

1-1-1994

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Recommended Citation

Kathleen McManus, "Executive Legislation: Delegate Law Making By the Executive Branch" (1994) 3 Dal J Leg Stud 257.

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Executive Legislation: Delegate Law Making By the Executive Branch

John Mark Keyes

Toronto: Butterworths, 1992, 308 pp.

Reviewed by Kathleen McManus[†]

In 1990, the Canadian Parliament passed 54 statutes. Also in that year, 860 regulations were published in the *Canada Gazette*. For every statute almost sixteen pieces of delegated legislation were made. Whether startling or not to the reader, these statistics confirm that delegated legislation is the source of a large proportion of the law in Canada. The explosion of delegated legislation has occurred in the twentieth century and this trend, by all indications, will continue. Lawyers face the challenge of becoming sufficiently comfortable with this source of law to effectively litigate it. *Execution Legislation* will be an important aid for lawyers in equipping themselves for the task.

“Executive legislation” is a new phrase which the author uses to describe law enacted either by the executive branch of government or by executive agencies. It does not, however, include the law of municipal, territorial, or local authorities. The legislation itself comes in the form of regulations, rules, or guidelines; all are subject to the same legal constraints.

The author argues in his introduction that executive legislation is a large enough source of law to merit standing alongside statutory and common law. The complexities of executive legislation explored throughout the book support this contention. Delegated legislation has far too much impact on the lives of Canadians to be relegated to a single chapter in an administrative or constitutional law text.

The book will appeal to readers with various levels of knowledge of delegated legislation. The uninitiated reader is introduced to what executive legislation is, its tensions with the rule of law, and the criteria used to identify when a rule, or similar instrument, is executive legislation. For the more knowledgeable,

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Keyes details the legal system that creates and constrains the effects of executive legislation as law. The various aspects of these legal constraints represent the bulk of the text.

Legal constraints on executive legislation come from both constitutional law and common law. The author has divided these constraints into two main areas: first, form and manner, and second, content. Constraints on form include such issues as who can participate in making legislation and how this legislation is made known to those whom it effects. Content constraints arise from uncertainty of language, subdelegation, and incorporation by reference. The author's division and subdivision of constraints is useful for those grappling with executive legislation. These divisions are useful guide-posts for those analyzing how to challenge executive legislation.

Executive Legislation is not without its difficulties. Two aspects of the author's style are distracting. Fortunately, these annoyances are minor. First, the text contains numerous phrases coined by Keyes, of which "executive legislation" is the most significant. The reader is forced to dedicate some time to flipping back pages to refresh her memory of the meaning of a phrase. A glossary would have gone some way toward resolving this problem. Second, each new chapter or section inevitably begins by referring the reader to ideas already explored, or in some instances ideas yet to be examined. Consequently, Keyes puts the onus on the reader to move back and forth among the relevant chapters and sections. This task breaks the flow of the read, but more importantly, makes each section incomplete as a discrete unit that can be quickly referenced. A brief summary of ideas, instead of a referral to another chapter, would increase the value of the book as a reference aid.

The greatest shortcoming in this book is the omission of substantial policy discussion. Issues such as the appropriateness of faceless lawmakers making law or the role of public participation are not addressed. Keyes implicitly seems to accept that the laws made by faceless lawmakers are beyond reproach. This uncritical view gives little comfort to those uncomfortable with the idea of legislation being formulated behind closed doors. Other important issues such as ensuring that an effective system exists to ensure public knowledge of these laws are dealt with briefly. Keyes endorses more uniformity with an effective numbering system, but avoids stating whether the objective should be access to the general public

or merely to legal experts. He raises the tantalizing debate that the *Canadian Charter of Rights and Freedoms*¹ may be the determining factor in what constitutes notice of executive legislation, but does not fully to explore the idea. One hopes a second edition of this book will delve into this issue.

Government intervention in the daily lives of citizens is a reality of our society. The main instrument of this intervention is executive legislation. As *Executive Legislation* shows, the intrusion by executive law does not have to go unchallenged. The complexities and issues surrounding executive legislation, as explored in this book, show that lawyers have many tools available to challenge this growing source of law.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.