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# *Brisbane Conference on Delegated Legislation*

*Senator Nathan Nurgitz and Robert Kaplan, MP*

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**A**t the invitation of the Queensland Committee of Subordinate Legislation, a Canadian delegation attended the inaugural Conference of Australian Subordinate Legislation Committees. The Conference brought together representatives of seven Australian jurisdictions whose legislatures have established parliamentary committees for the review and scrutiny of delegated legislation. It brought together representatives from other Commonwealth countries including Zambia, Zimbabwe and Canada. The need for regional conferences of this kind was discussed at the 1983 Commonwealth Conference on Delegated Legislation in Ottawa. It will come as no surprise to those familiar with Australia's leading role in the parliamentary scrutiny of delegated legislation that the first such regional conference was held there.

Sir Walter Campbell, Governor of the State of Queensland, opened the Conference by noting that the growth of delegated legislation is a matter of long-standing concern in parliamentary democracies. It goes back to Lord Hewart's 1929 attack on the new despotism of delegated legislation. "In 1929, the issue was one of parliamentary sovereignty. In 1985, the issue has become that of managerial efficiency and Government intrusion into the community's affairs. But the nub of the problem is the same in both cases. This is the practical need for subordinate legislation and at the same time the fear of perceived threats to parliamentary authority from public functionaries making such legislation. The balance between the legislature's authority over legislation and the Government's administrative responsibility to make equitable and managerially sound rules within the intentions of the Act is at the core of our system of public administration."

Sir Walter identified the safeguards available to Parliament if its "overriding authority" is to be maintained. These include: the careful choice of the delegate to which the power to legislate is given; ensuring that the empowering provision is appropriately specific as to what may be legislated; publishing the delegated legislation widely to ensure public knowledge thereof; and parliamentary review of delegated legislation.

The Governor reminded delegates that whether these safeguards are utilized is basically a matter for the Parliament itself. While expressing support for the concept of parliamentary

control of delegated legislation, he reminded delegates of Bernard Crick's famous remark that in our system of government "control means influence not direct power; advice, not command; intrusion, not obstruction; scrutiny, not initiation; and publicity not secrecy."<sup>1</sup>

The Conference was chaired by Gordon Simpson MLA, Chairman of the Queensland Committee of Subordinate Legislation. He introduced the Acting Chief Justice of Queensland who spoke on the subject of "The Courts and Subordinate Legislation". Mr. Justice Kelly described the role of the Courts in the supervision of subordinate legislation and drew attention to the essential distinction between judicial and parliamentary review. As he put it, the courts' supervision of delegated legislation "only comes into operation at a comparatively late stage, if it comes into operation at all". Judicial review of the legality of subordinate legislation can only arise "in the course of some proceeding brought by one party against another and where the determination of that question is necessary for the determination of some ultimate issue between those parties". These circumstances, according to the Chief Justice, "obviously limit the extent to which courts are called upon to exercise their power to review subordinate legislation".

While the distinction may seem obvious, it is not without interest to insist on the inherent limits of judicial review. The suggestion has sometimes been made, at least in Canada, that a parliamentary scrutiny committee should not concern itself with questions of validity as these involve legal considerations which are the proper province of the courts. This view ignores the functional distinction between judicial and parliamentary review: the purpose of the first is to decide on a dispute between two parties, while the second is directed at the maintenance of parliamentary legislative supremacy. To argue that judgments as to the legality of delegated legislation are the exclusive province of the courts is unrealistic. Chief Justice Kelly, when questioned on this point, indicated that, in principle, he found no objection to a scrutiny committee examining the validity of instruments of delegated legislation.

On the second day of the Conference, delegates heard from three distinguished speakers: Professor Dennis Pearce delivered a key-note address on "The Limits of Review"; the Honourable Mr. Justice McPherson, Chairman of the Queensland Law Reform Commission, gave a paper on "Some Unexpected Consequences of Subordinate Legislation"; finally, the Conference heard the Solicitor-General of Queensland on "The Practice and Procedure of the Solicitor-General's Office in Relation to Subordinate Legislation".

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*Senator Nurgitz and Mr. Kaplan are Co-Chairmen of the Special Joint Committee on Regulations and Other Statutory Instruments. Together with Vice-Chairmen Howard Crosby and Committee Counsel François Bernier, they attended the Brisbane Conference held from June 4-6, 1986. For a full report of the conference, write to the Clerk, Committee of Subordinate Legislation, Parliament House, Brisbane, Queensland 4000, Australia.*

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## Scrutiny of Legislation on its Merit

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Professor Pearce is well-known throughout the Commonwealth as the author of *Delegated Legislation in Australia and New-Zealand* (1977) and *Statutory Interpretation in Australia* (1974). He was also a guest at both the First and Second Commonwealth Conferences on Delegated Legislation. In selecting his topic, Professor Pearce followed up on the theme of his 1980 address to the First Commonwealth Conference on Delegated Legislation.<sup>2</sup>

After noting that "The review undertaken by subordinate legislation committees is one of the most significant roles that has to be undertaken by members of Parliament", Professor Pearce turned to the question of whether the review function of such committees should be extended beyond the bases at present generally accepted. Should the scrutiny of delegated legislation extend beyond its procedural and technical aspects and include its validity? Should the scrutiny of delegated legislation extend further to an examination of the merits of the legislation? In Canada, the first of these questions stands resolved insofar as the Joint Committee on Regulations and other Statutory Instruments has, from its inception, reviewed the legality of statutory instruments. Except to the extent remarked upon earlier, the Committee's role in this regard has presented no particular problems.

It is interesting to note, however, that Professor Pearce's position on this question has changed since he argued against such a role for scrutiny committees. He explained that: "When I gave a paper to the first Commonwealth Conference on Delegated Legislation in October 1980, I ventured the view that it was unwise for parliamentary Committees to consider the legal validity of delegated legislation. I put the view that a Committee was likely to find itself in dispute with the Government's legal advisers. . . . I said that validity questions were difficult and often involved matters of opinion. It was better to leave these issues for resolution by the courts on a challenge to the validity of the legislation in question. I was taken firmly to task by some of the delegates at that Conference, particularly those from Canada. I now think that they were right and that the view that I had put did not represent the best approach for a Committee to take". On reflection he agreed with comments of Perrin Beatty, former Joint Chairman of the Canadian Joint Committee, who said, made at the First Commonwealth Conference of Delegated Legislation Committees said: "The fact is that in modern society justice is often beyond the reach of individual citizens because of factors of cost. This is very disturbing. If there is some way in which Parliament can satisfy the concerns of citizens in a responsible way and avoid the need for recourse to the courts, then surely that is a compelling argument why Parliament should act".

On the issue of review of the merits of delegated legislation, or policy review as it is sometimes referred to, Professor Pearce alluded to his previously expressed opinion that scrutiny committees should not consider matters of policy for two reasons. First, because committees often lack the support systems that would enable them to fully investigate policy questions and secondly, because examination of these questions would involve partisan considerations which might undermine the usefulness of any such inquiry. He invited members of scrutiny committees to reconsider what he termed a "self-imposed limitation" and to ask themselves whether scrutiny committees do not often make policy judgments under the guise of applying technical scrutiny criteria. Professor Pearce commented that in examining this issue, he was reminded of the continuous protestations of courts that they do not consider the merits of administrative decisions but only their legality. He suggested that, in fact, courts often make policy judgments while purporting to intervene on the

basis of strictly legal considerations. To anyone familiar with public law, there is a ring of truth to those remarks. Professor Pearce went on to suggest that scrutiny committees, despite their often repeated protestations to the contrary, do the same and argued that it may be proper for them to do so.

To the extent policy relates to the considerations which administrative authorities have in mind in legislating and to the means chosen to achieve those goals, it is difficult to argue that policy judgments are never made by scrutiny committees. If one takes the Joint Committee as an example, some of its scrutiny criteria are openly concerned with matters of policy. The Committee will examine whether or not a statutory instrument "makes some unusual or unexpected use of the powers conferred by the enabling statute"; whether it "trespasses unduly on the rights and liberties of the subject"; or whether it "appears to amount to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment". It is difficult to see how the application of criteria such as these does not require parliamentarians to consider, if only indirectly, the policy aspects of an instrument.<sup>(3)</sup>

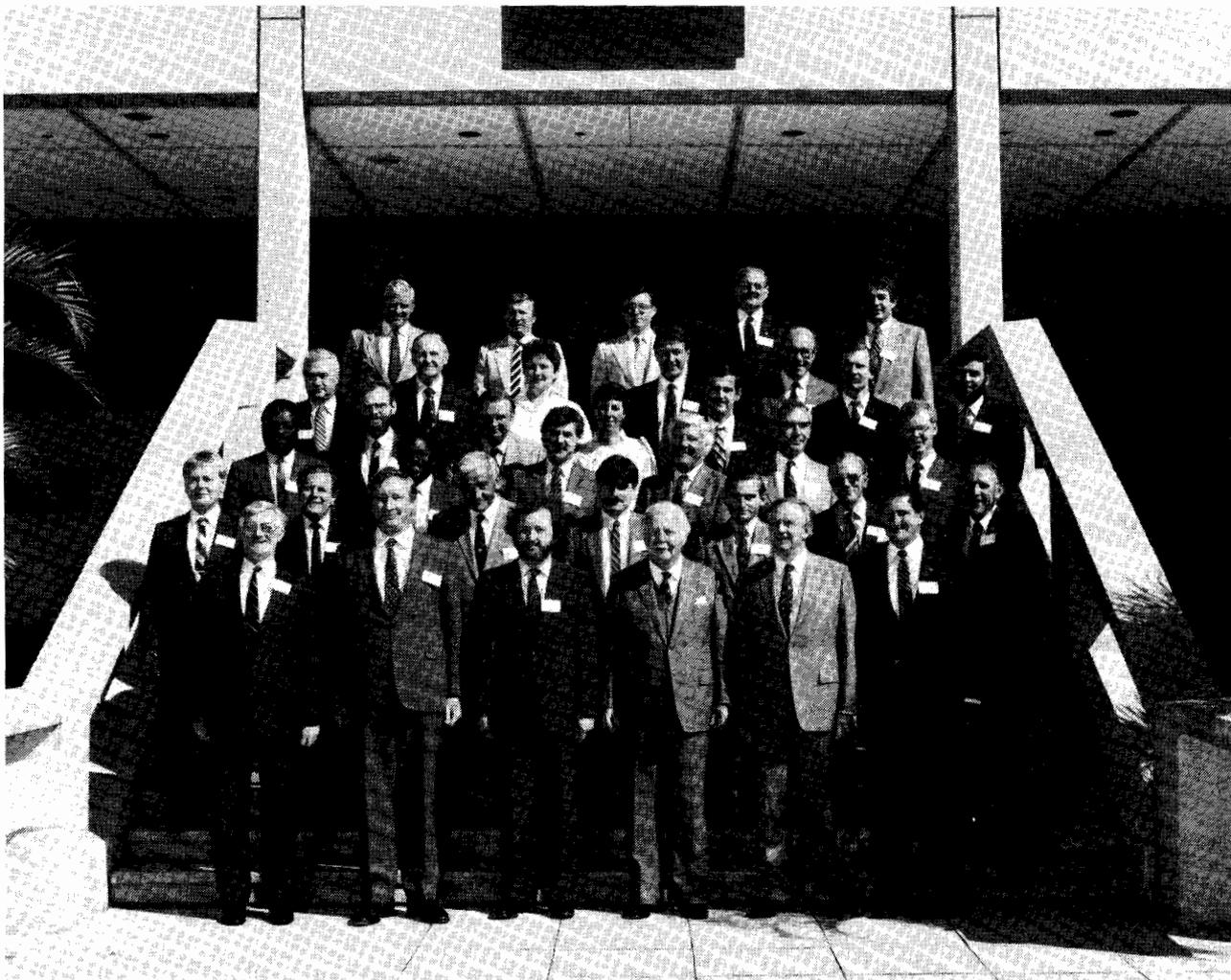
Many of those attending the Brisbane Conference warned their colleagues that for scrutiny committees to review the merits of delegated legislation would jeopardize the bi-partisan spirit common to most scrutiny committees. If these committees do in fact consider policy issues when reviewing statutory instruments, how do we explain these attitudes? One answer may be that in politics, the perception of facts is often quite as important as the facts themselves. Perhaps the bi-partisan approach of a scrutiny committee is preserved not so much by the non-consideration of the policy expressed in regulations, as by the public assertion that it is not being considered.

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## Uniform Legislation

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Professor Pearce also addressed himself to the difficulties scrutiny committees may encounter in reviewing subordinate legislation enacted as part of a uniform legislation scheme. These schemes, by their nature, are unique to federal states such as Australia and Canada. A recent example in Canada is the legislation governing the transportation of dangerous goods. Where agreement is reached by representatives of the central and provincial authorities as to the form and content of delegated legislation to be adopted by the jurisdictions involved in the scheme, what role can the scrutiny committee of one jurisdiction play? A scrutiny committee that objects to the delegated legislation adopted in its jurisdiction is likely to be met with the response that the delegated legislation represents the agreement of all participants in the uniform legislation scheme and that any subsequent change would bring into question the very existence of the agreement. Professor Pearce suggested that one approach to the problem may be for uniform subordinate legislation to be submitted in draft form to a scrutiny committee before it is formally agreed to and enacted. Beyond this, he suggested that a distinction be drawn between those provisions which are at the heart of the uniform legislation scheme and what he termed fringe provisions. "I am not sure . . . that uniformity means identity. I do put it to you . . . that perhaps there is some room for committees here to address issues relating to uniformity within certain bounds and to look to see whether it is possible to ensure that those provisions do not offend against the principles that the committee would object to in other legislation. It will be a case of trying to balance whether the provision is crucial to the operation of the legislation or whether it is, as it were, on the fringe, that is, a way



*Delegates to the Brisbane Conference.*

of implementing the legislation rather than being in the heartland of the topic with which it is trying to deal.”

As far as Canada is concerned, the concern is also relevant to subordinate legislation enacted pursuant to inter-jurisdictional delegations of subordinate legislative power. Under the *Canada Agricultural Products Marketing Act*, for example, federal regulatory powers over the marketing of agricultural commodities are delegated to, and exercised by, provincial marketing boards.<sup>4</sup> If a regulation is adopted by a *provincial* authority in the exercise of a *federal* legislative power, should it be treated by the Canadian scrutiny committee in the same manner as any other piece of federal subordinate legislation? Or does the fact it was enacted by a provincial body entitle it to special consideration? Although, in the past, the Joint Committee has dealt with these regulations on the same footing as other federal subordinate legislation, it has also been keenly aware that such regulations are in a unique situation because of their adoption by administrative bodies over which the federal government exercises no authority. The eventual revision of the *Statutory Instruments Act* may provide an occasion to examine whether or not regulations enacted as part of uniform legislation or legislative delegation schemes should be subject to scrutiny by the Joint Committee on Regulations and other Statutory Instruments.

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## Canadian Participation

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The final session of the Conference was devoted to presentations and comments by each attending delegation. Our delegation tabled a report with the Conference and distributed it to all attending delegates. The report explained the role of the Joint Committee on Regulations and other Statutory Instruments in the Canadian Parliament and the procedures it follows. It also dealt with the disallowance procedure recently adopted by the House of Commons and summarized some recent government initiatives in the area of regulatory reform. The report made it abundantly clear that Canadian parliamentarians have a crucial role to play in ensuring that powers delegated by Parliament are exercised in accordance with the parliamentary authorization and the principles of fairness and equity.

The remarks made in the opening address of the Conference on the continued growth of delegated legislation were borne out by the report's observation that: "The extent to which legislative powers are delegated by the Parliament of Canada is obvious if one considers that in the course of a recent Session of Parliament, which lasted a little over three years, Parliament adopted some 173 statutes; over the same period of time, approximately 4,000 instruments made pursuant to statutory powers

were published in the *Canada Gazette*. This does not account for the considerable number of such instruments the publication of which is not legally required. It has been remarked that regulations import on the daily lives of Canadians to a far greater extent than many of the statutes pursuant to which they are made." The phenomenal growth of subordinate legislation is common to many Commonwealth jurisdictions. While many parliamentarians reflected on this, the subject was not specifically discussed by the Conference. This prompted one delegate to suggest that the subject of deregulation ought to have been the focus of the Conference.

The Canadian delegation secured adoption, by the Conference of Australian Subordinate Legislation Committees, of a resolution urging the Commonwealth Delegated Legislation Committee<sup>5</sup> to pursue its efforts to arrange for the holding of the Third Commonwealth Conference on Delegated Legislation at an early date. Its sponsor reminded delegates of the resolution, by

the Second Commonwealth Conference on Delegated Legislation, calling for Commonwealth-wide conferences at regular intervals. The Canadian resolution was adopted by the Conference and is to be communicated to the members of the Commonwealth Delegated Legislation Committee by the Chairman of the Conference.

There was widespread agreement amongst those in attendance that the First Commonwealth Conference of Australian Subordinate Legislation Committees was a success. And plans are in hand for the organization of the next conference. The Brisbane Conference gave us a valuable opportunity to discuss and reflect on issues of common interest with our Commonwealth colleagues. We also collected valuable information which would otherwise be difficult or time-consuming to obtain. Beyond the immediate benefits to participants, the papers presented to the Conference and its proceedings form a permanent record that is of interest to all parliamentarians. ■

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<sup>1</sup>Bernard Crick, *The Reform of Parliament*, London, 1970.

<sup>2</sup>Commonwealth Conference of Delegated Legislation Committees, Senate Standing Committee on Regulations and Ordinances, Volume 2, *Documents of the Conference*, Australian Government Publishing Services, Canberra, 1981.

<sup>3</sup>See, for example, the comment of the Law Reform Commission in LRCC, *Independent Administrative Agencies*, Report 26, Ottawa, 1985, p. 20, note 21.

<sup>4</sup>R.S.C. 1970, c. A-6, s. 2.

<sup>5</sup>This Committee, chaired by the Honourable Perrin Beatty, consists of representatives from the principal regions of the Commonwealth. It was established as a continuing coordinating committee by the Second Commonwealth Conference on Delegated Legislation and has, as one of its major purposes, the sponsorship and arrangement of the next Commonwealth Conference.

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