Regulatory Law and Practice in Canada

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taken that that is an accurate statement unless and until the contrary is proved.[157]

That being said, it is possible that an exception might be made if the court determines, as it did in *Canada (Attorney General) v. Paulsen*,[158] that there was no evidence to support the report at all.

Given the general and sometimes vague manner in which the requirements of the *User Fees Act* are expressed, it would not be surprising if it gave rise to a significant number of challenges, particularly where regulations imposing very high regulatory fees are concerned. The jurisprudence produced by such challenges may very well change the manner in which the Act is interpreted down the line.

[157] See also *Teal Cedar Products (1977) Ltd. v. Canada*, [1989] 2 F.C. 158, at 172 (C.A.).
[158] (1973), 38 D.L.R. (3d) 225, at 231 (F.C.A.).

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INTERPRETING THE ENABLING STATUTE

As a starting point in examining regulatory validity, this chapter will focus on how the courts have interpreted enabling provisions — the statutory authority for the making of regulations. The courts do this by applying all of the standard principles of statutory interpretation to the enabling provision in question. This may involve an analysis of the ordinary meaning of the provision, an examination of the purpose of the Act, a comparison to confirm the consistency of the argued interpretation with other provisions in the Act and with the Act's legislative history and evolution, and an application of the relevant presumptions of legislative intent. I cannot thus stress strongly enough that the first point of reference for a lawyer seeking to attack the validity of a regulation is therefore one of the standard reference texts on statutory interpretation, such as *Sullivan and Driedger on the Construction of Statutes*.[1]

This chapter will begin by looking at how one identifies the appropriate regulation-making authority, and at the impact of a failure by the regulation-making authority to properly do so. This will be followed by a review of how the courts have analyzed the ordinary meaning of a range of enabling provisions. While the possible range of regulatory authorities is infinite, reviewing the provisions at issue in the cited cases gives some idea of the latitude that the courts are willing to read into some typical enabling provisions. Unless a regulation-making authority falls exactly within the bounds of one of the cited examples, however, its analysis will ultimately have to fall back on the general principles of statutory interpretation referred to above.

Certain words and expressions reoccur with some frequency in enabling provisions, and bodies of case law have grown up around their interpretation. This chapter will therefore review some of these, including purposive enabling provisions, omnibus or "basket clause" provisions and subjectively worded enabling authorities.

[1] R. Sullivan, 4th ed. (Markham: Butterworths, 2002). See also P.A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000); and R. Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1997).

I. CONFIRMING THE ENABLING AUTHORITY

The first step in determining whether any regulation is vulnerable to attack is to identify the statutory authority under which the regulation was purportedly made. As explained in Chapter 2, in federal regulations the enabling authority for a regulation is usually cited in the Order in Council that precedes the published text of the regulation in the *Canada Gazette*.[2] While the applicable enabling authorities are not cited in federal regulations included in the 1978 consolidation, citations for the enabling authorities for these regulations can be found by consulting the last 1977 quarterly index of regulations, published in the December 31, 1977 issue of Part II of the *Canada Gazette*.

Once the statutory authority for the regulation has been identified, it should be determined whether the authority has been amended since the regulation was made. Occasionally, amendments to a statute include changes to regulation-making powers that are not reflected in subsequent changes to the regulation. Where a statutory amendment removes some regulation-making powers, any portions of a regulation enacted pursuant to those powers are rendered void. While this result would follow naturally from the principle that delegated legislation derives its authority solely from the enabling statute, the rule is also confirmed by paragraph 44(*g*) of the *Interpretation Act*, which provides that

> 44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor, ...
>
> (g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead;

Under the *Interpretation Act*, a reference to a "regulation" includes a reference to any provision of a regulation. By extension of the rule set out in paragraph 44(*g*), then, any regulatory provision that is not consistent with the new enabling power will not "remain in force,"[3] and will hence

[2] For an example, refer to the sample regulation set out in Appendix E.

[3] R.S.C. 1985, c. I-21. Note that this does not mean that the regulatory provision is automatically repealed. It remains as part of the regulation but is no longer "in force." As a consequence, regulation-making authorities should ensure that any regulatory provisions that will not be carried over by virtue of s. 44 after amendment of the enabling provision are repealed before the statutory amendment takes effect. The regulation will otherwise carry a mix of valid and invalid provisions, and fail to provide a comprehensible guide to citizens' conduct.

be unenforceable.[4] If the entire enabling provision is missing from the new enabling statute, then the entire regulation made under it will be unenforceable.[5]

II. CONFIRMING THE FRENCH VERSION OF THE AUTHORITY

While an ability to read both language versions of a statute is always an asset in practising law in a bilingual jurisdiction such as Canada and its bilingual provinces[6] it is of particular value in interpreting the scope of enabling provisions. Because both language versions of statutes in these jurisdictions have equal authority,[7] even a minor discrepancy in the scope of the regulation-making powers expressed in one language can afford a legally persuasive argument for expanding or contracting the scope of the regulation-making powers from what is apparent by a reading of the other language version.

While significant discrepancies are relatively rare, it is possible for a regulation-making power to exist in one language version only, and to be completely absent in the other. If a litigant can convince the court that the narrower of two divergent provisions is the most appropriate expression of the enabling provision, then he or she can avoid the application of any provision founded solely on the broader language version. In its recent

[4] If only the identity of the regulation-making authority has been changed, however, the regulation will continue to be enforceable, and may be amended by the new regulation-making authority: *Badger v. R.*, [1991] 2 C.N.L.R. 17.

[5] Unless sufficient enabling powers have been retained in other provisions of the statute to support the regulation in question: *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, [2001] A.J. No. 864, [2001] 10 W.W.R. 99 (C.A.).

[6] In addition to being bilingual at the federal level, Manitoba, New Brunswick, Ontario, Quebec and the three territories are also bilingual.

[7] Canada: *Constitution Act, 1982* (U.K.) 1982, c. 11, s. 18(1); *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 13. The Northwest Territories, Yukon and Nunavut are subject to the same requirements. New Brunswick: *Constitution Act, 1982* (U.K.) 1982, c. 11, s. 18(1); Quebec: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133; *Charter of the French Language*, R.S.Q. 1978, c. C-11, s. 7(3). The courts have also declared both versions to be equally authoritative in Manitoba: *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, at 777; and in Ontario: *Crystalline Investments Limited v. Domgroup Ltd.* [2002] O.J. No. 883, 58 O.R. (3d) 549 (C.A.).

decision in *R. v. Daoust*,[8] the Supreme Court of Canada has suggested that recourse to the narrower version may even be automatic.[9]

It is therefore always advisable to verify whether any regulation in respect of which a challenge is contemplated is supported by the same regulation-making powers in each official language.

III. CITATION OF ENABLING PROVISIONS

Most regulations give some indication on their face as to what the applicable enabling provision is. As noted above, the enabling authority in federal regulations is indicated in the accompanying Order in Council. At first blush, it would seem crucial that a regulation-making authority know what powers it is exercising, and that the source of its authority should be made clear on the face of the regulation it makes.[10] As the British Columbia Court of Appeal observed in *British Columbia (Milk Board) v. Bari Cheese Ltd.*:

> ...tribunals which have statutory powers coming from various legislative sources ought to make it plain on the face of their enactments which powers they are exercising.
>
> Only if that is known can there be a judgment as to whether the power is properly exercised.
>
> The citizen and a court, if a dispute arises, ought not to be left to guessing what the tribunal is doing or to relying on an *ex post facto* assertion by the tribunal of what it was doing unsupported by any contemporaneous public expression of its intention.[11]

Counterintuitively, perhaps, the courts have nonetheless generally held that it doesn't matter whether the power is cited properly, or even cited at all, so long as the requisite regulatory power exists. In *Milk Board v. Grisnich*, the Supreme Court of Canada found that the citation of the appropriate statutory authority is not a mandatory legal requirement, but is done purely as a matter of public convenience:

[8] [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at 236, where the court indicated that it would give effect to the narrower of two divergent statutory provisions even in the face of an apparent Parliamentary intent to provide otherwise.

[9] Although the premise for doing so is arguably flawed: see P. Salembier, "Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule" (2004) 35 Ottawa L. Rev. 75.

[10] See *Third Report of the Special Committee on Statutory Instruments, "MacGuigan Report"* (Ottawa: Queen's Printer for Canada, 1969), at p. 53; *Abbott v. Shire of Heidelberg*, [1926] V.L.R. 199; *Tweed Realty Ltd. v. Toronto (Metropolitan)*, [1968] 2 O.R. 126 (C.A.); *Bartholomew Green 1751 Assn. v. Canada (Attorney General)*, [1978] 2 F.C. 391, at 400 (T.D.).

[11] [1991] B.C.J. No. 2444, 83 D.L.R. (4th) 329, at 361 (C.A.).

> There is no requirement that, in the exercise of that jurisdiction, any specification must be made as to its exact source....
>
> In sum, the only requirement is to possess jurisdiction, not to specify it on the face of every order.[12]

A number of earlier decisions support this conclusion, including *Fisher v. Municipal Council of Vaughan*,[13] *Gray v. City of Oshawa*,[14] *Favretto v. City of Sudbury*[15] and *Applewood Dixie Ltd. v. Town of Mississauga*.[16]

In *Grisnich*, the Court explained its reasoning in the following terms:

> Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it.... The mistaken identification by a delegate of a source of authority later found by the courts to be invalid will not help to support an unlawful administrative order or decision. If the specification of authority cannot assist an administrative tribunal in justifying its otherwise invalid enactments, why should the lack of specification compromise those enactments that would otherwise be valid?[17]

That being said, a discovery that the cited statutory authority does not appear to support a particular regulation would constitute at least a preliminary indication that the regulation may be vulnerable to challenge.[18] While in some cases an alternate provision may be found that provides sufficient authority, such cases are relatively rare.

Sometimes it is not a question of identifying and construing an enabling provision, but rather of questioning whether one even exists. In *Dale Corporation v. Nova Scotia (Rent Review Commission)*,[19] the court overturned rules made by a rent review commission that would have been regulations, except that no regulation-making authority existed to make them in the first place.[20]

[12] [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895, at 900-901.

[13] (1873), 10 U.C.Q.B. 492, at 495 (C.A.).

[14] [1972] 2 O.R. 856 (C.A.).

[15] (1970), 12 D.L.R. (3d) 320 (Ont. H.C.).

[16] [1969] 2 O.R. 467, at 472 (C.A.). See also *Williams v. Chief Inspector of Factories*, [1924] V.L.R. 321, at 324 (S.C.), and the decisions of the Federal Court of Australia in *Aban v. Minister for Immigration, Local Government and Ethnic Affairs* (1991), 23 A.L.D. 207 and *Harris v. Great Barrier Reef Marine Park Authority* (1999), 162 A.L.R. 651.

[17] *Supra*, note 12, at 906 (citations omitted).

[18] Because if the cited enabling provision is incorrect, it may require an element of serendipity for the scope of the actual enabling provision to coincide with the regulation in question.

[19] (1983), 2 Admin. L.R. 260 (N.S.C.A.).

[20] See also *North Coast Air Services Ltd. v. Canada (Transport Commission)*, [1968] S.C.R. 940.

IV. ORDINARY MEANING OF THE STATUTORY AUTHORITY

In determining the scope of an enabling provision, the courts will inevitably commence with an analysis of the ordinary meaning of the provision — that is, the meaning of the words used, considered in the context in which they are used. Determining that meaning, however, requires engaging principles of statutory interpretation, including principles such as the presumption against tautology (that every provision in a statute has been placed there for some purpose), the presumption of consistency of expression (that a word used in one provision will be used to mean the same thing in other provisions), and the *noscitur a sociis* and *ejusdem generis* principles (that words can take their meaning from other words in proximity to them). While even a basic examination of the principles of statutory interpretation is beyond the scope of this work, a number of textbooks provide a comprehensive treatment of the subject,[21] and recourse should be had to them to obtain an understanding of the applicable principles. The cases that follow are therefore intended only to illustrate examples of how these principles have been applied to the interpretation of enabling provisions for regulations and by-laws, and to give some indication of how the courts might treat similar provisions.

R. v. National Fish Co. provides an early statement of general approach taken by the courts in interpreting enabling provisions:

> 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.[22]

In *Bachmann v. St. James-Assiniboia School Division No. 2*,[23] the court rejected the argument that it was obliged to accept any interpretation of the enabling provision that its words "would reasonably bear." Such a test had earlier been applied in cases involving judicial review of arbitration awards. It ruled instead that it is up to the court to interpret exactly what the scope of the enabling provision is, and to apply that interpretation to its analysis of any regulation made under it.[24]

[21] See for example, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002); R. Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997); P.A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Carswell: Toronto, 2000).

[22] [1931] Ex. C.R. 75, at 81 (Can. Ex. Ct.).

[23] (1984), 8 Admin. L.R. 17 (Man. C.A.).

[24] *Ibid.*, at 28.

In *Dhami v. Canada (Minister of Employment & Immigration)*,[25] the court concluded that a power to make regulations "prescribing classes of persons" permitted the Governor in Council to distinguish between natural and adopted sons in establishing immigration eligibility requirements. Its reasoning is typical of the manner in which the courts determine ordinary meaning:

> The *Shorter Oxford Dictionary* defines "class" inter alia as "... a number of individuals possessing common attributes, and grouped together under a general or 'class' name." The *Living Webster Dictionary* defines "class", inter alia, as "... a number of persons or things regarded as forming one body through the possession of common attributes;"
>
> Accordingly, I think it clear that the natural sons described in Regulation 2(1)(a) are of a class separate and distinct from the adopted sons described in Regulation 2(1)(b) because they have at least one differentiating characteristic, namely the basis for their respective relationships with their father.[26]

In *Quebec (Procureur Générale) v. Fortier*[27] the court found that a statute authorizing regulations to establish the value of goods for the purposes of certain sections of the Act did not authorize regulations deeming certain goods to be income for the purposes of other sections of the Act.

In *Roth v. Nova Scotia Board of Examiners in Psychology*,[28] the court invalidated a regulation providing for the disciplining of a "registered candidate," on the ground that the enabling provision empowered the making of regulations only as regards to the discipline of "registered psychologists," and not registered candidates. It found support for its conclusion in the fact that other sections of the enabling Act provided a different procedure for addressing any deficiencies of registered candidates.

In *Royal Trust v. Law Society of Alberta*,[29] the Alberta Court of Appeal held that a power to make regulations requiring members to keep trust accounts at "a bank, a treasury branch or a corporation approved under the *Trustees Act*" did not authorize regulations specifying which such corporations could be used or the maximum amounts that could be deposited in any one account.

[25] (1989), 107 N.R. 95 (Fed. C.A.).

[26] *Ibid.*, at 98. See also *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Assn.*, [1985] 1 F.C. 623 (C.A.) and *Bartholomew Green 1751 Assn. v. Canada (Attorney General)*, [1978] 2 F.C. 391, at 410, in which dictionaries were also relied upon.

[27] [1990] R.J.Q. 1280 (Que. C.A.).

[28] (1985), 68 N.S.R. (2d) 408 (T.D.).

[29] (1985), 25 D.L.R. (4th) 633, 66 A.R. 76, 16 Admin. L.R. 317 (C.A.).

In *Parklane Private Hospital Ltd. v. Vancouver (City)*,[30] the Supreme Court of Canada confirmed that a power to make regulations to delimit the manner in which municipalities were assigned responsibility for providing social assistance to residents could not be used to limit the liability of a municipality to those providing services to such persons.

In *Ismaili v. Canada (Minister of Citizenship and Immigration)*,[31] the court found that a power to prescribe factors in determining whether, for medical reasons, a prospective immigrant "is or is likely to be a danger to public health" did not authorize a regulation aimed at determining whether the admission of a person would be expected to cause excessive demands on health or social services.[32]

In *Texaco Canada Ltd. and Vanier (City)*,[33] the Supreme Court held that a power to make by-laws "for licensing and regulating the owners or operators of public garages" did not authorize a by-law requiring garage owners to install fences and hedges at the boundaries of their properties. It emphasized that the fact that the by-law sought to achieve other meritorious purposes was irrelevant to the question whether the statute authorized it:

> The impugned provision of the respondent's by-law does not relate to the business that is being licensed and regulated; it has nothing to do with the character of the business, nor with any factors touching its conduct. Rather, it is concerned with aesthetic considerations, with the external appearance of the property on which the business is being carried on. It compels an amenity that will have a neighbourhood appeal in the sense of protecting neighbouring property or insulating such property to some degree from an adjoining public garage. The desirability of a fence, or hedge, is not the question that has to be answered but rather whether it falls within the power under which alone it is authorized.[34]

In *R. ex rel. Cox v. Thomson*,[35] a power to make by-laws regulating the "keeping" of swine was held not to confer a power to regulate what they could be fed.

In *Re Mid-west By-Products Co. and Clean Environment Commission*,[36] the commission in question was authorized to prescribe limits on the discharge of contaminants. The court held that this did not authorize

[30] [1975] 2 S.C.R. 47.
[31] (1995), 100 F.T.R. 139 (T.D.).
[32] Followed in *Manto v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 864, 205 F.T.R. 165 (T.D.).
[33] (1981), 120 D.L.R. (3d) 193, [1981] 1 S.C.R. 254.
[34] *Supra*, note 33, at 195 D.L.R.
[35] (1957), 9 D.L.R. (2d) 107 (Ont. C.A.).
[36] (1979), 102 D.L.R. (3d) 208 (Man. Q.B.).

the making of an order that imposed terms and conditions relating to the operation of the applicant's rendering plant or requiring alterations to it.

In *Quebec (Procureur Générale) v. Plantation de Fruits Levy Inc.*,[37] the courts found that a power to make regulations excluding certain products from the application of the Act did not authorize regulations excluding certain establishments from those in which such products were sold.

In *MacCharles v. Jones*,[38] the enabling statute authorized the making of rules regulating the pleading, practice and procedure in the courts. Rules authorizing garnishment of moneys paid into court were held to be *ultra vires* because they dealt with and conferred a substantive right or remedy, and as such did not relate to practice or procedure.

In *Canada (Attorney General) v. Umpire Constituted under s. 92 of Unemployment Insurance Act*,[39] the court considered an enabling provision that authorized regulations prescribing conditions to be met in order to file a late claim for unemployment insurance benefits, and invalidated a regulation that purported to establish a maximum period within which such a claim must be made:

> in our opinion, those provisions do not prescribe conditions. They fix a maximum period for which a claim may be antedated. This is not the prescription of a condition but, rather, the imposition of a limitation on the power, unlimited under the Act, to antedate a claim.[40]

A regulation that purports to set out a technical standard may be invalidated if the regulation does not adequately prescribe the method by which compliance with the standard is to be ascertained. In *Mid-west By-Products Co. v. Manitoba (Clean Environment Commission)*,[41] the court invalidated the portion of an order requiring the applicant to reduce odours emanating from its rendering plant to prescribed limits, on the ground that the absence of a prescribed method for the testing of emissions rendered the limitation "virtually meaningless and of no use to the operator of the plant or the enforcers of the regulation in ensuring compliance."[42] The court in *Brudnell v. Nestle Co (Australia) Ltd.*[43] invalidated a regulation prescribing the permissible amount of residue in a cup of instant coffee for similar reasons. After considering scientific evidence that the amount of residue would vary depending on the amount

[37] [1989] R.J.Q. 2910 (C.Q.).
[38] [1939] 1 W.W.R. 133 (Man. C.A.).
[39] [1976] 1 F.C. 684 (C.A.).
[40] *Ibid.*, at 686.
[41] (1979), 102 D.L.R. (3d) 208 (Man. Q.B.).
[42] *Ibid.*, at 218.
[43] [1971] V.R. 225 (S.C.).

of water added, and that this variable was not accounted for in the regulation, the court determined that no valid standard had been prescribed.[44]

In *R. v. Ciarniello*,[45] the court held that a power to approve the type of helmet to be worn while riding a motorcycle did not include a power to prohibit the sale of non-conforming helmets. In construing a similar regulation, the court in *R. v. Bermuda Holdings Ltd.*[46] chose to narrowly construe a power to make regulations "prescribing the equipment for motor-vehicles," invalidating a regulation that purported to set rules of conduct for persons selling motor vehicles, rather than simply setting out equipment standards for the vehicles themselves. While the reasoning employed in the decision may be somewhat suspect,[47] the decision nevertheless serves as a reminder that the manner in which a regulatory rule is drafted might affect the determination whether it falls within the scope of the enabling provision.

An enabling provision that uses the word "prescribing" is normally interpreted to authorize only the making of a regulation that sets out exactly what is to be prescribed. As noted by the court in *R. v. Seaway Gas & Fuel Ltd.*,[48] a regulation that prescribes something sets out a rule of conduct that is to be followed exclusively. A regulation made under a power to prescribe must therefore be precise. More importantly, a prescribing power will not likely support a regulation setting out rules ancillary to what is to be prescribed, or setting out rules that attempt to achieve indirectly what the prescribing power indicates must be set out explicitly.[49]

Other decisions illustrate circumstances in which the courts have taken a more liberal construction of the enabling provision in question. In *Aves v. Board of Public Utilities*[50] the court held that a power to regulate the distribution and sale of gasoline included the power to regulate hours of operation of retail gas stations. *Aves* is one of a number of decisions that cite the comments of the Privy Council in *Attorney-General v. Great*

[44] See also *Canada (Minister of Industry, Trade and Commerce) v. Dantex Woollen Co.* (1979), 100 D.L.R. (3d) 436 (F.C.T.D.), appeal quashed (1979), 100 D.L.R. (3d) 446 (Fed. C.A.), where the court found that a failure to set out quantities and duration was fatal to an order required to establish the extent and period of import limitations.

[45] (1979), 12 B.C.L.R. 394 (Prov. Ct.).

[46] (1969), 9 D.L.R. (3d) 595 (B.C.S.C.).

[47] Because the court later suggested (at 601) that alternate wording to the same effect, which was simply drafted in the passive voice, would have nonetheless been valid, which undermined the court's only defensible rationale that the regulations were not intended to prohibit sales.

[48] [2000] O.J. No. 226, 47 O.R. (3d) 458, at 464 (C.A.).

[49] For a further discussion of prescribing powers in the context of fees and taxes, see Chapter 13.

[50] (1973), 39 D.L.R. (3d) 266 (N.S.C.A.).

Eastern Railway Co.[51] as support for the proposition that a liberal interpretation should be given to the *ultra vires* doctrine.[52] It should be kept in mind, however, that the issue in the latter case was whether a power to contract should be construed liberally, and not a power to make regulations. Given that the principles traditionally espoused by the courts in relation to the freedom to contract are very different from those pertaining to the exercise of delegated legislative powers, it is doubtful whether *Great Eastern Railway* provides any meaningful guidance in respect of the latter.

Although the cases cited above often reflect a judicial reluctance to give much benefit of the doubt to municipalities in construing their power to enact by-laws, a recent decision of the Supreme Court of Canada suggests that this may be changing. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,[53] the court determined that a power to make by-laws relating to transportation and licensing was sufficient to support a by-law limiting the number of taxi licences that would be issued. Its decision suggests that the formerly strict construction of municipal powers is giving way to a more liberal approach:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities.... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced.[54]

V. RELIANCE ON PURPOSE OF THE ACT

As mentioned above, one of the many interpretive tools available in construing the scope of an enabling provision is an examination of the purpose of the Act as a whole. The following decisions illustrate circumstances in which such an analysis has been used either to expand the apparent scope of an enabling provision, or to restrict its application.

[51] (1880), 5 App. Cas. 473, at 478 (P.C.).

[52] *Bishop v. College of Physicians and Surgeons of British Columbia* (1985), 22 D.L.R. (4th) 185, at 190 (B.C.S.C.); *Milk Board v. Crowley*, [1954] 3 D.L.R. 519, at 523 (B.C.S.C.); *Chalmers v. Toronto Stock Exchange* (1989), 70 O.R. (2d) 532, at 539 (C.A.). See also D.C. Holland and J.P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989), at p. 195.

[53] [2004] S.C.J. No. 19, 236 D.L.R. (4th) 385.

[54] *Ibid.*, at 391, citing *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231, at 244-45, and *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] S.C.J. No. 14, [2000] 1 S.C.R. 342, at 351.

In *Wood v. Board of Registration of Nursing Assistants (Nova Scotia)*,[55] the court referred to the purpose of the enabling statute in determining that a power to make regulations for the suspension and cancellation of certificates of registration of nursing assistants included the power to establish a disciplinary system for considering allegations of incompetence or misconduct:

> ... having regard to the intent of the Act to regulate and control the practice of nursing by a certification system, the power to pass regulations to cancel or suspend certificates for so-called disciplinary reasons as in Regulation 11(1) is, in my view, directly granted by s. 2(g)....
>
> To restrict the unlimited power in s. 2(g) to merely administrative matters, such as cancellation or suspension of licence for non-payment of dues or departure from the country, as argued by counsel for the appellant, would vitiate a main purpose of the Act and leave the public unprotected if a C.N.A. acted negligently or in matters beyond his or her authorized field.[56]

In *Transx Ltd. v. Reimer Express Lines Ltd.*,[57] the Manitoba Court of Appeal resorted to the purpose of the Act to determine whether a power to make regulations prescribing conditions to which, as the Act stated, a licence issued by a provincial board "shall be subject" was sufficient to authorize regulations preventing the board from restricting the conditions that could be imposed. The court found that the purpose of the Act required the court to interpret the enabling provision as permitting regulations restricting what may not be imposed as a condition, and not just conditions that must be included:

> There are certainly other words which would have expressed more clearly an intention to authorize the Governor in Council to enact s. 8(1) of the regulations. But the issue is not whether Parliament has expressed its will in the most efficacious way: the issue is what Parliament meant by the words it used....
>
> In the present case, we must determine what Parliament intended ...We may look at the statute in its entirety, at the scheme which it creates and at its object, to the extent that its object can be ascertained without reference to extrinsic evidence.[58]

Having decided that the purpose of the Act was to implement a policy of less regulation, the court concluded that the enabling provision should be interpreted to permit restrictions on conditions, in addition to their stipulation, *per se*.

[55] [1988] N.S.J. No. 172, 84 N.S.R. (2d) 140 (C.A.).
[56] *Ibid.*, at 143.
[57] [1989] M.J. No. 236, 60 D.L.R. (4th) 249 (C.A.).
[58] *Ibid.*, at 254-55.

In *Alaska Trainship Corporation v. Pacific Pilotage Authority*,[59] the court considered whether a power conferred on the Great Lakes Pilotage Authority to "make regulations necessary for the attainment of its objects" authorized regulations that established different pilotage requirements, based on the country in which the ship in question was registered. The court found that the regulation-making powers were circumscribed by the requirement that the regulations be in furtherance of the objects of the Authority, which were established by the statute as "to establish, operate, maintain and administer in the interests of safety an efficient pilotage service":

> The short question is whether conditioning the claim for exemption on a ship's flag, here registration in Canada, and similarly, the claim for waiver, here registration in the United States, can fairly be said to be a matter of or connected with safety in realization of the objects of the Authority under s. 12.[60]

It answered this question in the negative:

> I am of the opinion that in the context of s. 9(2)(a)(iii) of the Regulations country of registration is not relevant to the question of safety. Since 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 other purpose not authorized by the Act.[61]

In *Quebec (Société des Alcools) v. Canada*,[62] the court ruled invalid the provisions of a regulation that provided a particular federal tax rebate to the plaintiffs. Although the enabling Act expressly provided for rebates in an amount prescribed by the regulations, the court held that the purpose of the Act was to refund taxes paid on inventory, and that the regulations were *ultra vires* because the amount rebated by the regulations did not accomplish this objective in respect of the plaintiff.

In *Lexogest v. Manitoba (Attorney-General)*,[63] the court considered a broadly-worded enabling provision that authorized regulations "For the purpose of carrying out the provisions of this Act according to their intent." The court held that regulations limiting the funding for therapeutic abortions to those performed in hospitals did not accord with the purposes of the Act, which it considered to be to administer a plan of health

[59] [1981] 1 S.C.R. 261.
[60] *Ibid.*, at 275. This reasoning was adopted in *Great Lakes Pilotage Authority Ltd. v. Misener Shipping Ltd.*, [1987] F.C.J. No. 428, 38 D.L.R. (4th) 745, at 753 (T.D.), which considered the same enabling provision.
[61] *Supra*, note 60, at 275.
[62] (2002), 300 N.R. 232 (F.C.A.).
[63] [1993] M.J. No. 54, 101 D.L.R. (4th) 523 (C.A.).

insurance for the residents of Manitoba.[64] In other circumstances, however, the courts have used a purposive analysis to uphold regulations based on the same wording.[65]

In *Re Minister of Environment and Cacchione*,[66] the court found that a power to make regulations prescribing grounds on which the Minister could cancel a permit under an environmental protection statute did not authorize regulations permitting cancellation on the ground that access roads were inadequate to handle a resulting increase in vehicular traffic. The court found that the purpose of the Act was to regulate the emission of pollution into the environment, and that, read in this context, the regulation-making powers did not authorize the regulations in question, the purpose of which was to control traffic.

In *Calgary Hotel Association v. Calgary (City)*,[67] the court invalidated a by-law that banned exclusive taxi stands on private property, on the ground that it imposed a direct restriction on the use of the private land of non-taxi businesses. Although the enabling statute gave the city very broad powers to regulate the taxi business, and the by-law's purpose was accomplished by prohibitions imposed upon taxi firms, as distinct from the private landowners, the court held that the city's interference with the use of lands by other businesses was not authorized.

In *Fisheries Assn. of Newfoundland and Labrador Ltd. v. Newfoundland (Minister of Fisheries, Food & Agriculture)*,[68] the court invalidated a regulatory requirement that all turbot be transported to a particular processing plant, on the ground that it was not in furtherance of the purposes of the enabling Act, which was to ensure proper quality control in the handling of fish. It came to this conclusion notwithstanding that the Act conferred a power to make regulations providing for the transporting of fish:

> Thus, even where, as here, the delegated powers appear to have been validly exercised in accordance with the language utilized in the Act, one must look further and determine whether such exercise conforms with the purpose and intent of the Act.
>
> As seen, and indeed as stated by Government itself, socio-economic reasons were the sole consideration for the 1993 Licensing Condition and Directive. *The Fish Inspection Act* ... clearly is concerned only with the quality of fish products.[69]

In *Utah Construction & Engineering Pty. Ltd. v. Pataky*,[70] the House of Lords held that a power to make regulations prescribing safeguards and measures to be taken to secure the safety of those engaged in excavation work did not empower the making of a regulation stating that "[e]very drive and tunnel shall be securely protected and made safe for persons employed therein." The court held that:

> The power conferred by this paragraph related only to the means for achieving an end and not to the creation of the end itself. In other words, that the subparagraph did not authorise a regulation prescribing that a tunnel must be safe, but authorised only regulations stating specific means which persons bound by the regulation were required to adopt.[71]

Other decisions, however, have not been as strict in this regard. In *Sianos v. Nuodex Ltd.*[72] and *Jacob v. Utah Construction & Engineering*,[73] for example, the court interpreted similar wording to meet the requirements set out in *Pataky*.

VI. PURPOSIVE ENABLING PROVISIONS

Certain enabling provisions describe regulation-making powers in terms of the objective that the regulations are to achieve, rather than empowering the making of regulations prescribing the means by which activities are to be carried out, presumably with the view to achieving the envisaged goal. The former can be described as purposive enabling powers, as opposed to the latter, which are prescriptive. A purposive power will often be conferred by an enabling provision that commences with "for"[74] or "for the purpose of."[75]

[64] See also *Hotel and Catering Industry Training Bd. v. Automobile Pty. Ltd.*, [1969] 1 W.L.R. 697, at 700 (H.L.); *Re Milk Board (B.C.) and Crowley*, *supra*, note 52.

[65] *Starley v. New McDougall-Segur Oil Co.*, [1927] 2 W.W.R. 379, at 381 (Alta. S.C.).

[66] [1987] N.S.J. No. 88, 35 D.L.R. (4th) 196 (S.C.).

[67] [1983] A.J. No. 700, 50 A.R. 241 (Q.B.).

[68] [1996] N.J. No. 286, 142 D.L.R. (4th) 732 (S.C.).

[69] *Ibid.*, at 741.

[70] [1966] A.C. 629 (P.C.).

[71] *Ibid.*, at 641.

[72] (1966), 83 W.N. (Pt.2) (N.S.W.) 360 (C.A.).

[73] (1966), 116 C.L.R. 200.

[74] *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18, s. 16(1); *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1, s. 5; *Bank Act*, S.C. 1991, c. 46, s. 448.1(3); *Marine Transportation Security Act*, S.C. 1994, c. 40, s. 5; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 115(1).

[75] *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7, s. 3; *Canada Deposit Insurance Corporation Act*, R.S.C. 1985, c. C-3, s. 37(4); *Canada National Parks Act*, S.C. 2000, c. 32, s. 41(2); *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 107(3); *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 343.

Subject to the implicit limits on regulatory powers discussed in the chapters that follow, a purposive regulation-making power will support the making of just about any regulation that is directed to achieving the objective stated in the enabling provision. As a result, the courts have generally accorded regulation-making authorities a considerable latitude in determining the exact means by which objectives are to be attained under purposive enabling provisions.[76]

In *Datta v. Sask. Medical Care Insurance Commission*,[77] the court found that a power to make regulations "for the purpose of establishing and administering a plan of medical care insurance" included a power to enact provisions with respect to "questionable billing" or "recurring errors in billing":

> It is difficult, if not impossible, to imagine a plan of medical care insurance being successfully "administered" without the taking of some measures respecting questionable or erroneous billings.[78]

In *CKOY Ltd. v. The Queen*,[79] the Supreme Court of Canada attached significant weight to the purpose of the enabling statute in construing the enabling provision in question, particularly in light of the fact that the regulation-making powers were expressly declared to be in furtherance of the objects of the Act:

> The grant of power to enact regulations is given to the Commission by s. 16 of the statute. By its opening words, such a power is directed to be exercised "in furtherance of its objects".... For our purposes, the said objects may be briefly stated in the last words of s. 15, "with a view to implementing the broadcasting policy enunciated in section 3 of this Act". Therefore, I agree with the courts below that the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3.[80]

It concluded that the regulations in question were related to such subjects, and upheld their validity.

In *Attorney-General for Canada v. Hallet & Carey Ltd.*,[81] the Judicial Committee of the Privy Council considered a regulation, made under the post-war *National Emergency Transitional Powers Act*, that permitted the Governor in Council to expropriate property without compensation.

[76] E.A. Driedger, The Composition of Legislation, 2nd. ed. (Ottawa: Supply and Services Canada, 1976), at p. 192.
[77] [1986] S.J. No. 726, 52 Sask. R. 18 (C.A.).
[78] *Ibid.*, at 21.
[79] [1979] 1 S.C.R. 2.
[80] *Ibid.*, at 11.
[81] [1952] A.C. 427 (P.C.) referring to SOR/1947-887.

The Act empowered the Governor in Council to make regulations for a variety of purposes, including for "maintaining, controlling and regulating supplies and services." Although the enabling provision did not expressly confer expropriatory powers, the court found that it was nonetheless a defensible means for achieving the statute's stated purposes:

> To speak of the "real purpose" of this Order as being that of confiscating profits is to confuse means with ends, for the true question is whether it can be said that the Governor in Council could not have deemed it necessary to take this step as a means incidental to the realization of the purposes stated in this Order. Clearly he could....[82]
>
> It was an Act that recognized that the emergency engendered by the war had brought about a situation in which new purposes might have to be served by new lines of executive action....[83] [I]t is misleading to ... conclude that, because expropriation is not included among the purposes listed in those clauses (a) to (e), it is not a power covered by the Governor's authority to do whatever he deems necessary or advisable for those purposes.[84]

In the exercise of regulation-making powers that are not drafted in a purposive manner, however, the adage that "the end does not justify the means" will often apply. In *Paull v. Monday*,[85] the Supreme Court of South Australia confirmed that particular attention must be paid to the words of the enabling provision, and that if it confers authority to exercise particular regulation-making powers to achieve a certain objective, a regulation that seeks to achieve the same objective through the exercise of different powers will be *ultra vires*.

> A power to do one thing cannot be validly exercised by doing something different, even if the effect of what is done is the same as that which would have resulted from doing what was permitted.... A regulation cannot be upheld as within power simply because it appears to have no wider practical effect than a valid regulation would have; where a statute allows certain means to be adopted, it does not permit the adoption of different means which happen to lead to the same end.[86]

Once again, this case underlines the importance of proper drafting of regulations to keep them within the confines of their particular enabling provisions.

[82] *Ibid.*, at 441.
[83] *Ibid.*, at 443.
[84] *Ibid.*, at 445.
[85] (1976), 50 A.L.J.R. 551 (Aust. H.C.).
[86] *Ibid.*, at 554.

VII. SUBJECTIVE ASSESSMENT OF SCOPE OF ENABLING PROVISION

While determination of the scope of regulation-making powers is normally considered to be strictly the prerogative of the courts in their function of arbitrating the meaning of statutes, in certain cases regulation-making powers have been drafted in such a way as to imply that the regulation-making authority is intended to have the discretion to decide what regulation-making powers are needed, and to have the power to legislate accordingly. The enabling provision in each of these cases can be said to confer regulation-making powers in a subjective manner, apparently leaving the determination of the scope of conferred powers to the subjective assessment of the regulation-making authority. Except in respect of the exercise of emergency powers, however, the courts have been reluctant to accord regulation-making authorities as much latitude as these enabling provisions might suggest.

As mentioned earlier, emergency powers, such as those exercised in wartime, have been the exception. In *Reference re Regulations (Chemical) under War Measures Act (Canada)*,[87] the court dismissed a challenge to regulations controlling the production, sale and use of chemicals necessary for the production and supply of munitions. The *War Measures Act*, under which the regulations were made, authorized the Governor in Council to make "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."[88] In giving a broad reading to the enabling provision, the court emphasized the subjective nature of the powers conferred:

> 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 words are too plain for dispute: the measures authorised are such as the Governor-General in Council (not the Courts) deems necessary or advisable.[89]

The statute considered in *Attorney-General for Canada v. Hallet & Carey Ltd.*[90] also gave the Governor in Council powers to make such regulations "as he may deem necessary or advisable" for a number of purposes related to the post-war economy. The court found that this similarly gave the Governor in Council wide regulation-making powers:

[87] [1943] 1 D.L.R. 248 (S.C.C.).
[88] *War Measures Act*, R.S.C. 1927, c. 206, s. 3.
[89] *Supra*, note 87, at 255-56.
[90] [1952] A.C. 427 (P.C.).

> It has been said that the Order was not in fact necessary for or related to any of the purposes of the Act and was therefore not a valid exercise of any of the powers which the Act conferred...
>
> The preamble of this Order states that it is necessary by reason of the continued existence of the emergency to effect the vesting in the Board of such holdings as are now in question "for the purpose of maintaining, controlling and regulating supplies and prices, to ensure economic stability and an orderly transition to conditions of peace." 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 he has stated?[91]

It should be kept in mind, however, that the statutes considered in both the *Chemicals Reference* case and in *Hallet & Carey* were directed to situations of national emergency, and the courts may not be disposed to give the same degree of deference to the discretion of the Executive branch in considering statutes in a non-emergency context. This distinction was emphasized in *Pulp & Paper Workers of Canada v. British Columbia (Attorney General)*:

> 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.[92]

R. v. CKOY Ltd.[93] constitutes a rare modern example of the courts deferring to the judgment of the regulation-making authority in interpreting the scope of its own enabling provision. Under the statute at issue in that case, the commission was empowered to make regulations relating to a number of specified subject-matters, followed by the basket clause "respecting such other matters as it deems necessary for the furtherance of its objects." In validating regulations that did not clearly fit under any of the specified powers, the court noted:

> I find it of some importance that the broad words appearing in s. 16(1)(b)(ix) "as it deems necessary" emphasize the discretion granted to the Commission in determining what is necessary for the furtherance of its objects.[94]

[91] *Ibid.*, at 440-41.
[92] (1968), 67 D.L.R. (2d) 378, at 383.
[93] *Supra*, note 79.
[94] *Ibid.*, at 13.

In another recent decision, *Apotex Inc. v. Canada (Attorney General)*,[95] the court adopted the broader of two possible interpretations to an ambiguous enabling provision based on the fact that the powers were conferred for a purpose clothed in subjective language.

I would suggest that these cases constitute exceptions to the more general rule, and that the courts are likely to jealously guard their jurisdiction to determine which regulations are authorized and which are not. The ultimate limits of executive authority were set out by the Supreme Court in *Roncarelli v. Duplessis*, where Rand J. wrote:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute ... [t]here is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[96]

In *Chalmers v. Toronto Stock Exchange*,[97] for example, the court declined to give a liberal reading to a subjectively worded enabling provision. The court found that a power to regulate "the business conduct of members" and to make "such rules and regulations ... as it considers necessary" did not support a by-law permitting the Toronto Stock Exchange to commence disciplinary proceedings against former members.

In *Re Milk Board (B.C.) and Crowley*,[98] the court similarly gave a narrow interpretation to a subjective enabling provision that authorized "such regulations ... as are considered necessary or advisable [to] provide for any proceeding, matter, or thing for which express provision has not been made in this Act." The court held that a regulation requiring that security be provided to producers by dairies was *ultra vires*, because its manifest object was to protect milk producers, whereas the purpose of the Act was to protect consumers of milk products.

In *Quebec (Attorney General) v. Lazarovitch*,[99] the court invalidated a regulation, made under an Act relating to collective agreements and the relationship between employers and employees, that attempted to fix prices to be charged for various types of services provided to the public. Although the Act conferred a power to include "such provisions as the

[95] [2000] F.C.J. No. 634, [2000] 4 F.C. 264, at 294 (C.A.).
[96] [1959] S.C.R. 121, at 140.
[97] (1989), 70 O.R. (2d) 532 (C.A.).
[98] [1954] 3 D.L.R. 519 (B.C.S.C.).
[99] (1940), 69 R.J.Q. 214, at 227 (C.A.).

Lieutenant Governor in Council may deem in conformity with the spirit of this act," the court found that a relationship between minimum price charged and minimum wages to be paid could not be sustained other than on "a fanciful view of the spirit of the Act."[100]

In *Fisher v. Minister of National Revenue*,[101] the court found that a power to make regulations "necessary to provide unemployment insurance for ... fishermen" did not authorize a regulation deeming, for the purpose of calculating benefits, that the earnings of fishermen's wives who worked with their husbands on the same boat would be considered to be those of the husband.

And in *Canada (Attorney General) v. Coleman Products Co.*,[102] the court held that a subjectively-worded enabling provision authorizing "the Minister to make such regulations as he deems necessary or advisable for carrying out the provisions of this Part," did not authorize him to define a term used in the enabling Act.

VIII. GENERAL REGULATORY POWERS (OMNIBUS CLAUSES)

Statutes sometimes confer a power to make regulations only in the broadest of terms, such as conferring a power to make regulations "for the purposes and provisions of" the enabling Act. These are often referred to as omnibus provisions or, where they fall at the end of a list of specifically enunciated powers, as basket clauses. While omnibus provisions generally precede or follow a list of specific regulation-making powers, in some cases — particularly in older statutes — they exist as a separate provision and are the sole source of regulatory powers.

As with the interpretation of any statutory provision, to determine the scope of an omnibus provision one must look first to the words it uses. Enabling provisions that confer a power to make regulations "for the purposes and provisions" of the enabling statute have generally been interpreted to require that one must find a particular provision of the Act:

(1) that contemplates the making of regulations; or,

(2) that the regulations are designed to carry into effect.

An apt explanation of the second application is set out in the High Court of Australia judgment in *Shanahan v. Scott*:

[100] *Ibid.*, at 228.
[101] [1980] 3 W.W.R. 680 (F.C.T.D.).
[102] [1929] 1 D.L.R. 658 (Ont. H.C.).

> That general power authorises the Governor in Council to make regulations providing for all or any purposes (whether general or to meet particular cases) necessary or expedient for the administration of the Act or for carrying out the objects of the Act.... It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions.[103]

This characterization was also adopted by the House of Lords in *Utah Construction v. Patky*.[104]

In *Steve Dart Co. v. Canada (Board of Arbitration)*, the Federal Court of Canada explained the scope of an omnibus provision in very similar terms:

> That section grants the additional right to make regulations to carry out the purposes and provisions of the Act, but such purposes and provisions must be clearly expressed in or contained within or flow by necessary implication from other sections of the Act. It would permit the making of *ejusdem generis* Regulations as those authorized in the other sections of the Act providing for the issuing of Regulations. It would also permit a Regulation required to carry out effectively a clearly expressed provision of the Act not falling within one of the other sections authorizing the making of Regulations; it certainly does not provide the right to make Regulations covering a matter which is not even remotely referred to in the Act.[105]

The limitations on the scope of omnibus provisions alluded to in *Steve Dart* were also reflected in the judgment in *Shanahan*:

> But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.[106]

This was echoed by the Ontario High Court in *Bomberry v. Ontario (Minister of Revenue)*, which struck down regulations imposing a quota system for tobacco retailers on Indian reserves:

> While the legislature conferred a general power to pass regulations to authorize the collection of tax imposed by the Act and to do things necessarily incidental to carrying out the powers granted by the Act, the legislature did not thereby write the Minister or the Director a blank cheque. Before an impugned power may be said to be necessarily incidental to a statutory power, the statutory power must be clearly identified to which the impugned power is necessarily incidental. The incidental power must have some peg to hang on. There is no provision in the Act which can support a quota as a necessarily incidental power.[107]

[103] (1957), 96 C.L.R. 245, at 249-50.
[104] [1966] A.C. 629 (H.L.).
[105] (1974), 46 D.L.R. (3d) 745, at 749 (F.C.T.D.).
[106] (1957), 96 C.L.R. 245, at 250.

The judicial reluctance to accord broad powers to general wording is evident in a number of similar decisions. In *Ulin v. The Queen*,[108] the court found that a power in the *Canadian Citizenship Act* to "make regulations generally for carrying into effect the purposes and provisions of this Act" did not empower the Governor in Council to make regulations adding a substantive requirement for obtaining citizenship to those already set out in the Act.

In *Bishop v. College of Physicians and Surgeons of British Columbia*,[109] the court considered the effect of an omnibus provision in the British Columbia *Interpretation Act* that empowered the Lieutenant Governor in Council, where it was given the power to make regulations, to also make such additional regulations "as are considered necessary and advisable, are ancillary to [the Act], and are not inconsistent with it." The court concluded that a regulation permitting the temporary removal of records for the purpose of copying them could not be considered to be ancillary to a power expressly conferred by the Act to make regulations "establishing the records and accounts to be kept by members of the college."[110]

In *Lexogest v. Manitoba (Attorney General)*,[111] the court considered a broadly-worded enabling provision that provided "For the purpose of carrying out the provisions of this Act according to their intent, the commission ... may make regulations ancillary thereto and not inconsistent therewith," followed by a lengthy list of specific powers. After concluding that the intent of the Act was to provide for the administration of a plan of health insurance for the residents of Manitoba, the court determined that a regulation limiting the funding for therapeutic abortions to those performed in hospitals was not "ancillary thereto."[112]

In *Parklane Private Hospital Ltd. v. Vancouver (City)*,[113] the court held that a power to make regulations "for the purposes of carrying into effect the provisions of the Act" did not permit the making of regulations impairing existing rights or obligations. Similarly, in *Smith v. Canada (Attorney General)*,[114] the court refused to read into a general enabling

[107] (1989), 70 O.R. (2d) 662, at 674 (Div. Ct.).
[108] (1973), 35 D.L.R. (3d) 738, [1973] F.C. 319 (T.D.).
[109] (1985), 22 D.L.R. (4th) 185 (B.C.S.C.); affd 26 D.L.R. (4th) 15 (B.C.C.A.).
[110] *Ibid.*, at 192.
[111] [1993] M.J. No. 54, 101 D.L.R. (4th) 523 (C.A.).
[112] *Ibid.*, at 558.
[113] [1975] 2 S.C.R. 47.
[114] [1999] F.C.J. No. 1751, 179 F.T.R. 134 (T.D.).

provision the authority to impose a limitation period on the exercise of rights under the statute, concluding that since the statute created the rights in question, limiting them would defeat the purpose of the Act.

In *Great Lakes Pilotage Authority Ltd. v. Misener Shipping Ltd.* the court considered a general enabling provision authorizing the Great Lakes Pilotage Authority to "make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing," followed by a list of specific regulation-making powers. The court focused on the word "necessary" as a constraining element in the scope of the regulation-making powers, citing the following from *Administrative Law* by Dussault and Borgeat:[115]

> In such a case, it is clear that Parliament does not want to rely solely on the discretion of the regulatory authority, and prefers to impose an objective test of whether the regulations adopted are "necessary". Such a provision, far from increasing the discretion of the body with regulatory powers, actually limits its eventual scope by imposing on it a further condition or requirement which provides even more basis for a legal challenge.[116]

In *Carroll v. Attorney-General for New Zealand*,[117] in considering whether a power of the Governor General to make such regulations relating to "Any other matters for which regulations are contemplated or required by this Act, or which he deems necessary for the efficient administration thereof" was sufficient to bind milk producers to a single dairy, the court also substituted its view of necessity for that of the regulation-making authority:

> I can find no evidence in the Act itself that so drastic a regulation was in any "contemplated" by the Act.... I think it at least equally clear that no such regulation is "required" by the Act or its amendments. If this had been the case, one would have expected to find in the statute itself some hint or suggestion regarding the reason of, or necessity for, this alleged requirement, but nothing of the kind is to be gleaned from the provisions of the Act. Finally, I am quite unable to see how cl. 55 could reasonably be deemed "necessary for the efficient administration" of the Act. The regulation as framed is not warranted by or indeed ancillary to any express provision of the enabling statute, which can quite well be administered without cl. 55.[118]

[115] 2d, ed., Vol. I (Toronto: Carswell, 1985), at p. 426.
[116] (1987), 38 D.L.R. (4th) 745, at 751 (F.C.T.D.).
[117] (1933), 52 N.Z.L.R. 1461.
[118] *Ibid.*, at 1477.

In *Attorney-General of Canada v. Silk*,[119] the Federal Court of Appeal, in considering an enabling provision that provided for "such other matters as are necessary to provide unemployment insurance for such fishermen," observed that such language does not empower regulations embracing whatever the regulation-making authority considers to be necessary, but rather only those that the court considers necessary.

Similarly, in *Dumont v. R.*,[120] the Quebec Court of Appeal placed the onus on the Crown to demonstrate the necessity of the regulation, having regard to the context of the Act, and ruled the regulation invalid when the Crown could not do so.

In *Gruen Watch Co. v. Attorney General of Canada*[121] the court held that a power to make such regulations as "he deems necessary or advisable for carrying out the provisions of this Act" did not give the Minister power to define terms for the purposes of the Act or to expand the base of taxation of the enabling Act.

In *Morton v. Union Steamship Co. of New Zealand*,[122] the court considered the scope of a provision in the Australian *Excise Act* authorizing regulations to prescribe "all matters ... as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to Excise," and concluded that a regulation adding a requirement to those of the Act was *ultra vires*:

> A power expressed in such terms to make regulations enables the Governor-General in Council to make regulations incidental to the administration of the Act. Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself.[123]

In *R. v. Thompson*,[124] the court indicated a disinclination to give a broad reading to a power to make regulations "for the health, safety, morality and welfare of the inhabitants of the municipality":

> The power to legislate for the 'welfare' of the inhabitants is too vague and general to admit of definition. It may mean so much that it probably does mean very little. It cannot include powers that are oth-

[119] (1981), 128 D.L.R. (3d) 366 (F.C.A.); affd (1983), 145 D.L.R. (3d) 221 (S.C.C.).
[120] [1977] C.A. 114, at 116 (Que. C.A.).
[121] (*sub nom. Bulova Watch Co. v. Canada (Attorney General)*) [1950] 4 D.L.R. 156, at 165-66 (Ont. H.C.J.), revd in part, [1951] 3 D.L.R. 18 (Ont. C.A.).
[122] (1951), 83 C.L.R. 402 (Aust. H.C.).
[123] *Ibid.*, at 410. See also *Banks v. Transport Regulation Board* (1968), 119 C.L.R. 222, at 235 (Aust. H.C.).
[124] (1957), 9 D.L.R. (2d) 107 (Ont. C.A.).

> erwise specifically given, nor can it be taken to confer unlimited and unrestrained power with regard to matters in which a conditional power only is conferred upon the subsidiary Legislature.[125]

While the courts may be reluctant to read much substance into omnibus provisions, they will nonetheless rely on them in combination with other regulation-making powers to support regulations incidental to achieving the purposes contemplated by those powers.[126] They can also serve to tie an orphaned regulation-making power — a power to make regulations that does not indicate by whom the regulations are to be made, for example — to a definite enabling provision.

In *Spence v. Teece*,[127] the court was willing to read a power to make "regulations ... necessary or convenient to be prescribed for carrying out or giving effect to" a statute relating to student assistance as being wide enough to permit regulations specifying eligibility criteria for receiving student assistance additional to the limited criteria set out in the Act. After concluding that the sections of the Act relating to residency and course requirements did not provide a sufficient basis for determining eligibility, the court decided that the general enabling words should be given a broad enough reading to fill the gap:

> Again, neither the sections nor the Act contains any express guidance as to criteria for deciding between the competing claims of applicants who satisfy the basic requirements of the sections. Unless every citizen or permanent resident of Australia who undertakes or proposes to undertake a relevant course is to be furnished with benefits, it is plainly necessary or convenient for carrying out or giving effect to the Act that authorized persons be provided with some general guidance as to requisite or relevant qualifications and needs and as to relevant discriminatory criteria.[128]

A related example is *Westinghouse Electric Corp. v. Duquesne Light Co.*,[129] where the court relied on an omnibus provision to expand regulation-making powers expressly conferred under another provision. The latter conferred regulation-making powers to prohibit the disclosure of information relating to the "production, use and application of, and research and investigations with respect to, atomic energy." The court somewhat questionably relied upon the omnibus power to make regulations "generally as the Board may deem necessary for carrying out any of the provisions for purposes of this Act" as authority to also prohibit the disclosure of information relating to the import, export, transportation,

[125] *Ibid.*, at 112.
[126] *Durham v. Ontario (Attorney General)* (1978), 95 D.L.R. (3d) 327, at 333 (Ont. H.C.).
[127] (1982), 41 A.L.R. 648 (F.C. Aust.).
[128] *Ibid.*, at 652.
[129] (1977), 78 D.L.R. (3d) 3 (Ont. H.C.).

refining, possession, ownership, or sale of uranium or its derivatives or compounds. On the basis of the *expressio unius* principle of statutory interpretation, the express conferral of a power to provide for confidentiality in respect of stated subjects would have militated against an interpretation that additional confidentiality requirements were intended by the use of general wording elsewhere.

Similarly, in *R. v. Huston*,[130] the court determined that a general power to make such regulations "not inconsistent with this Act as are necessary to carry out its provisions according to their obvious intent," in combination with an express authority to make regulations for the protection of workmen, was sufficient to authorize the making of regulations requiring fatal accidents to be immediately reported.

In some cases, a general regulatory power is used solely for the purpose of enacting a regulation or regulatory provision that is truly ancillary to the purposes of the Act or to other regulation-making powers that have been expressly conferred. In *R. v. Laver*,[131] the court held that a power to regulate an activity includes the power to enact such ancillary measures as are necessary to make the regulations enforceable.[132] In that case, it held that a power to "regulate and prevent fishing" included a power to limit the number of fish a person may possess at any one time, since without such a rule, it would as a practical matter be impossible to regulate as intended. By the same reasoning, a power to make regulations establishing a permitting scheme for an activity would of necessity be interpreted to authorize the making of regulations prohibiting the activity in the absence of a permit, since it is meaningless to issue permits for an activity that is not otherwise prohibited.

Notwithstanding the tendency of the courts to interpret general enabling provisions very narrowly, there are, not surprisingly, a number of cases that constitute exceptions to the rule. In *Telecommunications Workers Union v. Canada (C.R.T.C.)*,[133] the court considered that a power to make regulations "generally ... respecting such other matters as it deems necessary for the furtherance of its objects" was sufficiently broad to permit the regulation-making authority to make regulations exempting classes of licensees who met certain conditions from complying with a part of the regulations prescribing maximum fees for basic services.

[130] (1975), 62 D.L.R. (3d) 548 (Sask. C.A.).
[131] [1953] O.W.N. 501 (Dist. Ct.).
[132] The court did not, however, mention offences or penalties, which are discussed further below.
[133] [2003] F.C.J. No. 1546, 233 D.L.R. (4th) 298 (C.A.).

Another example of a broad reading being given to an omnibus provision is *Qu'Appelle Village Properties Ltd. v. Mourits*,[134] where the Saskatchewan Court of Appeal upheld the validity of a regulation that purported, by way of a deeming provision, to amend a provision of the Act under which it was made. The court reasoned that since the effect of the regulation was to extend the Rent Appeal Commission's ability to control rents, which was the purpose of the Act, it was valid. This decision is, however, to all intents and purposes indistinguishable from *Edmonton Assessor v. J.J.C. Holdings Ltd.*,[135] in which the court struck down the regulation in question. The court in *Qu'Appelle Village* suggested some ambivalence regarding its conclusions in its final observation that "if I am wrong in my conclusion ... the Legislature can correct the matter."[136]

IX. POWER TO PRESCRIBE FORMS

A particular enabling power that can be problematic is the power to prescribe forms. A sometimes irresistible temptation for a regulation-making authority on which such a power has been conferred is to attempt to leverage it into a much greater power by prescribing a form that contains substantive rules. This can definitely pose a problem of validity if no powers have been conferred to make regulations imposing such rules, since a power to prescribe a form does not include a power to prescribe rules by means of such a form. As the Manitoba Court of Appeal explained in *Aurora TV & Radio Ltd. v. Gelco Express Ltd.*, where it held that a power to prescribe the form of a bill of lading was not sufficient to permit the inclusion of waiver of liability clause:

> Section 313(1) which gives the board the power to mandate a bill of lading in a prescribed form ... is directed at the form of the bill of lading for inspection purposes and is not intended to prescribe or limit contractual terms.[137]

This follows logically from the ordinary meaning of "form," which is differentiated from "content" or "substance." *Black's Law Dictionary*[138] makes this point clearly: "In contradistinction to 'substance,' 'form' means the legal or technical manner or order to be observed in legal instruments ...Antithesis of 'substance.'"[139]

[134] (1981), 123 D.L.R. (3d) 480 (Sask. C.A.).
[135] (1984), 54 A.R. 378 (C.A.); leave to appeal to S.C.C. refd (1984), 12 D.L.R. (4th) 380*n*.
[136] *Ibid.*, at 482 (Alta. C.A.).
[137] (1991), 80 D.L.R. (4th) 236, at 242 (Man. C.A.).
[138] 7th ed. (St. Paul, Minn.: West Publishing, 1999).
[139] From *Phoenix Building & Homestead Association v. Meraux*, 189 La. 819, at 822.

Prescribed forms should therefore be limited to an administrative tool, for use in implementing a legislative scheme. They should not therefore be normative in content; any rules or requirements contained in a form should simply be an echo of rules and requirements set out elsewhere in the Act or in regulations.

In consequence, a power to prescribe forms will not likely be interpreted to include a power to require that anything other than routine information[140] be provided in the form. For example, a power to prescribe forms for a licence application would not normally imply a power to require that the applicant submit confidential personal or business information or that the applicant sign contractual undertakings or give binding declarations as part of the form.

X. CONCLUSIONS

It is hoped that the examples of regulation-making powers set out above will give a general idea about what the courts are, or are not, willing to read into the enunciation of particular enabling provisions. The following chapters address constraints on regulation-making powers that go beyond the choice of words used in the enabling provision, to encompass what might be considered to be the implicit limits on regulation-making powers imposed by the common law.

[140] What is "routine" will vary according to context, having regard in appropriate cases to standard industry practices.