Scientific or technical standards are often incorporated by reference into regulatory provisions in order

[136] Supra, n. 133 at p. 171.
[137] Note that these two characteristics have traditionally been bases for strictly construing enabling provisions: see infra, p. 141.

to avoid duplication in an official gazette.[138] However, in terms of the requirements of form, registration and publication, this technique is problematic. If a document is incorporated, then, by definition, it becomes a part of the incorporating instrument and like all other parts of the instrument should be subject to these formal requirements. However, this approach renders nugatory the benefits flowing from incorporation by reference. The technique has no value unless legal effect is given to incorporated standards without subjecting them to the formal requirements.

Before examining the case law and legislation applicable to incorporation by reference, one would do well to consider this technique from a linguistic standpoint. Incorporation by reference occurs not only in respect of complete or self-contained codes of standards or rules. In so far as the use of any word entails incorporation of its meaning, there is incorporation by reference. In most cases, the meaning is usually determined on the basis of common usage and can be found in a standard dictionary. At this level, there is no problem since everyone is taken to understand the language in which a regulatory instrument in written. However, an

[138] See e.g. the Food and Drug Regulations, C.R.C. 1978, s. B.01.045 which incorporates specifications for food additives published in the Food Chemical Codes, 2nd ed. published by the National Academy of Sciences; the Air Regulations, C.R.C. 1878, c. 2, s. 214.1 which incorporates the noise emission standards of Annex 16, 1st ed.-1981 to the Convention of Civil Aviation. See too Calder v. Minister of Employment and Immigration [1980] 1 F.C. 842 discussing the incorporation of unemployment statistics.

instrument may use a highly specialized term, or use a term in a specialized sense, the meaning of which can only be found in a scientific or technical publication.[139] Such usage can more clearly be characterized as incorporation by reference, since specialized terminology requires the reader to look beyond the text that contains it and may defeat the objectives of formal requirements.[140] Whether these objectives are defeated depends largely on the regulatory subject matter and the likelihood that persons affected are, or are capable of becoming, familiar with the terms used.

The case law surrounding the issue of incorporation by reference demonstrates considerable variation both in the extent to which courts have appreciated the latter question and in their willingness to investigate it. In Canada, a number of the cases focus on the issue of subdelegation that arises whenever standards or rules made by a body other than the delegated legislative authority are incorporated as amended from time to time. In four such cases[141] the courts recognized the validity of the respective subdelegations and either assumed or summarily held that the requirements of form, registration and publication did not apply to subdelegated legislation.[142]

These cases may be contrasted with two others from

[139]See Holland v. Halpin [1939] V.L.R. 253.
[140]See supra, p. 50. One should also note the ambivalence displayed by Canadian courts towards the use of specialized terminology in statutes and regulations: Pfizer Company v. D.M. National Revenue [1977] 1 S.C.R. 456; Olympia Floor and Wall Tile v. D.M. National Revenue (1983 , 49 N.R. 66 (F.C.A.).
[141]Kingston v. Ontario Racing commission [1965] 2 O.R. 10 (H.C.); R. v. Glibbery [1963] 1 O.R. 232 (C.A.); R. v. Isaac (1973), 38 D.L.R. 3d 349 (Ont. C.A.); Re Dennison Mines and the Ontario Securities Commission (1981), 32 O.R. 2d 469 (Div. Ct.).
[142]See infra, p. 79.

British Columbia. The first, Capital Regional District v. Henson,[143] did not involve the issue of subdelegation. The Court of Appeal considered a zoning regulation together with the applicable statutory requirement that "any such regulations or parts thereof as are publishable or that can reasonably be expected to be published in the Gazette shall be published." The court found that an unpublished zoning map was "an integral part of the regulation and without the zoning map the regulation is completely ineffective."[144] It then struck down the regulation, emphasizing the language of the publication requirement and characterizing it as mandatory. Finally, the court noted subsection 8(2) of the Regulations Act[145] and concluded that:

> as the legislature has provided for a specific system for filing certain maps in lieu of publication, it must have intended that in all other cases the regulations be published as designated by statute. In this case, the statute required that the "regulations . . . be published in one issue of the Gazette."[146]

Although the decision in the second case, R. v. Ciarniello,[147] is somewhat flawed, nevertheless, it provides a reasonably well-stated view of incorporation by reference. The case arose out of a prosecution under section 207 of the Motor Vehicle Act.[148] This section required motorcycle riders to wear "a safety helmet approved by the Superintendent." The Superintendent had purported to give this approval under

143 (1981), 28 B.C.L.R. 266 (C.A.).
144 Ibid., p. 270.
145 R.S.B.C. 1960, c. 336.
146 Supra, n. 143 at p. 271.
147 (1979), 12 B.C.L.R. 394 (Prov. Ct.).
148 R.S.B.C. 1960, c. 253.

a regulation that incorporated the helmet standards of a number of bodies "as amended from time to time."[149] Romilly, Prov. J. held the regulation to be ineffective as an improper subdelegation. However, his decision also recited the difficulties that an "average, well-intentioned citizen" might have in finding and understanding the incorporated standards. In this respect it parallelled a number of early Australian cases on incorporation by reference[150] and disapproved the manner in which the regulation was made.[151]

Before examining the merits of the reasoning in Ciarniello, one should note that the decision makes no mention of subsection 81(2) of the Motor Vehicle Act.[152] This subsection provided that

> the superintendant (sic) may, in making a regulation

[149] B.C. Reg. 46/77.

[150] See infra at pp. 68-70.

[151] Supra, n. 147. Romilly, Prov. J. stated:

> Before dealing with that issue, I want to make it perfectly clear that I have no doubt about the relative wisdom of the legislation and the regulations as they presently stand. It does appear, however, to be very difficult for someone by reading B.C. Reg. 46/77 to ascertain whether or not a safety helmet is approved. Even if one is fortunate enough to get a copy of these standards, they appear so complex that the ordinary man on the street may have difficulty understanding what they mean. . . . by adopting the standards for the Canadian Standards Association, the British Standards Institute, the American National Standards Institute, the Snell Memorial Foundation, and the United States of America Federal Motor Vehicle Safety Standard, the superintendent has made it very difficult for the average well-intentioned citizen to know whether or not he is complying with the regulation from reading the regulation itself.

[152] Supra, n. 148.

> under this Act, incorporate in it by reference any code, standard, rule or part of them, relating to the subject matter of the Act as amended from time to time before or after the making of a regulation.

It is unclear why Romilly, Prov. J. did not discuss this provision, though one explanation may be that he did not consider the instrument by which the Superintendent approved helmets to be a "regulation". This view gathers support from the fact that the Act did not specify how the Superintendent was to exercise his approval power. However, upon consideration of the definition of "regulation" in the Interpretation Act,[153] the instrument by which the approval was given seems to have fit within this definition and should have attracted the provisions of subsection 81(2).[154]

If one assumes that subsection 81(2) did not apply to the helmet approval, the reasoning in Ciarniello can be applied in those numerous situations where there is no express authority for incorporation by reference. The concern expressed by Romilly, Prov. J. for the "average, well-intentioned citizen" carries great weight in respect of delegated legislation that has a direct impact on a large sector of the community. However,

[153] S.B.C. 1974, c. 42.

[154] It is interesting to note that shortly after Ciarniello, subsection 81(2) was amended by S.B.C. 1979, c. 22, s. 29(b), such that the words "or approval" were inserted after the word "regulation" in the second line of the subsection. Oddly, however, this amendment has never been proclaimed in force. Shortly after the amendment, a new set of approval regulations was passed: B.C. Regs. 408/79, 409/79, 410/79. The first of these specified manufacturers and model numbers of approved helmets, while the latter two once again incorporated by reference the standards incorporated in B.C. Reg. 46/77.

the situation in Ciarniello presents a dilemma. The technical character of the helmet approval is inescapable: if helmets are to be manufactured properly, the standards must be complex. In fact, the "average, well-intentioned citizen" is not likely to construct helmets or to conduct tests to ensure that they meet the prescribed standards. Instead, he will rely on the representations of manufacturers, retailers or consumer information services. Publication of the standards would be of little purpose, while drafting them into language intelligible to consumers would probably result in an encyclopaediae of helmet manufacturing. Thus, if the standards are in fact used only by those in the helmet industry, their incorporation by reference is unlikely to offend the publication considerations.[155]

Apart from the subsection 81(2) omission, the result reached in Ciarniello probably represents the best resolution of the issues in the case. By leaning toward the interests of the "average, well-intentioned citizen," it puts the onus on the legislature to determine expressly when the technical exigencies of delegated legislation should override these interests.[156] However, where there is no conflict between these two sets of considerations, incorporation by reference should, subject to the subdelegation question, be permitted.

[155] This is so because those in the helmet industry will, or should, be aware of the standards and practices set within their own industry: see infra at p. 73.

[156] Subsequently the B.C. Legislature did this by giving the helmet approval power to the Lieutenant-Governor in Council to be exercised "by regulation": S.B.C. 1980, c. 37, s. 33.1.

Related to the publication cases are a number of decisions that originated in Québec and dealt with the incorporation of documents that were not available in both English and French. These cases involved prosecutions under regulations that incorporated standards promulgated only in English by U.S. standards associations. Although that province had no statutory regime governing the publication of delegated legislation, section 133 of the Constitution Act, 1867[157] required the "Acts" of the Legislative Assembly of Québec to be published in both French and English. The term "Acts" has been construed broadly by the Supreme Court of Canada in P. G. du Québec v. Blaikie (No. 2)[158] such that section 133

> applies to regulations enacted by the Province of Québec, a Minister or group of Ministers and to regulations of civil adminimistration and of semi-public agencies contemplated by the Charter of the French Language which, to come into force, are subject to the approval of that Government, a Minister or a group of Ministers.[159]

In Mathurin v. Les Coffrages Dominic Ltée.[160] the court did not consider section 133, but decided the case on a common law basis, concluding that the accused corporation was bound to comply with the incorporated standards since it had been fully aware of them. By contrast, the courts in Commission de la santé et de la sécurité au travail c. Chic-

[157] 30-31 Vict., c. 3 (U.K.); see too Official Languages Act, R.S.C. 1970, c. O-2, ss. 3 and 4; Constitution Act, 1982, Eliz. 2, c. 11 (U.K.), ss. 18.

[158] A. G. Québec v. Blaikie (1981), 123 D.L.R. 3d 15 (S.C.C.).

[159] Ibid. at p. 32.

[160] (1983), 147 D.L.R. 3d 486 (C.S.).

outimi Excavation Inc.[161] and Kruger Inc. c. Commission de la santé et de la sécurité du travail du Québec[162] each held that incorporated standards must be published in both English and French and acquitted the accused because no French version had been published.

Chicoutimi Excavation and Kruger clearly represent the better view and demonstrate that the Supreme Court of Canada's decision in Blaikie may extend to regulatory provisions incorporated by reference in delegated legislation. At the very least, these cases underscore the fundamental importance of publication in this area.

When one turns to Australia, a somewhat more extensive consideration of incorporation by reference appears. Although the publication aspects of this regulatory technique have been resolved in the federal sphere since 1964,[163] the case law decided before that time may be relevant to the present situation in Canada.[164] Professor Pearce provides a useful summary of this case law.[165] After noting that incorporation by reference was disapproved in four cases and approved

[161]Unreported decision of the Tribunal du travail, April 7, 1983, No. 200-28-000018-827.
[162]Unreported decision of the Cour Supérieure, January 28, 1983, No. 05-000-389-826.
[163]See The Acts Interpretation Act, 1901-1973, s. 49A, No. 52, 1964, s. 5, discussed infra at pp. 75-75.1.
[164]Wright v. T.I.L. Service Pty. Ltd. (1956 , 56 S.R. (N.S.W.) 413 was cited extensively in Denison Mines, supra n. 141.
[165]Dennis Pearce, Delegated Legislation in Australia and New Zealand (Sydney: 1977), pp. 111-17.

in five others, he concludes that the two groups are largely inconsistent and advocates the view ennunciated by the latter.[166] In Pearce's analysis, these cases reduce the incorporation by reference issue to that of publication and access to regulatory material by those affected by it. On this basis he asserts that incorporation by reference should only be objectionable where the reference is vague or the incorporated material is not available. However, a close examination of the cases suggests that these considerations are capable of elaboration.

The four cases where incorporation by reference was held to be invalid reveal that the courts considered more than simply the publication and accessibility issues. In

[166] Ibid., p. 115.

the first case, McDevitt v. McArthur,[167] the court refused on principle to investigate these issues. The other three cases were decided on the basis of strictly construing the relevant enabling provisions to require a large degree of completeness and particularity.[168] Notably, in McIver v. Allen,[169] the court suggested that a strict construction was warranted by the "legislative" nature of the pricing order there in issue and in the interests of ensuring parliamentary scrutiny.

Underlying all of these cases is the conception of an official publication like a gazette as a document that contains regulatory material and does not merely refer the

[167](1919), 15 Tas. L.R. 6. This case involved a by-law under the Tasmanian Marine Boards Act, 1899, 53, Vict., No. 34. The by-law incorporated by reference certain British water traffic regulations. In holding it to be invalid, Nicholls, C. J. stated

> I am prepared to lay down that, when by-laws are to be published in the Gazette, then what is there published must be sufficiently complete to leave a reader, who can and will understand ordinary English, free from uncertainty as to any enacting part of the by-law.

A second member of the court concurred with Nicholls, C. J. and dealt with the argument that the incorporation by reference should have been permitted because the incorporated material was so familiar to mariners. Crisp, J. stated:

> It may be so in this particular case; but we have to decide the matter according to principle, and if by-laws can be incorporated by reference, the Court, on every occasion when the matter was tested, would have to inquire whether or not the by-law referred to was so familiar as to be certainly known in all its aspects to every person affected. (p. 9)

[168]See Appendix A.

[169]Ibid.

reader elsewhere. This view is understandable in terms of the history of statutes providing for the publication of delegated legislation. C. T. Carr,[170] the first counsel to the U.K. Statutory Committee, has documented the disarray and confusion that reigned over the dissemination of delegated legislation in Britain before the Rules Publication Act[171] came into force in 1893. Although most such legislation was published in the London Gazette, its "miscellanious contents (were) so voluminous that the text of legislation (was) buried rather than revealed in its pages."[172]

The importance of having regulatory material fully published is substantially undermined when the publication regime in force merely requires delegated legislation to be "notified".[173] In Medcraft v. City of Box Hill[174] where publication of by-laws made under the Victoria Local Government Act, 1946[175] was required to be either by "publication at length" or else by "publication of a notice of the making" of the by-law in question, Pape, J. used this to distinguish the cases that disapproved incorporation by reference. He then allowed the by-law to incorporate by reference certain definitions of prohibited trades contained in a number of

170 C. T. Carr, Concerning English Administrative Law (London: 1941) at p. 57.
171 Supra, n. 28.
172 Op. cit., n. 170.
173 I.e., publication of a notice that a rule has been made and that copies of it are available at a given place.
174 [1959] V.R. 768.
175 No. 5203.

state statutes. He reasoned that, if publication could be effected in a manner that required the public to look elsewhere than in the Gazette, then there could be no blanket prohibition against a by-law that itself required the same.[176] He then adverted to the considerations of certainty and availability, concluding that the by-law was valid since the reference to the statutory definitions was clear and the definitions were as available as the statutes themselves.

The decision in Medcraft also rested on that three years earlier in Wright v. T.I.L. Services Pty. Ltd.[177] This case involved regulations that governed the storage of flammable liquids and incorporated standards developed by the Standards Association of Australia regarding "electrical devices" used in the storage facilities. The publication provision in question merely required the regulations to be "published in the Gazette." Although Walsh, J. cited McDevitt, he saw no need to distinguish it:

> the general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound. It is true that a regulation should indicate with sufficient certainty, to those upon whom it imposes a penalty for a breach of it, what is the extent of the obligation. Where a regulation contains a reference to some other document the question whether or not the requirement just stated is fulfilled must depend upon a consideration of the particular

[176] Publication by notification is not common in Canada. The only jurisdiction that employs this method is the Yukon Territory: Regulations Ordinance, R.O.Y.T., 1971, c. R-4, s. 4. Accordingly, this aspect of the judgement in Medcraft is hardly relevant in Canada.

[177] Supra, n. 164.

> regulation and of the nature and contents of the incorporated document. If there is uncertainty as to what is the document to which reference is made no doubt the regulation would be held invalid. Again, if such document is not readily accessible it may be, in some cases, that the regulation would be held to be bad, the true ground for doing so being that it is unreasonable rather than that it is uncertain. . . . Subject to the considerations mentioned, I can see no reason for holding that any uncertainty is created by the mere fact that the incorporated document is not set out in terms in the regulation itself. Whether the instrument with which a court is concerned is a statutory regulation, or is an instrument of a different kind, such as a written contract or a will, in my opinion no uncertainty arises from the circumstance that it has incorporated in it by reference some other document, if that which is incorporated is clearly identified, and contains no ambiguity in its own terms. In so far as the reasons given for the decision in McDevitt v. McArthur are not in accordance with what has been stated above, I do not agree with them.[178]

From McDevitt to Wright one sees a considerable shift in judicial attitude, a shift that probably has more to do with the increasing complexity of modern rule-making than with the different wordings of publication provisions. The principle of "strict construction" gives way to a more extended consideration of practical exigencies. The cases where incorporation by reference was permitted typically involve rather technical or scientific matters: in Wright, electrical equipment standards were incorporated while in two other cases the incorporated material consisted of a colour definition from the British Colour Council Dictionary of Colour Standards[179]

[178] Ibid. at pp. 421-22.
[179] Supra, n. 139.

and scientific tables for the calculation of alcohol content.[180] The incorporation involved in each of these cases was of a very limited nature and the material would undoubtedly have been familiar to, if not commonly used by, persons engaged in the relevant fields of endeavour.

The latter cases contrast sharply with those where incorporation by reference was not permitted. In these, the incorporation appears to have been much more extensive[181] and to have pertained to matters that were more apt to affect the general public directly, such as water traffic rules, building by-laws and price controls. Although the disapproval of incorporation by reference in these cases was expressed in rather general terms, one can perhaps ground this disapproval more narrowly in the fact that they did not involve activities as specialized or technical as the storage of flammable liquids or the manufacture of margerine or alcohol. Arguably, the general applicability of the former regulatory instruments was the decisive factor in requiring a higher degree of publication.[182] The courts that disapproved incorporation by reference were not faced with technical regulations that entail quite

[180] Ex. Parte Ryan [1957] S.R. (N.S.W.) 438.

[181] Indeed, in Arnold and McIver, Appendix A, the entire substance of the regulatory instrument--retail liquor prices--was incorporated by reference.

[182] This reasoning clearly underlies the Canadian decision in R. v. Ciarniello, supra, n. 147.

different publication considerations.[183]

A second transition in judicial attitude can be traced in terms of the legislative scrutiny of delegated legislation. In the McIver case,[184] the court referred to the possibility that incorporation by reference could impede such scrutiny, presumably by requiring legislators to go beyond the face of a regulation or order in search of its contents. However, in the Wright cases, Walsh, J. met this argument neatly, stating:

> The members of Parliament are not powerless to prevent the evil to which reference was made in McIver v. Allen since they may, if they think fit, disallow a regulation for the reason that it does not upon its face contain the whole of the details to which it refers.[185]

This reasoning shifts a measure of responsibility for the scrutiny of delegated legislation onto the legislature. However, the extent to which such bodies are effectively able to strike down objectionable regulations and orders is still an open issue, even in jurisdictions where legislative procedures

[183] However, see R. v. Glibbery, supra, n. 141, approving the referential incorporation of provincial highway traffic legislation. Although this decision did not deal with the publication issue, one can infer that the practical advantages of having such legislation apply to traffic or federal establishments within the relevant province eliminate any concerns arising from non-publication; see also R. v. Ciarniello, ibid.

[184] See Appendix A.

[185] Supra, n. 164 at p. 423.

for striking down such instruments enjoy a long history.[186] If the courts are to rely on parliamentary control as a reason for not interpreting procedural requirements more strictly, they must do so with the utmost care.

The issue of incorporation by reference in Canadian delegated legislation remains unsolved in many respects. Although this technique has been accepted by the courts in a number of situations, the circumstances when it will be permitted and the factors relevant to its permissibility have yet to be clearly or comprehensively defined. By contrast, Australia, the U.K. and the U.S. have by statute specifically provided for incorporation by reference.

[186]See, e g., with respect to parliamentary scrutiny in the U.K., Paul Byrne, "Parliamentary Control of Delegated Legislation" (1976), 29 Parl. Affairs 366; Alan Beith, "Prayers Unanswered: A Jaundiced View of the Parliamentary Scrutiny of Statutory Instruments" (1981), 34 Parl. Affairs 165; W. A. Proctor, "House of Commons Select Committee on Procedure" (1979), 47 The Table 13; Beatson, "Legislative Control of Administrative Rulemaking: Lessons from the British Experience?" (1979), 12 Cornell Int. L.J. 199. With respect to Australia, see Anne Lynch, "Fiftieth Anniversary of the Australian Senate Standing Committee on Regulations and Ordinances" (1982) The Table 70; J. E. Wilheim, "Proposed Improvements in Commonwealth Parliamentary Control of Delegated Legislation" (1981), 55 Aust. L.J. 713. With respect to the U.S., see J. Ray Wood, "Legislative Review of Administrative Action: Is the Cure Worse than the Illness?" [1978] S.I.U.L.J. 579; L. Harold Levinson, "Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives" (1982), 24 Wm. and Mary L.R. 79; M. Rosenberg, "Beyond the Limits of Executive Power" (1981), 80 Mich. L.R. 193; R. J. Pierce and S. A. Shapiro, "Political and Judicial Review of Agency Action" (1981), 59 Tex. L.R. 1175.

Section 49A of the Australian Acts Interpretation Act[186.1] provides broad authority to incorporate by reference, while somewhat more restrictive provisions appear in regulations made under ihe U.K. Statutory Instruments Act. These narrow the circumstances when this technique is permissible and empower the "Reference Committee" to direct that, even if these circumstances exist, it not be used.[187]

186.1 Supra, n. 163; subsection 494(1) reads as follows:

> Where an Act authorizes or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating, with or without modification--
>
> (a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
>
> (b) any matter contained in any other instrument or writing as in force or existing at the time the first mentioned regulations take effect,
>
> but unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

187 Supra, n. 29, section 7 states that where an authority makes a statutory instrument and "certifies" that

> the printing and sale . . . of any schedule or other document which is identified by or referred to in a statutory instrument . . . is unnecessary or undesirable having regard to the nature or bulk of the document and to any other steps taken or to be taken for bringing its substance to the notice of the public . . . any instrument so certified shall, unless the Reference Committee otherwise directs under these Regulations, be exempt from the requirements aforesaid so far as concerns the document specified in the certificate.

Similar provisions may be found in Title 5, Part 552 of the U.S. Code governing freedom of information. Section (a) requires rule-making agencies to publish regulatory matter in the Federal Register and goes on to state that:

> For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.[188]

This section is considerably elaborated by the requirements contained in Title 1, Part 51 of the Code of Federal Regulations.[189] These state that a publication must be "eligible" for incorporation by reference and then provide that a publication is eligible if it:

[188] 5 U S.C.S., paragraph 552(a)(1)(E).
[189] 47 F.R. 34108, August 6, 1982.

(1) Conforms to the policy stated in Part 51.1;[190]
(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material;
(3) Substantially reduces the volume of material published in the FEDERAL REGISTER;[191] and
(4) Is reasonably available to and usable by the class of persons affected by the publication.[192]

Part 51 also rules out the incorporation of documents as amended from time to time by providing that

> Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.[193]

Finally, Part 51 requires that the "language incorporating a publication by reference be as precise and complete as possible."[194]

The U.S. provisions constitute a remarkably complete

[190] Essentially, this policy is contained in paragraphs 51.1(c)(1) and (2):

> The Director will assume in carrying out the responsiblities for incorporation by reference that incorporation by reference
> (1) Is intended to benefit both the Federal Government and the members of the class affected; and
> (2) Is not intended to detract from the legal or practical attributes of the system established by the Federal Register Act, the regulations of the Administrative Committee of the Federal Register, and the acts which require publication in the Federal Register.

[191] 51.7(a)(4) states that

> In determining whether a publication is usable, the Director will consider
> (i) The completeness and ease of handling of the publication;
> (ii) Whether it is bound, numbered, and organized.

[192] Supra, n. 189, section 51.7.
[193] Ibid., section 51.1(f).
[194] Ibid., section 51.0(a).

code for incorporation by reference and embody virtually all of the concerns raised in the Australian case law. In addition, the criteria governing the discretion of the Director of the Federal Register to approve incorporation by reference vastly improve upon the U.K. regime which vests a very broad discretion in the Reference Committee. Both the Director and the Reference Committee are executive appointments[195] and some independent review of their decisions seems warranted. In the U.S., judicial review would be available to ensure compliance with the criteria in Title 1, Part 51 of the Code of Federal Regulations. Judicial review in the U.K. on the basis of the Statutory Instruments Regulations is not likely to be nearly as effective. However, legislative review by the Statutory Instruments Committee is available in the U.K. and perhaps makes up for the dearth of statutory guidelines governing the Reference Committee.

Unquestionably, a clear legislative regime for incorporation by reference is preferable to the vague publication provisions that have bedevilled the courts of Canada and Australia. This regulatory technique is too important to be exposed to the risks of invalidity that currently exist in these countries. In Canada the Henson[196] and Ciarniello[197] cases are very clear reminders of this fact. Although statutory provisions

[195] The Reference Committee is appointed by the Lord Chancellor and the Speaker of the House of Commons: S.I. 1948, No. 1, s. 11; the Director of the Federal Register is appointed by the Administrator of General Services: 44 U.S.C.S. 1501, who is, in turn appointed by the President: 40 U.S.C.S. 751.

[196] Supra, n. 143.

[197] Supra, n. 147.

specifically authorizing incorporation by reference are finding their way piece-meal into Canadian legislation,[198] there is clearly a need for general provisions such as those in Australia, the U.K. and the U.S. In the absence of specific statutory authorization, a delegated legislative authority would do well to minimize the use of this technique, confining it to documents that have an administrative or technical character, are widely used or available to those affected and provide little more than detail for regulatory provisions that are contained in the incorporating legislation. Particular care should be taken in respect of the incorporation of documents that are produced by the delegated legislative authority itself. Arguably, this constitutes avoidance of the obligation to act legislatively, discussed in Part III. In addition, the incorporated documents themselves may be characterized as delegated legislation and directly attract the formal and procedural requirements governing its promulgation.

Division B - Requirements of Natural Justice

This division deals with procedure in the sense

[198]See e.g. ss. 106(5) of the Canada Labour Code, S.C. 1984, c. 39, s. 20; ss. 4.9(3) of the Aeronautics Act, S.C. 1985, c. 28, s. 1.

of rights of individuals to participate in delegated legislative processes. Where such rights are expressly conferred in a provision of an enabling statute, the courts tend to take a respectful attitude and characterize compliance with the provisions as a "condition precedent" to the exercise of delegated power. Thus, if an authority is required to consult,[199] give notice to [200] or obtain the approval or recommendation of another body or group of individuals, [201] non-compliance with any aspect of the requirement will generally be fatal to a regulatory instrument.[202] There are, however, gradations of compliance and, as two cases from British Columbia demonstrate, courts are capable of construing conditions precedent with varying degrees of strictness.

In McMartin v. Vancouver[203] a city council held a hearing on a proposed amendment to a zoning by-law, as required

[199]For a list of statutory examples, see Rene Dussault, op. cit., n. 98, at. p. 486; see too Garant, op. cit., n. 18 at pp. 320-22; finally, two cases discussing these sorts of provisions are R. v. Feraco [1965] 1 O.R. 652 and Agricultural, Horticultural and Forestry Industry Training Board [1972] 1 All E.R. 280 (Q.B.).

[200]For a list of statutory examples, see Dussault, op. cit., n. 98 pp. 489-90,n. 381 ; Garant, op. cit., n. 18; three cases discussing these sorts of provisions are Bay Village Shopping Centre v. Victoria, [1973] 1 W.W.R. 634 (C.A.); Sunshine Hills Property Owners Assoc. v. Delta [1977] 6 W.W.R. 749 (B.C.S.C.); Prevost Investments v. Prov. of P.E.I. (1978), 15 Nfld. & P.E.I.R. 134 (P.E.I.C.A.).

[201]For a list of statutory examples, see Dussault, op. cit., n. 98 p. 485, nn. 373-4 ; Garant, op. cit., n. 18; three cases discussing these sorts of provisions are A.G. (Can.) v. Paulsen [1973] F.C. 376 (C.A.);R. v. Jasperson [1959] 0.R. 63 (C.A.) and Broiler Growers Marketing Board v. Sussex Poultry (1970) 17 D.L.R. 3d 459.

[202]See the cases cited above at nn. 199-201.

[203](1968), 70 D.L.R. 2d 38 (B.C.C.A.).

under the Vancouver Charter.[204] However, after the conclusion of the hearing, the council received and considered a letter from an interested party. It then made its decision without disclosing the letter's contents to the appellants and allowing them an opportunity to comment. Although the majority of the court refused to strike down the by-law, each of the three judges delivered different reasons. Davey, C.J.B.C. adknowledged that "the city ought not to have received the letter," but went on to state:

> I cannot regard that as a breach of the condition precedent to hold a public hearing upon which the council's authority to pass the by-law depended. It did hold a very full public hearing, so it had full authority to pass the by-law, unless in receiving the letter of Eastern Trust it departed so seriously from the statutory requirements that the by-law may be said to be invalid.[205]

He then went on to consider the facts of the case and found that the appellants must have known the contents of the letter, though they were never formally communicated to the appellants by the council. Thus, he concluded:

> In my respectful opinion while there was a violation of the letter of s. 566 of the Vancouver Charter, what was done was a substantial though informal compliance with it, and the irregularity does not invalidate the by-law.[206]

MacFarlane, J.A. took a somewhat less compromising view of the case, considering that the hearing requirement was merely a "limitation upon the general power conferred

204 S.B.C. 1953, c. 55.
205 Supra, n. 203, p. 41.
206 Ibid., p. 42.

by the other provisions of the statute."[207] On this basis, he narrowed the effect of the requirement, deciding that:

> after having held a public hearing in the manner required by s-ss. (3) and (4) the council may proceed to exercise its power to make and amend zoning by-laws without further restriction so far as s. 566 is concerned.[208]

Like the Chief Justice, Robertson J.A. found that the council's receipt of the letter violated the hearing requirement of section 566. However, he dissented on the basis that the section constituted "a code of procedure which must be followed and observed in every respect."[209]

Five years later a somewhat similar case came before the Court of Appeal. This time, however, Robertson J.A. was in the majority with Nemetz J.A. while Davey, J.A. (as he then was) dissented. In Bay Village Shopping Centre v. City of Victoria[210] a city council gave notice of a proposed zoning by-law and held a hearing under section 703 of the B.C. Municipal Act.[211] The by-law was put to a vote and defeated. At a later meeting, for which no notice was given, the council reconsidered the by-law, heard representations from the developer and passed it. Although the appellant, who owned land adjacent to that of the developer, apparently knew of the latter's intent to re-open the matter and make representations,[212]

207
208 Ibid., p. 45.
209 Ibid., p. 46.
210 Ibid., p. 47.
211 [1973] 1 W.W.R. 634 (C.A.).
212 R.S.B.C. 1960, c. 255.
Supra, n. 210, p. 647.

the majority held that "published" notice of any hearing concerning a zoning by-law was required. The dissent of Davey, J.A. dwelt on the fact of the appellant's actual notice while the majority reasons of Robertson J.A. turned on the likelihood that interested persons generally would have been unaware of the hearing, particularly since the by-law had been defeated once already.

The distinctions used by Robertson J.A. to circumvent the McMartin case are hardly compelling. He accepted the characterization of the requirements in McMartin as "directory" and then, without providing any reasons, went on to characterize those at issue in Bay Village as mandatory.[213] Nemetz, J.A., who concurred with Robertson J.A., was rather more candid in disposing of the McMartin case. He observed that "it is not possible to extract a thread of agreement between any two members of this Court who sat on the appeal" and then followed the approach of Robertson J.A. in McMartin, characterizing section 703 as a "code of procedure which must be strictly followed and observed."[214]

McMartin and Bay Village give little indication of the basis for taking a strict approach in one case, but not in the other. It may be possible to infer, if not from the judgements, then from the results, that the council in Bay Village stepped beyond the pale. It did not merely consider a letter, but heard representations and, in effect, held another

[213] Ibid., p. 641.
[214] Ibid.

hearing. Conceivably, the "paper hearing" in McMartin was not enough of a hearing to attract the procedural requirements there at issue.

Although this rationalization avoids the problems of distinguishing between directory and mandatory provisions, it does not altogether explain the fundamentally different attitudes of Robertson, J.A. in Bay Village and McFarlane, J.A. in McMartin. Although the latter pinned much of his decision on section 147 of the Vancouver Charter, providing for the transition from one council to another after an election,[215] he clearly did not appreciate the extent to which the hearing requirement could be frustrated by just the sort of action he envisaged. By using a very general administrative provision as the basis for weakening section 566, he indicated a distinct bias against fettering the council's discretion. The contrast between the judgements of McFarlane, J.A. and Robertson, J.A. is borne out by the existence in the Bay Village

[215] Supra, n. 203 at p. 45 where he stated:

> I think this section has an important bearing upon the ascertainment of the intention of the Legislature in enacting s. 566 because if the contentions of the appellants be sound the council would be acting illegally if, after the conclusion of the public hearing, its members should hear further representations or take expert evidence in the absence of persons opposed to the proposed by-law. The same result would follow the acceptance of those contentions if the by-law were passed by a council composed of aldermen elected after the conclusion of the public hearing. Such an intention should not I think be imputed to the Legislature without good reason to be derived from the language used in the statute.

case of a transitional provision similar to section 147 of the Vancouver Charter[216] and by the uncompromising language in the latter judgement: "To my mind it is essential that, whenever a hearing is held, there be compliance with subsections (1), (2), and (3) of section 703."[217]

When one surveys the cases generally concerning express procedural requirements, McMartin appears all the more anomalous. The courts have most often taken a strict approach to the enforcement of such requirements, grounding their decisions on any number of rules of statutory construction. In some cases, they have appealed to the penal nature of the regulatory instruments in question[218] or to the effect they have in restricting common law or statutory rights.[219] In R. v. Jasperson, ex. parte Knights,[220] for example, the Ontario Court of Appeal held that the failure to hold a vote of hog producers on the question of adopting a marketing scheme rendered it invalid. The appellants had argued that the scheme was merely an amendment to an earlier scheme that had been adopted before the enactment of the vote requirement. The court rejected this contention, stating that, in light of the penal sanctions attached to the violation of the scheme, the requirements for making it "should be construed with the utmost strictness."[221]

216 Supra, n. 204, s. 156.
217 Supra, n. 210, p. 640.
218 R. v. Jasperson, supra, n. 201.
219 A.G. (Can.) v. Paulsen, supra, n. 201; Prevost Investments, supra, n. 200.
220 Op. cit., n. 166.
221 Ibid., p. 73.

Most encouraging are cases where the courts have demonstrated considerable sensitivity to the practical application of procedural requirements. In R. v. Donald B. Allen Ltd.[222] the Ontario Divisional Court refused to permit a municipality to pass a zoning by-law under the guise of regulating business hours and thereby obviating the zoning by-law procedures.

An English case provides perhaps the best illustration of judicial concern for the effective operation of delegated legislation procedures. In Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.,[223] the Minister of Labour was obliged to consult employers organizations before making an industry training order. Although he sent a notice to the defendants inviting their submissions, they apparently did not receive it and, not surprisingly, did not participate in the consultations. Donaldson, J struck down the order, rejecting the plaintiff's argument that the Minister had satisfied the requirement:

> There is little more to be said for his submission that the mere sending of a letter of 26th April 1966 constituted consultation in that the Shorter Oxford English Dictionary gives as one definition of the verb 'to consult', to ask advice of, seek counsel from; to have recourse to for instruction or professional advice'. However, in truth the mere sending of a letter constitutes but an attempt to consult and this does not suffice. The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice . . . . If the invitation is once received, it matters not that it is not accepted and no advice proferred. Were it otherwise organizations with

[222] (1976), 11 O.R. 2d 271 (Div. Ct.).
[223] Supra, n. 199.

> a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation.[224]

When one turns from express to implied procedural requirements, very different results prevail. In spite of the inroads made by the fairness cases on the exercise of "administrative" powers,[225] the Supreme Court of Canada decision in A.G. Can. v. Inuit Tapirisat[226] seems to have foreclosed similar developments in respect of "legislative" powers. The case involved the Governor in Council's review of a decision of the Canadian Radio and Telecommunications Commission under subsection 64(1) of the National Transportation Act.[227]

The court's decision was delivered by Estey, J. who began from the principle that, if procedural fetters are to be implied on the exercise of a power, they must be implied from the enabling statute:

> While after Nicholson, supra, and Martineau v. Matsqui Institution Disciplinary Board (No. 2), the existence of such a duty no longer depends on classifying the power involved as "administrative" or quasi-judicial it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.[228]

He then asserted that "it is not helpful . . . to attempt to classify the action or function of the Governor in Council

224 Ibid., p. 284.
225 See e.g. Re Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. 3d 671. (S.C.C.).
226 Supra, n. 11.
227 R.S.C. 1970, c. N-17.
228 Supra, n. 11, p. 13.

. . . into one of the traditional categories established in the development of administrative law."[229] Thus, he instead, analysed the character of the subsection 64(1) power, isolating a number of factors that he considered relevant in determining what, if any, procedural requirements were to be implied.

These characteristics can be summarized into three groups. The first comprised statutory indications taken from the legislative framework of the enabling power. Estey, J. noted that subsection 64(1) permitted the Governor in Council to act on his own motion, at any time, without any express procedural requirements and with a wide array of possible dispositions. From this he concluded that it was unlikely that Parliament could have intended any such requirements to attach.

The second group of factors pertained to the office of the delegate. The fact that the members of the Cabinet, who effectively exercised the powers of the Governor in Council, "were by virtue of their office concerned with policy issues" argued that their powers were very broad and were not to be fettered by any obligation of fairness.[230]

The third group of factors dealt with the nature of the power itself, including the purposes for which and the ways in which it was to be exercised. Examination of this group revealed that large numbers of persons were affected[231]

229
230 Ibid., p. 14.
231 Ibid., p. 17.
See W. Wesley Pue, Natural Justice in Canada (Vancouver: 1981), pp. 59-63, especially pp. 59-60.

and that the apparent purpose of subsection 64(1) was to enable the Cabinet "to respond to the political, economic and social concerns of the moment."[232]

Although this analysis of the subsection 64(1) power has a functional tone, it does not stand up well when one considers that the case was decided on a motion to strike the plaintiff's statement of claim. The conclusions of Estey, J. regarding the nature of the Governor in Council were, one may suppose, based on general, theoretical notions of which he presumably took judicial notice. However, Professor Mullan has pointed out that:

> The circumstances under which certain statutory powers are exercisable frequently will vary dramatically. Quite clearly, this can have an effect on the utility of procedures. Under the fairness approach, as I understand it, the potential existed for these very real considerations to be recognized and for judicial approval of varied procedures under the same statutory provision depending upon the circumstances of the particular case. By adopting an all or nothing approach to these three aspects of the claims in the Inuit Tapirisat case, Estey, J. seems either to have closed the opportunities for such differentiations or, at the very least, to have suggested that great care be taken in making them.[233]

When one considers the balance of the decision in Inuit, some rather more disturbing prospects emerge. Despite his attempt to approach the case apart from the traditional administrative law categories, Estey, J. slipped back to them repeatedly, concluding at one point: "this is legislative

232 Supra, n. 11 at p. 19.
233 David Mullan, "Developments in Administrative Law: The 1979-80 Term," (1981), 2 Sup.Ct.L.R. at p. 22.

action in its purest form"[234] and later acknowledging that "the dividing line between legislative and administrative functions is not always easy to draw."[235]

The Inuit case is certain to be taken as a guide, not for the rigorous construction of enabling powers, but rather for identifying "legislative" powers with a view to excluding implied procedural fetters.[236] To some extent this is already borne out in several subsequent cases. Melville[237] and Jasper Park[238] are hardly surprising in this regard since they dealt with the same power, albeit in relation to an order of the Canadian Transport Commission, rather than the C.R.T.C.

The impact of Inuit is better demonstrated in Re Surrey Memorial Hospital and A.G. (B.C.)[239] where a hospital board sought review of a decision of the B.C. Lieutenant Governor in Council appointing an administrator and thereby suspending the board's authority. The case arose from the board's opposition to the performance of abortions at the hospital and the ensuing conflict with its staff. MacKenzie, J. refused to be drawn into this issue and adopted the respondent's argument verbatim incorporating a substantial portion of it into his judgement. This portion cites Inuit as authority for the contention the

234 Supra, n. 11, p. 15.
235 Ibid., p. 19.
236 See Mullan, loc. cit., n. 233, and R. A. MacDonald, "Case Comment: The Limits of Procedural Fairness: Executive Action by the Governor in Council," (1981-82), 46 Sask. L.R. 185. See too, Garant, op. cit., n. 18 at p. 320.
237 Supra, n. 78.
238 Ibid.
239 (1983), 142 D.L.R. 3d 697 (B.C.S.C.).

"the Lieutenant Governor in Council is . . . not subject to any rules of procedural fairness particularly when he is making a policy decision and not deciding a lis between two parties."[240]

The factum went on to assert:

> There is however nothing expressed or implied in the Hospital Act or any relevant provincial legislation which would require the Lieutenant Governor in Council to afford the Petitioners a hearing in this context. Indeed, it would be extraordinary to find such a provision given the traditional role played by the Lieutenant Governor in Council in our system of Parliamentary government.[241]

The decision in Surrey Memorial leaves underemphasized the intensely controversial nature of the background issues. The court chose to avoid these altogether by leaving the power of the Lieutenant Governor in Council virtually unfettered by procedural constraints. This hands-off approach extended to its treatment of the statutory requirement that the Lieutenant Governor "consider" the appointment of an administrator to be "in the public interest."[242] MacKenzie, J. simply concluded that the subjectivity of this provision put the matter within his "exclusive jurisdiction,"[243] and ruled out any procedural requirements, presumably on the assumption that the political arena was a sufficient mechanism for controlling the power in issue.

Both the Inuit and Surrey Memorial cases demonstrate a judicial reluctance to imply procedural constraints on policy

240 Ibid., p. 702.
241 Ibid., p. 703.
242 Hospital Act, R.S.B.C. 1979, c. 176, s. 44.
243 Supra, n. 239 at p. 704.

making functions.[244] This reluctance extends not only to the audi alterem parten branch of natural justice, but to the nemo judex branch as well,[245] and appears to turn largely on the character of the body exercising delegated powers.

[244] Somewhat different considerations appear to apply to functions that, though performed under powers that are largely legislative in character, have in fact a very narrow impact and resemble adjudicative functions: e.g. Wiswell v. City of Winnipeg (1965), 51 D.L.R. 2d 754 (S.C.C.).

[245] McGill v. City of Brantford (1980), 12 M.P.L.R. 24 (Ont. Div. Ct.) bears this out in relation to an application to quash a street closing by-law. In this case one also sees the extent to which courts may rely on electoral checks as the primary controls on the use of powers related to political matters. The applicants contended that, when the city held a series of hearings as required under section 446 of the Ontario Municipal Act (R.S.O. 1970, c.284), it did so with "closed minds" and was accordingly biased against the applicants. Henry, J. rejected the application, stating:

> Of fundamental importance is the proper recognition of the function of a municipal council in the body politic. Its conduct of a "hearing" under section 446 of the Municipal Act must be governed by the nature of that function. The council has the role of legislating on local matters delegated to it by the provincial Legislature. Although a delegatee, having critically defined powers, it is nevertheless a law-making body. Within its delegated jurisdiction it makes laws that are binding on citizens that have the force of statute. Its duty is to legislate in the interests of the citizens of the municipality as a whole. The members of the council are elected representatives who, in a democracy, are responsive to the concerns of their constituents, who have given them their mandate. It goes without saying that they are not judges. The process of governing and legislating is not a judicial process; it is a political function, the ultimate sanctions of which lie in the electorate. To put the matter shortly, it would manifestly be impossible for a legislative body, such as a municipal council, to govern on the basis that each decision affecting some citizens adversely had to be made judicially, as if it were a court. To the contrary, its collective decisions are political, based on the fundamentals of responsible government, reflecting the needs and mandates of the electorate as a whole. (pp. 31-2)

Although the definition of "legislative" powers turns as much on the nature of the authorities exercising them as on the breadth of their effect, one finds, in many of the cases very little consideration either of this aspect or of the degree to which political controls are actually effective. There is, for example, a wide gulf between municipal councils[246] and federal or provincial executive authorities. The former are elected for a shorter term by a relatively small constituency of voters, while the latter have more extensive responsibilities and longer terms of office and, accordingly, are more politically insulated from specific issues. Bending the ear of a municipal councillor is a far easier task than attracting the attention of a federal or provincial minister.

Division D - Conclusions (Formal and Procedural Scrutiny)

From the cases examined in Divisions A and B, two points of conflict emerge. The first involves the elusive distinction between "directory" and "mandatory" provisions. In some cases[247] the courts appear to have diluted the exceptional character of the former through less than rigorous analyses of the issues before them. These cases indicate a concern that delegated legislative processes not become clogged with formal or procedural requirements. Although this concern

[246] See McGill, ibid.

[247] E.g., Melville, supra, n. 78, Jasper, supra, n. 78 and McMartin, supra, n. 203.

has merit, decisions such as those in Melville or Jasper[248] show that courts are not always as thorough as they might be in analysing the matters before them and suggest a marked bias in favour of delegated legislative authorities.

Counterpoised against these cases is a somewhat larger group where express procedural requirements were considered mandatory and strictly enforced.[249] This group can be distinguished from Melville and Jasper on the basis that they involved the issue of publication, rather than administrative provisions. As the Michelin case shows, there is a deeply ingrained judicial concern that persons affected by the law be able to discover its content. However, if this concern explains the "directory" construction in some cases, it does not justify it. For, as most interpretation statutes indicate,[250] when a legislature uses the word "shall" it means the imperative; otherwise, it would use "may".

A second point of conflict emerges when one considers that although the courts tend to enforce rigorously procedural requirements that are expressed in enabling legislation, they have, by the same token, uniformly refused to imply such requirements. These disparate attitudes cannot easily be explained. In some instances, the courts have taken a strict approach because of the penal character of a regulatory instrument or because of its effect on individual rights.[251] At first

[248] Ibid.
[249] Supra, pp. 80-87.
[250] E.g., Interpretation Act, R.S.C. 1970, c. I-23.
[251] Supra, p. 85.

glance, these principles of strict construction offer an attractive reconciliation of the differing judicial attitudes: one cannot construe strictly requirements that are not express. In addition,

the cases where implied requirements were sought did not involve penal consequences or the restriction of individual rights.[252] This argument ignores, however, a widespread shift in the canons of statutory construction, away from strict construction to a more purposive approach.[253]

Courts are now recognizing that strict construction also involves a measure of "judicial legislating" and, in terms of the traditional common law presumptions, is a far more arbitrary than more functional methods of interpretation.

A perhaps better explanation for the differing approaches to express and implied procedural requirements rests in recognizing two conflicting concerns. On the one hand, the exercise of powers of delegated legislation generally involves complex issues and is subject to political controls. On the other, such powers usually have a very broad and critical impact. When construed as "conditions precedent," express requirements become the means for giving effect to the latter concern without appearing to entrench upon broad and often politically coloured powers. By the same token, the implication of procedural requirements becomes virtually impossible precisely because of the greater appearance of meddling with such discretion. The question is, should appearances give way to reality?

If procedures to permit greater public participation in delegated legislative processes have not been implied by

252 Ibid.

253 See, e.g. R. v. Budget Car Rentals (1981), 121 D.L.R. 3d 111 (Ont. C.A.).

the courts, they seem to be appearing incrementally in federal statutes and administrative practice. A number of recent enactments[254] contain provisions requiring that proposed regulations

> shall be published in the Canada Gazette at least ninety days before the proposed effective date thereof, and a reasonable opportunity shall be afforded to interested persons to make representations . . . with respect thereto.

In addition, a number of delegated legislative authorities have pre-published proposed regulations[255] without any statutory requirement to do so. Just how effective and extensive these notice and comment measures will be remains to be seen, though they could conceivably provide precisely the interpretive foothold that Canadian courts seem to require to engage in meaningful procedural review.

[254] Canada Post Corporation Act, S.C. 1980-81-82-83, c. 54, s. 17(3); Canada Oil and Gas Act, S.C. 1980-81-82-83, c. 81, s. 54(2); Electricity and Gas Inspection Act, S.C. 1980-81-82-83, c. 87, s. 28(2); Canadian Aviation Safety Board Act, S.C. 1980-81-82-83, c. 165, s. 30(3); Motor Vehicle Safety Act, R.S.C. 1970, 1st. Supp. c. 26, s. 9; Radiation Emitting Devices Act, R.S.C. 1970, 1st. Supp. c. 34, s. 11(2); Pilotage Act, S.C. 1970-71-72, c. 52, ss. 14(3) and (4), s. 23.

[255] See, e.g., Radio Act, R.S.C. 1970 c. R-1, s. 7 and Canada Gazette, Part I, vol. 118, p. 1416; Clean Air Act, S.C. 1970-71-72 c. 47, s. 23 and Canada Gazette, Part I, vol. 118, p. 1420; Divorce Act, R.S.C. 1970, c. D-8, s. 19 and Canada Gazette, Part I, vol. 118, p. 760; Precious Metals Marking Act, R.S.C. 1970 c. P-19, s. 9 and Canada Gazette, Part I, vol. 117, p. 7911; Fish Inspection Act, R.S.C. 1970 c. F-12, s. 3 and Canada Gazette, Part I, vol. 117, p. 4215; Food and Drugs Act, R.S.C. 1970 c. F-27, ss. 25, 32 and 38 and Canada Gazette, Part I, vol. 117, p. 696.

Part III - Substantive Scrutiny

If the "political" aspects of the exercise of delegated legislative power are important in cases involving procedural review, they are equally, if not more, crucial in relation to substantive review. This is hardly surprising since courts in such cases must have some appreciation of the function for which a power was granted in order to assess whether it has been exercised in accordance with its enabling authority. This point tends to be obscured by the traditional manner of formulating the role of the courts. In determining questions of *vires*, the judicial function is seen as one of interpretation or uncovering the intention of the legislature. This intention is, of course, a metaphor for a very complex interpretive process that is affected as much by the intention of judges as by those of legislators.[256] The construction of statutes takes place against a panoply of rules created by the judiciary to resolve "ambiguities" in legislation. However, it is often difficult to tell which is more ambiguous: the legislation or the manner in which these rules are applied.[257]

Although one might expect the scope for judicial creativity to increase proportionately with the vagueness

[256] Willis, *loc. cit.*, n. 13.

[257] See K. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed" (1950), 3 Vand. L.R. 395, for a classic example of legal skepticism embodied in a marshalling of variously contradictory judicial pronouncements on the construction of statutes.

of a statutory provision,[258] delegated legislation cases demonstrate that this is not so.[259] The courts have most often taken this vagueness to indicate legislative intention to confer broad powers, relinquishing responsibility over the regulatory subject matter by pleading that the court is not the place to decide the issues at stake. How they arrive at this conclusion is not always clear; their consistency in doing so is even less so.

[258] Cappelletti, loc. cit., n. 14 at p. 27.

[259] A prime example of this reluctance to engage in judicial creativity involves the general by-law making provision in many municipal government statutes in Canada (e.g. Municipal Act, R.S.O. 1980, c. 302, s. 104: "regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act"). See R. ex. rel. Cox v. Thomson (1957), 9 D.L.R. 2d 107 (Ont. C.A.); Re Morrison and City of Kingston [1938] O.R. 21 (C.A.). However, an exception to this reluctance appears in a number of early municipal law cases noted by G.K. Allen, "Attacking By-laws: Zoning and the Traditional Rules (Part II)" (1973), 22 U.N.B.L.J. 5 at p. 15.

Division A - Construction of Enabling Clauses

Any examination of the substantive scrutiny of delegated legislation should begin with an analysis of the judicial interpretation of enabling clauses. Although these clauses are potentially as varied as the draftsman's imagination, they most often fall into one of three categories: subject matter clauses;[260] purpose clauses;[261] and specific function clauses.[262] Thus, the question of whether delegated legislation is enabled should be answered by determining the breadth of the subject matter, purpose or function, as the case may be, and assessing whether the legislation is sufficiently related to it.[263] The scope of this scrutiny may be considerably narrowed by the addition of provisions for determining validity on the basis of a subjective assessment of the situation by:

[260] This type of clause turns on such prepositional phrases as "relating to" or "in respect of". For examples and further discussion of these, see E. A. Driedger, The Construction of Statutes, 2d ed. (Toronto: 1983) at p. 330; E. A. Driedger, The Composition of Legislation, 2d ed. (Ottawa: 1976) at p. 192; Dussault, op. cit., n. 98 at pp. 467-8. As should become clear further on, reviewing courts favour the sort of inquiry that this type of clause imports, probably because of its more tangible character: see infra at p. 103.

[261] this type of clause turns on the preposition "for" or the prepositional phrase "for the purpose of". For examples and further discussion, see Driedger, Construction, ibid. at pp. 329-30; Driedger, Composition, ibid. at pp. 191-2; Dussault, ibid. at pp. 465-6.

[262] It is somewhat more difficult to characterize this type of enabling clause; however, examples include powers of "regulating", "prescribing", "licensing", "restricting", and "prohibiting". For further examples and discussion, see Driedger, Construction, ibid. at pp. 330 1; Driedger, Composition, ibid. at pp. 192-3; Dusssault, ibid. at pp. 468-74

[263] See Appendix B.

the authority that makes the delegated legislation.[264]

The King v. National Fish Co. Ltd.[265] is frequently cited for its statement of the principles applicable to the construction of delegated legislative powers. These principles still apply, but what seems to have been lost since it was decided in 1931 is the rigour of their application. The case arose at a time when delegated legislation was much less pervasive, though, to the alarm of people like Lord Hewart, it was increasing steadily.[266] Thus, while the following passage states a series of principles with which no one can quarrel, it is most remarkable for its emphasis on strict construction:

> The tendency of modern legislation is to lay down general principles and to avoid going into administrative details. And it is within the competency of Parliament to delegate its authority for the making of Rules and Regulations.
>
> Delegated authority of this kind must be exercised strictly in accordance with the power creating it and in the spirit of the enabling Statute, and regulations which have fulfilled all the conditions precedent to their validity have the force of Statute . . .
>
> The proper method of construction is to read the original Act and its amendments together with the Regulations and in this way any excess of power assumed by the body entrusted with the duty of making such Regulations would be revealed. They cannot enlarge or abridge the scope or substance of their delegated power. Such Regulations must be strictly construed. . . .
>
> The Governor in Council can only make Regulations within the limited sphere and authority of the subject and area of the Act, with the object of carrying the statutory enactment into operation and effect, but not beyond the scope of such enactments.
>
> The Regulations must not conflict with the

[264] See Appendix C.
[265] [1931] Ex. C.R. 74.
[266] Op. cit., n. 1.

> specific enactments of the Statute and cannot operate as an amendment of the same. They can only provide for something to be done consistent with the requirements of the Statute. The Act supplies the governing rule and the Regulation is subordinate to it.

In order to assess the degree of scrutiny exhibited in the current case law, I propose to concentrate on the judicial construction of "purpose" clauses. The inquiry necessary to determine the validity of instruments made under these clauses seems on its face, to be far more extensive than that necessary to determine the validity of subject matter or specific function clauses. In general, it is easier to define and identify a regulatory subject matter or function than to uncover the purposes of an instrument and determine whether it fulfills the purposes prescribed in its enabling provision.[268] The latter demand an understanding of how the regulatory activity in question operates, and not merely a familiarity with categories of subjects or functions. Accordingly, the case law on the validity of instruments made under purpose clauses should indicate the forefront of the judicial review of the scope of delegated legislative powers.

Admittedly, an assessment of the relative scope of the three types of enabling clauses is difficult because of the interpretive discretion exercised by the courts and the infinite variability of circumstances in which the clauses operate. Indeed, in the ensuing pages I will attempt to demonstrate that the breadth of a delegated

[267] Supra, n. 264 at pp. 81-2, per Audette, J.
[268] See Appendix B.

legislative power is hardly determined by its categorization into one or other of these three types. Rather, it depends most on the nature of the relevant purpose, subject matter or function and the judicial interpretation of that nature.[269]

In CKOY v. The Queen,[270] a majority of the Supreme Court of Canada has quite recently displayed an attitude that differs sharply from that seen in the National Fish case. Their decision suggests that the courts have become so accustomed to finding scant guidance in enabling clauses that they often do not thoroughly scrutinize the little content that such clauses do have. The case arose out of a regulation of the Canadian Radio and Telecommunications Commission (CRTC). The regulation required radio broadcasters to obtain the permission of any person interviewed by telephone before broadcasting the interview. The enabling provisions upon which the CRTC rested its claim of validity consisted of several layers of interlocking and circuitously framed subjects and purposes. The subjects were defined in two paragraphs as (i) "standards of programmes and the allocation of broadcast time" and (ii) "such other matters as it (the CRTC) deems necessary for the furtherance of its objects."[271] Engrafted on to each of these were a series of purposive provisions that required the regulations to be "in furtherance of the objects set out in section 3

269 Infra at p. 119.
270 (1979), 90 D.L.R. 3d 1 (S.C.C.).
271 Broadcasting Act, R.S.C. 1970, c. B-11, s. 16(1)(b)(i) and (ix).

[of the Broadcasting Act]".[272]

Writing on behalf of the majority, Spence, J. skipped through most of the terms of the enabling provisions and reduced the question of validity to the issue of whether, "objectively speaking, the regulation deals with a class of subject referred to in section 3." In doing so, he transformed the "objects" set out in this section into "classes of subjects" and, accordingly, excluded from his consideration the question of whether the regulation would "implement a policy." Instead, he considered whether the regulation was "aimed at" one of the policies set out in section 3.[273]

The "aimed at" test propounded by Spence, J. is undoubtedly superficial. The section 3 purpose to which he devoted the most attention was that set out in paragraph (d) dealing with broadcasting as a medium for "varied and comprehensive" programming and the expression of "differing views on matters of public concern" and with the maintenance of a "high standard" of programming. In discussing this provision, he did not advert to any evidence presented as to how these objectives were generally defined or achieved. Rather, he simply speculated that:

> The Commission might well have concluded that a broadcasting station canvassing members (of the public) for their views upon a matter of public concern could not provide a "reasonably balanced opportunity for the expression of differing views" unless it granted confidentiality to the person

[272] Ibid., s. 16(1).
[273] Supra, n. 270 at p. 9.

> interviewed. . . . The Commission might well have concluded that the enactment of s. 5(k) was necessary to prevent development of programming which was the opposite of "high standard".[274]

The differences between the majority and minority opinions in the CKOY case can be found in both the rigour with which purpose clauses were construed as well as the breadth of the subject clauses in issue. In respect of the latter, Martland, J., writing for the minority, felt that neither the subject of "programming" nor the general "such other matters" provision was sufficiently broad to encompass the regulation. This view reflected the generally more restrictive approach that he took to the powers of the CRTC. While Spence, J. refused to confine the general provision to procedural matters and stressed the subjective "as it deems necessary" test attached to the provision, Martland, J. saw things quite differently:

> . . . counsel for the respondent took the position "that it is for the Commission, and not for the Court, to determine what regulations are necessary for the furtherance of its objects". In other words, the Commission has carte blanche to make any Regulation which it sees fit to enact provided it, the Commission, is of the opinion that it is desirable in order to further its objects.
>
> I am not prepared to accept this submission. I do not agree that Parliament has granted to the Commission autocratic powers to control every phase of the activities of broadcasters. Section 16 confers on the Commission certain powers of subordinate legislation. The Commission is an administrative body and can only legislate within the express limits defined by the Act. To clothe the Commission with the wide legislative powers claimed by it would require very clear language and I do not find it here.
>
> . . . In my opinion, as in the case of other

[274] Ibid. at p. 10.

> types of subordinate legislation, it is for the Courts to determine whether or not a Regulation made by the Commission is within its powers.[275]

In going on to consider the over-arching purpose clauses in section 3, Martland, J. found that the regulation did not conform to any of these and, in particular, differentiated between the control of the "standard" of programming and the control of its "content". He concluded by adopting several comments of Dubin, J.A. who had dissented on a similar basis when the case was heard in the Ontario Court of Appeal. These characterized the regulation as being merely one step removed from censorship and suggest that both he and Martland, J. counter-balanced the powers of the CRTC against the appellant's interest in freely choosing what to broadcast, an interest expressly guaranteed in paragraph 3(c) of the Act. In doing so, each exhibited a much greater predisposition towards individual interests as opposed to those of the state personified in the CRTC.

None of the decisions in the CKOY case provides much reasoning or factual basis for its conclusions. Spence, J. cited only one case on the construction of enabling provisions while Martland, J. cited none at all. For the most part, their decisions turned on impressions of what "programming" or "standards of programming" meant, with no consideration of how the broadcast of interviews without the consent of those interviewed might affect the industry or the objects

[275] Ibid. at pp. 5-6.

set out in section 3. In fact, Spence, J. steered well clear of any such considerations by adopting an "aimed at" test that hearkens back to constitutional cases involving the "for the peace, order and good government" clause in section 91 of the Constitution Act, 1867.[276] In the context of the validity of delegated legislation, the appropriateness of this test is highly suspect. Here the issues before the court tend to be much narrower and more manageable, involving individuals and regulatory agencies, rather than two primary legislative authorities. In addition, no principles of legislative supremacy are in issue; the courts are defining the limits of legislative jurisdiction, not partitioning an unlimited jurisdiction between two heads of authority.

If the CKOY case demonstrates a judicial reluctance to give more than casual scrutiny to the substantive validity of regulatory instruments, it is by no means alone. One finds strikingly similar majority and minority attitudes in McEldowney v. Ford,[277] a decision of the House of Lords sitting on an appeal from Northern Ireland. This case involved a regulation made under the Civil Authorities (Special Powers) Act, 1922.[278] The statute was enacted to deal with the civil strife that plagues Northern Ireland to the present day and was typical of emergency powers legislation, conferring broad powers to

[276] 30-31 Vict., c. 3 (U.K.). See e.g. Reference re Anti-Inflation Act (1976), 68 D.L.R.3d 452 (S.C.C.).
[277] [1969] 2 All E.R. 1039 (H.L.).
[278] (1922), 12 & 13 Geo. V, c. 5.

make orders and regulations "for the preservation of peace and the maintenance of order."[279] The impugned regulation proscribed membership in "unlawful associations" and deemed these to include organizations that described themselves as "Republican Clubs or any like organization, howsoever described."[280]

The appellants had been charged with being members of a club called Slaughtneil Republican Club. At trial, the witnesses for the prosecution conceded that there was nothing seditious in the pursuits of the club so far as they were aware and the appellants were acquitted on the basis that the regulation applied only to seditious clubs. On appeal, the acquittal was overturned and, in their appeal to the House of Lords, the defendants attacked the vires of the regulation by contending that it was unreasonable, too vague and unrelated to the purposes specified in its enabling clause.

By a majority of 3-2, the House of Lords upheld the decision of the Court of Appeal and, in discussing whether the regulation came within its prescribed purposes, commented as well on the extent of the court's role in reviewing this question. The majority view construed this jurisdiction to be extremely limited in terms of the statute in question, asserting that the issues at stake were largely matters that

279 Ibid., ss. 1(1) and (3).
280 S.R.O. 1967, c. 42, reg. 24A.

the Minister of Home Affairs was best suited to decide.[281]

The following comments of Lord Pearson are typical:

> The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the "preservation of the peace and maintenance of order". Obviously it must have intended that the Minister of Home Affairs should decide that question. Who else could? He might consult other Ministers before making the decision, but it would be his decision. The courts cannot have been intended to decide such a question, because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere.[282]

On its face, this statement virtually eliminates judicial review of the scope of the powers in question. Yet, in the next paragraph, Lord Pearson indicated that he was not prepared to go quite this far:

> When the Minister has made a regulation, and purports to have made it under s. 1(3) of the Act, the presumption of regularity (omnia praesumuntur rite esse acta) applies and the regulation is assumed prima facie to be intra vires. But if the validity of the regulation is challenged, and it is contended that the regulation was made otherwise than for the specified purposes, the courts will have to decide this issue, however difficult the task may be for them in some circumstances.
>
> The ways in which an instrument may be shown to be ultra vires have been discussed in many cases, and I do not find it necessary to enter into such a discussion in this case. I shall assume that a regulation might be shown prima facie to be ultra vires (made otherwise than for the specified purposes) either by internal evidence from the provisions of the regulation itself--e.g., if it purported to render all chess clubs unlawful--or by external evidence of the factual situation existing at the

[281] See supra, n. 277 at p. 1058, per Lord Hodson; p. ,1061, per Lord Guest; p. 1065, per Lord Pearce.

[282] Ibid. at p. 1066.

time when the regulation was made.[283]

This passage demonstrates that Lord Pearson in fact considered whether the regulation was "for" the purposes prescribed in its enabling provisions. However, this consideration turned out to be minimal and was substantially skewed in favour of the validity of the regulation by the presumption of regularity. As "internal evidence" supporting the propriety of the regulation, he noted the recital in the preamble stating that it was "expedient that further provision for the preservation of peace and the maintenance of order should be made."[284] The importance of the recital sprang from the presumption of regularity and its particular application to written documents.[285] Thus, the "internal evidence" was virtually conclusive and one can only speculate on the amount of "factual evidence" that would have been necessary to controvert it.

The "factual evidence" considered by Lord Pearson consisted of the admissions of several prosecution witnesses that, so far as the police were aware, there was "nothing seditious" in the pursuits of the club of which the accused were members. Although he conceded that this evidence was relevant, he concluded that it was "far from sufficient to prove that the regulation . . . was made otherwise than for the specified purposes."[286]

283 Ibid.
284 Ibid.
285 See infra, pp. 124-136.
286 Supra, n. 277 at p. 1067.

Lord Pearson's judgement clearly illustrates the imposing character of the presumption of regularity in delegated legislation cases. It does not, however, indicate much about the process of relating regulatory instruments to prescribed purposes. Although none of the three law lords who sat in the majority discussed this process in any detail, Lord Hodson's characterization of the issue is telling. He framed the primary question as one of whether "the impugned regulation is capable of being related to the prescribed purpose."[287] This characterization weakens the strictness of the test of validity set out in the enabling legislation and, like that formulated by Spence, J. in the CKOY case, replaces the preposition "for" with the phrase "related to", a phrase that imports a somewhat looser connection between the regulation and the prescribed purpose.[288] Not surprisingly, then, Lord Hodson was satisfied that the regulation met his test on the basis of a connection between the word "republican" and seditious groups in Northern Ireland. The fact that the word was not exclusively used in relation to seditious groups seems not to have affected his opinion and what emerges from his decision is the same type of "aimed at" test as that employed by Spence, J. in CKOY, a test that demands minimal evidence, and, one suspects, is more often satisfied on judicial notice.[289]

The inadequacy of the majority's scrutiny of the

287 Ibid. at p. 1058.
288 Supra, n. 270.
289 See Appendix D.

Civil Authorities Act regulation in McEldowney is borne out in a comment written by D. N. MacCormick shortly afterward:

> Now let us recall that the official opposition party in Northern Ireland has as its objective the incorporation of the Province into the Irish Republic. All its constituency associations are presumably voluntary associations. Thus, the regulation as interpreted by Lord Pearson (and Lord Guest) must be taken to have the effect of rendering these associations unlawful. All that prevents the suppression of these associations is the discretion of the Attorney-General to withhold his consent to their prosecution; no doubt he will exercise that discretion appropriately. But the very notion that one-party rule could conceivably--saving the discretion of a Minister belonging to the party in question--be brought into existence by delegated legislation, is an alarming and remarkable one. And, in more general terms, it is not clear that a power which can legitimately be used to suppress violently revolutionary organisations explicitly named ought to be extended to cover large and indeterminate classes of organisations. Only the courts can stand between the citizen and such arbitrary extension of executive powers. If indeed a Minister believes that so wide a general proscription of clubs is required in the interests of peace and good order, is it too much to ask that he have it enacted after full and proper deliberation in a Parliament which has unquestioned power to take such a measure if it thinks fit?[290]

He went on to point out how startling was this result given its impact on fundamental civil and democratic rights.[291] For, if the courts are capable of intervening in the exercise of subjectively worded enabling powers,[292] it is, to say the least, odd that the majority should have given such a wide berth to a power that was not so worded. Indeed, the distinction

[290] D. N. MacCormick, "Delegated Legislation and Civil Liberty" (1970), 86 L. Q. Rev. at pp. 176-7.
[291] Ibid. at p. 180.
[292] See Appendix C.

between enabling clauses that are phrased in subjective rather than objective terms formed the basis for Lord Diplock's dissent. He formulated two levels of scrutiny for regulations made under purposive enabling powers. The first applied to subjectively worded powers and corresponded to the test applied by the majority. The second he applied to the regulation before him since the power in question was not amplified by any subjective phraseology. This test he stated as follows:

> To be valid their effect must be to promote the preservation of peace and the maintenance of order. I use the expression "effect" rather than "purpose" for purpose connotes an intention formed by the maker of the regulation to achieve a particular object, and substitutes for the objective test of the effect which the regulation is in fact likely to achieve, the subjective test of what effect the Minister himself whether rightly or mistakenly believes that the regulation is likely to achieve.[293]

In assessing the effect of the regulation, he granted that

> The Minister's belief in its necessity or expediency is cogent evidence of its validity but it is not conclusive and the ultimate decision whether or not the likelihood that it will achieve the effect described in the statute is sufficient to bring it within the words of delegation and whether or not it will have any effects which may be prohibited by those words is one for the court itself to make on the facts proved in evidence before it, or of such general public notoriety that the court may take judicial notice of them without further proof. What degree of likelihood is sufficient and to what extent the likely effect must be confined to that stated in the description are questions for the court itself to determine by construing the words of delegation in the light of the general object that the statute serves, the gravity of the mischief at which the subordinate legislation is aimed and the effect (if any) which it will have on otherwise lawful acts or property rights

[293] Supra, n. 277 at p. 1069.

> of citizens which neither cause nor contribute to that mischief.[294]

From this general statement of principles, Lord Diplock went on to narrow further the issue in the case before him, ultimately framing it in terms of whether the regulation proscribed conduct that did not constitute a threat to the "preservation of peace and the maintenance of order."[295] Ultimately, he concluded that

> In my view the words used by the Minister in the regulation are either too wide to fall within the description of the regulations which he is empowered to make under s. 1(3) of the Special Powers Act or are too vague and uncertain in their meaning to be enforceable.[296]

By narrowing the breadth of the Minister's power in McEldowney, Lord Diplock was able to insist on a very clear link between the regulation and its enabling purposes. This approach appears correct when one examines the cases upon which the majority relied in order to construe the Minister's powers broadly. One of their primary sources was the post-war case of A. G. Can. v. Hallett & Carey Ltd.[297] Here, the enabling legislation provided for the continuation of powers conferred under the War Measures Act[298] and delegated legislative powers in similarly subjective terms.[299] Commenting on this subjective terminology, Lord Radcliffe stated:

294 Ibid.
295 Ibid. at p. 1070.
296 Ibid. at p. 1073.
297 Ibid. at p. 1074.
298 [1952] A.C. 427 (P.C.).
299 (1914), 5 Geo. 5, c. 2.
Ibid., s. 2(1).

> How, then, can a court of law decide that the vesting was for another and extraneous purpose or hold that what the Governor in Council has declared to be necessary is not in fact necessary for the purposes stated?[300]

However, in taking this approach, he repeatedly emphasized the breadth of the enabling provisions.[301] It comes as some surprise, then to find Lord Hodson stating in McEldowney: "I do not find that the absence of a deeming provisions in this Act assists the argument one way or the other."[302] His judgement expressed no clear rationale for dismissing the relevance of this point and one can only infer that he found a substantial similarity between the legislation and the circumstances in McEldowney and Hallett & Carey. However, if he considered that the legislation and circumstances had an emergency character that required rule-making powers as broad as those usually granted under subjectively worded clauses, he ought to have said so.

The decisions in both CKOY and McEldowney underline the judicial wariness of stepping beyond the "legal sphere" into the "political sphere". Exactly what doctrine of the separation of powers lies beneath this wariness is very difficult to tell. However, it seems that most often the courts assign matters to the political arena as if their character as such were self-evident, belying the existence of any further procedural or substantive constraints.

300 Supra, n. 297 at p. 444.
301 Ibid. at pp. 449-50.
302 Supra, n. 277 at p. 1057.

In order to obtain a clearer picture of the substantive control exercised by courts in respect of delegated legislative powers, one must turn to cases where regulatory instruments were struck down. In these one finds what judges have considered to be "legal" limitations and can perhaps in a negative fashion determine how they establish the boundaries for their review.

Heppner v. Minister of the Environment[303] involved a land development regulation made under the Alberta Department of the Environment Act.[304] Subsection 15(1) empowered the Lieutenant Governor in Council to establish and regulate areas of land "for the purpose of" a number of enumerated environmental aims. By a series of orders in council and regulations, a narrow strip of land encircling the city of Edmonton and including land begonging to the appellant, was established as a "Restricted Development Area".

In the Court of Appeal, Lieberman, J.A. began his consideration of the matter by invoking the presumption of regularity and quoted the passage cited above from the judgement of Lord Pearson in McEldowney.[305] As evidence of the purpose of the regulatory instruments in question, Lieberman, J.A. considered two letters sent by the Department of the Environment to various parties interested in the land during the period leading up to its establishment as a development area. These explicitly stated that the purpose was that of "establishing

[303] (1977), 4 Alta. L.R. 2d 139 (C.A.).
[304] S.A. 1971, c. 24.
[305] Op. cit., n. 283.

a transportation corridor." In addition, he referred to a notice sent to the appellant advising of a hearing regarding an application for a permit to construct a pipeline across the land. On the basis of these documents, Lieberman, J.A. concluded that "the main and compelling purpose . . . was to create a transportation and utility corridor."[306] This done, he went on to note the apparent inconsistency between this purpose and that of protecting the environment, holding that the former could "have nothing but a detrimental effect to the R.D.A."[307] and did not fall within the enabling provisions.

What differentiates Heppner from the CKOY and McEldowney cases is the degree of rigour that Lieberman, J.A. held necessary to link the impugned regulations with the prescribed purposes. His comments on the reasons of the trial judge suggest this clearly:

> An analysis of the reasons of the learned chambers judge discloses that he fully appreciated that "regulations that can be passed by way of order in council must be regulations that are designed to further the purposes of the Act and not for some other purpose" and that he thereafter proceeded to hold that the regulation came "squarely within the purposes of the Act." I respectfully suggest that in order to come to this conclusion the learned chambers judge adopted the proposition that even if the regulation was passed for a purpose not falling within the powers specifically provided by the terms of the Act as long as it, even in a peripheral fashion, incidentally accomplished a purpose authorized by the Act, in this case a general advantage to the environment as a whole, it should not be declared invalid. With this propos-

[306] Supra, n. 303 at p. 150.
[307] Ibid. at p. 151.

ition I respectfully disagree.[308]

In Heppner, the court found that the regulation in question had been made for a purpose other than one prescribed in the enabling legislation. However, a decision of the Supreme Court of Canada demonstrates that identification of the purpose of a regulatory instrument is not always necessary in deciding that it is ultra vires. Rather, it may be struck down where a court considers that its purpose, whatever it may be, is not that prescribed in the enabling statute. Pacific Pilotage Authority v. Alaska Trainship Corp.[309] involved a regulation of the Pacific Pilotage Authority that imposed pilotage requirements on ships other than those specified in an exempting provision. The exemption turned on a number of conditions, one of which entailed nationality. The appellants, who owned a Liberian ship, contended, inter alia, that this condition was irrelevant to the object of shipping safety stipulated in the enabling provision. Writing a unanimous decision, Laskin, C.J.C. adopted the reasoning and conclusions of LeDain, J. in the Federal Court of Appeal. Essentially, the latter found that, while the nationality of a ship was not "wholly irrelevant" in assessing its safety,

> the essential factors bearing on safety of navigation, in so far as the conduct of the vessel is concerned, are the competency of the master or officer who has the conduct of the vessel and his knowledge of the local waters.[310]

[308] Ibid.
[309] (1981), 120 D.L.R. 3d 577 (S.C.C.).
[310] (1979), 104 D.L.R. 3d 364 (F.C.A.) at p. 383.

He then turned back to the exemption provisions and concluded that:

> the requirement of safety is assured by the other conditions specified therein concerning the competency of the master or deck watch officer and his experience with local waters, country of registration is a superfluous requirement and can only be there to serve some purpose not authorized by the Act.[311]

In the course of his decision, LeDain, J. dealt briefly with the role of the court in deciding whether nationality was relevant to shipping safety. After noting the conflicting opinions of several witnesses, he stated:

> In the final analysis this is not a question to be determined on the basis of expert opinion but is rather one that is a matter of construction for the Court, taking judicial notice of what it may perceive from shipping regulation to be the regulatory implications of nationality.[312]

The reference to judicial notice here substantiates the inference of its use in cases such as CKOY. However, Pacific Pilotage also suggests that, notwithstanding the comments of LeDain, J. regarding the limited function of expert witnesses, he must have been influenced by the evidence presented. This evidence pertained to the relevance of the nationality both to safety as well as to the economic position of pilots. In his judgement, LeDain, J. noted that the pilotage authority performed a dual function of regulating shipping safety and managing the provision of pilotage services. Several members of the authority were pilots and their interest in increasing

[311] Ibid. at p. 384.
[312] Ibid. at p. 383.

the number of ships that required pilots was obvious.[313] Thus, although LeDain, J. did not precisely determine the objects of the nationality requirement, it clearly could have been imposed for an economic purpose, not within the relevant enabling provisions.

In searching for an explanation of the differing approaches in the four cases examined above, one point seems clear: the variation has little to do with the wording of the relevant enabling clauses. The use of purpose clauses does not prescribe a given standard of review. Rather, the review appears to turn much more on the nature of the purposes in question and the regulatory subject matter. It is perhaps not coincidental that the two cases where the court intervened involved distinct proprietary interests, whereas the other two concerned much less economically related individual freedoms. The results may also be rationalized on the basis of judicial experience in the subject areas in question. The courts have long reviewed land use controls and admiralty matters, but

[313] Ibid. at p. 381, where Pratte, J. stated:

> In addition to one of the reasons given for rejection of the draft Regulations proposed by the federal authorities, to which reference has already been made, one may note an internal communication from one of the pilot members of the Authority to the Chairman on March 4, 1972 in which it was said, "How will the Pilots Committee react when they learn that you intend to hold an examination that is not in accordance with our recent agreement with them to hold an examination under existing by-laws? The introduction of Pilotage Certificates could surely be construed as a breach of our agreement, since it will immediately result in a loss of revenue to the Pilots. Food for thought!!"

have comparatively little experience in respect of the control of broadcasting or subversive activities.[314]

These hypotheses find considerable support in the area of municipal law. Here, the courts have frequently scrutinized the purposes of delegated legislation to determine whether they square not only with those expressed in the enabling legislation, but, more frequently, with those implied by the courts themselves. This end is most often achieved through the concept of bad faith which, in the municipal context at least, has been broadened well beyond matters of corruption or moral taint.[315] Bad faith has been held to arise in relation to zoning by-laws passed with the object of lowering property values in order either to lessen the cost of expropriation[316]

[314]Davis, op. cit., n. 115 at p. 520 lends support to this point in commenting:

> In the absence of a particular statute otherwise providing, courts avoid substitution of judgment for that of agencies on all questions except the kind of questions of law about which courts are generally better qualified than agencies. . . .

[315]See generally, A. Craig Lovgren "Bad Faith as a Ground of Nullity in Canadian Public Law" (1984), 18 Gazette 277; see too Re Bala Investments Co. Ltd. and City of Hamilton (1969), 5 D.L.R. 3d 696 (Ont. H.C.) at pp. 701-2; Re Hamilton Powder Co. and Gloucester (1909), 13 O.W.R. 661; Hollett et. al. v. City of Halifax (1975), 58 D.L.R. 3d 746 (N.S.S.C.) at p. 762 where Cowan, C.J.T.D. commented on City of Ottawa v. Boyd Builders Ltd. (1965), 50 D.L.R. 2d 704 as follows:

> In my opinion, it is quite clear from the decision of Spence, J. that the expression "bad faith" is used in the sense of acting otherwise than with frankness and impartiality. It seems clear that bad faith should not be confined, as was submitted by counsel for the defendants on the hearing before me, to cases where there is corruption, such as bribery or some pecuniary interest in members of the Council.

[316]See Corporation of District of North Vancouver Zoning By-law 4277 [1973] 2 W.W.R. 260 (B.S.S.C.); Barrett Lumber Co. v. Halifax (County) (1975), 19 N.S.R. 2d 594 (T.D.).

or to punish a developer for delays in its development.[317] In addition, the courts have in some cases inferred bad faith on the basis of a municipal authority's course of conduct in enacting a by-law with inordinate haste, without notice to those vitally affected[318] or after giving contrary assurances to interested parties.[319] Finally, conclusions of bad faith are very often implicated with allegations of discrimination, such that the narrowness or apparent impartiality of a by-law will hasten such conclusions.[320]

The municipal cases demonstrate an unquestionably greater tendency toward judicial intervention on purposive grounds than one finds in CKOY or McEldowney. In addition to the reasons of familiarity of subject matter and the prominence of proprietary interests, a further basis for this distinction may arise from the character of municipal authorities. These have been considered, and no doubt often are, less sophisticated than ministerial authorities and more prone to pressure from local interest groups. Municipal government statutes typically set out in great detail the delegated legislative powers of

317 See Muskoka Mall Ltd. v. Town of Huntsville (1979), 3 M.P.L.R. 279 (Ont. H.C.).

318 See Hollett, supra, n. 315; Re Maurice Rollins Construction Ltd. and South Fredericksburgh (1975), 11 O.R. 2d 418; Capital Regional District v. Saanich (1980), 115 D.L.R. 3d 596 (B.S.S.C.); Thurlestone Co-op v. Scarborough (1981), 15 M.P.L.R. 240 (Ont. Div. Ct.); Boyd Builders, supra, n. 315.

319 Carrieres T.R.P.Ltee. c. Mirabel [1978] C.S.769 (C.A.); but see too Re Cambridge Leaseholds and City of Toronto No. 2 (1973), 37 D.L.R. 3d 60 (Ont. H.C.).

320 See Boyd Builders, supra, n. 315; Thurlestone, ibid.; Hollett, supra, n. 315.

these bodies, reinforcing further the notion that they need to be restrained more strictly.

On close examination these reasons hardly seem sufficient. If familiarity is an obstacle, then the answer surely is to inquire and learn more about the subject matter. The proprietary interest rationale is not much more impressive, particularly in a jurisdiction that has recently adopted a charter of rights and freedoms that does not mention property rights. Finally, the meaner estate of municipal authorities carries with it generally closer electoral checks than those found with more august delegated legislative bodies, counterbalancing the factors mentioned above.[321]

The inconsistency in the judicial scrutiny of the purposes for which powers of delegated legislation are exercised appears most striking when one considers the evidentiary issue of onus of proof. The importance of this issue is clear from the analysis of the four cases discussed above. In Heppner, the proof necessary to strike down the regulation in question came from the mouth of the department responsible for it.[322] In Pacific Pilotage, there was presented a good deal of expert testimony and grounds for improper purpose were easily suggested by the inherent economic bias of the members who constituted the authority. By constrast, the evidence of purpose in CKOY

[321] See McGill v. City of Brantford, supra, n. 245.

[322] For a further example of the same type of situation, see Re Kirkpatrick and District of Maple Ridge (1981), 119 D.L.R. 3d 598 (B.S.S.C.); and Re Apotex Inc. and A.G. (Ont) (1984), 47 O.R. 2d 176 (H.C.).

and McEldowney was exceedingly sparse and the delegated legislative authorities in each case were not compelled to disclose their purposes. This situation has much to do with the presumption of regularity noted above in the discussion of McEldowney and it may be useful at this point to examine it in some detail.

Division B - Presumption of Regularity

In the context of delegated legislation, this presumption is a device for protecting discretionary powers from judicial review. Although most often characterized as merely "prima facie", it assumes formidable proportions in this rarefied atmosphere where substantial evidence tends not to be available. The presumption has descended from the maxim omnia praesumuntur rite esse acta and it is widely applied as a rule of evidence.[323] Much of its rationale lies in the view that "The wheels of business will not go round unless it is assumed that that is in order which appears to be in order."[324]

Before examining the manner in which the presumption of regularity has been applied, it is first necessary to sketch out its relationship to burdens of proof. These are characterized by Sir Rupert Cross as being of two distinct sorts. The first is known as the "evidential burden" that relates to putting in issue the existence or non-existence of a particular fact.[325] The second is known as the "legal burden" and entails weighing

[323] See e.g. Halsbury's Laws of England, 4th ed., vol. 17 (London: 1976) at para. 118.

[324] Morris v. Kanssen [1946] A.C. 459 at p. 475 per Lord Simmonds. Much the same attitude is expressed in the leading American case, Bank of U.S. v. Dandridge (U.S.) 12 Wheat. 64; 6 L.Ed. 552. Here, Justice Story characterized the presumption as being "for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property."

[325] Sir Rupert Cross, Cross on Evidence, 5th ed. (London: 1979) at pp. 817-8.

all of the evidence on an issue at the end of a case.[326] Corresponding to each of these burdens are two further burdens of proof used to characterize the process by which burdens shift from one party to another during a trial. Thus, the "provisional burden" is seen as that cast upon a party when his opponent has adduced evidence that, when taken alone, satisfies the evidential burden on a given issue. In turn, the "ultimate burden" is that arising when one's opponent has adduced evidence that, taken alone, satisfies the legal burden.

With these burdens in mind, the function of the presumption of regularity as a device for heightening the probative value of evidence becomes apparent. Cross illustrates this effect by citing a case where the court applied the presumption in resolving the issue of whether traffic signs had been properly erected:

> As a matter of common sense, the mere erection of traffic signs might not be thought to amount to presumptive evidence of compliance with the relevant statutory provisions, but the legal force of the presumption is such that it casts the evidential burden of disproving compliance on the opponent of this fact.[327]

Presumptions can apply either to evidential or legal burdens of proof and "the substantive law determines the amount of counter-evidence that is required."[328] In the

[326] Ibid.
[327] Sir Rupert Cross, Cross on Evidence, 4th ed. (London: 1974) at p. 79.
[328] Cross, op. cit., n. 325 at pp. 93-4.

context of the presumption of regularity, then, one must determine to which burden of proof it applies: must a person attacking the regularity of an official act disprove its regularity on a balance of probabilities at the end of the case, or must he merely raise the issue?

Professor Cross begins his discussion of the incidence of burdens of proof by asserting that "it is only possible to lay down a few vague rules" and concludes in much the same vein:

> the incidence of the legal burden of proof can only be ascertained by consulting the precedents concerned with the various branches of the substantive law.[329]

When, however, one turns to the administrative case law to resolve this issue, Professor Wade paints a similar picture:

> Where the validity of an administrative act or order is attacked, the incidence of the burden of proof may vary with the circumstances. The burden of proof naturally lies in the first instance upon the plaintiff or complainant. Whether he can transfer it to the defendant public authority depends upon the nature of the act.[330]

He goes on to outline the judicial treatment of this issue in several respects, suggesting that, where an official act would, if not statutorily sanctioned, constitute a trespass or wrongful injury, "the burden of proof then passes to the public authority, which has to show justification."[331] However, Wade qualifies this principle substantially by stating

329 Ibid. at p. 94.

330 H. W. R. Wade, Administrative Law, 5th ed. (London: 1981) at p. 304.

331 Ibid.

further on:

> Where, on the other hand, the administrative act is some decision or order which in itself inflicts no legal wrong the complainant's task will be to raise a prima facie case of irregularity, and burden of proof lies upon him. This is equally so where there is an invasion of his liberty or property but he alleges not that the statutory conditions are not satisfied but that there is some ulterior defect, for example bad faith.[332]

Finally, he concludes:

> An administrative authority cannot therefore be put to proof of the facts or conditions on which the validity of its order must depend, unless the party attacking it can first produce evidence which will shift the burden of proof off his own shoulders. How much evidence is required for this purpose will always depend upon the nature of the case. If an order has an apparent fault on its face, the burden is easily transferred. But if the grounds of attack are bad faith or unreasonableness, the plaintiff's task is heavier. So it is also where the authority must be satisfied of something or form some opinion.[333]

In these passages it seem clear that Wade is discussing the evidential burden of proof. However, when one examines closely the cases he cites, the burden often appears to be legal and is much heavier than a prima facie case. In one such case involving a wartime order that placed a colliery under the control of the Minister of Fuel and Power, Lord Greene stated:

> It is a settled principle, in dealing with documents of this kind, that the rule of omnia rite esse acta is to be applied and, therefore, when it is stated by the Ministry in the proper way that it appears to the Minister of Fuel and Power that certain things are so, it is to be taken that that

[332] Ibid. at p. 305.
[333] Ibid. at p. 306.

> is an accurate statement unless and until the contrary is proved. (emphasis added)[334]

When Lord Greene considered the evidence, the impossibility of meeting this burden became apparent. He construed the subjectively worded enabling provision to make the Ministry the "judge of the adequacy of the evidence before it."[335] The applicants could not of course present any other evidence than that which had been before the Minister; evidence of the reasons that actually lay behind the order was obviously impossible to obtain since these were known only to the Minister who had conveniently chosen to call no evidence and with equal convenience could have claimed crown privilege, in order to fend off a subpoena or an order for production of documents.[336]

An attitude similar to that expressed by Lord Greene is found in another wartime case involving a detention order: R. v. Secretary of State, ex.p. Greene.[337] Here the court recognized crown privilege, limiting the scope of its review on the basis that the matters relevant to making the order were of a highly confidential character and, in the interests of state security, ought not to have been revealed in court. Scott, L.J. stated:

> . . . the answer is equally plain on the broad grounds of national interest stated in R. v. Halliday, ex. p. Zadig[338] which we ought to presume guided

[334] Point Ayr Collieries v. Lloyd-George [1943] 2 All E.R. 546 at p. 547.

[335] Ibid.

[336] See Appendix E. This privilege does not exist in relation to authorities other than the Crown, e.g. municipal councils. McGillivray v. Twp. of Cornwall (1977), 18 O.R. 2d 283 (C.A.) and Re H.G. Winton (1978), 20 O.R. 2d 737 (D.C.) demonstrate the greater ease of securing evidence of purpose in such cases.

[337] [1941] 3 All E.R. 104.

[338] [1917] A.C. 260.

> the present delegated legislation of His Majesty in Council. The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action, by an executive Minister of the Crown who occupies a position of the utmost confidence, who has at his disposal much secret information which ought not to be made public--above all during a war--who is under a duty to keep that information and its sources secret, and, finally, who cannot be compelled in any court to divulge what he considers ought not, in the national interest, to be divulged. All the King's courts recognise that inhibition and enforce it.[339]

As another ground for his decision, Scott, L.J. made a distinction between "objective" and "subjective conditions precedent to the exercise of a power. Thus, he held that the requirement in the enabling provision that the Minister have "reasonable cause" was subjective and not susceptible to judicial scrutiny.[340] He appears to have used this distinction as a means of avoiding an earlier habeas corpus decision of the Judicial Committee of the Privy Council, delivered by Lord Atkin in Eleko v. Officer Administering the Government of Nigeria.[341] In this case, an order had been made under a Nigerian ordinance[342] requiring a tribal chief to leave a certain area of the country. He challenged the order, alleging that three conditions precedent required by the ordinance

339 Supra, n. 337 at p. 109.

340 Ibid. at pp. 109-10. The gist of the distinction is not altogether clear from the judgement of Scott, L.J. but it appears to be as follows: a subjective condition precedent involves the state of mind of a given person (i.e. the rule-making authority) while an objective condition precendent involves an observable fact.

341 [1931] All E.R. Rep. 44 (P.C.).

342 Nigerian Deposed Chiefs Removal Ordinance, No. 59, 1917; Laws of Nigeria, 1925, c. 78.

had not been met. The reviewing courts in Nigeria held that the issue of whether the conditions had been met was a matter to be decided exclusively by the executive officer who made the order.

Lord Atkin firmly rejected the views of the Nigerian courts[343] and most of his decision was devoted to establishing the jurisdiction of the court to investigate the existence of the conditions precedent. However, the resulting order of the court went somewhat further and not only sent the matter back to Nigeria for a re-hearing, but in addition required the respondent to "show cause why a writ of habeas corpus should not issue" upon the ground that the conditions precedent had not been met. Although the decision contained no discussion of the burden of proof, the court seems to have been satisfied that the evidential burden had been discharged[344] and accordingly placed the legal burden on the respondents.

[343] Supra, n. 341 at p. 49 where Lord Atkin stated:

> Their Lordships are satisfied that the opinion which has prevailed that the courts cannot investigate the whole of the necessary conditions is erroneous. The Governor, acting under the Deportation Ordinance, acts solely under executive powers, and in no sense as a court. As the executive, he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

[344] Ibid. at p. 51 where Lord Atkin referred to the affidavits and oral evidence taken in the case.

Although in Greene Scott, L.J. distinguished Eleko on the basis of the objectivity of the conditions precedent in the latter case, Goddard, L.J. was not similarly inclined. He did not consider the passage cited above from Eleko[345] to mean:

> that, where the executive has detained a person under statutory authority . . . he can, merely by saying, "I don't know why I have been detained," oblige the executive to prove that every condition necessary to the making of the order has been fulfilled. In my opinion, once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for the making of the warrant or order do not exist.[346]

The apparent conflict between the result in Eleko and the dicta of Goddard, L.J. can perhaps be resolved if one views the former as dealing with the legal burden and the latter with the evidential burden.[347] Yet, as in Point Ayr Collieries, the weight of the burden applied by Goddard, L.J, was such as to make it appear much more like the legal burden.

The inconsistency between Eleko and Greene has most recently been resurrected in a number of immigration cases in the U.K.[348] Most of these adopt the attitude found in the latter, reinforcing the breadth of discretion conferred on immigration officers with a virtually incontrovertable burden of proof. However, under an earlier piece of legislation

345 Supra, n. 343.
346 Supra, n. 337 at p. 119.
347 This approach seems to have been adopted by Lord Parker, C.J. in R. v. Governor of Brixton Prison, ex. p. Ahsan [1969] 2 All E.R. 347 (Q.B.D.).
348 See infra at pp. 132-3.

the Divisional Court in R. v. Governor of Brixton Prison; ex. p. Ahsan[349] adopted instead the approach of Lord Atkin in Eleko and used the distinction between objective and subjective conditions precedent to avoid Greene. Both of the majority judgments stressed the importance of protecting the freedom of individual citizens, an importance that clearly seems to have lowered the threshold for shifting the evidentiary burden.[350]

In the sphere of immigration law in the U.K., Ahsan has had very little impact in subsequent cases. In Re Wajid Hassan,[351] it was distinguished as applying only to cases involving British citizens, as opposed to aliens. On this basis, the court seems to have held that the discretion to refuse entry vested in immigration officers was greater in Hassan and required the protection of a heavier burden of proof.[352] A similar result has obtained in a number of other such cases,[353] clearly affirming the link between the application

[349] Supra, n. 347.

[350] See Appendix F.

[351] [1976] 2 All E.R.123 (Ch.D.).

[352] Ibid. at p. 130 where Lord Widgery, C.J. stated:

> The gaoler's return is good on the fact of it. The gaoler said: 'I detain this man by virtue of an order under paragraph 16 of Schedule 2 of the Act of 1971'. Therefore it seems to me the onus is on the applicant to show a prima facie case that his detention is illegal and for reasons I have already given I am satisfied that that onus is not discharged and therefore the proper course here is to say that habeas corpus should not go and I would refuse the application.

[353] See e.g. R. v. Secretary of State, ex. p. Mughal [1973] 3 W.L.R. 647 (C.A.); R. v. Secretary of State, ex. p. Choudary [1978] 3 All E.R. 790 (C.A.); R. v. Secretary of State, ex. p. Hussain [1978] 2 All E.R. 421 (Q.B.D.).

of the presumption of regularity and the breadth of discretion vested in the official whose action is under review.

The habeas corpus cases present in stark relief both the effects of a more stringent burden of proof as well as one of the principal factors in determining its weight: the status of the applicant. The U.K. courts have demonstrated a good deal of chauvinism in exercising far greater concern over the freedom of citizens as opposed to aliens.[354] If the freedom of citizens has commended considerable respect in the courts, then so too their bank accounts. In Minister of National Revenue v. Wright's Canadian Ropes Ltd.[355] the Judicial Committee of the Privy Council struck down a taxation determination by the Minister since it was "unable to find . . . any material on which the determination of the appellant could lawfully be founded."[356] The decision turned largely on the absence of evidence to support the Minister's determination, as the following comments demonstrate:

> The Appellant has not chosen to produce any evidence as to these alleged matters, and their Lordships are quite unable to assume in the appellant's favour that he had before him sufficient facts to support his determination when he neither condescends to state what those facts were nor attempts to prove that any such facts were in truth before him.[357]

These conclusion are surprising, coming as they did in the

[354] See too Hosenball, supra, n. 92.
[355] [1947] A.C. 109 (P.C.).
[356] Ibid. at p. 124.
[357] Ibid.

face of a subjectively worded enabling clause[358] and after the court's statement that "it is for the taxpayer to show that there is ground for interference."[359] However, it is clear that, whether legal or evidential, the burden of proof on the taxpayer in this case was substantially less than that on the applicants for writs or habeas corpus in Greene and the immigration cases.

In the context of delegated legislation, there is little discussion of the application of the presumption of regularity. However, where it is discussed, great emphasis is usually placed on the difficulty in displacing it.[360] However, a most interesting twist occurs in the context of zoning by-laws that purport to prohibit construction in respect of which an application for a building permit has previously been made. In Ottawa v. Boyd Builders Ltd.[361] the Supreme Court of Canada unanimously ruled that the municipality has the onus of proving "that it has a clear zoning plan upon which it was proceeding in good faith" at the time of the application for the building permit.[362] The basis for the decision lay in the court's recognition of the builder's "common

[358] The Income War Tax Act. R.S.C. 1927, c. 97, s. 6(2):

> The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer.

[359] Supra, n. 355 at p. 122.

[360] See Heppner, supra, n. 303 at p. 147; McEldowney, supra, n. 277 at p. 1060; Newell County v. Standard Gravel & Surfacing of Canada Ltd. [1954] 2 D.L.R. 848 (Alta. C.A.).

[361] (1965), 50 D.L.R. 2d 704 (S.C.C.).

[362] Ibid. at p. 707.

law right" to a building permit and corresponds precisely to the rationalia propounded above in explaining the distinctions in the degree of judicial scrutiny of purposive enabling clauses.[363]

From the cases examined above, one can conclude that the strength of the presumption of regularity is directly related to the breadth of the discretionary power in issue. The presumption appears to weaken in the areas of individual liberty, taxation and property rights, where courts are traditionally circumspect of governmental action. Nevertheless, if an enabling power is construed broadly enough, such action even in these areas will, through the presumption, become virtually impervious to attack and render judicial review negligible.[364] Although the courts clearly need a mechanism such as the evidentiary burden of proof to weed out frivolous cases, they often seem to ignore the fact that the authority exercising a delegated power is usually in the best position to demonstrate whether it has met the conditions precedent to its exercise of power.[365] This is particularly true where the purposes of an instrument of delegated legislation are in issue.

The presumption of regularity is most crucial in cases where the courts find few other tools to resolve questions

363 Supra, pp. 119-23; see too George Elliott, "Case Comment: City of Ottawa v. Boyd Builders Ltd." (1967), 5 O.H.L.J. 94.
364 See Lloyd-Jones, loc. cit., n. 99.
365 See K. C. Davis, Administrative Law of the Seventies (Rochester: 1976) at p. 675.

arising on the substantive review of delegated legislation. This is precisely the situation in the cases examined up to this point. Accordingly, I now propose to consider how a number of rules of statutory interpretation are invoked to relieve this arid situation.

Division C - Rules of Statutory Construction

There are a number of interpretive rules that may be applied to the construction of enabling clauses. Although these rules are nearly always treated as separate heads of scrutiny, such an approach tends to obscure their interconnection. For the most part, they can be consolidated as a single rule of strict construction applicable to provisions in instruments of delegated legislation that, broadly speaking, disturb the status quo. Typically, this involves interference with "rights" and principles recognized at common law[366] or by statute.[367] The effect of the rule of strict construction is to require clear enabling authority. Any ambiguity about whether an enabling provision authorizes interference with established rights or principles is to be resolved in favour of the individuals who stand to benefit from them.

The rights and principles that trigger the rule of strict construction range from firmly entrenched property rights[368] to somewhat

[366]See e.g. Mullan, op. cit., n. 293, Appendix C at p. 3-186 where he comments:

> Stated more generally, there is a presumption against construing empowering legislation to allow interference with existing rights by subordinate legislation. This must, however, be balanced against the requirements of the federal and Ontario Interpretation Acts that all legislation is to be given a purposive interpretation.

[367]See Pearce, op. cit., n. 165 at pp. 178-9, 182ff; Re Stilling (1961), 28 D.L.R. 2d 102 (B.S.S.C.); R. v. Alaska Pine and Cellulose Ltd. (1960), 24 D.L.R. 2d 241 (S.C.C.); and Division D of this Part.

[368]See R. Dussault, Traité sur le droit administratif (Québec: 1974) T. I, p. 805; Garant, op. cit., n. 18 at p. 300; but see too Hallett & Carey, supra, n. 297 demonstrating that property rights are not absolutely sacrosanct.

less clearly defined notions involving natural justice[369] or undertakings not otherwise constrained by the law.[370] One should note, however, that there are limits on the willingness of the courts to recognize novel or previously undefined "rights" and that these may either not be recognized or be subordinated to other rights that an instrument of delegated legislation seeks to protect.[371]

The development of this rule of construction should hardly be surprising given the judicial suspicion of legislative encroachments on the common law, a suspicion that arose and flourished with the growth of legislative activity in the

[369] See Joplin v. Chief Constable of Vancouver Police Department et. al. [1985] 4 W.W.R. 52 (B.S.C.A.) involving a regulatory instrument that denied the right to counsel at a disciplinary hearing; Commissioners of Custom and Excise v. Cure & Deeley Ltd. [1961] 3 All E.R. 639 (Q.B.D.): access to the courts; Garant, ibid. at p. 315; Dussault, ibid. at p. 802; Pearce, op. cit., n. 165 at pp. 121, 179 and 188.

[370] See e.g. Re Prince Edward Island Retail Gasoline Dealers Association and Public Utilities Commission (1981), 12 D.L.R. 3d 141 (P.E.I.S.C.): regulation setting the hours of operation of gasoline stations; Re Weir et. al. and the Queen (1979), 102 D.L.R. 3d 273 (Ont. Div. Ct.): by-law requiring shop owners to prevent patrons from smoking; Re Dantex Woolen Co. Ltd. and Minister of Trade and Commerce (1979), 100 D.L.R. 3d 436 (F.C.T.D.): restriction of importation of goods. At p. 443, Addy, J. stated:

> Finally, where a statute restricts a basic right recognized by common law and is capable of two interpretations, the strict interpretation, that is, an interpretation against the restriction and in favour of the citizen must be given the statute. Since such a rule of interpretation is used against enactments by Parliament, it must apply a fortiori against legislative enactments of the Governor in Council, which complete restrictive legislation.

See too Dussault, op. cit., n. 98 at p. 810; Pearce, op. cit., n. 165 at p. 176.

[371] See e.g. Re Weir, ibid. at pp. 278-81.

nineteenth century.[372] In addition, virtually all cases where the validity of delegated legislation is challenged, apart from enforcement proceedings, are instituted by individuals who claim infringement of their "rights".[373] This results not only from the private interests that usually underlie such actions, but also from the fact that, since the law is cast almost exclusively in terms of rights and obligations, the courts are loathe to entertain an action unless infringement of one of the plaintiff's rights can be put in issue.[374] That this reluctance has receded to some extent in recent years[375] does not alter the traditional and still dominant concept of courts as places for the adjudication of rights, a concept that has most recently been affirmed in The Queen v. Operation Dismantle.[376]

Since the nineteenth century, the rule of strict construction stated above has weakened somewhat in the face of growing judicial acceptance of regulatory activity. Provisions

[372] See Loughlin, op. cit., n. 2.

[373] For a discussion of what this concept constitutes, see T. M. Benditt, Rights (Rowman and Littlefield, Ottawa: 1982).

[374] This point is amply borne out in relation to entitlement to natural justice: see Pue, op. cit., n. 231 at pp. 42-54.

[375] The "trilogy" of standing cases, Thorson v. A.G. Can. [1975] 1 S.C.R. 138; N.S. Board of Censors v. McNeil [1976] 2 S.C.R. 265; and Minister of Justice v. Borowski (1982), 130 D.L.R. 3d 588 (S.C.C.) demonstrate how, in the context of standing to sue, the Supreme Court has not strictly enforced the rights requirement. Hence, it has recognized that a challenge to the validity of legislation by a publicly spirited citizen should not be frustrated merely because no other individual would or could bring the action for infringement of a "right" as that term is traditionally defined.

[376] Supra, n. 12.

in interpretation statutes for the "fair, large and liberal"[377] construction of legislation finally seem to be gaining a hold on the interpretive process.[378] This is not to say that the courts are no longer vigilant for incursions on individual rights; rather, they are quicker to recognize legislative intention to control previously unregulated activities more extensively than before.[379] The modern trend appears to require individual "rights" to be better defined and more entrenched in order to survive provisions in delegated legislation. Thus, the rule of strict construction primarily finds its application in relation to delegated legislation that purports to do the following:

(a) impose fees,[380] taxes,[381] or penalties;[382]

(b) regulate matters outside the territorial jurisdiction of the delegating authority;[383]

(c) alter provisions established in primary legislation;[384]

[377] Interpretation Act, R.S.C. 1970, c. I-11, s. 11.

[378] See R v. Budget Car Rentals Ltd., supra n. 253 at p. 115; Re Gossner and Regional Assessment Commissioner (1983), 148 D.L.R. 3d 643 (Ont. Civ. Ct.); N.B. Liquor Corp. v. C.U.P.E. (1983), 48 N.B.R. 2d 229 (Q.B.).

[379] See e.g. CKOY, supra n. 270.

[380] See Pearce, op. cit. n. 165 at p. 164.

[381] See Pearce, ibid. at p. 188; Dussault, op. cit. n. 98 at p. 571; Garant, op. cit. n. 18 at p. 316; Gruen Watch Co. v. A.G. (Can.) [1950] 4 D.L.R. 156 (Ont. H.C.).

[382] See Pearce, ibid. at pp. 158, 177; Dussault, ibid. at p. 574; Garant, ibid. at p. 317; Morguard Properties Ltd. v. City of Winnipeg (1984), 6 Admin. L.R. 206 (S.C.C.). However, as Driedger, Construction op. cit. n. 260 at pp. 205-6 points out, the strict approach is now giving way to a more liberal interpretation of taxing statutes, as in Gossner, supra n. 378 and Stubart Investments Ltd. v. The Queen (1984), 53 N.R. (S.C.C.).

[383] See Sharlmark Hotels and Municipality of Metropolitan Toronto (1981), 32 O.R. 2d 129 (Div. Ct.) at p. 137; Pearce, ibid. at p. 291

[384] Discussed infra at pp. 143ff.

(d) regulate in a retroactive[387] or discriminatory[388] fashion.

The effect of strict construction in cases dealing with these types of delegated legislation is to require clearer and more precise enabling authority.[389] Many such cases arise in relation to general or ancillary purpose clauses that are often construed to permit only "procedural", as opposed to substantive instruments of delegated legislation.[390] Although this distinction is often elusive, it indicates a judicial attempt to tighten the ambit of powers of delegated legislation through strict construction.

Essentially, the invocation of strict construction entails comparing the purport of an instrument of delegated legislation to the pre-existing legal framework into which it is to fit. This framework consists of individual rights

[387]See Pearce, op. cit., n. 165 at p. 292; Dussault, op. cit., n.98 at p. 566 ; Garant, op. cit., n. 18 at p. 299; R.F. Reid and H. David, Administrative Law and Practice 2d ed. (Toronto: 1978) at p. 204.
[388]See infra at pp. 163-6.
[389]See Mullan, op cit., Appendix C at p. 3-186.
[390]See e.g. A.G. Can. v. Public Service Staff Relations Board [1977] 2 F.C. 663 (C.A.).

and obligations. Where changes in these are substantial, scrutiny of the instrument in terms of its enabling authority will be more intense and more precise terminology will be demanded to validate it.[390.1] This is perhaps most clearly exemplified in relation to instruments that attempt to alter the effect of provisions in primary legislation.

390.1 P.A. Cote, The Interpretation of Legislation (Cowansville:1984) at pp. 403-412 characterizes this as the "presumption of stability" while Driedger, op. cit., n. 260 at pp. 211-4 calls it the "presumption that the Legislature does not intend to make any substantial alteration to the law beyond what it explicitly declares."

Division D - Delegated Legislation that Alters Primary Legislation

The exercise of any delegated legislative power has an impact on the effect of primary legislation in so far as its function is to flesh out and complete a legislative scheme. What the courts have found objectionable are instruments of delegated legislation that do so by tampering with provisions in primary legislation that they consider to be complete already. This has been held to occur where such instruments either define terms used in their enabling statute or impose on a given activity requirements that are additional to those already imposed by statute. In the definitional cases, the courts have employed two co-related arguments to support the conclusion of legislative completeness: first, that the definition constitutes an attempt to amend the parent legislation and therefore usurps the role of the enabling authority; second, that the definition impinges upon the role of the courts as the ultimate interpreters of the law.[391] Where additional requirments are contained in a regulatory instrument, their invalidity seems to depend on similar arguments. If, however, one examines the cases in which these arguments were put forward, their superficiality becomes apparent. For, as noted above, every exercise of a rule-making power has an effect on and, in this

[391] See Trans-Canada Pipe Lines v. Provincial Treasurer of Saskatchewan (1968), 67 D.L.R. 2d 694 (Sask. Q.B.); Pulp and Paper Workers of Canada et al. v. A.G.B.C., 67 D.L.R. 2d 378 (B.C.S.C.); McLeod v. Egan (1974), 46 D.L.R. 3d 150 (S.C.C.); Bell v. Ontario Housing Corporation (1971), 18 D.L.R. 3d 1 (S.C.C.).

sense, constitutes an amendment of the enabling statute or an interpretation of the policy contained in it. Hence, one must search further for more substantial reasons.

In determining whether an instrument of delegated legislation improperly defines a term or imposes a requirement, one must obviously consider first the terms of the relevant enabling provision. If an authority is given an express power to define a specific term, the courts are unlikely to interfere merely on the basis that it is used to alter its generally understood meaning and thereby narrow or broaden the effect of the enabling statute.[392] In addition, the infamous "Henry VIII" clauses demonstrate that a broadly enough worded enabling provision can be interpreted to permit statutory amendment

[392] See Re Warwick and Minister of Community and Social Affairs (1978), 91 D.L.R. 3d 131 (Ont. C.A.).

through delegated legislation.[393] However, their impact has now been somewhat vacated through judicial glosses on their meaning[394] and in cases involving the definition of statutory terms in delegated legislation, the courts have generally been undeterred by them.[395]

Perhaps the best example of this occurs in Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan.[396] This case involved a taxation statute that empowered Saskatchewan's Lieutenant Governor in Council to make regulations "defining any expression used in this Act and not hereafter defined."[397] The power was reinforced with a provision stating that the "regulations shall have the same force and effect as if enacted

[393] Like the process of statutory construction in general, the determination of whether a regulatory instrument conflicts with its enabling statute must begin with the relevant enabling clause. For, a conflict of any kind can be virtually eliminated through the use of a broad enough enabling provision. The "Henry VIII" clauses (also known as "C. D. Howe clauses" in the Canadian Department of Justice in the late 1940's and early 1950's) provide that regulatory instruments "have effect as if enacted in this Act" (for a discussion of this clause, see Pearce, op. cit., n. 165 at p. 175; Garant, op. cit., n. 18 at p. 305; Institute of Patent Agents v. Lockwood [1894] A.C. 347; Minister of Health v. The King ex. p. Yaffe [1931] A.C. 494; Trans-Canada Pipe Lines, supra, n. 391; John Willis, The Parliamentary Powers of English Government Departments (Cambridge: 1933) at p. 22. Similar phrases, also discussed in the authorities cited above are to the effect that a regulatory instrument "shall be conclusive evidence that all the requirements of the Act have been complied with" or that the instrument "shall not be questioned in any legal proceedings whatever." The Yaffe and Trans-Canada Pipe Lines cases demonstrate, however, the judicial ingenuity in circumventing the "as if enacted" phrase.

[394] Yaffe, ibid.

[395] See Trans-Canada Pipe Lines, supra, n. 391.

[396] Ibid.

[397] Education and Hospitalization Tax Act, R.S.S. 1953 c. 62, s. 33(2)(f).

by this Act."[398] Under these provisions, the Lieutenant Governor in Council made a regulation defining "natural gas" as "natural gas used for fuel in homes and buildings,"[399] thus narrowing a statutory tax exemption relating to natural gas.

Disberry, J. held the regulation to be ultra vires by casting the power to define in terms of stating "qualitative" aspects of a subject and characterizing the regulation as an attempt to amend the statute:

> It is inconceivable that when the Legislature had itself specifically exempted certain things from the provisions of the Act, that the Executive Council by means of Regulations passed by Orders in Council under the guise of merely defining expressions in the Act, could validly reduce to whatever extent they desired, the proper scope and ambit of a statutory exemption. The anticipated effect of the purported "definition" would be to amend s. 6 by reducing the statutory exemption of natural gas to only such as was used for fuel in homes and buildings, and thus open the door to the Treasury Department to tax natural gas otherwise used, including that used in the operation of internal combustion engines and turbines. No power to diminish or otherwise affect the scope of the statutory exemptions was delegated to the Lieutenant Governor in Council by s. 33.[400]

In reaching these conclusions, however, Disberry, J. seems not to have realized that even a "qualitative" definition would have had precisely the same impact in altering the scope of the exemption. Hence, the real basis for his decision must rest elsewhere, most probably in both the nature of the legislation as a taxation statute[401] as well as in terms of

398 Ibid. at s. 33(3).
399 O.C. 1041/60; 56 Sask. Gaz. at p. 570.
400 Supra, n. 391 at pp. 704-5.
401 Op. cit., n. 381.

the enabling provisions. These were circumscribed by a purpose clause: "For the purpose of carrying into effect the provisions of this Act according to their true intent or of supplying any deficiency therein . . ."[402] This clause makes clear the ancillary nature of the delegated legislative powers in question and suggests that, although intended as a device for making minor adjustments to the legislation, they were not intended to be used to cut down an exemption in a substantial fashion.[403] Exactly when minor adjustments become substantial alterations is a question to be determined by appreciating the practical circumstances in which an instrument of delegated legislation operates. Although not stated in Trans-Canada Pipe Lines, this determination conceivably turned on the extent to which natural gas could be used for purposes other than heating fuel.

In seeking to understand how courts recognize when a statutory term or provision is complete, Trans-Canada Pipe Lines should perhaps be treated with some caution. Like many of the cases involving the definition of statutory terms in delegated legislation, it arose under a taxation statute and, arguably, attracted a stricter construction on that basis alone.[404] The currency of strict construction on the basis

402 Supra, n. 397 at s. 33(1).

403 For an illustration of the minor-substantial distinction in another context, see Frobisher Ltd. v. Oak (1950) 20 W.W.R. (Sask. Q.B.). Here, the court held that a regulation-making power could not be used to create a "substantive right in law."

404 Supra, n. 391.

of statutory alteration can, however, be demonstrated through definitional cases in other areas. Where, for example, a regulation purported to augment a statutory definition of "financial resources" to the detriment of applicants for welfare benefits, the Manitoba Court of Appeal had no difficulty concluding that the definition was intended to be complete.[405] The fact that the Legislature had gone some distance in specifying what the phrase meant was taken as a clear indication of this.

In the area of labour relations, one finds as well a judicial reluctance to give effect to the definition of statutory terms or phrases in delegated legislation. However, the conflict between two such cases also shows the uncertainty of the judicial approach in this regard. The first of these, Pulp and Paper Workers of Canada et. al. v. A.G.B.C.,[406] also demonstrates how definitional provisions in instruments of delegated legislation shade into provisions imposing supplementary requirements. Here, the Lieutenant Governor of British Columbia was given power under the Labour Relations Act[407] to make regulations governing procedures before the Labour Relations Board[408] and

> as to the time within which anything hereby authorized shall be done, and also as to any other matter or thing which appears to him necessary or advisable to the effectual working of the provisions of this Act.[409]

405 Re Gach and Director of Welfare (1973), 35 D.L.R. 3d 152 (Man. C.A.).
406 Supra, n. 391.
407 R.S.B.C. 1960, c. 205.
408 Ibid. at s. 63.
409 Ibid., at s. 75.

In turn, the Board was empowered to determine conclusively various types of questions arising under the act, including "whether . . . a person is a member in good standing of a trade union."[410] The Lieutenant Governor in Council made a regulation prescribing that a person was a "member in good standing of a trade union" if "in the opinion of the Board" he met two requirements.[411]

Verchere, J. characterized the situation as follows:

> The Act does not define "members in good standing" and the Legislature must therefore be taken to have intended that those words, being precise and unambiguous, should be given the meaning which they themselves declare when, in the course of its duties, the Board seeks to carry out its function; . . . But when the Board applies to those words the artificial definition contained in s.8, a new and different test is introduced; and it is one which could readily conflict with the test set up by the ordinary meaning of the words used by the Legislature.[412]

He then rejected the contention that the general enabling provision empowered the Lieutenant Governor in Council to

---

[410] Ibid. at s. 65.

[411] O.C. 900/61, s. 8:

> For the purposes of sections 10, 11, 12 and 65 of the Act, a member in good standing of a trade union is a person who, in the opinion of the Board, has at the date of application for certification
> (a) signed an applicatin for membership in that trade union; and
> (b) on his own behalf, paid an amount at least equal to one month's union dues
> (i) within; or
> (ii) applicable to a period within the three months immediately preceding the date of application.

[412] Supra, n. 391 at p. 382.

impose such a "new and different test," distinguishing the situation from that in war time cases involving similarly worded provisions in emergency powers legislation.[413]

In striking down the regulatory provision in the Pulp and Paper Workers case, the decision of Verchere, J. may have turned not merely on the potential conflict between the two tests. Rather, a more crucial conflict occurred between the Board's discretion to determine union membership and the effect of the regulation in fettering that discretion.[414]

The trend toward greater protection for the jurisdiction of labour relations boards through the implementation of more forceful privitive clauses reinforces the inviolability of

413 Ibid. at p. 383, where Verchere, J. stated:

> It seems to me that the Chemicals case is clearly distinguishable from the present case. There the Regulation under review had been made under the provisions of the War Measures Act, which Duff, C.J.C. at p. 255 described as "the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war." Here the authority given to the Lieutenant Governor in Council is far from plenary. Under the first part of the section, Regulations may be made only "as to the time within which anything hereby authorized shall be done", and the power given by the second part of it, although not, in my opinion, to be limited by reference to the preceding portion (see Badger v. Streight and Majunich, Jr. (1961), 29 D.L.R. 536 at pp. 545-6, where the need for care in the application of the ejusdem generis rule is made clear and the authorities reviewed), is restricted to "any other matter or thing which appears . . . necessary or advisable to the effectual working of the provisions of this Act.".

414 This rationale is even more evident in cases such as A.G. Can. v. P.S.S.R.B., supra, n. 390 and Marsh v. Bonavista (1982), 108 A.P.R. 373 (Nfld. C.A.).

the Board's discretion and, in this sense, the decision seems solidly grounded.

Whether the same can be said of Re International Union of Operating Engineers, Local 968 and Michelin Tires Manufacturing Co. of Canada Ltd.[415] is much less clear. This case also arose in respect of the certification of a union, though the impugned regulation dealt with this function more broadly than did the regulation in the Pulp and Paper Workers case. Rather than merely prescribing a test for one element of the certification process, the regulation set out a series of criteria that applied to the ultimate determination of whether a union should be certified.[416] In making the regulation, the Nova Scotia Lieutenant Governor in Council relied on a provision that was identical to the general enabling provision in the Pulp and Paper Workers case.[417]

Dubinsky, J. held the regulation to be intra vires and specifically rejected the conclusions reached by Verchere, J. in the latter case regarding the breadth of the general enabling clause. His decision in this respect demonstrates considerable reliance on the terminology used in the clause, virtually to the exclusion of distinctions between the circumstances in which labour relations statutes and war time emergency legislation operate. Similarly, he stressed a provision that empowered the Nova Scotia Labour Relations Board to certify

[415] (1973), 43 D.L.R. 3d 602 (N.S.S.C.).
[416] O.C. 58A/73.
[417] Supra, n. 391.

a group of employees "if the group is otherwise appropriate as a unit for collective bargaining,"[418] interpreting "otherwise appropriate" to incorporate the provisions of the regulations:

> The words "otherwise appropriate" can hardly be termed "precise and unambiguous". Section 18(1)(g) of the Act imposes on the Board the responsibility of determining if a group of employees is a unit appropriate for collective bargaining and the criteria set forth in the new Regulations, s. 1, assist the Board in deciding whether or not the unit is otherwise appropriate.[419]

In point of fact, the regulation purported to do more than "assist" since it provided that the "Board shall require to be satisfied of the existence of the criteria there enumerated."[420] Essentially, Dubinsky, J. found the discretion of the Board to be statutorily circumscribed by the Lieutenant Governor in Council's regulation-making power. In looking for a conflict between the regulation and the statute in question, he seems to have confined his attention to the words of the statute, without appreciating fully the broader considerations suggested by the applicant:

> These additional requirements are unique and novel and do not exist in any other Labour Relations Act in Canada. It is important to note that the Trade Union Act was revised and re-enacted as a new statute as recently as May 1972, and many changes and innovations were included. If the Legislature had intended to discourage certification for craft units, it would have done so. If the Legislature considered that changing times or circumstances dictated additional criteria or requirements to be met, it would have included them in the new

418 Trade Union Act, S.N.S. 1972, c. 19, s. 23(1).
419 Supra, n. 415 at p. 624.
420 Supra, n. 416 at s. 1(1).

Act.[421]

The British Columbia and Nova Scotia labour relations cases betray the same divergence of attitude as do the majority and dissenting judgements in CKOY and McEldowney. In the area of labour relations, this divergence has most recently surfaced in Telecommunications Workers Union v. B.C. Telephone Co.[422] where the British Columbia Court of Appeal considered a regulation made under paragraph 60.2(d) of the Canada Labour Code.[423] This provision empowered the Governor in Council to

> make regulations for carrying out the purposes and provisions of this Division and, without restricting the generality of the foregoing . . .
>
> (d) prescribing the circumstances in which a lay-off of an employee shall not be deemed to be a termination of his employment by his employer.

and related back to subsection 60(4) which deemed a lay-off to be a "termination" except "where otherwise prescribed by regulation". The importance of this deeming provision sprang from the fact that subsection 60(1) required an employer to give notice to the Minister of his intention to "terminate" a prescribed number of employees. Hence, the power conferred under paragraph 60.2(d) enabled the Governor in Council to narrow the circumstances when an employer was required to give notice. However, the impugned regulation purported to

421 Supra, n. 415 at p. 617.
422 [1983] 2 W.W.R. 274 (B.C.C.A.).
423 R.S.C. 1970, c. L-1, as amended by R.S.C. 1970 (2d Supp.), c. 17, s. 16.

do so by prescribing, inter alia, that a lay-off was not a termination if the employees were notified that they would be recalled back to work within 6 months and were in fact so recalled.

At trial, Spencer, J. found the regulation to be ultra vires because the circumstances prescribed for excluding the notice requirement could not be determined until well after the date on which notice would otherwise be required. Thus, he stated:

> . . . one of the primary intentions of the operative provisions of division V.2 of the Act is to assist the class of employees, which includes these petitioners, in finding other employment by giving the Minister and themselves through the trade union a longer opportunity to find other employment. If the notice is not given to the Minister or to them, they are deprived of that opportunity to which they are statutarily (sic) entitled. Regulation 30(c)(ii) has the practical effect of making the employees wait until after the end of the 16 week period specified in s. 60(1)(c) for notice to the Minister and until after the time in which they or their trade union are entitled to a copy of that notice, before knowing whether they were entitled to have notice given to the Minister and to themselves in the first place.[424]

This sort of analysis is refreshing and demonstrates that courts often need not look very far for solid bases upon which to determine the limits of rule-making powers. What is discouraging is that only one judge of the Court of Appeal approved of this approach. The majority judgement is difficult to fathom, if not patently illogical. At one point, MacDonald, J.A. admitted that the scheme of the Act could not work

[424] [1982] 6 W.W.R. 97.

unless the question whether the action taken by the employer is a termination or a lay-off were determined not later than the date of cessation of work.[425] Yet, in the next breath he stated:

> The result is that the action of the employer may then be characterized as a lay-off but whether it is indeed a lay-off, or a termination, will not be known until there is either a recall, or a failure to recall the employees to work. Thus it is the Code which contemplates, and creates, the situation of employees not knowing for certain until the recall to work, whether the action taken by their employer was a lay-off or a deemed termination.

In order to provide some solace to the employees, MacDonald, J.A. went on to conclude that if an employer does not in fact recall his employees he commits an offence for not having given the notice required by subsection 60(1). That Parliament could have intended such a scheme of catch-22's is beyond belief and one hopes that the matter will be corrected in the Supreme Court.[426]

With the exception of the Operating Engineers case, all of the cases examined thus far have involved essentially definitional regulatory instruments. When one turns to the additional requirements cases, the method of judicial scrutiny is much the same as Re Silk,[427] a recent Federal Court of Appeal decision, demonstrates. It involved section 85 of the Unemployment Insurance Regulation[428] which, with respect

425 Supra, n. 422 at p. 280.
426 Leave to appeal granted February 8, 1983.
427 (1982), 39 N.R. 523 (F.C.A.); aff'd by the S.C.C. on March 3, 1983, adopting the reasons of the C.A.
428 C.R.C. 1978, c. 1576.

to fishermen, altered the statutory requirements for qualifying for unemployment insurance benefits. Under the Unemployment Insurance Act, applicants were required to have a certain number of weeks of insurable employment within the 52 weeks immediately preceding the date of their application. However, the regulation shortened the qualifying period for fishermen, potentially excluding some who would otherwise qualify for benefits. The Unemployment Insurance Commission sought to justify the regulation on the basis of section 146 of the Act. This section empowered it to make regulations for bringing fishermen and their employees within the purview of the Act[429] and "for . . . all such other matters as are necessary to provide unemployment insurance for such fishermen."[430]

Thurlow, J. rejected the claims of the Commission, stressing both the inclusory aspect of paragraphs 146(a) and (b)[431] as well as the specific provisions of the Act governing the length of the qualifying period.[432] Since paragraphs

[429] Unemployment Insurance Act, S.C. 1970-71-72, c. 48, s. 146(a) and (b).

[430] Ibid., at s. 146(c).

[431] Supra, n. 427 at p. 528.

[432] Ibid. at p. 529:

> . . . it seems to me to be clear that it (s. 146(c)) does not authorize the setting up for such fishermen of a separate and more restrictive unemployment insurance scheme requiring them to qualify in a different period from that prescribed by s. 18 of the statute itself for an "insured person", .. . In my opinion, therefore the requirement of s.85(1)(b)(i) of the regulations that the twenty weeks of insurable emloyment be within a period commencing with the last Sunday of March is in conflict with the statute and is ultra vires and invalid.

(a) and (b) could only be used for the benefit of fishermen, the noscitur sociis principle of the interpretation suggests that the general provision in paragrah (c) was intended to be used in the same manner. Here, then, the breadth and completeness of the statutory provisions ousted jurisdiction to make delegated legislation on the same subject matter.[433]

Cases similar to Re Silk reveal that the courts have struck down regulatory instruments that purported to impose time limits on exercising a statutory right to request and receive reasons for an Immigration Appeal Board decision[434] or requesting the Public Service Staff Relations Board to review a decision.[435] Regulations that added to the statutory fishing trawler licensing requirement of nationality a further requirement that a trawler be built in Canada[436] or that required an applicant for citizenship to swear an oath renouncing his previous citizenship in addition to the oath of allegiance required by the enabling legislation have also been declared ultra vires.[437] Finally, a fishing regulation that purported to transform a mens rea offence into an offence of strict liability was also considered ultra vires.[438] Although the expressio unius principle was not cited in these cases, it

433 Pearce, op. cit., n. 165 at p. 181.
434 Alvarez v. Minister of Manpower and Immigration [1979] 1 F.C. 149 (C.A.).
435
436 A.G.Can. v. P.S.S.R.B., supra, n. 390.
437 National Fish, supra, n. 265.
438 Ulin v. The Queen [1973] F.C. 319 (T.D.).
R. v. Sigmund [1978] 4 W.W.R 336 (B.C. Cty. Ct.). See also Re Mallberg and Ferguson et. al. (1984), 3 D.L.R. 4th 755 (Ont. Div. Ct.).

aptly describes the rationalia of the respective decisions. The detail contained in the enabling legislation was found to be sufficient to exclude delegated legislative power to impose requirements of a "substantial" nature and sharply differentiates them from cases such as CKOY where the enabling legislation provided little more than a mechanism for conferring powers. Although the enabling powers in the statutory alteration cases were most often phrased at least as broadly as those in the purpose cases,[439] they were construed far more narrowly.

This more restrictive construction of powers of delegated legislation clearly turns on the application of judicially developed rules of interpretation. In many of the definitional cases, one can discern the underlying presence of the rule of strict interpretation applicable to taxation statutes; similarly, the noscitur sociis principle can be identified behind the decision in Re Silk, while the concern with not fettering the Labour Relations Board's discretion in the Pulp and Paper Workers case is also clearly visible. However, the availability of such legal tools has not necessarily guaranteed or improved the correctness of their decisions. Statutory provisions cannot be taken to restrict the scope

[439] Trans-Canada Pipe Lines, supra, n. 391, Pulp and Paper Workers, supra, n. 391, Telecommunications Workers, supra, n. 422, and Ulin, supra, n. 437 all involved broadly worded enabling clauses authorizing regulatory instruments to be made either "with respect to" the general subject matter of the legislation or "for carrying purposes." In addition, Trans-Canada Pipe Line dealt with a "Henry VIII" clause while Pulp and Paper Workers was subjectively phrased.

of delegated legislative powers merely on the basis of a passing similarity of subject matter. For example, there seems good reason to question the conclusions reached in the time limitation cases noted above.[440] Surely the right to receive reasons for a decision or to have a decision reviewed cannot be altogether unqualified as to the time within which they must be exercised. In neither of the cases referred to did the courts discuss the ability of individuals to exercise these rights or the administrative problems that would result without time limits. Rather, they simply assumed that the rights could not be qualified in this manner.

[440] Supra, nn. 434, 435.

Division E - Obligation to Act Legislatively

My review of substantive judicial scrutiny has, up to this point, concerned limitations on what may be included in delegated legislation. However, there is a large body of developing case law that in effect places limits on what may be excluded from the content of an instrument of delegated legislation. The focus of this case law is Brant Dairy Co. Ltd. v. Milk Commission of Ontario.[441] This decision demonstrates that when an authority is given power to make delegated legislation, it must make rules, as opposed to reserving to itself discretion to regulate on a case by case basis. This proposition turns largely on the concept of delegated legislation considered in Part I and the distinction between legislative powers, on the one hand, and administrative or judicial powers on the other.

In Brant Dairy, the failure to make rules in the exercise of a rule-making power was perhaps as blatant as one is ever to find. The case involved a milk marketing board that was empowered to "make regulations with respect to milk, providing for" the licensing of milk producers and the allocation of quotas to them.[442] However, in dealing with quota allocation, the impugned regulation did nothing more than reproduce the terms of the empowering provision, conferring on the board

[441] (1973), 30 D.L.R. 3d 559 (S.C.C.).
[442] See the Milk Act, S.O. 1965, c. 72, ss. 8(1) and 11.

discretion to allot and cancel quota as it "deemed proper". In striking down the regulation, Laskin, J. (as he then was) wrote:

> A statutory body which is empowered to do something by a Regulation does not act within its authority by simply repeating the power in a Regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a redelegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in A.-G. Can. v. Brent (1956), 2 D.L.R.(2d) 503, 114 C.C.C. 296, 1956 [S.C.R.] 318.[443]

Although Laskin, J. approached the case from the standpoint of subdelegation, this frame of reference does not seem quite apt, since subdelegation typically occurs when one body confers power on another. It is somewhat anomalous to speak of a body delegating power to itself. As Professor Willis points out in his comment on a quotation from Huth v. Clarke,[444]

> What is "delegation"? "Delegation, as the word is generally used, does not imply a parting with powers by a person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. . . . it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with this power in such a way as to denude himself of his rights." The fact that the authority named in the statute has and retains a general control over the activities of the person whom it has entrusted the exercise of its statutory discretion does not, therefore, save its act of so entrusting to him the discretion from being "delegation" and so falling within the

[443] Ibid., p. 582.
[444] (1880). 25 Q.B.D. 391 at p. 395, per Willes, J.

> ambit of the maxim. If, however, the authority exercises such a substantial degree of control over the actual exercises of the discretion so entrusted that it can be said to direct its own mind to it, there is in law no "delegation" and the maxim does not apply.[445]

The maxim to which Professor Willis refers is, of course, delegatus non potest delegare and, as he has demonstrated, it is essentially a rule of construction used in the interpretation of provisions that confer power. It presumes that, when a power is given to a particular individual or body, it is given on the understanding that it will be exercised by that individual or body. Thus, in Brant Dairy, it is difficult to see how the maxim could have any application. Rather, Laskin, J. under the guise of the rule against subdelegation, recognized a much broader rule prohibiting the transformation of legislative powers into administrative discretion.[446]

Subdelegation is unquestionably the most common method by which the Brant Dairy principle is violated. It involves the transfer of power to complete or flesh out a scheme embodied in delegated legislation. Such transfers are not universally prohibited, but depend for their validity on a number of rules that have grown up under the delegatus maxim. However, before discussing these, I propose to canvass a number of other groups of cases that also seem to fall within

[445] Willis, loc. cit., n. 70.

[446] The proof of this lies in the manner in which Brant Dairy has been applied in subsequent cases such as Canadian Institute of Real Estate Companies v. City of Toronto (1975), 5 O.R. 2d 736 (C.A.) and Butler Metal Products Co. Ltd. v. Canada Employment and Immigration Commission, supra at n. 82.

the Brant Dairy principle.

The origins of Brant Dairy can be traced back through a number of cases,[447] and also appear to underlie cases involving delegated legislation that was ruled invalid because it was discriminatory or vague.

In the vagueness cases, the delegated legislation in issue did not indicate with reasonable certainty what was expected of those being regulated and, in a sense, delegated to the courts the task of fleshing out the requirements in enforcement proceedings.[448]

In the discrimination cases, a similar breach of the Brant Dairy principle appears, in so far as the delegated legislation in question had too narrow a focus and did not

[447] See. e.g. City of Verdun v. Sun Oil Company Ltd. [1952] S.C.R. 222 and Vic Restaurant Incorporated v. City of Montreal [1959] S.C.R. 58.

[448] Most of the vagueness cases have involved regulatory provisions that, because they have penal consequences, attracted a generally stricter construction in favour of the accused. Nevertheless, it is arguable that they also turned on the Brant Dairy principle. See, e.g. Cie. Miron Ltee. c. R., supra at n. 19; Re Weir, supra, n. 370; Re Hamilton Hospitality Industry Assoc. Inc. and the City of Hamilton (1981), 32 O.R. 2d 353 (Div. Ct.); Utah Construction and Engineering Pty. Ltd. v. Pataky [1966] A.C. 636 (P.C.); Springbank Mun. Dist. v. Render, supra, n. 19; but note also McEldowney v. Ford, supra, n. 277 where this aspect seemed not to impress the majority of the court. Also note Senecal v. The Queen (1984), 3 D.L.R. 4th 684 (F.C.A.) at p. 691 where Walsh, J. suggested that the determination of whether a delegated legislative instrument is vague depends on the type of person required to comply with it.

apply generally.[449] The discrimination cases turn on the notion of equality as between individuals whom courts conclude to be in the same "class".[450] This sense of inequality finds fuller expression in the later case law, particularly municipal zoning cases, where the requirement of impropriety is introduced. In these, the very nature of zoning imports a significant degree of discrimination and improper or "unjust" discrimination tends to manifest itself under the heading of bad faith.[451] In fact, the bad faith ground of attack virtually subsumes discrimination such that the latter serves primarily as a

[449] As a ground of invalidity, discrimination is perhaps more accurately described in terms of improper discrimination, in as much as all delegated legislation applies to a defined subject matter and, in this sense, discriminates. This point, is, however, only implicitly apparent from the earlier cases which emphasize only the narrowness and inequalities of the regulatory instruments there in question.

[450] See e.g. Re T.W. Hand Fireworks Co. Ltd. [1962] O.R. 794; City of Toronto v. Miller Paving Ltd. [1965] 1 O.R. 658 (C.A.); Re Stilling (1961), 28 D.L.R. 2d 102; R. ex. rel. Cox v. Thomson (1957), 9 D.L.R. 2d 107 (Ont. C.A.).

[451] See e.g. Uxbridge v. Timber Bros. Sand & Gravel Ltd. (1975), 7 O.R. 2d 484 (C.A.); Re Lacewood Development Co. and City of Halifax (1975), 58 D.L.R. 3d 383 (N.S.C.A.); Petrofina Canada Ltd. v. City of Moncton (1976), 13 N.B.R.2d 547 (Q.B.); Hollett v. City of Halifax (1975), 58 D.L.R. 3d 746 (N.S.S.C.); Lacey v. Town of Port Stanley [1968] 1 O.R. 36 (H.C.); Hanson v. Ontario University Athletic Assoc. (1976), 65 D.L.R. 3d 385 (Ont. H.C.). However, Dussault, op. cit., n. 98 at pp. 558, n. 601 asserts that one ought not to confuse discrimination with either bad faith or unreasonableness. In the municipal context, it is difficult to see how this position can be maintained in light of the above cited cases. The concept of bad faith has in many of these been broadened to include "impartiality" (see e.g Petrofina) which is nothing else but discrimination. The truth of Dussault's assertion may lie, however, in the fact that some courts (e.g. Trustees of Assembly Hall v. District of Surrey [1975] 4 W.W.R. 608 (B.C.S.C.)) have not broadened the notion of bad faith to this extent, but find a variety of discrimination that has more in common with the conversion of delegated legislative powers into administrative discretion.

device for providing evidence of bad faith: the narrower the ambit of a regulatory instrument, the easier it is to identify the intent behind it and thereby show bad faith.[452]

Whether one regards discrimination as an element of bad faith or as a ground of attack in itself, it nevertheless demonstrates the operation of the notion that delegated legislation ought to be generally applicable. Although its operation is tempered by the additional requirement of impropriety, Mr. Ian Rogers outlines its importance in relation to zoning by-laws where the courts have been perhaps most reluctant to find improper discrimination:

> While the authority of the council to amend restricted area by-laws is undisputed, the result of the cases is that it must endeavour to act in a general way. However, a by-law relating to one parcel of land is not necessarily illegal because it is spot rezoning if it is passed in good faith and in the public interest. In Ontario the question has been resolved in favour of spot rezoning whereas in British Columbia fair play is still the name of the game and what council does for one it must do for all the players. Yet it is always open to a resident adversely affected by a by-law altering existing restrictions in an area to challenge the action of the council on the basis that it is discriminatory and solely

[452] See, e.g., Hollett, ibid., see also Lovgren, loc. cit., n. 315 at pp. 282-3.

for the benefit of a private individual.[453]

If the Brant Dairy principle that delegated legislative powers must be exercised legislatively is rooted in cases dealing with subdelegation, vagueness and discrimination, two quite recent decisions demonstrate that the courts now seem prepared to employ it on a much broader bases. In Jiminez Perez v. Minister of Employment and Immigration[454], LeDain, J. considered a statutory power to "prescribe" exceptions to the requirement that prospective immigrants and visitors to Canada obtain visas before appearing at a port of entry. In construing the scope of this power, he stated:

> The respondents rely in part on the words "Except in such cases as are prescribed" in subsection

[453] Ian M. Rogers, Canadian Law of Planning and Zoning (Toronto: 1973) at p. 198; see too Re St. John's Trotting Park Ltd. and Town of Goulds, No. 2 (1981), 122 D.L.R. 3d 534 (Nfld. S.C.), and Trustees of Assembly Hall, supra, n. 451. In the latter case a by-law created a special zone for church use, but did not in fact designate any land as such. The court concluded that the municipal council intended to designate these zones piecemeal by amending the by-law. Rutman, J. struck down the provision, relying on the "classic definition of discrimination" set out in Forst v. Toronto:

> When the Municipality is given the right to regulate, I think that all it can do is pass general regulations affecting all who come within the ambit of Municipal legislation. It cannot itself discriminate and give permission to one and refuse it to another. [(1923), 54 O.L.R. 256 at p. 278.]

Then, adopting this definition, he concluded:

> . . . it is just such discrimination that the municipality in this case may exercise, albeit intending to act in the utmost good faith, when it may vote favourably for one bylaw application and unfavourably for another. Thus, to create a zone classification without a specific zone leads inevitably to individual discrimination and must render the purported zoning bylaw meaningless and void as ultra vires. (p. 620)

[454] Supra, n. 87; see also Re Creative Shoes Ltd., supra, n. 87.

> 9(1). "Prescribed" is defined in subsection 2(1) to mean "prescribed by regulations made by the Governor in Council", and paragraph 115(1)(ii) empowers the Governor in Council to make regulations "prescribing any matter required or authorized by this Act to be prescribed." I am of the view that these provisions confer authority to make exceptions to the rule in subsection 9(1) for certain categories or classes of immigrants or visitors rather than to grant exemptions from the rule in individual cases. It contemplates exceptions of a general, legislative nature to be applied to individual cases. That is what is implied, I think, by the word "prescribed".[455]

In this passage, LeDain, J. is clearly employing a concept of legislative powers akin to that discussed in Part I.

The second case is Dale Corporation, which I have already discussed in the context of formal and procedural scrutiny.[456] The court here examined what the Rent Review Commission was attempting to do by administrative action (issuing internal guidelines) and found that it was in fact legislative action that demanded implementation through the Commission's delegated legislative powers. In a sense, the case represents the obverse side of the Brant Dairy coin, the transformation of an administrative into a legislative power. However, precisely the same considerations underlie both cases, though they are more precisely elaborated in Dale Corporation. These considerations have two sources. The first is the concern expressed in the doctrine of natural justice that a party to an administrative or quasi-judicial proceeding be able to discover the

[455] Ibid., p. 169.
[456] Supra, pp. 55-7.

case he or she must meet to obtain the relief sought. The second is the notion of equality "before and under the law", a notion soon to be enforced through section 15 of the Canadian Charter of Rights and Freedoms.[457]

Although section 15 is not yet in force, the Charter has already provided some impetus for its development of an obligation to act legislatively. In Re Ontario Film And Video Appreciation Society and the Ontario Censor Board[458] the Court considered section 1 of the Charter which permits the rights and freedoms set out therein to be narrowed by "reasonable limits prescribed by law." The court construed "law" to mean statute law, regulations and the common law, rejecting the contention that regulation by administrative discretion came within that term:

> law cannot be vague, undefined and totaly discretionary: it must be ascertaineable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[459]

If the Ontario Censor Board case provides the ultimate inspiration for the obligation to act legislatively, it does not contain much insight into its extent. Cases such as Capital Cities Inc. v. C.R.T.C.[460] demonstrate that it is limited

---

[457] This section comes into force on April 17, 1985: see subsection 32(1).

[458] (1983), 43 O.R.2d 583 (Ont. Div. Ct.).

[459] Ibid., at p. 592.

[460] (1978), 81 D.L.R. 3d 609 (S.C.C.); see also Wimpey Western Ltd. v. Standards and Approvals of the Department of the Environment (1984), 2 D.L.R. 4th 309 (Alta. C.A.).

and that the courts are sometimes prepared to allow imprecision or the conferral of broad discretion in delegated legislation. In this case, Laskin, C.J.C. held that the Broadcasting Act conferred on the C.R.T.C. powers broad enough to permit it to regulate the burgeoning cable television industry on an ad hoc basis, laying down only informal "guidelines" for the exercise of its licensing discretion.[461] However, he clearly recognized that the industry was in its infancy, asserting:

> An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory scheme as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.[462]

Laskin, C.J.C. did not say what should or must happen when the policy has "matured". Arguably, at that point an obligation to make delegated legislation matures as well. If the purpose of regulating a given area is to provide guidance and direction to its development, its regulation cannot be left forever in the hands of administrative discretion.[463] The greater the experience of a regulatory authority, the more it should solidify that experience in legislative instruments in order to give notice of its policies to those affected and to enable them to rely on those policies in planning their affairs.

[461] One should note how this construction corresponds to the broad interpretation given to the Broadcasting Act in CKOY, supra, n. 270.

[462] Supra, n. 460 at p. 629.

[463] See Re Phillips and Registrar of Mortgage Brokers, supra, n. 113.

In the past, the courts have exerted pressure in this regard using two principle methods. First, they have classified documents as delegated legislation, even though they were not regarded as such by the authorities that made them.[46] Second, they have prevented regulatory bodies from unduly fettering their discretion or considering irrelevant matters through the formulation and use of informal policy guidelines.[463.2] However, these tools have provided at best an incomplete solution to the fundamental problem of controlling administrative discretion. Arguably, there is a need for a more direct device, namely, the duty to act legislatively.

If one turns to the case law in the United States,

[463.1] See supra, n. 129.

[463.2] See Molot, op. cit., n. 52.

the development of a legislative obligation appears along these lines. In his Administrative Law Treatise[464], Professor Davis has reviewed a number of cases involving "required rulemaking" on the basis of the non-delegation doctrine,[465] denial of due process,[466] vagueness,[467] requirements of fairness and propriety arising out of implied legislative intent,[468] and avoidance of rulemaking procedures.[469] As in Canada, these U.S. cases involve the issues of procedural requirements and legal effect. However, there appears to be a far more extensive tradition of informal or "interpretive" rules in that country[470] and the courts have not, until quite recently, questioned an agency's powers to make such rules. Although interpretive rules are generally given great weight in judicial review of administrative action, they are not binding on courts because they do not embody the exercise of "delegated" legislative power.[471] Essentially, these rules entail the construction of statutory provisions, construction that is necessary when one confronts a legislative scheme at the level of day to

464 Supra, n. 34.
465 Environmental Defence Foundation v. Ruckelshouse, 439 F. 2d 584 (D.C.Cir., 1971) at p. 598.
466 Holmes v. New York City Housing Authority, 398 F 2d 262 (2d Cir., 1968).
467 Papachristou v. City of Jacksonville, 405 U.S. 156 (1970).
468 Port Terminal Railroad Association v. U.S., 551 F. 2d 1336 (5th Cir., 1977).
469 Morton v. Ruiz, 415 U.S. 1499 (1974) at p. 232.
470 See Davis, op. cit., n. 34 at pp. 46-54; Skidmore v. Swift & Co., 323 U.S. 134 (1944) at p. 138.
471 Davis, ibid. at pp. 59-64, 411; Batterton v. Francis, 432 U.S. 416 (1977).

day administration.[472] Davis fleshes out the character of interpretive rules in terms of their distinction from legislative rules, asserting that a court is bound by the statutory interpretation embodied in the latter and can only inquire into their validity.[473] Thus, the distinction involves the degree of permissible judicial scrutiny in each case.

The push towards a delegated legislation obligation in the U.S. appears to come from two directions. On the one hand, some courts have, in effect, held that rules promulgated by an agency as interpretive rules are to be treated as legislative for the purpose of binding the agency in question[474] or attracting the requirements of the Administrative Procedures Act.[475] On the other hand, they have invalidated administrative action that was unregulated by legislative rules.[476] The rationale for doing so has varied, turning in some cases on the infringement of constitutional rights and the burden of proving that the administrative action involved was justified[477] or met the demands of due process.[478] The due process requirement most often imports as well the notion that a participant in an administrative process is entitled to know the case he must

[472] Taxation and labour law are prime examples of areas where interpretive rules have been used extensively in the U.S.: see Davis, ibid., at pp. 55-56.
[473] David, ibid., at p. 59.
[474] Davis, ibid., at pp. 100-5; Morton v. Ruiz, supra, n. 469.
[475] Davis, ibid., at pp. 78-94.
[476] Davis, ibid., at pp. 128-40.
[478] Morales v. Schmidt, 419 F. 2d 1335 (7th Cir., 1973); Sherrill v. Knight, 569 F. 2d 124 (D.C. Cir., 1977); Soglin v. Kauffman, 418 F. 2d 163 (7th Cir., 1969); Campbell v. McGruder, 580 F 2d 521 (D.C. Cir., 1978).

make or meet.[479]

Superimposed on a number of the cases just cited is the view that administration without enunciated standards tends to be "inherently irrational and arbitrary."[480] This view is perhaps best expressed by Gessell, D.J. in Kent Farm Co. v. Hills:[481]

> Here, as in the past, HUD (Department of Housing and Urban Development) has again failed to observe minimum requirements in this respect (protecting against administrative arbitrariness). Admittedly, HUD confronts a monumental task. It receives vast sums of money and operates a variety of programs affecting fundamental aspects of the lives of many people, and its various units and divisions are necessarily assigned different aspects of the agency's total responsibilities. But whatever the difficulties, this process must always be coordinated to achieve the ultimate goals set by congress, and the larger aspects of HUD's missions must not be lost in a maze of individual bureaucratic decisions by those having only limited responsibility and concerns. So long as the agency proceeds piecemeal by individual actions that cannot be fitted into a coherent program addressed to the agency's larger reponsibilities, it may expect increasing difficulty in the courts, which have a constitutional responsiblity to see that federal statutes are administered in a manner consistent with congressional directives.[482]

The additional due process considerations that underlay this decision do not detract from the significance of these comments.

---

[479] Davis, op. cit. n. 34 at pp. 135-6; City of Santa Clara v. Kleppe 418 F. Supp. 1243 (N.D. Cal., 1976); Port Terminal Railroad Association, supra, n. 468; Franklin v. Shields, 569 F. 2d 784 (4th Cir., 1978); Harnett v. Board of Zoning, Subdivision and Building Appeals and Planning Board, 350 F. Supp. 1159 (D.V.I., 1972).

[480] Harnett, ibid.

[481] 417 F. Supp. 297 (D.C. Cir., 1976).

[482] Ibid., at p. 302.

As in a number of other cases,[483] the court has here found the delegated legislation obligation to arise from the very existence of a huge bureaucracy.

Although the cases cited above demonstrate a trend towards required rule-making in American jurisprudence, this movement has not been clearly defined or free from criticism. In addition, the courts have themselves expressed concern about unduly restricting the discretionary powers necessary to develop policy or respond to variable circumstances. The detail of required rules varies with these needs[484] and the ability of administrative agencies to develop policy through adjudication remains largely intact,[485] although there are indications that major departures from adjudicatively established law may attract rule-making requirements[486] or an obligation to give a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[487]

The U.S. Supreme Court case that goes the furthest towards required rule-making has, coincidentally, attracted the greatest criticism from Professor Davis. The broad language

[483] See e.g. Morton, supra, n. 469; also note Campbell, supra, n. 478 where the court noted that the defendant prison authority had itself issued a directive to jail superintendants to establish rules governing contact visits and security assignments for convicted persons awaiting sentencing.

[484] See e.g. Sherrill, supra, n. 478.

[485] See S.E.C. v. Chenery Corp., 332 U.S. 194 (1947); N.L.R.B. v. Bell Aeorspace Co., 416 U.S. 267 (1974).

[486] N.L.R.B. v. Wyman-Gordon Corp., 394 U.S. 759 (1969).

[487] Greater Boston Television Corp. v. F.C.C., 444 F. 2d 841 (D.C. Cir., 1971) at p. 852.

and scantily articulated bases of Morton v. Ruiz[488] potentially tie the hands of administrative agencies by not allowing them any scope to use either adjudicative methods or interpretive rules. Davis has commented as follows:

> The courts should push agencies to develop guides for decisions, but they can hardly insist on legislative rules in all instances. . . . Courts could soundly prohibit unnecessary ad hoc decisions if doing so were practical. Operating without any standards of eligibility would be judicially condemned; . . . a good system--one that could properly be judicially required--is the one the BIA (Bureau of Indian Affairs) used in the Ruiz case, involving an explained decision based on a meaningful standard stated in a Manual that was open to public inspection. The Courts's prohibition of ad hoc decisions is a move in the right direction that went much too far; the Court can and should fashion more refined instruments to influence or require agencies to supplant ad hoc decisions with decisions guided by rules or standards. The Ruiz case may be a crude beginning that is susceptible of gradual refinement.[489]

Professor Davis' plea for a flexible doctrine of required rule-making is appealing in its functional emphasis, and should not be too hastily dismissed as applicable only to the U.S. situation. Although there are certainly differences between Canada and the U.S., the reasoning that lies at the core both of the Brant Dairy principle and "required rule-making" is essentially the same. The differences lie in the extent to which similar concepts, such as natural justice and due process, have been applied. With the establishment of constitutional rights in this country, these differences can only

488 Supra, n. 469.
489 Davis, op. cit., n. 35 at pp. 153-4.

diminish.

If it is argued that Canadian courts do not have the creative potential of their U.S. counterparts, rebuttal may be possible by examining the nature and scope of the rule against subdelegation. The judicial application of this rule exhibits a considerable degree of involvement in moulding the limits of delegated legislative powers. In addition, the principles developed in relation to subdelegation seem applicable to the legislative obligation insofar as the former is a species of the latter.

Division F - Subdelegation and Incorporation by Reference

The rationale for subdelegation and, indeed, for delegation in general, is that an authority exercising a delegated power is incapable of effecting its exercise in every detail and that this is better accomplished by subdelegating some of the responsibility.[490] A similar rationale applies when a delegated legislative authority reserves discretion to itself, or attempts to cast it off on the courts by using vague terminology. In these cases, an authority is not, in the exercise of its legislative powers, completing that exercise of power by spelling out the rules that it is charged with making.

As I have already noted, the legality of subdelegation is governed by the maxim delegatus non potest delegare. As a rule of construction, it does not impose an absolute prohibition against subdelegation, but rather gives way to the extent that it is permitted by the relevant enabling legislation. Indications of its permissibility may arise either from the language of the enabling provision[491] or from the circumstances under which the power is exercised.[492]

Traditionally, it is more difficult to rebut the presumption against subdelegation in the context of legislative[493]

[490] See G. Pepin & P. Ouellette, Précis de Contentieux Administratif, 2e ed. (Montréal: 1982) at p. 101.
[491] See e.g. the Milk Act, s. 8(6), supra, n. 442.
[492] See Willis, loc. cit., n. 70, citing Chemicals Reference, supra, n. 3.
[493] See Dussault, op. cit., n. 101 at p. 770.

or judicial powers,[494] as opposed to those that are administrative.[495] This unquestionably results from the discretionary elements in the first two being generally much larger than those in the latter. Courts are more likely to approve the subdelegation of a power when the subdelegating authority retains a large measure of control over its exercise.[496] Since "administrative" functions usually import less discretion, their subdelegability is easier to infer. In fact, the question of whether subdelegation is permissible has for the most part been considered in terms of whether the subdelegated function is administrative.

Two somewhat similar cases decided by the Ontario Court of Appeal serve well to illustrate the judicial reliance on the administrative-legislative distinction as a tool for determining the validity of regulatory instruments that subdelegate power. In addition, they affirm the requirement that rules be established with as much precision as possible to ensure that any subdelegated power is no broader than necessary.

Both R. v. Joy Oil Co. Ltd.[497] and R. v. Sandler[498] involved municipal by-laws dealing with fire prevention. In the former, the by-law regulated bulk storage of flammable

494 See Reid and David, op. cit., n. 387 at pp. 288-92.
495 See Dussault, op. cit., n. 101 at pp. 768-9, citing Re B.C. Hotel Employees Local 260 and Labour Relations Board [1956] 2 D.L.R. 460 (B.C.C.A.).
496 See Pepin & Ouellette, op. cit., n. 490 at p. 194; Willis, loc. cit., n. 70.
497 [1964] 1 O.R. 119 (C.A.).
498 [1971] 3 O.R. 614 (C.A.).

liquids, requiring that storage facilities

> be provided with foam fire extinguishing equipment and such quantities of foam producing materials ready for immediate use as may be directed by the Chief of the Fire Department.[499]

In the latter case, the by-law empowered the Chief to

> inspect the fire protection equipment in any premises and to make such orders for the installation, repair or replacement of fire protection equipment as he deems necessary.[500]

In neither case were there any express provisions for the subdelegation of powers to the Fire Chief. However, the court in Joy Oil seems to have proceeded on the assumption that administrative powers were delegable, while legislative powers were not. Without specifically considering the terms of the enabling provision, Roach, J.A. responded to the contention of ultra vires subdelegation as follows:

> I think the words "as may be directed by the Chief of the Fire Department" qualify both the "foam fire-extinguishing equipment" and the "quantities of foam-producing materials ready for immediate use", but I also think that the power of direction thereby conferred on the Fire Chief is an administrative power only and it was competent for the Council to delegate that power to him. Legislatively the by-law is as specific as it could possibly be, having regard to the great variety of conditions or hazards that might arise in the circumstances, with respect to which the Council was exercising its legislative powers. It specifies that the equipment shall be "foam fire-extinguishing equipment" and the materials shall be "foam-producing materials". Accordingly there is no discretion vested in the Fire Chief as to the type of fire-extinguishing equipment or the material to be used therein. The capacity and location of that equipment and its efficiency and the sufficiency of the materials

[499] City of Toronto By-Law 9868, c. 22, s. 11.
[500] City of Toronto By-Law 60-69, s. 3(f).

> will, of course, vary, and are matters that of sheer necessity would have to be left to the decision of the Fire Chief as matters of administration.[501]

In R. v. Sandler one finds a much more critical review of the by-law question. Kelly, J.A. began by examining the provisions of the Municipal Act[502] under which the by-law was passed, noting that the powers conferred were substantially broadened by the use of a subjective test of validity.[503] After finding that these powers held great scope for discriminatory consequences and attached penal sanctions for non-compliance with the Fire Chief's orders, he concluded:

> It is my view that when the Legislature gave to the municipal councils a wide discretion as to the formulation of regulations for the prevention or spread of fires, it did not contemplate that any municipal council would attempt to evade its responsibility for making regulations by substituting for its judgment that of a non-elected official in its fire department.[504]

After considering whether the Fire Chief's powers were merely "administrative", and hence properly delegated, Kelly, J.A.

---

[501] Supra, n. 497 at pp. 121-2.

[502] R.S.O. 1960, c. 249, s. 379(1):

> By-laws may be passed by councils of local municipalities:
>
> 38. For requiring buildings and yards to be put in a safe condition to guard against fire or other dangerous risk or accident.
>
> 40. For authorizing appointed officers to enter at all reasonable times upon any property in order to ascertain whether the provisions of the by-law are obeyed, and to enforce or carry into effect the by-law.
>
> 48. For making such other regulations for preventing fires and the spread of fires as the council may deem necessary.

[503] Ibid., s. 379(1)43.

[504] Supra, n. 498, p. 619.

rejected this contention and distinguished R. v. Joy Oil as follows:

> First, it is purported to deal only with a specially hazardous situation whereas in the instant case the by-law extends to any premises in the City of Toronto, premises being defined to mean "a building and its adjuncts including yard area." Secondly, the by-law under consideration in the Joy Oil case itself specified the generic type of equipment and material which the Council considered necessary; By-law 60-69 offers no guidance as to the nature of fire-protection equipment contemplated by the Municipal Council. One is left with the unmistakable conviction that the Municipal Council intended that the discretion of the Chief should be complete, a position inconsistent with the obligation imposed on the Council itself to decide on what is considered necessary.
>
> In the result, the area of discretion left to the Chief in the flammable liquids storage by-law was restricted to defining for the persons responsible for the creation of the hazard, the particular type of foam fire-fighting equipment and the quantity of material to be kept ready for use, all of which discretions fell properly under the area of administrative details, once the Municipal Council itself had created the obligation to maintain foam fire-fighting equipment and foam-producing material.
>
> By contrast here, in an area co-extensive with the municipal boundaries of the city, every occupant of property is required to comply with the orders of the Chief although nowhere in the by-law can the Chief or the citizen find an expression of the standards which the Municipal Council expects to be observed.[505]

The judgement of Kelly, J.A. in the Sandler case is invaluable in its statement of a number of factors relevant to the issue of whether a power is administrative and delegable. They are echoed repeatedly in other delegated legislation cases and stand, not as conclusive tests in themselves, but rather as indicators of the probability that a power will

[505] Ibid., at pp. 619-20.

be held to have been improperly subdelegated. These factors can be summarized as follows:

(a) the breadth of discretion entailed in a subdelegated power,[506] particularly in relation to the breadth of the subdelegating authority's own powers;[507]

(b) the breadth of the impact of the exercise of the power;[508] and

(c) the qualifications and character of both the subdelegating authority[509] and the subdelegate[510] in relation to the subject matter upon which the power operates.[511]

The operation of these factors can be demonstrated by considering again incorporation by reference. In Part II, this concept was examined in terms of procedural requirements. It appeared that, while Canadian case law discussing these was minimal, the Australian courts had treated publication issues in some detail.

When one approaches incorporation by reference from the perspective of subdelegation, quite the reverse appears. Canadian courts have considered this subject largely in terms

[506] See Appendix G.
[507] See Appendix H.
[508] See Appendix I.
[509] See Appendix J.
[510] See Appendix K.
[511] A corollary of the factor discussed in Appendix K is that the regulatory area must be one of some technical complexity. See the discussion on incorporation by reference <u>infra</u> at pp. 189ff.

of subdelegation[512], while the Australian decisions hardly discuss this aspect.[513]

The differences between the Canadian and Australian approaches to incorporation by reference can perhaps be minimized when one considers how each is related to a single unifying concept of delegated legislation. The importance of such a concept, so amply demonstrated in the cases discussed in Division E clearly surfaces in the Australian incorporation by reference cases.[514] Here, it is embodied in a concern for certainty and clarity in regulatory instruments, a concern that I have already argued can be characterized in terms of subdelegation.[515]

Although the earlier Australian cases appear to take a very strict approach to incorporation by reference, one sees in the later cases considerable relaxation of this.

---

[512] Note, however, Mathurin c. Coffrage Dominic Ltée, supra, n. 160, where the court did not consider the subdelegation issue, but nevertheless upheld the incorporation by reference of tower crane standards.

[513] In Ex. p. Ryan, supra, n. 180 at p. 443, the court noted the issue of whether references in delegated legislation could have "ambulatory effect", but because the regulation there considered was fixed dated, it did not decide the issue.

[514] See McDevitt, supra, n. 167 at p. 7 where Nicholls, J. stated:

> The statute provides that, before by-laws shall bind the people, they shall be published. I believe this to mean that they shall be published to all the people of the State, in such manner that the average intelligent citizen can, by reading them learn what duties and restrictions they impose upon him.

See also Holland, supra, n. 1390 at p. 259; and Wright, supra, n. 164 at p. 422.

[515] Supra, p. 163.

In Holland v. Halpin[516] and Wright v. T.I.L.,[517] the courts accepted the proposition that uncertainty did not necessarily result from incorporation by reference. Rather, the issue of uncertainty was considered in terms of the clarity of the incorporating reference, the availability of the incorporated document and the technical or practical exigencies of regulating the relevant matters. Although the first two of these have little to do with controlling subdelegation, the third is intimately connected with this issue. If industry practices have developed around standards and technical data developed by a body other than the regulatory authority concerned, then it seems only reasonable that regulation of the industry be carried on in a similar fashion.[518]

When one turns to the Canadian cases on incorporation by reference, a more direct, though somewhat muddled, consideration of the subdelegation issue appears. In Kingston v. The Ontario Racing Commission[519] Stewart, J. merely concluded:

> I do not regard the adoption of the Canadian Trotting Association rules by the Ontario Racing Commission as the delegation of the latter's authority. Merely to embody the rules of another organization into its own is not in any way delegating the authority to make such rules.[520]

[516] Supra, n. 139.
[517] Supra, n. 164.
[518] E.g., in the regulation of electrical devices used in the storage of flammable liquids: Wright, ibid; the colour of margarine: Holland, supra, n. 139; the determination of the alcohol content of liquor served in a hotel: Ryan, supra, n. 180.
[519] Supra, n. 141.
[520] Ibid., at p. 14.

Although this may be true when a fixed set of rules or standards is incorporated, it is difficult to see how the incorporation of the trotting association rules, which were incorporated as amended from time to time, could have been anything other than subdelegation. What Stewart, J. perhaps meant was that the incorporation did not constitute an ultra vires subdelegation or a subdelegation of the Commission's entire rule-making power. Such a conclusion can perhaps be inferred from the provision in the enabling legislation that "any order or ruling issued by the Commission under this Act shall be deemed to be of an administrative and not a legislative nature."[521] Although Stewart, J. discussed this provision only in terms of the publication requirements, his conclusion that the rules in question were "administrative" undoubtedly rendered more easily delegable the power to make them.[522]

A second decision, R. v. Glibbery[523] is not quite so barren of reasons; however, the observations expressed on the validity of incorporation by reference appear somewhat misconceived. The court became preoccupied with the constitutional interdelegation issue and its judgement concentrates only on the question of whether Parliament could have authorized incorporation by reference; giving short shrift to the further question of whether it in fact did so. McGillivray, J.A. supported

521 Racing Commission Act, R.S.O. 1960, c. 342, s. 15.
522 Supra, pp. 177-80.
523 Supra, n. 141.

his decision on the basis of A.G. Ontario v. Scott,[524] a constitutional case where the Supreme Court of Canada approved the adoption of the law of foreign states in proceedings for the reciprocal enforcement of maintenance orders. However, this decision relates to the plenary powers of a primary legislative authority, the Ontario Legislature, and cannot be transferred holus bolus into the realm of delegated legislation.

Because the decision in Glibbery gives consideration only to the constitutional issue, its usefulness in relation to incorporation by reference in delegated legislation is highly suspect. However, in providing some enlightenment on the interpretational question of whether the incorporation was ambulatory or fixed dated, McGillivray, J.A. suggested a number of factors that are arguably relevant as well to the validity of an incorporating provision. In commenting on the regulation-making power in the Government Property Traffic Act,[525] McGillivray, J.A. stated:

> I am in no doubt as to what was intended. It is eminently sane that traffic regulations and similar enactments regarding highways upon Dominion property should conform at all times with those on highways in the areas surrounding such property and that such was the intention of the present regulation. This is confirmed by reference to other portions of the regulations. Section 5(a) requires a driver to hold all licences and permits required "by the laws of the province and the municipality in which the highway is situated." Section 5(b) stipulates

[524] [1956] S.C.R. 137.

[525] R.S.C. 1952, 324, s. 2(1) which permitted the Governor in Council to "make regulations for the control of traffic upon any lands belonging to or occupied by Her Majesty in right of Canada. . . ".

> that the vehicle be registered and equipped by "the laws of the province and the municipality in which the highway is situated." Were the laws thus referred to those of 1952 then compliance with the regulations would require a motorist entering upon the Dominion property to have a vehicle equipped to satisfy 1952 standards and to have a licence as required in that year. Such an interpretation would defeat the obvious effort of the legislation to impose a conformity of laws in order to avoid the confusion and inconvenience which would otherwise occur.[526]

In R. v. Ciarniello[527] one finds a much different attitude to that displayed in the Kingston and Glibbery cases. Romilly, Prov. J. not only recognized the subdelegation issue, he also found that the incorporation by reference of motorcycle helmet standards constituted an "abdication" of the responsibility to approve helmets. This characterization appears to have been rather extreme in these circumstances. The technical nature of the regulatory subject matter and the narrow scope of the power granted, relative to the entire subject matter of motor vehicles, both argue in favour of the incorporation of industry standards.[528] Where such standards have been established and are accepted by the industry affected, delegated legislative authorities should be able to rely on them, rather than having to duplicate the efforts of the industry itself.

To some extent this argument is recognized in Re Dennison Mines and The Ontario Securities Commission.[529]

526 Supra, n. 141 at pp. 235-6.
527 Supra, n. 147.
528 See Appendix K.
529 Supra, n. 141.

Although the Court's comments on incorporation by reference were obiter, and there was strong enabling authority for the incorporation, the approach taken by Robins, J. is a useful precedent. The case involved a regulation made under subsection 77(1) and section 139 of the Ontario Securities Act.[530] Subsection 77(1) required reporting issuers to file financial statements "made and certified as required by the regulations and in accordance with generally accepted accounting principles." In turn, section 139 gave the Lieutenant Governor in Council power to make regulations:

> prescribing the form and content of financial statements and governing the preparation and filing of financial statements of the affairs of security issuers and the audit requirements in respect thereto.

The regulation in question incorporated the handbook of the Canadian Institute of Chartered Accountants in the following terms:

> . . . for the purposes of the Act and this Regulation, where a recommendation has been made in the Handbook of the Canadian Institute of Chartered Accountants which is applicable in the circumstances, the terms "generally accepted accounting principles," "auditor's report" and "generally accepted auditing standards" means the principles, report and standards, respectively, recommended in the Handbook.[531]

The decision of Robins, J. to allow this incorporation was almost certainly conditioned by the existence of the twin requirements in subsection 77(1): i.e., conformity both with "generally accepted accounting principles" as well as with

[530] S.O. 1978, c. 47.
[531] O.Reg. 478/79.

the regulations. Hence, any reference in the regulations to those principles, or to the means by which they were usually determined, seems implicitly to have been contemplated by the Act itself.

Robins, J. also considered extensively the objects of the Securities Act and the manner in which it operated.[532] His remarks in this regard demonstrate that, as a technique in delegated legislation, incorporation by reference is more likely to be permitted where the incorporated standards or rules are made in an area of some technical complexity by a body that has recognized expertise in that area, in this

[532] Supra, n. 141 at p. 476 where Robins, J. stated:

> The Securites Act, 1978, has, as a basic aim, to afford a measure of disclosure to people who buy and sell securities, and through continuous disclosure to maintain public confidence in the capital market. Section 77, supplemented by the regulation, implements the policy underlying the legislation and in the interests of the investing public seeks to ensure that the intended level of disclosure will be achieved by the application of GAAP (generally accepted accounting principles) to financial statements required or permitted to be filed under the Act. The GAAP requirements set the standard for financial statements--they must accord with generally accepted accounting principles. Manifestly, in some situations a divergence of professional opinions may exist as to whether an accounting principle is generally accepted, or whether a choice of generally accepted accounting principles is available, or whether a particular practice constitutes an accounting principle. Section 1(3) of the regulation eliminates the likelihood of such issues and clearly identifies the standards or principles to be followed in the preparation of financial statements by adopting a definition of "generally accepted accounting principles" referable to the recommendations in the Canadian Institute of Chartered Accountants' Handbook.

case, the preparation of financial statements for the purpose of disclosing the financial structure and stability of businesses.[533] Just what form this recognition must take is unclear, though in Dennison one should note that the C.I.C.A. had, quite apart from the Securites Act, statutory authority to regulate the accounting profession.[534]

Dennison also reflects the logic of the cases where subdelegated powers were confined by criteria or limits and did not represent unfettered transfers of discretion. Robins, J. emphasized the overriding control maintained by the Commission as the sole authority in applying the regulations in individual cases and in granting relief from the requirements of the Act and the regulations.[535] He accordingly rejected the relevance

[533] Ibid., where Robins, J. continued by stating:

> The regulations definition, in my opinion, does not constitute an invalid or improper delegation of authority to the CICA. It simply incorporates by reference the accounting and auditing standards and principles set out by a professional governing body with responsibility in such matters to whose handbook, practically speaking, auditors would in any event refer in order to ensure that statements to be certified by them were in accordance with the GAAP requirements for the purposes of the Act or, indeed, for the other purposes served by the handbook.

[534] See the Public Accountancy Act, R.S.O. 1980, c. 405.

[535] Supra, n. 141 at p. 477.

of cases such as Sandler and Brant Dairy.[536]

If the incorporation by reference cases exemplify the significance of pragmatic factors in determining the propriety of subdelegation and the extent of the legislative obligation, then a recent Federal Court case illustrates the overriding importance of the provisions of enabling legislation. In Dene Nation et. al. v. The Queen[537] the Court considered a regulation[538] under the Northern Inland Waters Act.[539] This Act created a licensing scheme for water management undertakings. However, paragraph 26(g) enabled the Governor in Council to make regulations:

> (g) authorizing the use without a licence of waters within a water management area
> (i) for a use, uses or class of uses specified in the regulations,
> (ii) in a quantity or at a rate not in excess of a quantity or rate specified in the regulations, or
> (iii) for a use, uses or class of uses specified in the regulations and in a quantity or at a rate not in excess of a quantity or rate specified therein.

The regulation in question purported to do this by imposing

[536] Ibid:

> Those decisions, in my opinion, are not apposite here. The rationale for invoking delegatus non potest delegare against a governmental agency is not found in this case. The regulation does not constitute a broad or unstructured delegation of authority; the standards incorporated by it are not vague or uncertain; and it can not be construed as encouraging discrimination, arbitrary action or subjective notions of policy.

[537] Unreported decision of the Federal Court, Trial Division, No. T-3536-81, dated February 14, 1984.

[538] S.O.R./72-382, as amended by S.O.R./74-60 and S.O.R./75-382.

[539] R.S.C. 1970, c. 28 (1st Supp.).

a number of conditions, one of which was that

> . . . the Controller has stated in writing that he is satisfied that the proposed use would meet the applicable requirement of subsection 10(1)[540] of the Act if an application described in that section for that use were made . . .[541]

Reed, J. noted both that the Controller was not mentioned in the Act and that his role under the regulation was substantially similar to that of the Water Boards that granted licences under the Act. She went on to conclude that an unauthorized subdelegation of legislative power had occurred, despite the inclusion in the regulation of some constraints on the Controller's power:

> In this case there has not been a wholesale delegation as in the Brant and Brent cases (supra); some legislative guidance is given. The proposed use must be for municipal or water engineering purposes; the quantity must be less than 50,000 gallons a day; and the requirements of section 10(1) must be met. However, not enough legislative guidance has been given to escape the conclusion that an unauthorized sub-delegation has occurred. Section 10(1) does not provide a sufficiently complete code of requirement. Instead, it sets up parameters within which discretionary judgments must be made.[542]

The most significant indicator of the excessive breadth of the Controller's discretion was the subjective terminology used in the regulation, requiring that the Controller be "satisfied". In construing the breadth of this discretion, Reed, J. considered whether mandamus would lie to compel the Controller to act. The use of this test illustrates a

[540] This subsection imposed conditions relating to the issue of licences.
[541] Supra, n. 538, s. 11.
[542] Supra, n. 537 at pp. 6-7.

judicial proclivity for rules and tests that are established in law. However, one may question its appropriateness in these circumstances. Her decision seems to go in two directions at once. Initially, Reed, J. stated that the requirements for water use without a licence were to be "specifically and exhaustively set out . . . in the regulation."[543] Later, however, she discussed the mandamus test as if subdelegation of administrative powers would have been permissible.

Arguably, the mandamus test was a red herring and Reed, J. was correct in her initial conclusion that the regulations should have been exhaustive. This view follows both from the sensitive environmental considerations that underlay the enabling Act and from the language of the enabling provisions. The latter contemplated the permissible uses being "specified" in the regulations and the application provisions in section 4 provide a statutory example of how these might be specified. These exempt water use "for domestic purposes" and incorporate an extensive definition of "domestic use" in subsection 2(1), a definition that does not depend on the decision of an administrative official. Finally, the references to "quantity" and "rate" in the enabling provisions reinforce the notion that permissible uses should have been discernable from the face of the regulation.

The cases on subdelegation and incorporation by reference all depend on the construction of statutory enabling

[543] Ibid. at p. 6.

provisions. The Dene Nation case is somewhat exceptional in that the enabling provisions of the Northern Inland Waters Act were relatively precise. In most cases, however, enabling provisions provide only rudimentary guidance, bringing into play the practical factors and limitations surrounding the exercise of delegated legislative powers. Thus, despite the absence of clear statutory provisions, the courts have assumed jurisdiction in subdelegation cases to determine how the responsibilities and authority inherent in delegated legislative powers may be apportioned. In the Sandler and Joy Oil cases, for example, it is scarcely surprising that the Ontario Legislature did not address itself to the precise details of what powers ought to have been capable of subdelegation to fire chiefs. On the question of subdelegation, the courts supplement the supervisory function of primary legislative bodies, just as delegated authorities supplement their legislative functions. Since such detailed control is, most often, beyond the capacity of the former and cannot be left to the latter, the role of the courts in this respect entails a potentially detailed assessment of the practicalities surrounding the exercise of power, an assessment that most often has not, however, been made or clearly articulated.

Division G - Unreasonableness

Up to this point, my review of judicial scrutiny has concentrated on the courts as interpreters of the substantive constraints expressed or implied in enabling legislation. There remains, however, one final head of scrutiny that, on its face, appears to have little to do with the interpretation of enabling provisions: unreasonableness.[544] Not surprisingly, as courts have become more accustomed to the use of delegated legislation as a law making technique, this aspect of their review has receded to the point where it is now narrowly circumscribed in the municipal context[545] and rendered virtually nonexistent in relation to the review of ministerial powers.[546] In these circumstances, the courts have recognized the potential that such an unstructured criterion as "unreasonableness" holds for trespass on the jurisdiction of rule-making authorities[547] and emphasized the alternative checks available to

[544] This head of scrutiny seems closely related to the "contrary to public interest" criterion that occasionally appears in municipal law: see Allen, loc. cit., n. 259 at p. 15. It seems particularly to have arisen in attempts to avoid statutory provisions excluding review on the basis of unreasonableness: see Re Howard and City of Toronto [1928] 1 D.L.R. 952 (Ont. C.A.); see too Re Stilling, supra, n. 367 where it was used to strike down a regulation limiting the licensing of dental technicians and was supported on the basis of Kruse v. Johnson [1898] 2 Q.B. 91.

[545] Kruse v. Johnson, ibid. See too Allen, loc. cit., n. 259 at pp. 5-7.

[546] See Sparks v. Edward Ash Ltd. [1942] K.B. 223.

[547] Sparks, ibid. at p. 229; Kruse, supra, n. 545 at p. 100.

control delegated legislation.[548] And, lest their caution be thought excessive, one should note provisions such as section

[548] In Kruse, ibid., Lord Russell, C.J. stated at pp. 97-8:

> What are the checks and safeguards under which this very wide authority of making by-laws is exercisable? The same s. 23 further provides that no by-law can be made unless two-thirds of the whole number of the council are present; and, when so made, it shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall; and it shall not come into force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those forty days the Queen, with the advice of her Privy Council, disallows a proposed by-law or part thereof, such by-law, or such part, shall not come into force, and the Queen may, within the forty days, enlarge the time within which the by-law shall not come into force. We thus find that Parliament has thought fit to delegate to representative public bodies in town and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards.

Similarly, in Sparks, ibid., Scott, L.J. observed at p. 229:

> If it is the duty of the courts to recognize and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is remitted. Over and above these grounds for trusting to that minister's constitutional discretion is the further consideration that these regulations have to be laid on the table of both Houses, as provided by s. 111 of the Act of 1930 with which the Act of 1934 is to be read as one, and can be annulled in the usual way.

103(2) of the Ontario Municipal Act[549] which specifically excludes review of municipal by-laws on the basis of unreasonableness.[550]

When one examines the cases where unreasonableness has been argued, it is usually submerged in other grounds of review and emerges as little more than an afterthought. It is most frequently paired with bad faith,[551] discrimination[552] or vagueness[553] or appears as an element in assessing the relationship between an instrument of delegated legislation and the purposes or subject matter specified in its authorizing legislation.[554] Thus, although unreasonableness may be determ-

[549] R.S.O. 1980, c. 302:

> A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.

[550] Note, however, that, according to Howard, supra, n. 544, reasonableness is still relevant indetermining the existence of bad faith.

[551] See e.g. Kruse, supra, n. 544; Lacey, supra, n. 451; Hanson, supra, n. 451; Figol v. City of Edmonton (1980), 11 Alta. L.R. 9 (Q.B.).

[552] See e.g. Kruse, ibid.; Lacey, ibid.; Hanson, ibid.; Figol, ibid.; McEldowney, supra, n. 11; Bell v. The Queen, supra, n. 391; Re London Drugs and City of North Vancouver (1972), 24 D.L.R. 3d 305 (B.S.S.C.); Re Aves and Board of Public Utilities (1973), 39 D.L.R. 3d 266 (N.S.C.A.); Smith v. Twp. of Tiny (1980), 39 D.L.R. 3d 483 (Ont. H.C.); Cassidy v. Minister for Industry and Commerce, a 1977 Irish case reviewed by J. P. Casey, "Ministerial Orders and Review for Reasonableness" [1978] P.L. 130.

[553] See e.g. Smith, ibid.; McEldowney, ibid.; London Drugs, ibid.

[554] See e.g. Chertsey Urban District Council v. Mixnam's Properties Ltd. [1965] A.C. 735; Corp. Municipalité de St. Eugène v. Dorais (1981), 15 M.P.L.R. 69 (C.S.Q); Ritholtz v. Manitoba Optometric Society (1960), 21 D.L.R. 2d 542 (Man. C.A.).

inable on a very broad basis, it is narrowed to an adjectival function and the focus of inquiry continues to be one or other of the grounds noted above.

This said, one may justifiably ask what purpose does the notion of unreasonableness serve in the context of delegated legislation since in many cases it is synonymous with ultra vires.[555] Two conclusions seem possible here. First, the adjectival status of unreasonableness, when taken together with the pervasiveness of the concept throughout the common law, suggests that, whether courts say so or not, all of the criteria for the review of delegated legislation

[555] See e.g. Hanson, supra, n. 451; London Drugs, supra, n. 552; Kruse, supra, n. 544 at pp. 99-100 where Lord Russell, C.J. attempted to define unreasonableness in a passage that has recently been cited with approval by Spence, J. in the Supreme Court of Canada in Bell v. The Queen, supra, n. 391;

> But unreasonable in what sense? If, for instance, they (the by-laws) were found to be partial and unequal in their operation as between different classes; if they involved such oppressive or gratuitous interference with the rights of those subjects to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded.

are applied through the lens of unreasonableness.[556] Secondly, unreasonableness may be employed as a device for imposing more stringent requirements in determining whether delegated legislation comes within its enabling powers.[557] Its use manifests dissatisfaction with tenuous linguistic or logical links between the prescribed and actual purposes or subject matter of delegated legislation and seeks to achieve results that the courts feel resonate more soundly with the needs and wishes of the public on whose behalf it is made. I use the comparative form here because, as the cases cited above amply demonstrate, the courts will not presume to decide what is most reasonable and impose this judgement on delegated legislative authorities. To do so would entail sitting as an appellate court on the merits and would come much too close to usurping the functions of the authority under review.

The concept of unreasonableness reflects this conside-

[556] See e.g. Chertsey, supra, n. 554 where the House of Lords cast the unreasonableness criterion in terms of the relationship between caravan site licence conditions and the subject matter with respect to which local authority was empowered to impose the conditions. At p. 751, Lord Reid quoted from Lord Denning's judgement in Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1958] 1 Q.B. 554 at p. 572:

> Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

[557] See Paul Robertshaw, "Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case" [1975] P.L. 113.

ration throughout its application in law. In tort law, a defendant is not negligent merely because he failed to take the most prudent course of action. He is allowed a range of alternatives that fall within the ambit of "reasonable" conduct. So too in administrative law cases, as the judgement of Lord Denning in Secretary of State for Education and Science v. Tameside[558] demonstrates. In determining whether the Secretary of State properly concluded that a school council acted "unreasonably", he stated, "No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view."[559]

The application of the notion of unreasonableness in the scrutiny of delegated legislation demonstrates in the starkest of terms the tension that exists between the functions of the courts and the delegated legislative authorities that they review. As much seems clear from Bell v. The Queen,[560] a somewhat surprising judgement of the Supreme Court of Canada that recently resurrected the concept of unreasonableness in this context. The case arose from a municipal zoning by-law passed under the Ontario Planning Act.[561] The by-law purported to restrict the use of dwellings in the City of North York

[558] [1976] 3 All E.R. 665 (C.A.).
[559] Ibid. at p. 671.
[560] Supra, n. 391.
[561] R.S.O. 1970, c. 349, s. 35(1). Note that because the by-law was passed under this statute, and not under the Municipal Act, it was not protected against review for unreasonableness, by the provision noted above at n. 549.

as residences by persons unrelated by "consanguinity, marriage or legal adoption."

Writing for the majority of the court, Spence, J. ruled that the provision was invalid on two related bases. First, he considered that the by-law "was not regulating the use of the building but who used it;"[562] secondly, he pointed to the "dire result of such a restrictive provision"[563] and adopted the comments made by Estey, C.J.H.C. when the case was heard in the Divisional Court:

> Both counsel admitted before this Court that the effect of such a provision of the by-law is to preclude the sharing of rented accomodations by two adult perons unrelated by blood or marriage, whether or not that accomodation be an apartment. For example, students attending a college in the Borough of North York, could not as tenants share apartment accomodation in or outside the college. There are endless examples, all of which inexorably lead this Court to the conclusion that there are consequences which cannot reasonably be considered to have been in the mind of the enacting Legislature when it enacted s. 35 of the Planning Act. Such possible consequences would require the clearest possible language in the ensuing legislation.[564]

Then, after quoting two further passages that strongly warned against judicial interference with municipal by-laws,[565] Spence, J. proceeded to conclude that the case came within the definition of unreasonableness stated in the locus classicus on unreasonableness in the municipal context, Kruse v. Johnson:[566]

---

562 Supra, n. 391 at p. 262.
563 Ibid.
564 (1977), 69 D.L.R. 3d at p. 383.
565 The citation of these passages seems clearly to have been intended to narrow the breadth of the unreasonableness criterion that the court in Bell was re-establishing.
566 Supra, n. 544.

> In view of the many possible inequitable applications of the definition of "family" which I have mentioned above, I am of the opinion that the by-law in its device of adopting "family" as being the only permitted occupants of a self-contained dwelling unit comes exactly within Lord Russell's words as to be found to be "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" and, therefore, as Lord Russell said, the Legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is ultra vires of the municipality under the provisions of the Planning Act.[567]

The Bell case has drawn comment in two divergent articles, one of which was written by Susan Himel who appeared as counsel for the successful appellants in the case. She asserted that the decision was substantially grounded on the "fact that the common law relationship now is receiving greater and greater legal recognition."[568] She concluded:

> Some years ago, the provisions of by-law no. 7625 perhaps would not have been found by the Supreme Court of Canada to be ultra vires the powers of the municipality. However, in light of the economic hardship to residents in North York, the shortage of available housing, the increasing recognition by the law of common law relationships, and the realization that persons in this country have fundamental human rights to choose with whom they wish to reside, the Court in Bell, reflecting changes in social mores, was moved to find that this by-law was not within the competence of the municipality.[569]

At the other end of the critical spectrum, David Goyette and Professor S. M. Makuch were not nearly so laudatory,

---

[567] Supra, n. 391 at p. 263.

[568] Susan G. Himel, "We are (not) Family: Zoning By-laws and Reasonableness--A Comment on Bell" (1980), 1 Sup. Ct. L.R. 367 at p. 372.

[569] Ibid. at p. 373.

pointing out the superficiality of the "user versus use distinction" and the consequential difficulties that would result if the municipalities attempted to control population densities on the location of group homes. However, their most fundamental criticism was of the court's approach:

> It would seem that the Court is engaging in an examination of the substantive fairness of the municipality's zoning by-law and to see if it is wise policy. . . . It would seem appropriate that the Courts attempt to limit their examination of the merits of municipal by-laws except where there is evidence of discrimination in the passing of the by-law. In this case it appears that the Court is using the doctrine of ultra vires to narrow municipal authority simply because it does not agree with a particular policy or result. The policy choice is surely the municipal councils (sic).
>
> As the Court of Appeal pointed out in this case "the by-law was not aimed at unmarried couples or elderly widows or at any other particular individual or indeed any moral conduct." Moreover, in interpreting the scope of the Legislative authority it would seem necessary to examine the rationale for that legislation. The Planning Act deals with such matters as sewage, water, roads, and other services as well as the segregation of uses to prevent nuisances. In the instant case, to quote the Court of Appeal, "the limitation of use to families" as defined may be based on such things as schools, traffic, sewer or water requirements, or on a host of other needs, problems and concerns within the responsibility of the municipality. The Supreme Court of Canada does not deal with this point and has simply reduced the ability of municipalities to deal with planning problems by its decision because of unreasonable consequences.[570]

Although Goyette and Makuch perhaps too easily dismiss the discrimination aspect of the case, the substance of their criticism is not adequately met by the rationalia

[570] David Goyette and S. M. Makuch, "Annotation to Bell v. R." (1979), 9 M.P.L.R. 104 at p. 105.

propounded by either Spence J. or Himel. They underscore the Court's limited analysis of the matter and its over-readiness to recognize the "right to live together" that Himel celebrates. In a sense, Bell is the obverse of CKOY, representing a subordination of the power of a delegated legislative authority to an individual right. The distinctions between the two cases are, however, difficult to grasp and certainly do not turn on any express consideration of the enabling provisions in the two cases.[571] Arguably, the notion of reasonableness was used by the court in Bell as a lever for increasing its authority for intervening on the basis of discrimination. In CKOY, the appellant could not fit the case into a familiar category, such as discrimination, and was also deterred from asserting unreasonableness because of the nature of the authority in question. As I have noted above, ministerial delegated legislation has been held to enjoy virtual immunity from the unreasonableness criterion and, as a specialized administrative agency subject to the directions of the Governor in Council,[572] the C.R.T.C. was more closely aligned with the latter than with municipal authorities in respect of which unreasonableness subsists as a criterion of validity.

[571] Although Spence, J. in Bell cited section 35(1) of the Planning Act, he did not discuss it in any fashion.

[572] Broadcasting Act, supra, n. 271, s. 15.

Division H - Conclusions (Substantive Scrutiny)

This part began with a review of the manner in which courts construe enabling provisions, focussing particularly on "purpose" clauses. There emerged considerable variation in the degree of scrutiny undertaken. This variation seems to have depended largely on the subject matter involved and the degree of recognition given to the rights with which the delegated legislation in question conflicted. In essence, these cases suggested that when the courts are in familiar territory, in terms either of the subject matter being regulated or the definition of the rights being infringed, they are more circumspect and tend to construe enabling provisions more narrowly.

The cases on the construction of enabling provisions also bear out the importance of evidence in determining whether an authority acted within the scope of its powers. The presumption of regularity tends to impose a very heavy evidentiary burden on persons attacking the validity of delegated legislation and should be modified, particularly when the authority in question is in exclusive possession of the relevant evidence. The fact that the presumption has been modified in some taxation, habeas corpus and property rights cases both suggests that it is possible in others and affirms the proposition that courts are most critical when dealing with well defined rights.

The latter proposition is further strengthened

when one examines the rules of statutory construction that the courts have developed and applied. In the case law dealing with delegated legislation that alters primary legislation, one sees an expansion of these presumptions in favour of individual rights. The rights in question arise not from traditional, common law sources, but from statutory provisions on the construction of which the courts consider themselves to be the chief authorities. As the courts define individual rights they concomitantly restrict the scope of delegated legislative powers.

Many of the cases discussed throughout this part demonstrate the importance of statutory detail in the construction of enabling provisions. When delegated legislation is made under skeletal legislation, its enabling authority is likely to be construed to be very broad. Contrariwise, statutory definition of a regulatory scheme provides a very powerful basis for narrowing the scope of delegated legislative powers.

Although judicial scrutiny is enhanced by statutory detail, the courts have nevertheless developed what I have called the obligation to act legislatively. It has taken most of its inspiration from the rules governing subdelegation, rules that manifest a considerable degree of judicial creativity in both their development and application. The obligation to act legislatively represents the high point of judicial scrutiny of delegated legislative powers and demonstrates the courts can supplement the role of primary legislative

authorities in supervising their delegates. The obligation also represents the confluence of substantive and formal scrutiny, turning as it does on natural justice or due process concerns. These argue that administrative authorities should both make known and be bound by the rules that guide their exercise of discretion. Thus one returns to the rationale propounded by Professor Davis in the context of his critiques of discretionary powers[573] and the doctrine of required rule-making.[574] The courts are and should be vehicles for eliminating unnecessary discretion. If an administrative authority invariably exercises its powers in accordance with defined guidelines, then these should be embodied in delegated legislation.

[573] Supra, n. 4.
[574] Supra, p. 174.

Judicial Review of Delegated Legislation - Conclusions

The wealth of techniques to assist judicial review does not guarantee its effectiveness. Often these are not employed, or if they are, they are not employed on the basis of a thorough, functional analysis of the situation. The courts frequently seem to be deterred by what they perceive to be matters of "policy". Although this attitude may have evolved from the traditional judicial reluctance to examine the purposes of legislative enactments, it seems to have at least as much to do with questions and subjects with which they are familiar. The judicially created rules dealing with legislative and administrative powers, subdelegation and rules of construction are aspects of scrutiny that are well known to the courts and constitute "legal matters" over which they claim exclusive jurisdiction. The fact that these aspects have been developed by the courts themselves seems not to have inhibited their use as bases for judicial intervention. The slow, gradual entrenchment of such forms of intervention in the law no doubt makes them as acceptable in a democratic state as is statute law. Democracy and majority rule seem able to accomodate the judiciary as moulders of the legal system and its interpretive rules. As long as legislators know these rules in advance, they should, presumably, be able to achieve the results they intend.

The problem with this analysis is that the rules

are not clearly defined and the intensity of judicial scrutiny is not uniform.[575] The relationship between the judicial and legislative branches of government reflects a chicken and egg conundrum with each branch casting an eye to the other in search of the rules for determining the validity of instruments of delegated legislation.

To be sure, a certain degree of the uncertainty apparent in the judicial review of delegated legislation results from the typical breadth of its enabling powers. However, it seems equally to arise from a reluctance on the part of many reviewing courts to appreciate in fuller detail the circumstances that surround the exercise of these powers. Even the application of the rules of statutory construction entails substantial practical considerations that, when overlooked, produce dissatisfying decisions.

The fear of trespassing on or taking over the functions of delegated legislative authorities often results in a wariness of delving very deeply into these functions. However, the latter does not necessarily entail the former. A deeper analysis can, I would argue, lead only to the better definition of the limits of the powers required to fulfill delegated legislative functions, so long as the courts keep in mind their role to establish these limits, not invade them. Judicial review

[575] See e.g. Robertshaw, loc. cit., n. 557 for a psychological analysis of Chertsey Caravans that suggests that the reasons underlying the review of administrative discretion can range far indeed.

cannot rest solely on invocations of the various interpretive rules of thumb. These may be helpful as rudimentary guides for expressing and uncovering legislative intent, but they are insufficient in themselves.

My examination of the procedural aspects and substantive limits of delegated legislation reveals the importance of the definitional analysis with which I began. A priori concepts of "rules" and legislative functions are an essential feature of these aspects of judicial review. In the procedural context, this analysis serves to draw the limits of the express requirements of registration, notice and comment and publication. In addition, the notion of "legislative" powers that lies at the heart of the definition of delegated legislation forms the basis for drawing the limits of natural justice and fairness.

When one turns to substantive review, the definitional approach is equally serviceable as a device for preventing the exercise of legislative powers by administrative discretion. Cases such as Brant Dairy reflect the view of delegated legislation as a necessary check on such discretion and arguably impose an obligation on delegated authorities to exercise their powers legislatively.

This obligation stems from the supremacy of Parliament and the democratic impulses inherent in that notion. For, if authority flows from the electoral mandate of legislative bodies, then the more closely an exercise of power is tied to that mandate, the greater its legitimacy. As the pre-eminent

means of controlling the exercise of power, rules made by a higher authority transfer its legitimacy to the lesser authority who is bound to exercise power accordingly. The importance of a delegated legislative authority's link with an electoral mandate clearly underlies the importance attached to the character of delegated legislative authorities in determining the scope of judicial review. Because delegated legislation is, virtually by definition, made at a relatively high level in any administrative stucture, it tends to enjoy greater legitimacy and is, arguably, an essential feature of any such structure in a democratic society.

Growing out of the democratic principle is the notion of equality that underlies Dicey's rule of law, a notion that is both recognized in the discrimination cases and enshrined in section 15 of the Canadian Charter of Rights and Freedoms. The uniformity that rules help to produce clearly establishes their importance in ensuring that "every individual is equal before and under the law." A further outgrowth is the consideration of procedural due process embodied in natural justice and fairness. When the bases upon which a decision is to be made are set out in regulatory form, an individual is better able to prepare a case and secure relief.

Counterpoised against these considerations are those arising from the nature of a particular regulatory function and the practical exigencies of its subject matter. The sub-delegation and incorporation by reference cases clearly bear

out the importance of such factors and illustrate that the obligation to act legislatively is by no means absolute.

In the Introduction, I noted and discussed briefly a paragraph quoted from J. A. G. Griffith's Judiciary Politics. Although he viewed the courts as an integral part of the prevailing system of government, this view was coloured with pessimism. However, the delegated legislation cases that I have canvassed suggest not so much a political philosophy or a concern for governmental stability as an adherence to tried and true legal norms and a reluctance to expand the bounds of judicial experience. The superficiality of the judicial scrutiny of purpose clauses and the significance of the principle of strict construction in relation to certain defined areas amply demonstrate this. Although the respect accorded proprietary interests may reflect right wing sentiments, I would argue that it arises primarily from the orientation of the legal system as a whole, from its foundation on the notion of "rights" and from the historical predominance of proprietary interests within this notion. Cases such as Bell v. The Queen[576] suggest, however, a shift away from this predominance as the legal system incorporates differing types of interests within its notion of "rights".

If the political colour of judicial review is changeable, one might also hope that the extent of its analysis of the validity of delegated legislation may be as well.

576
Supra, n. 391.

Throughout this thesis I have noted the superficiality arising from the tension between establishing the limits of delegated legislative powers and assuming the functions for which they were conferred. Undoubtedly, this superficiality has resulted from the heavy burden of proof on those challenging the validity of delegated legislation and the dearth of evidence. However, it conceivably also results from an insufficiency in the investigation of issues and presentation of evidence by counsel.

Hope for more intensive judicial review lies in cases such as Heppner,[577] Pacific Pilotage[578] and Telecommunications Workers.[579] In addition, the review of powers now given to the courts under the Canadian Charter of Rights and Freedoms may broaden the bounds of their experience and intensify their approach to the legality of delegated legislation.[580] What seems clear is that, despite set-backs such as the Inuit case,[581] there is still considerable scope for development.

I have at several points referred to the recent judicial awakening of the "fair, large and liberal construction" provisions in interpretation statutes.[582] This development is, however, so recent that its probable impact must at present be based on a handful of cases, only one of which deals with the

[577] Supra, n. 303.
[578] Supra, n. 309.
[579] Supra, n. 424.
[580] See Barry, loc. cit., n. 14; R. A. MacDonald, "Postscript and Prelude--The Jurisprudence of the Charter: Eight Theses" (1982), 4 Sup.Ct.L.R. 321 at pp.329-38.
[581] Supra, n. 11.
[582] Supra, n. 378.

validity of delegated legislation.[583] Although these represent a loosening of the strict method of interpretation in many areas, this loosening should not entail a relaxation of judicial scrutiny. In fact, it should fuel the opposite tendency by encouraging courts to pry even more deeply into the objectives and practicalities of delegated legislation in order to "ensure the attainment of [an enactment's] objects."[584]

If the judicial review of delegated legislation in Canada needs inspiration, the courts should turn from the pessimism expressed by Professor Griffith to the rather more encouraging approach advocated by the late Judge Harold Leventhal in the U.S. His approach arose out of a much more rigourous and adventuresome tradition of judicial scrutiny and is rooted in the feeling that this scrutiny needed to be reined in. Rather than goading the judiciary to life, as Professor Griffiths has attempted to do, Judge Leventhal advocated a less antagonistic role for the courts. His conception of the role of the court is well expressed in Greater Boston Television Corporation v. F.C.C.:[585]

> . . . the court is in a real sense part of the total administrative process," supervising the agency in order to ensure fidelity to the legislative will and reasoned decision-making, and joining with the agency in "a °partnership' in furtherance of the public interest," as "°collaborative instrumentalities of justice'.

Although this approach finds expression in terms

583 N.B. Liquor Corp., ibid.
584 Interpretation Act, supra, n. 377.
585 Supra, n. 487.

of review on the basis of such general criteria as "reasoned decision-making" and the "hard look doctrine," notions that are so broad as to cause most Canadian courts to recoil, these notions are applied in a manner that is as sound in the American context as it should be in Canada. In commenting on the development of the "hard look" doctrine, Samuel Estreicher has noted:[586]

> Although the primary focus of the "hard look" doctrine is on whether the agency took the requisite "hard look," the reviewing court must immerse itself in the record in order to determine whether the agency's findings and conclusions enjoy the required degree of factual support and reasoned articulation. Students of D.C. Circuit decisions are familiar with the longstanding debate between the Chief Justice Bazelon and Judge Leventhal over whether the courts are capable of meaningful review of the substantive rationality in agency decisions raising complex scientific and technological issues. Judge Bazelon argued that courts, experts at devising procedures, should limit their intervention in such cases to fashioning appropriate procedures for testing opposing views. Judge Leventhal countered that familiarity with the record was indispensable if there was to be any genuine scrutiny of the agency decision at all: "Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably."

Estreicher went on to elaborate further on Judge Leventhal's view of "constructive" judicial review. This view certainly does not describe the typical relationship subsisting either in the U.S. or in Canada, but rather is a vision of where the courts should be heading in their review, a vision that unifies the process of governing, rather than

[586] Samuel Estreicher, "Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law" (1980), 80 Col. L.R. 894 at p. 906.

fragmenting it into separate bodies, each charging off in different directions while straining to pull the wagon of democratic government:

> In the Leventhal vision, the court's role is not only to ensure reasoned decision-making, and to be alert to "danger signals" suggesting the absence of reason in the process, but also to join with the agency in an effective partnership in the public interest. Judge Friendly voiced skepticism in a 1975 article: "There is little doubt who is considered to be the senior partner." Judge Leventhal disagreed. Court and agency, he insisted, are not competitors or occupants of different levels of a hierarchy; they are joint venturers, each having an area of primary responsibility. Their relationship "embraces a quality of coordination, and not merely of review." The court's mission is not to supplant or control, but to facilitate the sound workings of the administrative process. "The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance."
>
> In a "working partnership," the court undertakes review of agency action in a spirit of "mutuality of recognition and respect." Where a principled choice is possible, the court should opt for the resolution that yields dialogue within the agency, rather than mere submission to judicial will; that enhances flexibility and creative response by the agency, rather than unreflective acquiescance; that bespeaks cooperation, rather than coercion.[587]

Underlying the approach suggested by Judge Leventhal is an awareness of the enormity of governing in the present day. The scope of powers transferred from primary legislative authorities evinces the inadequacy of these authorities either to legislate completely or to control the executive bodies on whom those powers have been conferred. The courts cannot shirk their role of assisting parliaments and legislatures

[587] Ibid., at p. 907.

in performing their task of governing. This supplemental role is new only to the extent that governmental activity has expanded it. Surely it is time for the courts to recognize that neither they nor the legislative bodies that they support are in the nineteenth century, that democratic responsibility has already been attenuated by growth of regulatory programs and that a more analytically and investigatively thorough judiciary can only ameliorate this attenuation.[588]

[588] When I commenced this thesis, I had hoped to examine both judicial and legislative scrutiny of delegated legislation. I still hope to pursue this and recognize that my conclusions here, emphasizing the importance of judicial review, may be modified as a result of examining legislative scrutiny.

APPENDIX A

Australian Incorporation by Reference Cases

In the second of the four cases, O'Keefe v. City of Caulfield [1945] V.L.R. 227, a municipal by-law incorporated parts of a regulation that had been previously passed by the same authority and was in fact published in the same volume of the Government Gazette as the incorporating by-law. The case differed from McDevitt in that the enabling statute, the Local Government Act, 1890, N. 112, s. 204, provided that every by-law should be "published at length in the Government Gazette". The court struck down the by-law, noting that it was unintelligible without the incorporated regulation and that the statutory requirements for making and publishing by-laws were to be strictly complied with. (pp. 228-9)

The third and fourth cases involved wartime regulations made by the Commonwealth Prices Commissioner pursuant to a power to "fix and declare" the maximum prices of various commodities under Regulation 23(1) of the National Security (Prices) Regulations, S.R. 1940, N. 176 - 1942, N. 513. In Arnold v. Hunt (1943), 67 C.L.R. 429 (H.C.), the Commissioner purported to set the price of whiskey in an order that referred to the retail price list published by a trade association. Rich, J. struck down the order, stating

> The order published in the Gazette in the present case does not fix or declare any price. The price is fixed and declared by the list issued by the Victorian Associated Brewers. I consider that

> the price must be fixed and declared in the body of the order itself or in a schedule to the order and cannot be fixed by some extraneous document which is not part and parcel of the order. (p. 431)

He did not, however, discuss another regulation that, on its face, broadened substantially the "fix and declare" power of the Commissioner. Regulation 23(1A) conferred power

> to declare maximum prices relative to such standards of measurement, weight, capacity, or otherwise howsoever as he thinks proper, or relative to prices charged by individual traders on any date specified by him, or so that such prices shall vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by him.

In a similar case, McIver v. Allen (1943), 43 S.R. (N.S.W) 266, the court did note this regulation, but was undeterred in holding the relevant pricing order invalid. Jordan, C.J. stated:

> It is of great importance that the provisions of such regulations should be strictly observed by the Commissioner when he proceeds to make orders under them. The orders are of a legislative character; therefore, by virtue of s. 5(4) of the National Security Act, 1939, read in conjunction with s. 48 of the Acts Interpretation Act, 1901-37, they must be laid before each House of Parliament, and, if disallowed by either House, cease to have effect. If information is withheld from the face of the order which ought to be stated there, legislators are impeded in exercising a right of criticism which the Act expressly requires that they are to have. It is disquieting to learn, from the evidence given in the case now before us, that it has been sought to legislate upon so important a matter as price fixing a commodity which is in great demand, by means of telephone messages between a Commonwealth official and the secretary of a private association, with complete disregard for the safeguards required by the statutory regulations. (p. 269)

APPENDIX B

Enabling Clauses

A subject matter is almost by definition tangible or referable to common experience. By the same token, the most commonly enumerated specific functions, such as "licensing", "regulating" or "prescribing" are definable in terms of administrative experience. In contrast, the realization of a purpose is far less tangible. Although the objective may be as capable of definition as are subjects or functions, the way of achieving that objective is obviously much less so. Indeed, the primary reason for delegating a legislative power in purposive terms is the inability of the delegating body to define how the purposes are to be achieved. This in fact is the function being delegated.

I believe that this point is borne out in Dr. Driedger's comments on enabling clauses in Construction of Statutes, op. cit., n. 290. In discussing purpose clauses at p. 308, he has stated:

> But where Parliament authorizes regulations for a stated purpose, the regulation-making authority has a free hand to establish, not only the details, but also the main principles. The entire law is therefore to be left to the decision of subordinates. So long as the law is within the stated purpose, it cannot be challenged.

The last two sentences of this passage hint at the underlying tension between leaving the "entire law" in the hands of a delegate while confining it to the "stated purpose". The distance the courts go in defining the purpose determines

the extent of the "entire law".

For a judicial analysis of the relative scope of purpose and subject matter clauses, see Paull v. Munday (1975), 11 S.A.S.R. 346 (S.C.) per Wells, J. at p. 352. Although this decision was overturned on appeal: (1976), 50 A.L.J.R. 551, the Full Court of Australia did not discuss in detail the terms of the enabling provision. Rather, it focussed on the detail in the other enabling provisions of the Act in question, reaching the decision on a basis similar to that discussed in Part III, Division D.

For a case contrasting the scope of subject matter and "prescribing" clauses, see N.B. Liquor Corp., supra n. 378 where the court construed the former more broadly than the latter.

APPENDIX C

Subjectively Phrased Enabling Clauses

Typical subjective phraseology includes "as (the delegated legislative authority) deems necessary" or "as are necessary in the opinion of (the authority)". For further examples and discussion, see Driedger, Construction, op. cit., n. 260 at p. 307; Driedger, Composition, op. cit., n. 260 at p. 191; Dussault, op. cit., n. 98 at pp. 47-48; Garant, op. cit., n. 18 at pp. 213-3; D. J. Mullan, Administrative Law, 2d ed. (Toronto: 1979) at pp. 3-190-192. See also J. M. Evans, De Smith's Judicial Review of Administrative Action, 4th ed. (London: 1980) at pp. 286-98 where one finds an extended discussion of subjectively worded clauses enabling a wide range of statutory powers. At pp. 296-7 he concludes:

> On analysis, then, few discretionary powers are found to be absolutely unreviewable when they have a direct impact on private rights; and judicial review is conducted by applying flexible principles of legality in a flexible way . . .
>
> Broadly speaking, however, one can say that the courts will show special restraint in applying tests of legality where (i) a power is exercisable in "emergency" conditions; (ii) an executive power, the exercise of which is not subject to appeal, is used to exclude, remove or deport aliens or other non-patrial persons on policy grounds; or (iii) the "policy" content of the power is large and its exercise affects large numbers of people. Their reluctance to intervene is likely to diminish the more closely the wording and context of the power approximate to those of a discretion typically exercised by a tribunal. The willingness of the courts to intervene may also depend on the nature of the interest affected by the exercise of discretion: for example, the citizens's interest in the vindication of public rights, the alien's interest in entering or remaining after his leave has expired in the United Kingdom, and the individual's interest in

> not being adversely affected by an exercise of discretion that has no final effect upon his rights, do not appear readily to attract judicial intervention.

See too John Griffiths, "Some Recent Developments in Judicial Review of Executive Powers" (1978), 11 Melb. L.R. 316; Paul Robertshaw, "Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case" [1975] P.L. 113.

APPENDIX D

Judicial Notice

Traditionally, judicial notice is reserved for facts that are "the common knowledge of the great majority of mankind," "known to intelligent persons generally," "what everyone is familiar with", and "notorious and clearly established:" see S. Schiff, "The Use of Out of Court Information in Fact Determination at Trial" (1963), 41 Can. Bar Rev. 335 at p. 339. However, this view applies largely to what Professor Davis has called "adjudicative facts": see K.C. Davis, "Judicial Notice" (1955), 55 Col. L.R. 945. In the Canadian context, there is little consideration of Davis' "legislative facts", i.e., facts used "to determine the content of law and policy and to exercise its (the court's) judgment or discretion in determining what course of action to take" (Davis, supra at p. 952). However, B.L. Strayer, Judicial Review of Legislation in Canada (Toronto: 1968) at pp. 173-7 addressed this issue in the constitutional context and notes that in such cases the courts have not confined themselves to "a narrow concept of judicial notice." See too Reference re Anti-Inflation Act (1976), 68 D.L.R. 3d 452 (S.C.C.) at p. 496 where Laskin, C.J.C. adverted to the limits on judicial notice, but at the same time expanded the bounds of admissible evidence to include statistical and economic date relevant to the issue of whether there was a "rational basis" underlying the impugned legislation. The decision thus recognizes that judicial notice, whether

expressly invoked or implicitly used, should not be employed as a device for hiding crucial, albeit very broad, issues.

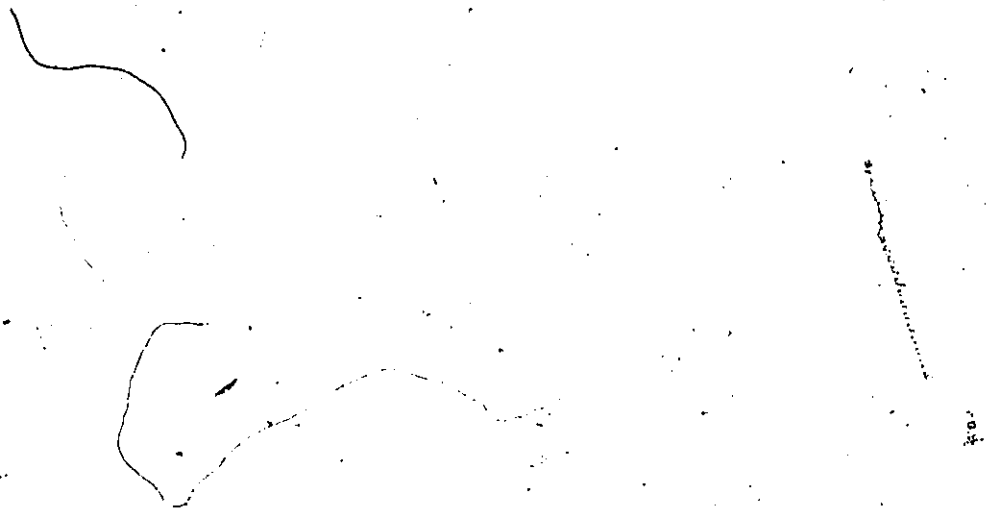
A far more extensive and generally applicable consideration of judicial notice of "legislative facts" is contained in A.S. Miller and J.A. Barron, "The Supreme Court, The Adversary System, and The Flow of Information to the Justices: A Preliminary Inquiry" (1975), 61 Va. L.R. 1187 and K.C. Davis, "Facts in Lawmaking" (1980), 80 Col. L.R. 931. Both of these articles recognize that, while judicial notice of legislative facts is essential to judicial decision-making, it is open to abuse in the manner noted above. The authors provide examples of a number of American cases involving decisions reached on the basis of assumptions that were clearly debatable, yet which were not argued before the courts in question.

For an Australian case involving the explicit use of judicial notice in the review of delegated legislation, see Conroy v. Shire of Springvale and Noble Park [1959] V.R. 737 at p. 753, per Sholl, J.:

> In this case, it was for the council to judge how to go about the matter of regulating the keeping of dogs in its municipality, and so long as it has acted bona fide and within the limits of the power, it is not for this or any other court to pass judgment upon the wisdom or unwisdom of the particular method of regulation adopted. But I am bound to say that, if I am at liberty to refer to such general knowledge as I have of the locality in which this Shire is situated, this particular by-law seems to me to have employed a perfectly sensible and practical method of dealing with the task which the council was about.

The judicial notice issue demands much further analysis than is possible in this thesis. However, it seems

clear that, like its close relative, the presumption of regularity discussed in Part III, Division B, it is a judicial device for avoiding complex issues.



APPENDIX E

Crown Privilege

The law regarding Crown privilege in respect of the disclosure of evidence appears to be in a developmental stage, as two recent Canadian appellate court decisions indicate: Gloucester Properties Ltd. v. The Queen in Right of British Columbia (1982), 129 D.L.R. 3d 275 (B.C.C.A.) and Re Carey and The Queen (1984), 43 O.R. 2d 161 (C.A.). Both held that the Crown does not possess an absolute privilege, although they differ on the extent to which they elaborate the privilege. In Gloucester, the Court required a provincial cabinet minister to attend for discovery and answer questions on whether a "recommendation" had been made by the Environment and Land Use Committee, the recommendation being a condition precedent for making an order in council under the Environment and Land Use Act, R.S.B.C. 1979, c. 110. The Court reached its decision in the absence of any evidence "that it would be injurious to the public interest to answer the questions". (p. 283)

In Carey, Thorson, J.A. elaborated the issues rather more extensively and ventured to establish a procedure for deciding whether evidence was privileged. He began from the general rule of disclosure, putting the onus on the Crown in the first instance to assert that disclosure would be harmful to "some specified public interest" (p. 201). This done, the onus shifts to the applicant to establish a case for disclosure. This is done where

(a) there are cogent and concrete ground to believe that the documents are likely to provide evidence of the existence of facts or a state of affairs which, if the documents are produced, will substantially assist the position of the party seeking their introduction;

(b) the issue to which the documents are relevant is one of real substance in the litigation, and is not merely one which is raised by the party seeking production in order to gain access to the documents but without any other bona fide purpose, and

(c) without the production of the documents, there is reason to believe that the existence of the facts or state of affairs sought to be established is unlikely to be capable of being proved by other means.

On closer examination, the results in both cases are quite compatible. Although Gloucester suggests that it is for the Crown to provide some "evidence" of injury to the public interest, the amount of such evidence is probably not substantial given the acceptance in Carey of statements contained in an affidavit sworn by the Ontario Secretary to the Executive Committee. He asserted that the notes of the Cabinet meetings which the applicants sought to obtain were generally incomplete and were used primarily to record cabinet decisions, not the process by which such decisions were reached. Then he went on to state:

> It is my firm opinion that if these notes of the discussions in the Executive Council were to be produced, it would almost necessarily lead to a distorted, incomplete and inaccurate impression of the nature of the actual discussion which took place. It is also my opinion that if these notes were produced, it would in future affect the nature of the discussions in Cabinet, and would inhibit the freedom of the members of the Cabinet to discuss matters of significant public concern and policy, to the detriment of the public interest.
>
> The minutes or reports of committees of Cabinet intended for use by the Cabinet, and the

> submissions to Cabinet prepared by ministry staff are all documents prepared to assist the Cabinet in formulating government policy, very frequently involving significant and highly complex matters. In my considered opinion it could very well lead to a decrease in completeness, in candour and in frankness in these documents if it were known that they could be required to be produced in litigation, and this in turn would detrimentally affect the formulation of government policy and the public interest. (p. 170)

There is unquestionable merit in these assertions and the approach of Thorson, J.A. in balancing such interests against the applicant's interest in disclosure may provide the best resolution of such issues. The true test will come in the court's application of the grounds for disclosure quoted above in paragraphs (a), (b) and (c).

APPENDIX F

The AHSAN Case

This case dealt with a detention order under the Commonwealth Immigration Act, 1962 (10 & 11 Eliz. II, c. 21). This statute empowered immigration officers to refuse admission to Commonwealth citizens landing in the U.K. However, this power was only exercisable after the prospective entrant had been "examined" by the officer and given notice of refusal. In addition, paragraph 1(2) of Schedule I of the Act provided that "a person shall not be required to submit to examination . . . after the expiration of the period of 24 hours from the time when he lands in the U.K. . . . " In Ahsan, the applicants had landed clandestinely and the evidence as to the time of landing was inconclusive. Lord Parker, C.J. and Blain, L.J. were in the majority, deciding that the legal burden of proving this issue rested on the immigration authorities. Although neither judge discussed the issue in terms of the evidentiary and legal burdens, Lord Parker, C.J. at p. 352 seems to have concerned himself with the latter:

> We are here dealing with a claim by the executive to detain in custody a British subject, and apart from authority I should myself have thought that in the end the burden in such a case must be on the executive to justify that detention. I say "at the end" because, of course, nothing need be done in the first instance other than to make a good return valid on its face, but if the applicant for the writ challenges that return, as for example claiming that there was no jurisdiction in the executive officer to make the order which resulted in the detention, it would, I think, be for the executive to negative that challenge by proving

that jurisdiction in fact existed.

Towards the end of his judgement, the distinction between the two burdens became clearer as Lord Parker, C.J. characterized the Greene case as one where the issue was whether the applicant had made a "proper challenge" to the validity of the detention order; whereas in Ahsan the question was "as to the position at the end of the day when the applicant had challenged the validity of the order" (p. 355). Although Lord Parker, C.J. did not discuss the sufficiency of the applicants' evidence in discharging the evidentiary burden, one can assume from his conclusions that he found their evidence to have done so. However, his insistance on the need to protect "British subjects" from wrongful detention suggests that this consideration lowered the threshold for shifting the onus of proof.

Although Blain, L.J. reached the same decision, his basis for doing so was less clear. After asserting that the conditions precedent to detention were "factual" and not subjective, he made the following comment:

> There has emerged here a dispute of fact into which the court must enquire and the notice of refusal does not assert the ground's requirement of fact, that is to say does not assert that examination was within 24 hours of landing . . . . In Greene's case the sole issue of fact was as to the state of mind of the Home Secretary and the notice did assert that.

Here, Blain, L.J. seems to echo the comments of Lord Radcliffe in Hallett & Carey, supra, n. 297 at p. 445 suggesting that a recital of the rule-making authority's state of mind was conclusive. The dichotomy between subjective and objective conditions precedent thus becomes crucial to the judgement

of Blain, L.J. and arguably narrows the scope of the comments of Lord Parker, L.J. quoted above. The later immigration cases, cited at n. 353, clearly adopt the restricted approach to the review of subjectively worded powers, an approach that virtually displaces the burden of proof issue and renders proof of non-compliance with a subjective condition precedent impossible. See however Evans, cited in Appendix C.

APPENDIX G

"Breadth of discretion" is an admittedly vague phrase since it varies substantially with the circumstances in which it is applied. However, it appears most often to signify a power of decision that must be made on the basis of a wide range of factors with no strict guidelines on the relative weights of those factors: see e.g. Re Clarke and A.G. (Can) (1978), 81 D.L.R. 3d 333 (Ont. H.C.). at pp. 48-51 (power to decide whether uranium information could be released); A.G. (Can) v. Brent [1956] S.C.R. 318 (power to decide whether to admit a person otherwise prohibited from entering Canada); Re Davies and Village of Forest Hill [1965] 1 O.R. 240 (H.C.) (power to decide whether a residential swimming pool should be permitted); Vic Restaurant Inc. v. City of Montreal [1959] S.C.R. 58 (power to decide whether a restaurant licence should issue); R. v. Tenale, cited at n. 79 (power to set closed seasons for fishing). In all of these cases, the power of decision was substantially unfettered and the courts struck down the impugned regulatory instruments. Contrariwise, where a subdelegate's powers are substantially fettered, the subdelegation is more likely to be upheld: Joy Oil, cited at n. 252; Alberta Teachers Association v. Edmonton School District Board (1973), 39 D.L.R. 3d 528 (Alta. C.A.), where the court considered a by-law passed under a power of "fixing and collecting annual and other fees:" the by-law stated that membership fees "shall be those recommended by the Provincial Executive Council and

prescribed from time to time by a two thirds majority vote of the Annual Representative Assembly" (s. 7(1)). It also provided that, where "an emergency exists" the Council could levy "an additional assessment not exceeding $10.00 per week per member." Sinclair, J.A. commented as follows at p. 529:

> In my opinion the Association has the power, by by-law enacted at a general meeting, to establish, as a special fee, or as an element of its membership fee, a levy of the kind envisaged by By-law 9 provided a specific sum is mentioned or a formula is employed by means of which the levy can be calculated precisely, and there is a mechanism, such as a decision of the Council prescribed for its implementation, I consider such a fee to be "fixed" by the Association.

APPENDIX H

Unless expressly authorized to do so, a rule-making authority will not be permitted to subdelegate substantially all of its powers in respect of a given subject matter: see Brant Dairy, cited at n. 442; Vic Restaurant, cited in Appendix G; Re Clarke, cited in Appendix G; Robertson v. R. [1972] F.C. 796 (C.A.). The corollary to the above is that where the subdelegated function constitutes merely one aspect of the subdelegating authority's entire function, the subdelegation is more likely to be permitted: Figol v. City of Edmonton (1969), 8 D.L.R. 3d 1 (Alta. C.A.) (subdelegation to a city engineer of power to approve parking, access and drainage aspects of a proposed development); Hookings v. Director of Civil Aviation [1957] N.Z.L.R. 929 (S.C.). The latter case involved a skeletal aeronautics statute that contemplated virtually all of the regulatory detail to be established by delegated legislation. A regulation made under it prohibited the towing of one aircraft by another "except with the permission of the Director." In turn, the Director issued a civil aviation information circular that set out the qualifications neccesary to obtain permission to tow. The appellant was convicted of towing without permission and he appealed on the basis that the qualifications should have been set out in the regulation and not left to the discretion of the Director. In support of this contention he cited F.E. Jackson and Company Ltd. v. Collector of Customs [1939] N.Z.L.R. 682, where the court

had struck down a regulation that prohibited importation of all goods except under the authority of a Minister's licence. Turner, J. rejected the applicability of this case and upheld the validity of Regulation 43 stating at p. 934:

> If by the Civil Aviation Regulations, 1953 the Governor General, in the exercise of his power to make regulations securing safety, had purported to prohibit the use of all aircraft except such as were authorzed by the Director, I could readily allow myself to be persuaded that Jackson's case governed the matter; but this is not the position. Regulation 43 does not (as the offending regulation did in Jackson's case) extend to a prohibition over the whole field of the regulation. Its prohibition is effective in only a small area of that field--namely, as to the use of aircraft engaged in towing other aircraft.

The Hookings case suggests that, where the subject matter of a delegated legislative power is very broadly defined, it is easier to carve it into subdelegable chunks. However, the case is weakened by the fact that the qualifications set out in the information circular clearly demonstrated that substantial rules could have been promulgated to regulate the towing of aircraft. The principle of a delegated legislative obligation argues that these rules should have been spelt out in the form of regulations.

APPENDIX I

The greater the potential impact of a subdelegated power, in terms both of the number of persons affected and of the degree of interference with common law or statutory rights, the more likely will be its classification as legislative: see e.g. Robertson, cited in Appendix H; Calgary v. Reid (1958), 27 W.W.R. 193 (Alta. C.A.).

APPENDIX J

Where the subdelegating authority is an elected body (see e.g. Sandler, cited at n. 498) or has special expertise (see e.g. Brunswick Mining and Smelting Corporation v. United Steel Workers Union of America (1974), 43 D.L.R. 3d 467 (N.B.C.A.)), the authority is less likely to be permitted to subdelegate broad powers; contrariwise, where administrative limitations make it impossible for the subdelegating authority to fulfill its functions without subdelegating, it will be permitted to do so: see e.g. Brooker v. A.G. (Can) [1973] F.C. 327 (C.A.) where, in relation to public service staff selection, Pratte, J. stated at p. 330:

> To begin with, I think it must be clear that Parliament did not have in mind that the Commission itself, which consists of only three members, would personally run every competition and personally carry on the mechanics of each of the other processes of personnel selection that might be adopted. Obviously, the size of the Public Service when the Public Service Employment Act was adopted in 1967 was such that Parliament must have intended that those three members utilize the service of a very large number of other persons in the selection processes.

See too Chemicals Reference, cited at n. 3, though it should be considered with some caution since it dealt with a war-time emergency situation.

APPENDIX K

The following four cases provide examples of how the characteristics of a subdelegate, when considered in relation to his or her function, operate to make the subdelegation permissible. In the first, Figol v. City of Edmonton, cited in Appendix H, the subdelegated function was highly technical, involving an assessment of the parking, traffic and drainage aspects of a proposed development. Subdelegation of this function to a person possessing the appropriate technical qualifications, an engineer, was approved. For the same result, see also C.R. Aggregate Sales Ltd. v. District of Squamish (1980), 115 D.L.R. 3d 81 (B.C.S.C.) and Re Taylor (1982), 132 D.L.R. 3d 341 (Alta. C.A.).

In the second case, Lamoureux v. Beaconsfield (1976), 9 N.R. 395 (S.C.C.) the subdelegation concerned approval of the construction of service stations in commercial zones. The subdelegates were the persons owning property within 1,000 feet of a proposed service station. The by-law in question provided that if two-thirds of these persons objected, no construction permit was to be granted. The majority of the Court approved the subdelegation, with Martland, J. stating:

> It is of the essence of zoning legislation that limitations are imposed upon the right of a land owner to use his land in any manner which he chooses. The limitations are imposed for the benefit of other land owners. . . . the by-law does not delegate to them (the other land owners) a general power of decision as to whether or not service station permits shall issue. Instead the by-law takes into account, in each particular case, the wishes of adjacent land owners who are the very people

> affected by the proposed use, as one of the conditions precedent to the obtaining of a specific permit. In my opinion this is in accord with the principle of zoning legislation and the provision was not ultra vires of the responent municipality. (pp. 401-3)

Although Martland, J. did not consider the matter to be one of subdelegation, it is difficult to see why it was not. This is how the court in Re Davies, cited in Appendix G, characterized a similar situation. This decision now seems to be effectively overruled. Indeed, the approach in Lamoureux appears to have greater merit, turning as it does on a consideration of the purposes of land use controls and the circumstances of their operation.

The third case involved a subdelegate who was a chief administrative official and a subdelegation of powers connected with his administration. In Desrosiers v. Thinel (1962), 33 D.L.R. 2d 715 (S.C.C.), an aeronautics regulation subdelegated to the Minister of Transport unfettered control over the operation of "commercial passenger vehicles" at federal airports. The judgements of the Court emphasized both the Crown ownership of airports and the Minister's statutory authority to "construct and maintain" them under paragraph 3(c) of the Aeronautics Act, R.S.C. 1952, c. 2. In a sense, the subdelegated function merely elaborated the general administrative powers already possessed by the Minister. Although Fauteux, J. also relied on the breadth of the enabling regulation, the predominant factor in the decision seems to have been the role of the Minister as the chief authority charged with airport administration. (see p. 716) Of the same effect if Senecal v. The

Queen (1984), 3 D.L.R. 4th 684 (F.C.T.D.).

The fourth case, P.G. c. Corporation Pharmaceutique Francaise Ltée [1977] C.A. 675, presents characteristics similar to those found in both the Figol and Desrosiers cases. It involved a provision of the Food and Drug Regulations, S.O.R. Cod. 1955, c. 1675 that prohibited the sale of a drug unless it was made, packaged and sold under the supervision of inspectors who had technical training approved by the Director General. The Court approved this subdelegation, emphasizing both the character of the Director General as "un officier d'administration" (p. 682) and the technical constraints on making delegated legislation:

> Il faut d'abord se rappeler que la matière dont traite la Loi F-25 et le règlement est une matière en constante évolution sous l'impulsion des milliers de chercheurs et de fabricants de tous les coins du monde. Non seulement voit-on chaque jour apparaître un produit nouveau qu'il faut bientôt faire place à de nouveaux formats, à des copies et à des combinaisons. De nouvelles techniques de production et d'analyse apparaissent constamment. C'est une matiere ou le remède de l'un est le poison d'autre. L'état se doit de contrôler les drogues avant qu'elles n'atteignent les marchés. Mais il ne faut pas que ces contrôles découragent l'invention et paralysent l'évolution. Le contrôle doit être assez souple pour s'adapter au changement et assex ferme pour garantir l'innocuité des produits. (p. 682)

This statement closely corresponds to the analysis of the incorporation by reference cases in Division F, and provides perhaps the clearest indication of the relevence of the technical character of regulatory subject matter in construing the scope of delegated legislative powers.

The cases noted above should not, however, be taken as enunciating absolute propositions that community groups

or technical or administrative officials are always proper subdelegates: see e.g. Re Dantex Woolen Co. and Minister of Trade and Commerce, cited at n. 370; Re Clarke, cited in Appendix G; Re Bimini Neighbourhood Pub Ltd. (1984), 7 D.L.R. 4th 556 (B.C.S.C.); R. v. Horback (1967), 64 D.L.R. 2d 17 (B.C.S.C.); Dene Nation v. The Queen, cited at n. 537. Although these cases demand close analysis and undoubtedly show some inconsistency, they serve to illustrate how complex is the determination of subdelegation issues in any given case.

Bibliography

Texts and Monographs

1. C.K. Allen, Law and Orders: an inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law (Stevens & Sons, London:1965).

2. Raoul Barbe, La Réglamentation (Wilson & Lafleur, Montreal: 1983).

3. T.M. Benditt, Rights (Rowman & Littlefield, Totawa:1982).

4. C.T. Carr, Concerning English Administrative Law (Columbia U. Press, New York: 1941).

5. R. Cross, Cross on Evidence, 5th ed. (Butterworth & Co., London: 1979).

6. K.C. Davis, Discretionary Justice (Louisiana State U. Press, Baton Rouge:1969).

7. K.C. Davis, Administrative Law Treatise, 2nd ed. (K.C. Davis Publishing Co., San Diego:1979).

8. K.C. Davis, Administrative Law in the Seventies (Lawyers' Cooperative Publishing, Rochester:1976).

9. E.A. Driedger, The Construction of Statutes, 2nd ed. (Butterworth & Co., Toronto: 1983).

10. E.A. Driedger, The Composition of Legislation, 2nd ed. (Queen's Printer, Ottawa:1976).

11. René Dussault, Traité sur le droit administratif (Les presses de l'Université Laval, Quebec:1974)

12. J.M. Evans, DeSmith's Judicial Review of Administrative Action, 4th ed. (Stevens & Sons, London:1980).

13. Patrice Garant, Droit Administratif (Les éditions Yvon Blais Inc., Montreal: 1981).

14. J.A.G. Griffith, The Politics of the Judiciary (Manchester U. Press, Manchester: 1977).

15. J.A.G. Griffith and H. Street, Principles of Administrative Law (Pitman, London: 1973).

16. L. Jaffe, English and American Judges as Lawmakers (Clarendon Press, Oxford: 1969).

17. J. Kersell, Parliamentary Supervision of Delegated Legislation: U.K., Australia, N.Z. and Canada (Stevens & Sons, London: 1960).

18. D.J. Mullan, Administrative Law, 2nd ed. (Carswell & Co., Toronto: 1979).

19. Dennis Pearce, Delegated Legislation in Australia and New Zealand (Butterworth & Co., Sydney: 1977).

20. G. Pepin and P. Ouellette, Précis de Contentieux Administratif, 2è ed. (Editions Thémis, Montreal: 1982).

21. R.F. Reid and H. David, Administrative Law and Practice, 2nd ed. (Carswell & Co., Toronto: 1978).

22. I.M. Rogers, Canadian Law of Planning and Zoning (Carswell & Co., Toronto: 1973).

23. B.L. Strayer, Judicial Review of Legislation in Canada (University Press, Toronto: 1968).

24. H.W.R. Wade, Administrative Law, 5th ed. (Clarendon Press, Oxford: 1982).

25. John Willis, The Parliamentary Powers of English Government Departments (Harvard U. Press, Cambridge: 1933).

Articles

1. G.K. Allen, "Attacking By-Laws: Zoning and the Traditional Rules (Part II)" (1973), 22 U.N.B.L.J. 5.

2. Leo D. Barry, "Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms" (1982), 60 Can. Bar Rev. 237.

3. J. Beatson, "Legislative Control of Administrative Rulemaking: Lessons from the British Experience?" (1979), 12 Cornell Int. L.J. 199.

4. Alan Beith, "Prayers Unanswered: A Jaundiced View of the Parliamentary Scrutiny of Statutory Instruments" (1981), 34 Parl. Affairs 165.

5. Paul Byrne, "Parliamentary Control of Delegated Legislation" (1976), 29 Parl. Affairs 366.

6. Mauro Cappelletti, "The Law-Making Power of the Judge and its Limits: A Comparative Analysis" (1981), 8 Mon. U.L.R. 15.

7. J.P. Casey, "Ministerial Orders and Review for Reasonableness" 1978 P.L. 130.

8. J.T. Craig, "The Reluctant Executive," [1961] P.L. 45.

9. K.C. Davis, "Facts in Lawmaking" (1980), 80 Col. L.R. 931.

10. S.A. DeSmith, "Subdelegation and Circulars" (1949), 12 Mod. L.R. 37.

11. George Elliott, "Case Comment: City of Ottawa v. Boyd Builders Ltd." (1967), 5 O.H.L.J. 94.

12. Evelyn Ellis, "Deportation of a Community National After Imprisonment" (1981), 97 L.Q.R. 533.

13. Samuel Estreicher, "Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law" (1980), 80 Col. L.R. 894.

14. Ralph F. Fuchs, "Procedures in Administrative Rule-making" (1938), 52 Harv. L.R. 259.

15. D. Goyette and S.M. Makuch, "Annotation to Bell v. R." (1979), 9 M.P.L.R. 104.

16. J.A.G. Griffith, "The Place of Parliament in the Legislative Process" (1951), 14 Mod. L.R. 279.

17. John Griffiths, "Some Recent Developments in Judicial Review of Executive Powers" (1978), Melb. L.R. 316.

18. S.G. Himel, "We are (not) Family: Zoning By-laws and Preasonableness - A Comment on Bell" (1980), 1 Sup. Ct. L.R. 367.

19. Hudson Janisch, "What is 'Law'? - Directives of the Commisioner of Penetentiaries and section 28 of the Federal Court Act - The Tip of the Iceberg of Administrative Quasi-Legislation" (1977), 55 Can. Bar Rev. 576.

20. L. Harold Levinson, "Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives" (1982), 24 Wm. & Mary L.R. 79.

21. K. Llewellyn, "Remarks of the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed" (1950), 3 Vand. L.R. 395.

22. David Lloyd-Jones, "The Role of Habeas Corpus in Immigration Cases" (1979), 95 L.Q.R. 171.

23. Martin Loughlin, "The Crisis in Administrative Law Theory" (1978), 28 U.T.L.J. 215.

24. Anne Lynch, "Fiftieth Anniversary of the Australian Senate Standing Committee on Regulations and Ordinances" (1982), 50 The Table 70.

25. D.N. MacCormick, "Delegated Legislation and Civil Liberty" (1970) 86 L.Q.R. 170.

26. R.A. MacDonald, "Postscript and Prelude - The Jurisprudence of the Charter: Eight Theses" (1982), 4 Sup. Ct. L.R. 321.

27. R.A. MacDonald, "Case Comment: The Limits of Procedural Fairness: Executive Action by the Governor in Council" (1981-82), 46 Sask. L.R. 185.

28. W.H. McConnell, "Freedom of Expression - Civic Ban on Posters Affixed without Permission to 'City Owned or Controlled Property'" (1980), 58 Can. Bar Rev. 766.

29. A.S. Miller and J.A. Barron, "The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry" (1975), 61 Va. L.R. 1187.

30. David Mullan, "Developments in Administrative Law: The 1979-80 Term" (1981), 2 Sup. Ct. L.R. 1.

31. Dare Pearce, "Some Practical Guidelines for Incorporating Codes into Legislation" (1982), 60 Can. Bar Rev. 755.

32. R.J. Pierce and S.A. Shapiro, "Political and Judicial Review of Agency Action" (1981), 59 Tex. L.R. 1175.

33. W.A. Proctor, "House of Commons Select Committee on Procedure" (1979), 47 The Table 13.

34. Paul Robertshaw, "Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case," [1975] P.L. 113.

35. M. Rosenberg, "Beyond the Limits of Executive Power" (1981), 80 Mich. L.R. 193.

36. B. Schwartz, "Legislative Control of Administrative Rules and Regulations: The American Experience" (1955), 30 N.Y.U.L.R. 1031.

37. John Willis, "Statutory Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1.

38. John Willis, "Delegatus Non Potest Delegare" (1943), 21 Can. Bar Rev. 257.

39. J. Ray Wood, "Legislative Review of Administrative Action: Is the Cure Worse than the Illness?" 1978 S.I.U.L.J. 579.

Reports

1. Commission d'étude sur le contrôle parlementaire de la législation déléguée (Assemblée nationale de Québec), Le contrôle parlementaire de la législation déléguée (Quebec: 1983).

2. The Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments (Parliament of Canada), Second Report to both Houses of Parliament in the SEcond Session of the Thirtieth Parliament (Ottawa: 1977).

3. The Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments (Parliament of Canada), Third Report to both Houses of Parliament in the Second Session of the Thirty-second Parliament (Ottawa: 1984).

4. Royal Commission of Inquiry into Civil Rights (Ontario), Report No. 1 (Toronto: 1968).

5. Special Committee of the House of Commons on Statutory Instruments (Parliament of Canada), Report (Ottawa: 1969).