

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE
VALIDITY OF THE REGULATIONS IN RELATION TO CHEMICALS ENACTED BY THE GOVERNOR GENERAL OF CANADA ON THE 10TH DAY OF JULY, 1941, P.C. 4996, AND OF AN ORDER OF THE CONTROLLER OF CHEMICALS, DATED THE 16TH DAY OF JANUARY, 1942, MADE PURSUANT THERETO.

1942

*Dec. 14, 15.

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*Jan. 5.

Constitutional law—Power of the Governor General in Council, under the War Measures Act, 1914, to delegate his powers to subordinate agencies—Order in Council same as Act of Parliament—Final responsibility for acts of Governor General in Council resting upon Parliament—Enactment contained in Order in Council not open to review by courts of law—Regulations as to chemicals and Order by Controller of Chemicals declared intra vires—Applicability of the maxim: Delegatus non potest delegare.

Held: Regulations respecting chemicals established by an Order in Council, which is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*, are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*.

Paragraph four of the Order in Council provides that the compensation, to which a person may be entitled whenever the Controller of Chemicals takes possession of any chemicals, or equipment, or real or personal property, shall be as prescribed and determined by the Controller, with the approval of the Minister of Munitions and Supply. Such paragraph is in conflict with section 7 of the *War Measures Act*, which enacts that, whenever any property has been expropriated by the Crown, the claim for compensation must be referred by the Minister of Justice to the Exchequer Court of Canada or to other mentioned courts.

Held, also: An Order of the Controller of Chemicals, appointed by these Regulations, relating to the control of the production and consumption of, as well as the dealing in, glycerine, is not *ultra vires* of the Controller either in whole or in part.

No opinion was expressed by the Court, such questions not having been referred to it, as to the meaning or the application of any of the Regulations or of the Order of the Controller.

*PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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The authority vested in the Governor General in Council by the *War Measures Act*, (its constitutional validity having been finally determined in *Re Gray*, 57 S.C.R. 150 and *Fort Frances* case, [1923] A.C. 695), is legislative in its character; and an order in council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, have the effect of an Act of Parliament: *In re Gray, supra*.

*Held, further*, that the Governor General in Council has the power, under section 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations above mentioned.

But, under the *War Measures Act*, the final responsibility for the acts of the Executive Government rests upon Parliament.

*Per Rinfret and Taschereau JJ.*:—Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

*Per Davis J.*:—Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act* or to make ineffective any of the orders in council passed in pursuance of its provisions.

*Per Kerwin J.*:—If at any time Parliament considers that too great a power has been conferred upon the Governor General in Council, the remedy lies in its own hand.

*Per Rinfret and Taschereau JJ.*:—The advisability of the delegation of his powers to other agencies is in the discretion of the Governor General in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it.

Comments as to the applicability of the maxim *Delegatus non potest delegare*.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following questions: 1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent? 2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Order in Council referring these questions to the Court is as follows:—

“Whereas section three of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, provides as follows:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

“And whereas by reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done and, from time to time, to make orders and regulations pursuant to the *War Measures Act* aforesaid and in particular to control, restrict and regulate by means of Controllers the production, sale, distribution, consumption and use of essential supplies and thereby powers have been conferred upon the said Controllers in the exercise of which numerous orders and regulations have been made by the aforesaid Controllers affecting the community at large and a question of general application has arisen as to the authority of the Governor General in Council to establish this method and system of control;

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“And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

“That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

“And whereas orders and regulations have been made,—

- (a) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;
- (b) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;
- (c) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;
- (d) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

“And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

"That typical of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

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"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of the authority conferred by section fifty-five of the *Supreme Court Act*, is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

(Sgd.) A. D. P. HEENEY,  
*Clerk of the Privy Council."*

The respective Attorneys-General of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan were, pursuant to order of the Court, notified of the hearing of the Reference.

*Aimé Geoffrion K.C.* and *David Mundell* for the Attorney-General of Canada.

*D. L. McCarthy K.C.* and *John J. Robinette*, counsel appointed by the Supreme Court of Canada pursuant to the provisions of sub-section 5 of section 55 of the *Supreme Court Act*.

*Rosario Genest K.C.* for the Attorney-General of Quebec.

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THE CHIEF JUSTICE: His Excellency the Governor General in Council by an order in council of November 30th, 1942, has been pleased to refer to this Court for hearing and consideration two questions, namely:—

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Regulations in relation to chemicals (the subject of the first interrogatory) were enacted by an order in council of July 10th, 1941. In this order it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war. It is also recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the production and supply of munitions of war and for the needs of the Government or of the community in war; and the order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*.

By the Regulations a Controller of Chemicals is appointed and his duties and powers are enumerated.

The Order of the Controller of Chemicals, dated the 16th day of January, 1942 (the subject of the second interrogatory) relates to the control of the production and consumption of, as well as the dealing in, glycerine.

Although the Regulations of the 10th of July, 1941, were enacted pursuant to the powers conferred by the *Department of Munitions and Supply Act*, as well as by the *War Measures Act*, it will be unnecessary to discuss the first mentioned statute. The question of substance concerns the scope and effect of the *War Measures Act*. By section 3 of that Act it is enacted as follows:—

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada, and the movement of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

This is a convenient place to notice that the *War Measures Act* contains specific provisions relating to particular subjects in sections 4, 5, 6, 7, 8, 9, and in the second limb of paragraph 2 of section 3. It may be said at once that in so far as they have not been affected by subsequent legislation, the enactments of these sections would appear to have primacy over the orders and regulations of the Governor General in Council under section 3, and it would seem that in case of any inconsistency between these provisions and any order or regulation made under section 3, it is the statute which prevails. The same rule governs the relation between the *Department of Munitions and Supply Act* and orders and regulations made under the authority of that statute. It would appear that section 4 of the Regulations is not consistent with section 7 of the *War Measures Act*. Subject to this observation, it is apparent, from inspection, that the subject matters dealt with in the Regulations are matters to which the powers of the Governor General in Council extend

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under section 3. They are indeed obviously within the scope of the subject matters enumerated in sub-paragraphs (e) and (f).

The order of His Excellency in Council directing the Reference proceeds *inter alia* upon these recitals:—

And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

And whereas orders and regulations have been made,—

- (a) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;
- (b) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;
- (c) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;
- (d) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

That typical of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

From these recitals it appears that the primary purpose of the Reference is the determination of the question that has been raised as to the power of the Governor General in Council under section 3 of the *War Measures Act* to delegate



authority to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations of the 10th of July, 1941.

No doubt has been suggested that the various subject matters which have been dealt with by regulation and order, whether by the Governor General in Council direct or by subordinate agencies under a delegated authority, are within the ambit of the powers with which His Excellency is invested by force of section 3. The cardinal matter for consideration is that which concerns the validity of delegation to subordinate agencies of the character explained.

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The Attorneys-General of the provinces were informed of the Reference, but, in view, no doubt, of the fact that the constitutional validity of the *War Measures Act* was finally determined by the Privy Council in the *Fort Frances* case (*Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* (1)), no argument was presented on the part of any of the provinces.

The Court invited Mr. D. L. McCarthy K.C. and Mr. J. J. Robinette to file a factum and address to us an argument in opposition to the argument on behalf of the Dominion in support of the validity of the instruments in question, and, accordingly, we had the advantage of a very able argument from them in this sense.

The *War Measures Act* came before this Court for consideration in 1918 in *re Gray* (2), and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act, 1917*, was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament.

In the same case it was also decided, and the point was subsequently settled by the decision of the Judicial Com-

(1) [1923] A.C. 695.

(2) (1918) 57 Can. S.C.R. 150.

mittee in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co. supra* (1) that the *War Measures Act* was validly enacted.

There is, however, an observation which ought to be made touching the sweeping language of section 3, in which are set forth the subject matters to which the authority of the Governor General in Council extends and in which the scope of his powers in relation to those subject matters is indicated. The judgment of the Privy Council in the last mentioned case laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the provinces in relation to a vast field in which the provinces would otherwise have exclusive jurisdiction. It must not, however, be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed by Parliament to the Executive for legislative action in the case of an emergency.

It is not necessary for the purposes of the present Reference to consider whether it is within the power of Parliament, even in an emergency, to give authority to the Governor General in Council to exercise legislative powers in relation to such matters as, for example, those within the scope of sections 53 and 54 of the *British North America Act*. It is in the highest degree unlikely that any such question will ever arise touching such matters. But it ought to be observed that, apart from the conditions expressed in the *War Measures Act*, the validity of any Order, or Regulation, made under the authority of section 3, is affected by a two-fold condition: that it could be enacted as a statute, by Parliament, in execution of its emergency powers, or otherwise; and, furthermore, that Parliament is not precluded by the *British North America Act*, or by any later lawful enactment concerning its legislative powers, from committing the subject matter of it to the Executive Government for legislative action. The application of this two-fold condition does not require consideration on this Reference.

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(1) [1923] A.C. 695.

I turn now to the conditions prescribed by the *War Measures Act* itself. As already observed, any Order or Regulation made under the *War Measures Act* is subject to the specific provisions mentioned above of that statute. Subject to that, the *War Measures Act* by its terms requires only that the act or thing done, or the order or regulation made, shall be such that the Governor General in Council by reason of (in the present case) "real \* \* \* war" deems it to be necessary or advisable for the security, defence, peace, order and welfare of Canada.

I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules.

The duty of the Governor General in Council to safeguard the supreme interests of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in sub-paragraphs (a) to (f), to make use of such agencies. As is well-known, during the last war, in the United Kingdom under the statutes known generally as *The Defence of the Realm Acts*, in which the grant of authority to the Executive was expressed in words less comprehensive than those implied in the *War Measures Act*, extensive powers were delegated to Boards and Controllers under Regulations enacted by orders in council, and the acts of these subordinate agencies were again and again before the courts without question being raised as to the legality of these delegations. The necessity of this procedure is recognized in the *Defence of the Realm Act* of 1939.

Mr. McCarthy, in his admirable argument, contended that, if such had been the intention of the framers of the statute, explicit provision would have been made for such devolution, as was done in the *Defence of the Realm Act* of 1939 in the United Kingdom. There would be much force in the suggestion that if the *War Measures Act* were now being re-enacted the legislation might well be cast in

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some such form; but the function of a court of law is to give effect to the language which the legislature itself has selected for expressing its intention. I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.

There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.

The enactment is, of course, of the highest political nature. It is 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. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

True, it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in council would be invalid as showing on its face that the essential conditions of jurisdiction were not present (*Rex v. Comptroller General of Patents* (1)); but such theoretical speculations cannot affect the question we have to decide.

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor General in Council are not, by the *War Measures Act*, outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are given, although here again, as regards the present Reference, that rule has only a theoretical interest.

(One observation of a general character remains. It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act*, or some other Act of Parliament. All such instruments

derive their validity from the statute which creates the power, and not from the executive body by which they are made (*The Zamora* (2));

and the *War Measures Act* does not, of course, attempt to transform the Executive Government into a legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures.

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The Order is not *ultra vires* of the Controller of Chemicals either in

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(1) [1941] 2 K.B. 306, at 316.

(2) [1916] 2 A.C. 77, at 90.

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whole or in part. Here again no question is before us concerning the meaning, or the application, of the Order or any part thereof.

The judgment of Rinfret and Taschereau JJ. was delivered by

RINFRET J.—The *War Measures Act* (now c. 206 of the Revised Statutes of Canada, 1927) was adopted by Parliament in 1914 to confer certain powers upon the Governor in Council in the event of war, invasion or insurrection.

By reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done, and from time to time to make orders and regulations pursuant to the Act aforesaid and, in particular, to control, restrict and regulate by means of controllers the production, sale, distribution, consumption and use of essential supplies; powers have been conferred upon these controllers in the exercise of these numerous orders, and regulations have been made by the controllers affecting the community at large.

A question of general application has arisen as to the authority of the Governor in Council to establish this method and system of control.

It has been found in the public interest that, by virtue of the authority conferred by section 55 of the *Supreme Court Act*, the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained; and, for that purpose, as typical of the method and system of control adopted, the Governor General in Council has chosen the regulations in relation to chemicals enacted on the 10th day of July, 1941 (P.C. 4996), providing for a controller of chemicals exercising wide powers, and an order made by the controller of chemicals pursuant thereto, dated January 16th, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

Two questions were referred to the Court for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

In the recitals of the Order in Council P.C. 4996, it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war.

It is further recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the supply of munitions of war and for the needs of the community in war.

The order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*.

A Controller of Chemicals is appointed, and certain powers are conferred upon him which it is not necessary to enumerate for the present purposes.

Under other orders in council, either anterior or posterior to that of the 10th of July, 1941 (P.C. 4996), a Wartime Industries Control Board was established, and it was provided that the power of every controller to fix prices shall be exercised only with the concurrence of the Wartime Prices and Trade Board, and further that no controller's order of general effect throughout Canada, or part of Canada, except an order fixing prices, shall be effective, unless approved by the Chairman of the Wartime Industries Control Board in writing.

The order of the Controller of Chemicals respecting glycerine provides for a very wide control of crude, refined or dynamite glycerine, as to its sale, dealing in, consumption, import or export; the general scheme being that none of these things may be done, except under either a permit issued by the controller or a licence issued by the Minister of Trade and Commerce or by the Minister of National Revenue respectively.

In my view, it is not necessary to consider the provisions of the *Department of Munitions and Supply Act*. The reference would appear to have been made because the

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regulations enacted by the order in council were adopted, as set out in the recital, to assist the Minister of Munitions and Supply in carrying out the duties imposed upon him by that Act, and it is sufficient, for the purpose of answering the questions submitted, to limit our considerations to the *War Measures Act*. In turn, no question of constitutionality under the *B.N.A. Act* is raised with regard to the *War Measures Act*. The Act is within the legislative field of the Dominion Parliament (*Fort Frances Pulp and Power Co. v. Manitoba Free Press* (1); and it is well established that it is within the power of Parliament, when legislating within its legislative field, to confer subordinate administrative and legislative powers (*Hodge v. The Queen* (2); *Re Gray* (3); *Shannon v. Lower Mainland Dairy Products Board and Attorney-General for British Columbia* (4)).

The question of the powers of the Governor in Council under the *War Measures Act* is, therefore, solely one of interpretation of the provisions of that Act, and it is to be determined by reference to those provisions by which the powers were conferred.

The Act has already received authoritative interpretation, both in this Court and in the Judicial Committee of the Privy Council. In the *Gray case* (3), Fitzpatrick C.J., at page 158, said:

It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section (i.e. section 3 of the Act) contains unlimited powers.

The present Chief Justice of this Court, at p. 166, expressed the following view of the Act:

The words are comprehensive enough to confer authority for the duration of the war to "make orders and regulations" concerning any subject falling within the jurisdiction of parliament—subject only to the conditions that the Governor in Council shall deem such orders and regulations to be by reason of the existence of real or apprehended war, etc., advisable.

And, at page 167:

The judgments of the Law Lords in *Rex. v. Halliday* (5), afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the

(1) [1923] A.C. 695.

(3) (1918) 57 Can. S.C.R. 150.

(2) (1883) 9 App. Cas. 117.

(4) [1938] A.C. 708.

(5) [1917] A.C. 200.



functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of super-session. The authority conferred by the words quoted is a law-making authority.

And it is as well immediately to set out here the following further quotations from the judgment of my Lord the Chief Justice in the *Gray* case (1):

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned (p. 169).

\* \* \*

The authority devolving upon the Governor in Council is, as already observed, strictly conditioned in two respects: First—It is exercisable during war only.

(*Nota bene.* In connection with this first condition, reference may be had to the subsequent judgment of the Privy Council in the *Fort Frances* case (2), whereby it was decided that a Dominion Act passed after the cessation of hostilities for continuing the control of newsprint paper until the proclamation of peace, with power to conclude matters then pending, was *intra vires*, in view of certain circumstances there mentioned.)

Secondly—The measures passed under it must be such as the Governor in Council deems advisable by reason of war (p. 170).

\* \* \*

In the case of the *War Measures Act* there was not only no abandonment of legal authority

(by Parliament),

but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence (p. 171).

There follows from the principles so enunciated these consequences:

The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the

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(1) (1918) 57 Can. S.C.R. 150.

(2) [1923] A.C. 695.

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same nature as those of Parliament itself (Lord Selborne in *The Queen v. Burah* (1)). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

The conditions for the exercise of that power are: The existence of a state of war, or of apprehended war, and that the orders or regulations are deemed advisable or necessary by the Governor in Council by reason of such state of war, or apprehended war.

Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control, in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

As a result of what precedes, and to use the words of Sir Barnes Peacock delivering the judgment of the Privy Council in *Hodge v. The Queen* (2), the powers conferred upon the Governor in Council by the Dominion Parliament are

not in any sense to be exercised by delegation from or as agents of the Parliament.

Within the limits prescribed, the authority of the Governor in Council is as plenary and as ample as the Parliament "in the plenitude of its power possessed and could bestow". The "devolution effected by the *War Measures Act*" (to borrow the expression of my Lord the Chief Justice in the *Gray* case (3)) is not to be assimilated to a so-called delegation; and such a devolution has no analogy with agency.

The maxim *Delegatus non potest delegare* is a rule of the law of agency. It has no reference to an authority to legislate conferred by statute of Parliament. Indeed, the power

(1) (1878) 3 App. Cas. 889.

(2) (1883) 9 App. Cas. 117.

(3) (1918) 57 Can. S.C.R. 150.

of delegation being absolutely essential, in the circumstances for which the *War Measures Act* has been designed, so as to have a workable Act, that power of delegation must be deemed to form part of the powers conferred by Parliament in the Act. The Governor in Council, within the ambit of the Act, is not a delegate. The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative.

Assuming his powers have been delegated without express reference to any standard, as mentioned in the United States Supreme Court in the *Panama Refining Company* case (1), the standard, in the words of Cardozo J., is "implicit within the Act".

In like circumstances, the Legislature

confides to a municipal institution or body of its own creation authority to make bylaws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. (*Hodge v. The Queen* (2)).

Here, Parliament was confronted with a tremendous emergency and it had to meet the situation with a workable Act. Hence the *War Measures Act*.

That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated. For a court to review the enactment would be to assume the roll of legislator.

It need not be added that in discussing these questions it should not be assumed that the powers granted will be abused. We are warned by the Privy Council, in many of

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(1) (1934) 55 S.C. Rep. (U.S.) 241. (2) (1883) 9 App. Cas. 117, at 132.

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its judgments on Canadian Constitutional Law, against such a line of discussion. In laying down the general principles whereby one is to be guided in answering the questions referred to the Court, one must remain within the bounds of reasonableness, and a broad view of the situation must be envisaged. It need not be assumed that, for example, the Governor in Council would substitute a Board to exercise in his place the entirety of the powers which have been conferred upon him by the *War Measures Act*; nor, to use an illustration at the other extreme end of possibilities, that the Governor in Council might deem it advisable to confer upon a Controller of his choice the power to amend or abrogate a statute of Parliament. The answer to such objections based upon unexpected occurrences is that, in my view, it is hardly conceivable that the powers of the Governor in Council would be exercised in such a way, and they are not to be taken into account in the ordinary and normal interpretation of the *War Measures Act*.

It is, of course, impossible to foresee every case that may occur in the practical application of the principles discussed; but a careful examination of Order P.C. 4996 and of the Controller of Chemicals' Order No. C.C. 2-B has failed to reveal any exercise of powers in excess of the authority conferred upon the Governor in Council under the *War Measures Act*, or upon the Controller of Chemicals by Order P.C. 4996; except that I agree that paragraph 4 of the latter Order is in conflict with section 7 of the *War Measures Act*, in as far as, under section 7, whenever any property has been expropriated by His Majesty and compensation is to be made therefor and has not been agreed upon, the claim must be referred by the Minister of Justice to the Exchequer Court of Canada, or to a Superior Court, or County Court, of the province within which the claim arises, or to a judge of any such court. While, if paragraph 4 of the order in council should be followed, whenever the Controller takes possession of any chemicals, or equipment, or real or personal property and the Minister of Munitions and Supply determines that any person is entitled to compensation, then the compensation to be paid in respect thereof, in default of agreement, shall be as prescribed and determined by the Con-

troller, with the approval of the Minister. In other cases, by force of the same paragraph 4, the compensation is to be such as is determined by the Exchequer Court of Canada on reference thereto by the Minister of Munitions and Supply. The method adopted for fixing compensation under paragraph 4 of Order 4996 is different from that provided for in section 7 of the *War Measures Act*, and, in my opinion, section 7 of the *War Measures Act* must prevail over paragraph 4 of the order in council, since it is not open to the Governor in Council to derogate from the provisions of the *War Measures Act*, except in so far as that Act may have been amended or modified by a subsequent Act of Parliament.

Subject to the above, my answers to the questions as put are, therefore, in the negative; and I join with the other members of the Court in formally answering them as follows:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

DAVIS, J.—The Order of the Governor General in Council, the validity of which is in question in this Reference to the Court, was passed pursuant to the provisions of the *War Measures Act*, R.S.C. 1927, ch. 206. This statute was enacted by Parliament soon after the outbreak of the last war, being ch. 2 of the statutes of the 2nd Session, 1914. The validity of the statute itself is not in question; its validity was determined by the Judicial Committee of the Privy Council in the *Fort Frances* case (1). But the constitutional question now raised before us did not arise in that case.

The Order in Council recites:

And whereas it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals which

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(1) [1923] A.C. 695.

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are, or are likely to be, or may be, necessary or useful for, or in connection with, the production, storage, transportation, and/or supply of munitions of war, or necessary or useful for the needs of the Government or of the community in war, with a view to conserving the financial, material and other resources of Canada and facilitating the production of munitions of war and supplies essential for fulfilling the present and potential needs of Canada and her allies;

The Order in Council then appoints a named Controller of Chemicals and vests in him the widest sort of powers. I shall only take time to refer to a couple of the numerous specific powers which the Controller may exercise from time to time:

2. (1) (m) To make orders regulating, fixing, determining and/or establishing the kind, type, grade, quality, standard, strength and/or quantity of any chemicals and/or any equipment that may be made and/or dealt in by any person; and to prohibit any making and/or dealing in any chemicals and/or any equipment, contrary to any such order or orders;

2. (1) (t) To regulate and control, by prohibition or otherwise any or all dealings or transactions between any person making and/or dealing in any chemicals and/or any equipment and any other such person in respect of, or in connection with, any making and/or dealing in any chemicals and/or any equipment and/or the acquisition and/or use of any real and/or personal property, including any equipment, for or in connection therewith.

Section 3 of the Order in Council is very wide and is as follows:

3. Wherever herein any power is given to the Controller whether or not subject to the consent or approval of the Minister or of the Governor General in Council, to make or give any order to, or with respect to, or impose any restriction, prohibition or requirement on, or with respect to, any person or thing, the Controller may exercise such power either generally with respect to the whole subject matter thereof, or partially or selectively with respect only to a portion or portions of the subject matter thereof, and, without restricting the generality of the foregoing, the provision or provisions of this Order in Council granting such power shall be deemed and construed to mean that such power is given, and may be exercised, in respect of, and/or in relation to:

(i) \* \* \*

(ii) \* \* \*

(iii) such person and/or thing either generally throughout Canada or in any particular province, place, area, zone or locality designated by the Controller; and

(iv) such a person of any particular trade, industry, occupation, profession, group, class, organization or society, and/or such a thing of any particular kind, type, grade, classification, quality or species; and

(v) an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

While the *War Measures Act* limits its operation "during war," the powers given to the Controller are by the Order in Council to be deemed and construed to mean that such powers are given and may be exercised for

an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

As the Order in Council derives its validity from the statute itself and not from the executive body by which it is made, the Order must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from the limitation of time fixed by the statute itself.

The questions propounded for our consideration and advice are of grave concern in that it is admitted by the Attorney General of Canada that the regulations in relation to chemicals enacted by the Governor in Council in the Order before us, providing for a Controller of Chemicals exercising wide powers, and the order before us made by the Controller of Chemicals pursuant thereto, are "typical of the method and system of control adopted" in this country at this time. Since the argument, information has been furnished us on behalf of the Attorney General of Canada of the different boards, administrators and controllers now functioning along similar lines. To take only one case for illustration, the Wartime Prices and Trade Board functions in relation to price levels and rentals of real property. The Board has already appointed 68 Administrators and 4 Coordinators. All these officers and the Board, it is stated, have power to make orders of varying natures. The Board has already made 209 orders, and the Administrators have made 574 orders, including amendments.

The *War Measures Act* is extraordinarily wide in its scope, even wider than the (English) *Defence of the Realm Consolidation Act, 1914*. It may be observed that the *Emergency Powers (Defence) Act, 1939*, being ch. 62 of the English statutes of 1939, gave authority to His Majesty by Order in Council to make such Regulations (in the Act referred to as "Defence Regulations") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His

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Majesty may be engaged, and for maintaining supplies and services essential to the life of the community. But by section 11 this Act was only to continue in force for the period of one year beginning with the date of the passing of the Act,

and shall then expire: Provided that, if at any time while this Act is in force, an address is presented to His Majesty by each House of Parliament praying that this Act should be continued in force for a further period of one year from the time at which it would otherwise expire, His Majesty may by Order in Council direct that this Act shall continue in force for that further period.

Fundamentally, the function of Parliament is to legislate—the function of the Executive is to administer. The exercise of supreme legislative power, the outward and visible sign of sovereignty, rests with Parliament. But Parliament, by our statute, in effect lifted much of its wartime legislative authority and handed it over to the Executive, subject only to two limitations, firstly, “such acts and things” as the Governor in Council may by reason of the existence of war “deem necessary or advisable for the security, defence, peace, order and welfare of Canada” (sec. 3); and, secondly, “during war” (sec. 6). All orders and regulations made under the special powers entrusted to the Governor in Council “shall have the force of law” (sec. 3 (2)). That Parliament may so legislate is no longer a matter of any doubt, but to the extent of the wide powers of legislative authority entrusted to what is normally the executive branch of government such a statute may constitute a virtual resignation during war of the essential character of Parliament as a legislative body. It may well be, however, as Lord Finlay said in the *Halliday* case (1): that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.

Viscount Maugham as recently as November, 1941, in the House of Lords in *Liversidge v. Anderson* (2), stated, at p. 219, what he thought to be the proper approach to the construction of such an Order in Council, in these words:

My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

(1) [1917] A.C. 260, at 268.

(2) [1942] A.C. 206.



Lord Macmillan in the same case, at p. 251, said:

In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in war time canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

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And Lord Wright added at p. 261:

I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.

The effect of the *War Measures Act* is to entrust to the Executive the making of orders and regulations which shall have the force of law. If the appointment of the Controller and the vesting of the powers in him were in the statute itself, that is in the *War Measures Act*, there could be no valid objection to the enactment. But it is said that the Governor in Council has passed on to a named individual the legislative power that was by the statute entrusted to and conferred upon the Executive itself, and that there is no authority, either express or necessarily implied, in the statute to permit the Executive to do this—that it may confer administrative functions is of course admitted, but not legislative functions.

There may be ground for complaint in the system adopted by the Executive of giving the most extensive and drastic powers of control into the hands of individuals or boards who are in no way responsive to the will of the electorate. The orders made from time to time by all these controllers and boards may well appear to the people to constitute an

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arbitrary abuse of government by persons not representative of or responsible to the people. But the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself. In the ultimate analysis the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal the *War Measures Act* or to make ineffective any of the Orders in Council passed in pursuance of its provisions. The Judicial Committee of the Privy Council in *Hodge v. The Queen* (1), said:

It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature and not for Courts of Law, to decide.

In 1922 the House of Lords had to deal with an information at the suit of the Attorney-General where under the *Defence of the Realm Acts* and regulations the Food Controller had imposed as a condition of the granting of a licence to purchase milk in certain areas a charge of 2d. per gallon payable to him by the purchaser, the charge being part of a scheme for the regulation of prices. That was the case of *Attorney-General v. Wilts United Dairies* (2). Lord Buckmaster in delivering judgment said this in part:

The question before this House is not whether or not that was a wise and necessary step to take having regard to the difficulties by which the whole question of the milk supply was surrounded; the only question which we have to decide is whether there was any power conferred upon the Food Controller to do what he did. The Attorney-General has urged your Lordships to consider the extreme difficulty of the situation in which this country found itself owing to the war, and the importance of all the officials who had charge of our vital supplies being enabled to act under the powers conferred upon them without the fear of technical and vexatious objections being taken to the powers which they used. All that may be readily accepted, but it cannot possibly give to any official a right to act outside the law; nor can the law be unreasonably strained in order to legalise that which it might be perfectly reasonable should be done if in fact it was unauthorized. The real answer to such an argument is to be found in this, that in times of great national crisis Parliament should be, and generally is, in continuous session, and the powers which are required for the purpose of maintaining the integrity of the country, both economic and military, ought always to be obtained readily from loyal Houses of Parliament. The only question here is, were such powers granted?

(1) (1883) 9 App. Cas. 117, at 132. (2) [1922] 91 L.J. (K.B.) 897.

I should like now to quote a passage from the judgment of Lord Dunedin in the House of Lords in the *Halliday* case (1), at page 271:

That preventive measures \* \* \* may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

And Lord Wrenbury in the same case (1) (at p. 307):

There is room for difference of opinion whether what I may call legislation by devolution is expedient; whether a statute ought not to be self-contained; whether it is desirable that a statute should provide that regulations made by a defined authority or in a defined matter shall themselves have the effect of a statute. But I think it clear that this statute has conferred upon His Majesty in Council power to issue regulations which, when issued, will take effect as if they were contained in the statute.

In the light of the foregoing statements of the proper principles to apply and of the fact that the Order in Council has by statute "the force of law," I have come to the conclusion, subject to the reservation which I shall presently mention, that the Order in Council except section 4 thereof is valid.

The second question submitted is as to the validity of the Controller's order. The individual Controller, having been vested with the wide powers given to him by the Order in Council, issues an "order" so sweeping and drastic that "the method or system of control adopted," of which this order is said to be typical, may well be regarded by many as an abuse of government. But once granted the validity of the Order in Council, the Controller is within his authority so long as he does not exceed the general powers conferred upon him by the Order in Council. Those powers, as I have already said, are so extensive that it is not possible to say, as a general proposition, that the Controller has acted in excess of them.

The whole matter is for Parliament, not for the courts.

We should reserve for consideration any particular question which may hereafter arise on specific facts or in a particular case under the Order in Council or the Controller's order (or under any such orders of which those before us are said to be typical).

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(1) [1917] A.C. 260, at 271.

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KERWIN J.—This is a reference to the Court by His Excellency the Governor General in Council of the following two questions for hearing and consideration:—

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?
2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C.2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The order of the Controller of Chemicals, mentioned in question 2, is stated to be made pursuant to the powers granted by Order in Council P.C. 4996 (referred to in question 1), and also with the approval of the Minister of Munitions and Supply and the Wartime Industries Control Board. The approval of the Minister and Chairman and the relations between them and the Board and the Controller need not be further noticed because the validity of the order of the Controller and of P.C. 4996 depend primarily upon the proper construction of the *War Measures Act*, R.S.C. 1927, chapter 206.

We are not concerned with any constitutional question, that is, as to whether the Dominion Parliament itself could enact into law all the provisions either of the order in council or of the order of the Controller of Chemicals. When, under the provisions of the *War Measures Act*, a state of war is declared to exist by the Governor in Council, Parliament may do many things which in ordinary times would be held, under the terms of *The British North America Act*, clearly to be within the competence of the provincial legislatures. The only question is whether the order in council and the order of the Controller are authorized by what Parliament itself has done in enacting the *War Measures Act*.

That Act was first enacted in 1914 at the outbreak of the first great war and now appears as chapter 206 of the last revision of the Dominion statutes in 1927. By section 2, the issue of a proclamation is conclusive evidence that war, invasion or insurrection, real or apprehended, exists, and of its continuance. Such a proclamation has been issued.

Sections 3 and 4 of the Act read as follows:—

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
- (b) Arrest, detention, exclusion and deportation;
- (c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;
- (d) Transportation by land, air, or water and the control of the transport of persons and things;
- (e) Trading, exportation, importation, production and manufacture;
- (f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation: but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

The provisions of subsection 1 of section 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in *In Re Gray* (1) "more comprehensive language it would be difficult to find." Unless there is found to be some rule to the contrary or some valid reason why the provisions of the *War Measures Act* cannot operate to their fullest extent, they authorize, in the main, both the order in council and the order of the Controller. In a reference such as this, the Court is not bound by any admission of counsel or by the omission to urge any point that might be open either for or against the validity of these documents. I have been unable to envisage any objections

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(1) (1918) 57 Can. S.C.R. 150.

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against the validity of either, as a whole, other than those raised by Mr. McCarthy and Mr. Robinette and these I now proceed to examine.

Mr. McCarthy sought to read the first part of subsection 1 of section 3 of the Act in such a way as to draw a distinction between "acts or things" and "orders and regulations". He pointed out that the Governor in Council might do and authorize the first of these while the Governor in Council might make, from time to time, the second, and he also pointed out the comma after the word "things". I am unable so to read this subsection. In my view such a method would be to lose sight of the purpose and intent of the Act, which was to place in the hands of the Governor General in Council all possible power in order that the war should be carried to a successful conclusion. In so concluding, it may be pointed out that one would be but carrying out the provisions of section 15 of the *Interpretation Act*, R.S.C. 1927, chapter 1:—

15. Every Act and every provision and enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The purpose of the Act would not be carried out by confining the Governor in Council, under the words "do and authorize such acts and things" to the doing and authorization of a single specified act or thing, and under the words "make from time to time such orders and regulations" to the making of a provision of general application. Parliament intended by the *War Measures Act* to confer upon the Governor in Council the widest possible powers of legislation and devolution, because of the necessity of acting speedily and in the realization that celerity could not be accomplished by Parliament itself, or even by the Governor in Council, when it might be most urgently required. If at any time Parliament considers that too great a power has been conferred upon the Governor in Council, the remedy lies in its own hands.

The burden of the argument is that the Governor in Council, by re-delegating or sub-delegating the powers vested in him by the *War Measures Act*, to make orders

and enforce them, to persons without the purview of the Act has gone beyond the prescribed limits and beyond the powers vested in him under the Act.

We need not, I think, concern ourselves with certain decisions in the United States, of which *Panama Refining Co. v. Ryan* (1), cited by Mr. Robinette, may be taken as typical. That and similar cases depend upon the language of the United States constitution and the theory of government which underlies it. Nor is the question the same as that considered in the courts of the province of Ontario in discussing the ability of municipal councils to delegate their powers. At common law the maxim *delegatus non potest delegare* is not confined to agency, although it there has its widest application, but in my opinion there is no foundation in principle or authority for applying it in answering the questions submitted to us.

It is suggested, however, that the maxim may be at least used as a canon of construction and that unless a power to delegate legislative functions appears expressly or by necessary implication in the terms of the *War Measures Act*, it should be declared that such a power had not been conferred. While I think that that would be putting the matter too strictly, I am of opinion that even on that basis the *War Measures Act* does confer such a power. The Judicial Committee of the Privy Council found no difficulty in deciding that this had been done by the legislation under review in *Hodge v. The Queen* (2) and in *Shannon v. Lower Mainland Dairy Products Board* (3). In the latter case, it appears that counsel for the respondent was not called upon to argue the question of delegation and Lord Justice Atkin, in delivering the judgment of the Judicial Committee, approved the judgment of Chief Justice Martin of British Columbia on that point. It would be idle to compare the provisions of the provincial statutes in question in either of these cases with the terms of the *War Measures Act*. Speaking generally, however, I am of opinion that the terms of the *War Measures Act* authorize the provisions of P.C. 4996 and that the latter, in turn, authorize the provisions of the order of the Controller of Chemicals.

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(1) (1934) 55 S.C. Rep. (U.S.) 241.

(2) (1883) 9 App. Cas. 117.

(3) (1938) A.C. 708.

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Questions may arise from time to time as to the exact meaning of the clauses of either document, just as in England similar questions arose under *The Defence of the Realm Act* as, for instance, in *Attorney General v. De Keyser's Royal Hotel Limited* (1); *Chester v. Bateson* (2); *Newcastle Breweries Limited v. The King* (3). It is impossible on a reference such as this to conceive of all the issues that might arise in the carrying out of the provisions of the order in council and of the order of the Controller but attention should be called to paragraph 4 of the order in council:—

4. If the Controller takes possession of any chemicals and/or any equipment and/or of any real and/or personal property, or if the Minister determines that any person is entitled to compensation by reason of any order, then the compensation to be paid in respect thereof, in default of agreement, shall be such, in the case of any chemicals and/or any equipment, as is prescribed and determined by the Controller with the approval of the Minister, and in other cases shall be such as is determined by the Exchequer Court on reference thereto by the Minister.

This is certainly in conflict with section 7 of the *War Measures Act*:—

7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefore and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

and possibly also in conflict with subsection 5 of section 12 and subsection 2 of section 16 of *The Department of Munitions and Supply Act*.

I would therefore answer the questions as follows. (1) The regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the regulations.

(2) The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

(1) [1920] A.C. 508.

(2) [1920] 1 K.B. 829.

(3) [1920] 1 K.B. 854.



HUDSON J.—The questions submitted by His Excellency the Governor General in Council to this Court for hearing and consideration are the following:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 20B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

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The terms of the Order in Council referred to in the first question and the order of the Controller of Chemicals referred to in the second have already been quoted by other members of the Court, and it is not necessary for me now to repeat them.

It is quite clear that in time of war Parliament has power to legislate in respect of the subject matter of the orders under consideration.

It is equally clear that Parliament could delegate such powers to the Governor General in Council or to others.

So much is conclusively established by a decision of this Court in *Re Gray*, (1) and by the Judicial Committee of the Privy Council in *Fort Frances Pulp and Power Company Ltd. v. Manitoba Free Press Company Ltd.* (2).

The subject matter of the orders in question falls within the provisions of section 3 of the *War Measures Act*, and in particular paragraphs (e) and (f) of such section.

That the Governor General in Council himself could deal with this matter is not open to serious question.

But it is contended that under the terms of the statute the Governor General in Council had no power to delegate to others the authority to make orders and regulations such as is done here.

The statute does not in express terms provide for delegation and the maxim *delegatus non potest delegare* is invoked to support a construction as would deny any implication of such an authority.

The general principle is stated in Broom's Legal Maxims at page 570, as follows:

This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari*, that is, one agent cannot lawfully

(1) (1918) 57 Can. S.C.R. 150

(2) [1923] A.C. 695.

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appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.

The principle thus stated is somewhat qualified by Broom, at page 572, as follows:

Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

Hudson J. And again:

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be either express or implied by the recognised usage of trade.

The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority; for example in *Re Behari Lal et al*, (1), it was held that the power conferred on the Governor General in Council by section 30 of the *Immigration Act* to prohibit the landing of immigrants of a specified class could not be delegated to the Minister of the Interior. Mr. Justice Clement said:

***In my opinion, nothing short of express words would avail to enable His Excellency in Council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

Again in *Geraghty v. Porter*, (2), it was held that a delegated power of legislation must be exercised strictly in accordance with the powers creating it; and in the absence of express power so to do the authority cannot be delegated to any other person or body.

The maxim, however, is at most a rule of construction, subject to qualifications, some of which are referred to by Broom.

In the case of a statute, there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects.

(1) (1908) 13 B.C.R. 415.

(2) (1917) New Zealand Law Rep. 554.

The *War Measures Act* was passed soon after the commencement of the war in 1914. Section 3 provided that:

The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

In the course of that war, under the authority of this Act, the Governor General in Council appointed many controllers who actively exercised powers in general not dissimilar from those here under consideration. In no case was it ever held that such delegation was *ultra vires*. On the contrary, in the case of *Fort Frances Pulp and Power Company Ltd. v. Manitoba Free Press Company Ltd.* (3), it was expressly held by Mr. Justice Riddell at the trial (4) that such delegation by the Governor in Council to a controller of pulp and paper was valid. Mr. Justice Riddell said at page 119:

Moreover, if the Dominion have regulative power over any class of subjects, it may exercise such power through any agency selected by itself—the power of the Dominion is not delegated, and the maxim *Delegatus non potest delegare* has no application.

And again:

The Governor in Council in effect regulated the trading, etc., so far as it consisted in paper, etc., by directing those concerned to obey the orders and regulations of the Minister: I think that this was perfectly valid.

The case went to the Ontario Court of Appeal, but this question was not there dealt with, the appeal being dismissed on another ground. In the Judicial Committee of the Privy Council the appeal was again dismissed. Their Lordships held that the *War Measures Act* and the Orders in Council thereunder were *intra vires*. At the conclusion of his judgment Lord Haldane accepted in general the views of Mr. Justice Riddell, although guarding himself against accepting his statement on one point which is not here relevant.

At the commencement of the present war the *War Measures Act* again came into operation. Since then the practice of 1914-1918 has been followed and extended, commensurate with the vastly increased national obligations.

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(3) (1923) A.C. 695.

(4) (1922) 52 O.L.R. 118.

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It is manifest that the business of government in war time cannot be effectively carried on without delegation by the Executive of a very great part of its duties.

This was found to be the case in Great Britain during the last war. There was first a general delegation of powers to His Majesty in Council, and then a sub-delegation by His Majesty in Council to controllers or directors of different governmental activities arising out of the prosecution of the war. Notwithstanding that His Majesty in Council had no express power of sub-delegation, none of the acts of the controllers or directors were ever declared to be *ultra vires* because of such sub-delegation. The attitude of the courts in England is sufficiently shown by the following extracts from Halsbury's Laws of England, vol. 6, p. 527:

Presumptions in favour of the liberty or property of the subject, which are usually of great effect in interpreting statutes in time of peace, become relatively weak in time of war when the safety of the realm is in danger.

Again at page 533:

Note (d). The main Act was the *Defence of the Realm Consolidation Act*, 1914 (5 Geo. 5, c. 8), which was in form declaratory, though it undoubtedly introduced some new law*** It was held, on more than one occasion, that no regulation which was made with the honest intention of securing the public safety and defence of the realm could be treated by the Courts as invalid, unless it was clear, upon the face of it, that it could not possibly aid in securing the public safety or the defence of the realm.

After the conclusion of the war several emergency Acts were passed, and the latest which came into effect at the commencement of the present war contained express authority to His Majesty in Council to delegate. It was pressed upon us as an argument that it was then recognized in England that the prior legislation was insufficient. This, however, would not be conclusive even in England and much less so when construing the Canadian Act.

Bearing in mind that we are not now called upon to construe a constitutional Act but an Act which the Canadian Parliament passed in war time for the security, defence and welfare of Canada, I do not think that the maxim *delegatus non potest delegare* is applicable.

By the statute the Governor in Council is given power to do and authorise such acts and things and make from time to time such orders and regulations as he may deem necessary or advisable for the security, defence, peace, order and welfare of Canada, and by subsection 2 such orders and regulations shall have the force of law.

In the light of the necessity for delegation and what took place during the last war, and the decision of the courts in the case of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press* (1), I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case. Any such delegation would, of course, not confer on the delegate power to do anything in conflict with other provisions of the *War Measures Act*. One of such provisions has been called to our attention, namely clause 4 of Order in Council No. 4996, in regard to compensation. This conflicts with section 7 of the *War Measures Act* and, for that reason, is invalid.

For these reasons, I concur in the following answers to the questions referred to us:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

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