

Valerie Saunders

Delegatus and *Carltona* are obsolete:
the 'modern principle' is the only tool necessary to
determine issues of delegation

Delegatus and *Carltona* are obsolete: the 'modern principle' is the only tool necessary to determine issues of delegation

Valerie Saunders

Student #1442511

Word Count: 13,105

SUPERVISOR: Dr. Helen Xanthaki

Declaration

I, Valerie Saunders, declare that this dissertation is my own work and that all sources quoted, paraphrased or otherwise referred to are acknowledged in the text as well as in the footnotes and bibliography. This work has not been submitted to any other institution for consideration.

This work reflects the opinions of the author and does not represent the views of the Office of the Judge Advocate General.

Dedication

This work is dedicated to my caring, considerate and exceedingly patient husband, Pete Saunders, without whose support this endeavor would have been impossible. Despite my long absences at the office and subjecting you to endless reviews of draft submissions, you maintained your sense of humour, kept our daughter on track with all her various activities and were ever the encouraging supporter as I often questioned why I had engaged in this course of study. The occasional glass of wine you offered was also quite a boon. Please know that I love you and that this degree was only possible because of your support.

Acknowledgement

I would like to express my gratitude to the Office of the Judge Advocate General for having selected me and supported me for this master's program. In particular, I would like to thank Colonel Vihar Joshi for expressing his faith in me and providing me with sound guidance on how to improve my writing and analysis.

Additionally, I would like to thank the University of London, Institute of Advanced Legal Studies (IALS) for having admitted me to this course of study. Special thanks go to my supervisors Dr. Helen Xanthaki and Dr. Constantin Stefanou for their support, advice and guidance. I realize that trying to support students scattered around the world can prove challenging; thank you very much for your flexibility and willingness to receive the harried phone calls as I sought guidance on my writing. The insider information on Greece was also very much appreciated.

I'd like to thank my family for all their support while I neglected many of them to focus on writing. Without my family's support (my mother Elizabeth Wallace, my husband Pete Saunders, my son Ryan Saunders, my daughter Rebecca Saunders and my sister Anne-Marie Simoneau), I would not have been able to complete this degree. My promise to you is that I will make it up in the upcoming months and years and I will be there for you when you need support.

Declaration -----	iii
Dedication -----	iv
Acknowledgement -----	v
Introduction -----	1
The Modern Principle -----	5
The “rules” of interpretation -----	5
Purposive analysis -----	5
Textual analysis -----	5
Consequential analysis -----	6
The Assumptions -----	7
Straightforward Expression -----	7
Uniform Expression -----	8
Tautology -----	8
Internal Coherence -----	8
The Canons -----	8
<i>Expressio unius est exclusio alterius</i> -----	8
<i>Noscitur a sciis</i> -----	9
<i>Ejusdem generis</i> -----	9
<i>In pari materia</i> -----	10
<i>Reddendo singular singularis</i> -----	10
Delegation and devolution -----	11
What is delegation? -----	11
Why do we need delegation or devolution? -----	12

How is authority delegated? -----	14
<i>Delegatus non potest delegare</i> -----	15
Applying the 'modern principle' to the <i>delegatus</i> case -----	16
Textual analysis -----	16
Purposive analysis -----	17
Consequential analysis -----	18
The <i>Carltona</i> Principle -----	19
Ministerial accountability -----	21
Applying the 'modern principle' to the <i>Carltona</i> case -----	23
Textual analysis -----	23
Purposive analysis -----	24
Consequential analysis -----	25
The 'modern principle' explains delegation -----	26
Further considerations in limiting delegation -----	27
Administrative, judicial and legislative discretion -----	28
Administrative -----	28
Judicial -----	29
Legislative -----	31
Case Study: Powers of an 'acting' Commanding Officer -----	31
Context -----	32
What authorities does a CO exercise? -----	33
Command -----	33
Financial -----	33

Administrative -----	33
Disciplinary -----	33
What is a CO? -----	34
What is an 'acting' CO? -----	36
Can an 'acting' CO preside over a summary trial? -----	36
Explicit summary trial jurisdiction -----	36
Explicit authority to delegate -----	37
Delegation of command -----	38
Applying the 'modern principle' to the case -----	39
Textual analysis -----	39
Purposive analysis -----	41
Consequential analysis -----	42
Determination of the application of the 'modern principle' -----	43
Conclusions -----	43
Bibliography -----	45

Introduction

The rule of law is an important concept in modern democracies. It is a philosophy that embraces the idea that if we are all held accountable to the same fundamental rules; society will develop in a fair manner. Despotism will be avoided. The corruptive influence of power will be mitigated. As expressed by Lord Bingham in presentation at the Sixth Sir David Williams lecture:

“The core of the existing principle is, I suggest, that all persons and authorities within the states, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”¹

It is particularly important, in the context of what will be discussed in this paper, that when the legislature grants powers, that these are properly exercised. The rule of law will define how and by whom powers may be exercised and this is the means by which the legislature will direct and manage the activity of the executive. Lord Bingham stated further on in his presentation that one of the sub-rules of the rule of law was that:

“... that ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and **without exceeding the limits** of such powers.”(emphasis mine)²

¹ Rt Hounourable Lord Bingham, “The Rule of Law” (Sir David Williams lecture, London, November 2006)
<http://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> accessed 22 August 2016

² Rt Hounourable Lord Bingham, “The Rule of Law” (Sir David Williams lecture, London, November 2006)
<http://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> accessed 22 August 2016

However, in order for the rule of law to be effective, and for the extent of the powers exercised to be known, the law must be clear. As stated by Lord Diplock:

“Absence of clarity is destructive of the rule of law”³

How can a rule be applied equally to all if its meaning is not clear? How can individuals be expected to comply with the law if they do not truly understand what it means? In this context, the importance of clarity is evident. To ensure clarity we rely on Parliament to provide clear instructions as to the intent of any law they wish to pass which is then expressed by drafters. However, despite the best efforts of drafters and legislators, statutes and regulations are sometimes ambiguous or leave gaps. In order to ensure that, even in those circumstances, there is a means of making sense of the law; the courts need to develop clear principles of interpretation. If standardized, they will assist the reader in understanding the law and provide predictability in the outcome of the interpretive process.

Additionally, the drafters have to interpret the instructions of their client and draft the law knowing that, if there is any uncertainty, a determination of the meaning of the law will be resolved through the application of relevant legislation, such as an interpretation act, and the principles of interpretation as recognized and applied by the court. Having a clear understanding of what principles will be applied will assist the drafter in ensuring the intent of Parliament is reflected in the wording of the document. The greater the certainty as to what rules of

³ *Merkur Island Shipping v Corp Laughton* [1983] 2 WLR 778

interpretation will apply, the easier it is for the drafter to select the appropriate terms and forms of expression required to achieve the intent of Parliament.

In the Canadian context, the courts have adopted a number of interpretive techniques throughout the years.⁴ For some time, however, the Supreme Court of Canada has held that uncertainty in legislation should be addressed through the application of the 'modern principle' of statutory interpretation expressed by Driedger and adopted by the SCC in the *Rizzo* case.

This appears to have created a normative approach to interpretation that should be welcomed by practitioners, judges and the public. It should be sufficient to address all concerns relating to legislative certainty.

This said, where the principal issue in question is whether an authority can be delegated or devolved, courts consistently refer to two legal principles, either in conjunction with standard interpretation techniques or independently.⁵ The two principles referred to by the court are: *delegatus non potest delegare*, a legal maxim which proposes that someone to whom a power has been delegated cannot further delegate; and the *Carltona Principle* which flows from a UK case in 1943 and generally stands for the idea that Ministers are not expected to personally exercise every power granted to them in legislation. *Carltona* recognizes that the Minister is expected to ensure that the Ministry's work is accomplished and is accountable to Parliament for that work. In this context, the powers of the Minister can be exercised on their behalf by employees of the ministry in question.

⁴ Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 Can Bar Rev 51
http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

⁵ *R v NDT Ventures Ltd.*, 2001 NLCA 16

It's my contention that *delegatus non potest delegare* and the *Carltona Principle* are unnecessary constructs that do nothing to assist in the interpretation of statutes that cannot be addressed simply through the proper application of the 'modern principle' of interpretation adopted by the SCC in *Rizzo*. Adhering to these concepts, rather than simply approaching any issue of clarity through the application of the 'modern principle', clouds understanding and complicates the task of ensuring drafters, lawyers, judges and the public at large understand how a law will be applied and how and by whom powers should be exercised.

In this paper I will explore what Driedger meant by the 'modern principle' and how the traditional canons and presumptions of interpretation fit in the 'modern principle'. I will demonstrate that *delegatus non potest delegare* and the *Carltona* principle provide no additional insight and how the situations they purport to address can be equally explained through the 'modern principle'. Finally, in order to better understand how the application of the 'modern principle' allows us to fully explain issues of delegation, I will provide a case study exploring delegation and devolution in the context of an acting commanding officer in the Canadian Armed Forces.

The Modern Principle

The “rules” of interpretation

Prior to the adoption by the SCC of the ‘modern principle’, the rules of interpretation of legislation were not consistent.⁶ The eminent scholar, and drafter of the seminal paper on *delegatus*, John Willis identified three primary rules that continue, slightly modified, today:

1. The ***mischief rule***, now referred to as the ***purposive analysis***, relies on the identification of the harm that the legislation is meant to address and requires an interpretation of the ambiguity in that context. The interpreters must ask themselves what the legislature intended. In conducting this analysis, previous versions of the act, historical data relating to the initial enactment, relevant extrinsic material and the preamble and purpose clauses can be used to establish the intent. Additionally, a consideration of how the act is meant to operate, the scheme of the act, can be of assistance;
2. The ***plain meaning*** or ***literal rule***, now referred to as the ***textual analysis***, generally requires the consideration of the words in their normal everyday meaning to determine the intent of Parliament, particularly if the audience is the general public. Additionally, the modern variant allows for

⁶ Some would say that even after the adoption of this principle, the courts continued to apply only the interpretive tools that would lead to the outcome they had already fixed. However, for the basis of this paper we will take the court’s expression at face value and will presume that the ‘modern principle’ is always applied. John Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can Bar Rev 1 http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015 and Ruth Sullivan, “Statutory Interpretation in a New Nutshell” (2003) 82 Can Bar Rev 51 http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

the presumption of the “technical meaning” of a term if the audience is specialized; and

3. The **golden rule**, or **consequential analysis**, which is based on an assumption that lawmakers did not intend an unreasonable or absurd outcome. If a proposed interpretation would lead to an absurd outcome, then it is not to be followed. In considering this, it is appropriate to also consider the intended social policy outcome.⁷

At the time Willis first discussed these rules (as they were then expressed); he suggested that the courts would not rely on the application or consideration of all of the rules but may rely on one alone and that lawyers should be prepared for this.⁸ The court in *Rizzo*, however, determined that only applying one rule, without the consideration of the effect of the others, would not be appropriate. They therefore adopted the ‘modern principle’ that requires the interpreter to consider all of the rules of interpretation before arriving at a conclusion as to the meaning of the legislation. Dreidger expressed it as follows:

“Today there is only one principle or approach, namely the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”⁹

⁷ John Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can Bar Rev 1 http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015; Geoff R. Hall, “Statutory Interpretation in the Supreme Court of Canada: the Triumph of a Common Law Methodology” (1998) 21 Adv Q 28 http://www.mccarthy.ca/pubs/Statutory_Interpretation_Triumph.pdf accessed 14 December 2015; Ruth Sullivan, “Statutory Interpretation in a New Nutshell” (2003) 82 Can Bar Rev 51 http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

⁸ John Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can Bar Rev 1 http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

⁹ *Rizzo v Rizzo Shoes Ltd*, [1998] 1 SCR 27

While it may appear that these rules or modes of analysis might have displaced the older canons or assumptions in interpretation, this is not so. The new steps in analysis actually incorporate the existing canons and assumptions. There was no intent to exclude any existing tool in interpretation, just a need to recognize that all relevant tools should be applied and weighed before a conclusion can be reached. The canons and assumptions that have historically been used by courts in understanding legislation are still relevant factors to be considered. Driedger was merely expressing the need to consider all relevant material before deciding on the meaning of the law. It would be more accurate to suggest that the intent was to incorporate all the relevant rules and weigh them as appropriate in a given circumstance.¹⁰ Reviewing the canons and assumptions, they can fit fairly well into the proposed three rule or analytical approaches. Some may fit into more than one category and perhaps should be kept in mind in both steps.

The Assumptions

The assumptions are really a means of “reading the mind” of the drafter and presuming a certain level of professionalism on their behalf. The four principle presumptions are:

1. **Straightforward expression** The presumption is that Parliament (through the drafter) used the simplest and clearest means of expressing its intent. The most obvious meaning should be adopted; otherwise an

¹⁰ Stéphane Beaulac and Pierre-André Côté, “Driedger’s ‘modern principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) *Revue Juridique Thémis*, forthcoming <https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/1352/BeaulacCôtéRJT40-1.pdf> accessed 6 January 2015

alternative phrase or terms would have been adopted. This can easily be incorporated into the textual analysis.

2. **Uniform expression** Parliament uses the same words and phrases to mean the same things within and between legislation. If an unusual meaning is intended, it will be clearly expressed. This can be incorporated into the textual analysis.

3. **No tautology** This can be summarized by saying that there are no extra words or phrases in a text. If the term or phrase is there, it's because it serves a purpose. This could be applied in both the textual and the purposive analysis.

4. **Internal coherence** The various parts of a piece of legislation work together with a common purpose and are consistent. This can be incorporated in the purposive analysis.¹¹

The Canons

The canons of interpretation are long established tools to assist in understanding the intent of the legislature. The following are the principle matters that must be considered when understanding a given text.

1. ***Expressio unius est exclusio alterius*** (the implied exclusion rule)
This rule dictates that if the legislation expressly includes a term it implies that other terms were intentionally excluded. If the legislation specifically grants a certain power to a named individual, the presumption is that this power is not granted to anyone else. By taking the time to name one

¹¹ Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 Can Bar Rev 51
http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

individual, by inference, the legislation means to exclude others. The obverse is also true; if a named person or item is excluded, the presumption is that no others are intended to be excluded. For example if a law prohibits the seizure of a farmer's horse, it is presumed that the butcher's horse can be seized.¹² This rule can be incorporated into the textual analysis.

2. ***Noscitur a sciis*** (the associated words rule) This rule requires the consideration of the words with which a term is associated in order to understand the meaning of that term. For example, the word "horn" might be ambiguous. If it is associated with bugle, clarinet and saxophone, it becomes clear that it is intended to be the musical instrument. If it is associated with terms such as hoof, mane, or tail, then the implication is that it is meant to be the body part of an animal.¹³ This can best be incorporated into the textual analysis.

3. ***Ejusdem generis*** (the limited class rule) This is really just a slightly different application of the *Noscitur* rule in that the words that are associated will modify how a term is understood. In this case, if a general term follows a specific term (usually there will have to be a list of specific terms to engage this rule), the general term is to be interpreted narrowly in

¹² Paul- André Côté, *The Interpretation of Legislation in Canada* (2nd edn, Carswell 2011) 358; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014)

¹³ Paul- André Côté, *The Interpretation of Legislation in Canada* (2nd edn, Carswell 2011) 358; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014)

the context of the specific terms.¹⁴¹⁵ It would be best to apply this rule during the textual analysis.

4. ***In pari materia*** (common intent rule) Because the legislature is presumed to be producing consistent legislation on common subject matters, other acts applying to the same type of issue should guide the interpretation. Legislation on common matters should explain each other.¹⁶

This is best used in the textual analysis.

5. ***Reddendo singular singularis*** This rule applies to how a modifying phrase, at the end of a list of words, functions. It is said to modify only the last term in the list.¹⁷ This rule should be applied during the textual analysis.

Applying these canons and the relevant assumptions to the purposive, textual and consequential analyses should allow for the resolution of any ambiguity in law. If that is the case, why do we see the courts applying additional criteria when considering delegation in the context of a statute? Are they really necessary or are they simply an alternate means of encapsulating the process that is arrived at through the application of the ‘modern principle’?

¹⁴ In *Consolidated Fastfrate*, the court considered how to interpret “other works and undertakings” in the context of the Constitution. Because the words of the act were “lines of steam or other ships, railways, canals, telegraphs and other works and undertakings” the court limited the meaning of “other works and undertakings” to transportation activities. *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, [2009] SCC 53

¹⁵ Paul- André Côté, *The Interpretation of Legislation in Canada* (2nd edn, Carswell 2011) 358; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014)

¹⁶ *Sharbern holdings Inc v Vancouver Airport Centre Ltd*, [2011] 2 SCR 175 at para 117 the court quoted *R. v Loxdale* 97 ER 394

¹⁷ *Rogers v. Aliant* CRTC 2007-75, <http://www.crtc.gc.ca/eng/archive/2007/dt2007-75.htm> accessed 15 December 2014

Delegation and devolution

In order to compare the delegation rules to the 'modern principle' we need to answer the following questions: 1. What is delegation or devolution? 2. Why is it necessary? and 3. What do we use to control delegation and devolution?

What is delegation?

A look at the dictionary definitions of delegation and devolution provides no helpful guidance.¹⁸ However, the traditional understanding of delegation is the granting of a power that is to be exercised by the grantee. Devolution is generally expressed as an agency relationship. When De Smith, Woolf and Jowell discuss the concepts of devolution (agency) and delegation, they provide the following distinctions between the two:

Agent: 1. The agent acts on behalf of principal and in their name. Acts by agents are attributable to principal. 2. The agent is given detailed instructions by principal and usually doesn't have a wide area of discretion. 3. The principal retains concurrent powers.

Delegate: 1. The delegate acts in own name 2. The delegate has scope of authority and discretion. 3. The principal retains powers to revoke but is bound by decision made by delegate.¹⁹

We can understand by this that the idea behind both delegation and devolution is a scheme that allows someone other than the grantee identified in the statute to

¹⁸ The Concise Oxford Dictionary 2nd edition 2004 defines delegation as the action or process of delegating or being delegated. It further defines the verb delegate as entrusting a task or responsibility to another or authorizing someone to act as a representative on one's behalf. It defines devolution as the devolving of power by a central government to a local or regional administration. It then defines devolve as the transfer or delegation of power to a lower level, especially from central government to local or regional administration. It's hard to make out a clear distinction between the two using these definitions.

¹⁹ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995) 361

exercise a specific authority (legislative, judicial or administrative). The distinction between the two is primarily based on how much control the principle authority holder retains in the process. Reasonably, we can expect that the greater the control retained, the more likely the court is to recognize and authority to allow another to act on the principal's behalf. Undoubtedly the risk of allowing another to act is mitigated by the level of control exerted. In the analysis of the courts, we can see that risk mitigation appears to be the guiding principle, not whether it is a "true" delegation or an agency relationship.

Regardless of how the courts reach their findings, the decision is fundamentally about whether an individual has the formal authority to act, an implied authority to act, or no authority to act?

Why do we need delegation or devolution?

In order to understand why delegation and devolution is necessary, one needs to understand how the government is run. Through the Constitution, the Canadian government is divided into three branches: the executive, legislative and judicial. The three branches of government are meant to work together but exercise jurisdiction over specific matters. The executive is made up of the Prime Minister and his ministers who form the Cabinet. They hold the authority to run the country on a day to day basis and exercise the powers of the Crown. The Ministers are part of the executive as a result of forming the Cabinet, but they are also part of the legislative branch, as most are members of parliament. Though a minister can also be selected from among the senators, this is rare. The legislature, principally the House of Commons and the Senate, pass the laws that

direct the country and its citizens. The Judiciary, made up of the various courts, apply and interpret the law.²⁰

While, as a general rule, each branch is expected to exercise discretion over matters within their jurisdiction, in practice it is a more complex relationship. It is more accurate to suggest that the executive exercises discretion over certain subject matters under their control and are accountable to Parliament for the exercise of that discretion. While the legislative branch will pass laws, they will often delegate the authority to create regulations to the executive (the minister and his staff).

In fact, through legislation, ministers (and the civil servants working for them in their departments) are routinely delegated the authority to create regulations and exercise discretion in decision making processes. As Jones and de Villars have stated:

“Thus, members of the departmentalized civil service form part of the executive branch of government but may be delegated powers that are not really executive in nature, powers such as (a) to make subordinate legislation; (b) to determine disputes in a judicial or quasi-judicial manner; or (c) to do some merely administrative act (such as issuing drivers’ licences or admitting returning Canadian citizens to the country)”²¹

This delegation is necessary because of the breadth of activity that must be taken on by the executive.

The day to day exercise of the Crown authority can only be accomplished through some form of delegation of powers. This is not a novel concept. The need to delegate had been a concern for some time. It was aptly expressed by

²⁰ Craig Forcese and Aaron Freeman, *The Laws of Government* (Irwin Law 2005)

²¹ Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009) 89

our own government in their publication “Review of accountabilities and responsibilities of ministers”:

“Clearly, the management and direction of a modern government department requires significant formal delegation. In fact, this reality is not unique to contemporary government. Over 150 years ago, in the famous Northcote-Trevelyan Report on the British civil service, the following statement was made: “The Government of this country could not be carried on without the aid of an efficient body of permanent officers, occupying a position duty subordinate to that of the Ministers.”²²

Stated another way:

“Delegation of power by Parliament is the most important source of executive branch power. For example, Parliament does not directly police borders, levy antidumping duties, adjudicate human rights complaints, collect taxes or do any of the millions of other things that we associate with “government”. It does, however, authorize the executive to do these things, through acts of Parliament.”²³

To put it plainly, the government simply would not function without being able to delegate. The question then becomes how to accomplish this delegation in a manner that ensures the “right” person exercises the “right” authority without unnecessarily burdening the system with regulations and orders for minor matters.

How is authority delegated?

When authority is delegated, it can be accomplished directly through statute by naming an individual; by providing an individual the authority to sub delegate; or it can be inferred from the scheme and wording of the legislation.

When clearly stated in the act, there is little concern, the challenge that we face

²² “Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

²³ Craig Forcese and Aaron Freeman, *The Laws of Government* (Irwin Law 2005) 24

is in determining when it is allowable to infer or imply that a delegation is authorized. The two principal tools used by courts in determining whether delegation was intended are the principle of *delegatus non potest delegare* and the *Carltona* principle.²⁴ It is through the exploration of these two concepts and the comparison of the rationale adopted to explain them to the application of the ‘modern principle’ that I propose to demonstrate that only the ‘modern principle’ need be applied in order to resolve any ambiguity in law.

Delegatus non potest delegare

In 1943 John Willis wrote a paper entitled “*Delegatus non potest delegare*”.²⁵ In it he explored when and whether a power that had been granted to a named individual (usually the Minister) could be exercised by someone else. The principle he expressed was that if an individual receives a power directly from the legislature, unless they are provided with a clear authority to further delegate that power, it must be exercised by the named individual.²⁶ Willis expressed that it was a “rule” of interpretation and not a rule of law and Canadian courts certainly haven’t applied it with any great regularity.²⁷ Jones and de Villars expressed its acceptance by Canadian courts as follows:

“Translated to the world of statutory powers, if literally applied, it would mean that, absent express statutory permission, those whom parliament, the legislature, and indeed the makers of subordinate legislation have delegated power must exercise that power personally and cannot sub-delegate its exercise to someone else. In fact, the maxim has never been applied by the Canadian courts in anything resembling that absolutist position. At most,

²⁴ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995); Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009); Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014)

²⁵ John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257

²⁶ Marion L Dixon, “Delegation, Agency and the Alter Ego Rule” (1987) 11 Sydney L Rev 326

²⁷ John Mark Keyes, “From Delegatus to the Duty to Make Law” (1987) 33 McGill L J 49

Canadian courts have traded the concept that while legislative and judicial powers cannot be delegated, there is no outright prohibition on the delegation of administrative powers.”²⁸

However, when we look more closely at the manner in which Willis explained how *delegatus* functioned, we see that it is likely no more than the literal rule he referred to in his 1938 paper “Statute Interpretation in a Nutshell” and provides nothing new to the analytical process.²⁹ Below is the description most often quoted from Willis’ paper on *delegatus*:

“A discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority but this **intention may be negative by any contrary indications found in the language, scope or object of the statute**; to put the matter another way, the word “personally” is to be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words “or any other person authorized by it” are to be read into in its place.”³⁰(emphasis mine)

Applying the ‘modern principle’ to the *delegatus* case

If we approach each step of *delegatus* as expressed by Willis and compare it to how it fits in the ‘modern principle’ we see that it offers nothing new to the analysis.

Textual analysis

Willis’ principle first requires us to presume that we should read in the word “personally” when an individual is granted an authority under the act. On the face of it, this is a textual analysis. It requires an assumption of straightforward expression where the drafter used the simplest and clearest

²⁸ Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009) 368

²⁹ John Willis, “Statute Interpretation in a Nutshell” (1938) 16 Can Bar Rev 1

http://www.cba.org/cba_barreview/Search.aspx?VolDate=05%2f01%2f2003 accessed 5 January 2015

³⁰ John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257 at 259

means of expressing the thought. Additionally, *Expressio unius* would be applied, as the power is granted to a named individual, it is presumed that the power is not granted to anyone else. At the first stage of the analysis, presuming that the word “personally” prefaces the named individual provides us with nothing more than would a textual analysis.

Willis also suggests in his paper that the presumption against delegation can be displaced “by a section in the statute which expressly permits the authority entrusted with a discretion to delegate it to another”.³¹ Again, this is a straightforward reading of the text. If the authority to sub delegate is expressly stated in the act, then that is the intent. Additionally, if such an authority is clearly stated in the act, using the principle of *expressio unius*, we could infer that where it isn’t stated in this manner, it is not intended to be sub delegated (note that this can also be displaced through further analysis). This would also be an application of the textual analysis. So far, there is no benefit to the application of *delegatus*.

Purposive analysis

If we now apply the purposive analysis, we will consider the “scope or object” of the statute when determining whether an authority to delegate is implied in order to effect the purpose of the Act. We need to determine if the intent of Parliament was to allow anyone other than the named individual to exercise the authority. As expressed by Jones and de Villars:

“Firstly one can conclude that Parliament intended sub-delegation to occur, even in the absence of express words to that effect, **where legislation delegates a power to a person who clearly will not be able to exercise it personally**... Secondly, courts are prepared to accept that

³¹ John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257

Parliament intended to permit sub-delegation of merely administrative functions, as opposed to legislative or judicial ones.”³²(emphasis mine)

When it comes to the authority to sub-delegate, the courts, as noted above, have consistently recognized the reality of modern government when interpreting the intent of Parliament. Willis himself recognized this but described it as a decision to read in the term “or any other authority”. In the context of cases of delegation within departments, he lamented in his article on *delegatus* that:

“... Courts have in most cases preferred to depart from the literal construction of the words of the statute which would require them to read in the word “personal” and to adopt such a construction **as will best accord with the facts of modern government** which, being carried on in theory by elected representatives but in practice by civil servants or local government officers, undoubtedly require them to read in the words “or any person authorized by it.”³³ (emphasis mine)

When we apply a purposive analysis, we can look at the scheme of the act, the historical application and any relevant extrinsic material (such as Hansard discussions) to determine the intent of Parliament. The result is a presumption (in certain cases) that the intent of Parliament was to allow for delegated authority. Once again, the expression of *delegatus* offered us nothing additional.

Consequential analysis

As noted above, Willis recognized that in modern government, civil servants must be able to carry out the functions of the elected representatives and that, as a result, courts have read in the words “or any person authorized by

³² Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009)

³³ John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257

it".³⁴ This recognition can also be interpreted as a form of consequential analysis. If we cannot infer that delegation is allowed, what will the consequence be? Clearly the legislature did not intend that the Minister would personally exercise all these powers as it would not be achievable. The machinery of government would grind to a halt. The outcome would be absurd and therefore is not defensible. Canadian courts agree and it has been expressed in the Ahmad case as follows:

“It would be quite **impossible for the deputy head of a large modern government department to give personal attention** to all such matters, important as they may be to individuals concerned. That is why department administration is organized as it is and, in my view, there is a necessary implication, in the absence of something expressly or implicitly to the contrary, that minister’ powers, and deputy ministers; powers are exercised on their behalf by their departmental organizations as long as they are of an administrative character.”³⁵ (emphasis mine)

Once again, it’s not clear that adopting the *delegatus* principle provides us with any insight that we cannot reasonably glean through the application of the ‘modern principle’. By avoiding this loaded terminology, we can instead apply a logical step by step approach to each individual case of potential delegation of authority.

The Carltona Principle

Only a few short months after Willis published his seminal article on the *delegatus* principle, the English Court of Appeal provided a decision regarding the exercise of ministerial authority that remains with us today. In fact, some have suggested that the outcome of that case has virtually reversed the

³⁴John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257 at 264

³⁵ *Ahmad v Public Service Commission*, [1974] 2 FC 644

presumption expressed by Willis, at least with respect to powers conferred on Ministers.

“Indeed, in the case of powers that are conferred on ministers of the Crown, the maxim has very little role to play. In this domain, the operating presumption is in effect reversed and, absent express provision or other clear indicators, ministers are assumed to be able to act through responsible officials in their departments and in the agencies for which they are responsible.”³⁶

However, it is important to note that the *Carltona* case was decided based not on strict delegation of authority but based on the concept of devolution or agency.³⁷ In essence, *Carltona* does not propose to displace the bar on delegation generally; it simply recognizes the need for civil servants to act on behalf of their minister.³⁸

The *Carltona* case, which took place during the second world war, revolved around the issuance of a notice to a factory owner that his factory was to be closed and used to support the war effort. The owner disputed the authority of the person who issued the notice, a Mr Morse, as the Act only provided for a “competent authority” to issue the notice in question. The regulations only identified the “Commissioner of Works” as a “competent authority”. The court’s analysis, when determining that Mr Morse could indeed issue the notice, relied heavily on two principles: 1. The concept that ministers are “constitutionally” responsible to Parliament in the Westminster model government; and 2. The

³⁶ David J Mullan, *Administrative Law* (Irwin 2001) 369

³⁷ Mark Freedland, “The rule against delegation and the *Carltona* doctrine in an agency context” (1996) PL 19 ; Ann Chaplin, “*Carltona* Revisited: Accountability and the Devolution of Statutory Powers” (2008) 39 Ottawa L Rev 495

³⁸ Henry Molot, “The *Carltona* Doctrine and the Recent Amendments to the Interpretation Act” (1994) 26 Ottawa L Rev 257

sheer impossibility of the Minister exercising personally every discretion granted under the law. As the court stated it:

“In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) **are functions so multifarious that no minister could ever personally attend to them.** To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. **The duties imposed upon minister and the powers given to ministers are normally exercised under the authority of the minister by responsible official of the department.** Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter be selected an officials of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organization and administration is based on the view that minister, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not to that, Parliament is the place where complaint must be made against them.”³⁹(emphasis mine)

Ministerial Accountability

In order to further analyse the nature of these arguments, it's important to understand what the court is referring to when it discusses the constitutional responsibility of ministers. It has been said that the “cornerstone (of the Westminster model of accountable government) ... is the doctrine of ministerial responsibility” in which “Ministers are accountable to parliament for the exercise of authority assigned to the Crown under the constitution and under statutory law.”⁴⁰ As expressed by Professor Hogg: “All the acts of the department are done in the name of the minister, and it is the minister who is responsible for

³⁹ *Carltona Ltd v Commissioner of Works and Others*, [1943] 2 All E.R. 560(CA) at 563

⁴⁰ “Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

Parliament for those acts.”⁴¹ Fundamentally the minister is the representative of the executive branch of government responsible for a particular portfolio.⁴²

Ministers are provided with the requisite authority to manage the matters under their control and are expected to be accountable for accomplishing the goals set for them. They provide direction and guidance to the civil servants under their control and provide answer to Parliament for the performance of their department.⁴³

“Ministers remain individually and collectively responsible for their statutory duties and accountable to Parliament and the Prime Minister for the stewardship of the resources and exercise of powers assigned to them.”⁴⁴

Because of this, it has been suggested that the actions of civil servants are indistinguishable from the action of the minister.

“...public servants have no constitutional identity independent of their minister.”⁴⁵

“... the dictum of Lord Greene as it stands, fully recognizes that, in matters such as those with which we are presently concerned, the Minister is not expected personally to take every decision entrusted to him by parliament. If a decision is made on his behalf by one of his officials, then that constitutionally is the Minister’s decision. It is not strictly a matter of delegation, it is that of the official acts as the Minister himself and the official’s decision is the Minister’s decision.”⁴⁶

⁴¹ Peter W Hogg, *Constitutional Law of Canada*, vol 1 (5th edn, Thomson Canada Ltd 2007) 9-13.

⁴² Henry Molot, “The *Carltona* Doctrine and the Recent Amendments to the Interpretation Act” (1994) 26 Ottawa L R 2; Michael Taggart, “From “parliamentary powers” to privatization; the checkered history of delegated legislation in the twentieth century” (2005) 55 U Toronto LJ 575; Pierre Cloutier de Repentigny, “Precaution, Sub-delegation and Aquaculture Regulation: Morton v Canada (fisheries and Oceans)” (2015) 28 J Env L & Prac 125

⁴³ “Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

⁴⁴ “Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

⁴⁵ “Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

⁴⁶ *R. v Skinner* [1968] 3 All ER 85 (CA)

The court in *Carltona* recognized that there is a special relationship between a minister and Parliament. Further, the very nature of this relationship influenced the court's understanding of the intent of Parliament with regard to an authority granted to a minister through legislation.

Applying the 'modern principle' to the Carltona case

If we consider the decision in *Carltona* through the lens of the 'modern principle' what will it tell us?

Textual analysis

Let us first consider the application of the textual analysis. At first blush the plain language of the Act and regulations imply that the "Commissioners of Works" were the only "competent authority" who could be delegated the authority to sign the document. The Act goes to the trouble of specifically indicating that a "competent authority", in addition to the minister, can sign the document. The regulations then establish that the "Commissioners of Works" are such a "competent authority". The application of *exclusio unius* would lead us to conclude that if the "Commissioners of Works" had been named, then no other should be considered a "competent authority". At the first stage of a 'modern principle' analysis, we would likely find that no further delegation is allowable.

The court in *Carltona*, however, avoided this outcome by choosing to distinguish between a delegated authority (which would have resulted in the conclusion noted above) and devolution of authority (agency). Essentially, to avoid the reasonable conclusion that Mr Morse was not an "authorized delegate", they simply considered him as an agent. In doing so, the existence of an actual delegate

would not necessarily impair them from concluding that Mr Morse exercised the authority on behalf of the minister. The court simply avoided the normal textual analysis by looking at this as an issue of agency not directly addressed through the legislation. In the end, they applied a consequential analysis by reframing the authority being exercised by Mr Morse.

It is interesting to note, as Lord Denning pointed out in a later case, that if this were truly an exercise of agency, then the individual signing should indicate that they are doing so “on behalf of minister X”.⁴⁷ In that way it would be clear to the person signing and the person receiving the letter, that the authority being exercised is that of the minister. That is, however, not how discretion is exercised in most of the *Carltona* cases.⁴⁸

Purposive analysis

The next stage of the analysis would engage a purposive review of the Act. On the one hand it could be argued if the “... delegate was presumed to have been chosen to exercise powers or act on another’s behalf because of the confidence inspired by the delegate’s personal qualities.”⁴⁹, which would argue that Parliament’s intent was that the named individual would personally exercise the discretion. In the *Carltona* case that would mean that Parliament’s intent in allowing for delegation to a “competent authority” expressed how they wished for the minister to exercise his discretion if he could not do so personally. This also supports the textual analysis and would lead to a conclusion that the minister would

⁴⁷ *Metropolitan Borough and Town Clerk of Lewisham v Roberts* [1949] 2 K.B. 608, [1949] 1 All ER 815 (CA)

⁴⁸ Henry Molot, “The *Carltona* Doctrine and the Recent Amendments to the Interpretation Act” (1994) 26 *Ottawa L Rev* 257

⁴⁹ John Mark Keyes, “From *Delegatus* to the Duty to Make Law” (1987) 33 *McGill L J* 49

make the determination himself or, if he found he was unable to do so, would delegate so as to ensure that the “competent authority” would act.

At this stage it is also important to consider the analysis of the relationship between the minister and Parliament. Was Parliament’s intent to have the minister himself draft the letter or could we consider, as another author has that:

“... rather than seeing Parliament as indulging in fiction that ministers will normally exercise discretions personally, it is preferable to see the draftsmen as employing a notation or code whereby the entrusting of a discretion to a government department is expressed by conferring that discretion upon the minister concerned.”⁵⁰

In other words, was Parliament’s intent that the minister act himself or that he ensure that necessary action is taken by his department to fulfil the mandate of the Act? Can we “read in” ministry where it says “minister”? I would suggest that this is exactly what the court has done in the *Carltona* case by necessarily relying on a consequential analysis.

Consequential analysis

Carltona was decided principally on the basis of a consequential analysis. Fundamentally the courts relied on the determination that it would be unreasonable to expect the minister to personally exercise discretion for every decision for which he is authorized under the law. The court recognized the administrative reality of the departmental organization of government and was satisfied that the reporting requirement of the minister would balance the risk in allowing someone to act on his behalf. *Carltona* therefore stands for no more than a court applying the three main analytical approaches to legislation and, in

⁵⁰ Mark Freedland, “The rule against delegation and the *Carltona* doctrine in an agency context” 1996 PL 19

the context of the case, relying primarily on the consequential analysis to come to the conclusion that this particular authority was intended to be exercised not by the minister personally, but on behalf of the minister by a representative of his department. An application of the 'modern principle' arrives at the same result.

The 'modern principle' explains delegation

As we can see from applying the 'modern principle' to the both *delegatus* and to the *Carltona* circumstances, there is truly no need for specialized constructs to interpret legislation in the context of delegation. Moreover, it's been suggested about delegation that:

“... the rule against delegation is in a sense a purposive rule, being instrumental in the achievement of a more general notion of institutional coherence is, I suggest, evidenced in the way it has been developed and applied by the courts. For it in fact operates not as a blanket prohibition upon non-personal exercise of powers or discretions, but rather as requiring a more discriminating inquiry as to whether a power of discretion has been entrusted to a coherent instructional decision-making structure and exercised at the appropriate level within that structure in the way envisaged when the power was conferred.”⁵¹

I would argue that when considering delegation, the “discriminating inquiry” referred to can be accomplished simply through the application of the 'modern principle'. Applying the concepts of *delegatus* and *Carltona* does not further the analysis in any significant manner. In fact, rather than a straight forward application of the fundamental principles of interpretation, it confuses the reader by suggesting that there are clear rules to apply in all circumstances of delegation. It is therefore recommended to avoid this terminology and approach any issue of delegation through the application of the 'modern principle'.

⁵¹ Mark Freedland, “The rule against delegation and the *Carltona* doctrine in an agency context” 1996 PL 19

Further considerations in limiting delegation

As noted above, there are often arguments that support or detract from the presumption of delegation. It can sometimes be difficult to determine which arguments should be given more weight. As in all cases of interpretation, court decisions will help guide the determination of what weight should be placed on each factor or stage of the analysis. The following is a summary of several principles expressed by Canadian courts and legislative experts in that context. The courts have indicated that when considering issues of delegation, the nature of the discretion will have a significant impact on the outcome of the analysis. The weight for or against a presumption of intent to delegate will rely heavily on what the effects of the discretion will have on individuals. Largely, the greater the consequence, the less likely the discretion was intended to be delegated without express statutory authorization.⁵²

The general principle as expressed by Jones and de Villars, and regularly reference by Canadian courts,⁵³ is:

“The general rule is that both delegated **legislative** and **judicial** powers must be exercised by the very person to whom they have been granted, whereas merely **administrative powers** can be sub-delegated quite freely to others.”⁵⁴(emphasis mine)

Additionally, when:

“... an authority vested with discretionary powers affecting private rights empowers one of its committees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the **exercise of the powers is likely to be held invalid.**”⁵⁵
(emphasis mine)

⁵² J.H. Grey, “Discretion in Administrative Law”(1979) 17 Osgoode Hall L J 1

⁵³ *Northeast Bottle Ltd v Alberta (Beverage Container Management Board)* 2000 ABQB 572

⁵⁴ Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009)

⁵⁵ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995)

It can reasonably be stated that the more “important” the discretion ostensibly being delegated, the less likely it is to be inferred from the statute.⁵⁶ The greater the discretion and the consequence of the decision, the less likely the court is to allow a sub-delegation without express authority in the statute.⁵⁷ Additionally, the more control exercised over the individual using the discretion, the more likely the courts will allow it. In fact, if the oversight is particularly significant, the courts may not even consider it to be a delegation of authority.⁵⁸ The principles expressed by the courts should be considered during both the purposive and consequential analysis phase.

Administrative, judicial and legislative discretion

The distinction offered by the courts is between administrative, legislative, judicial, or “important” discretion. In order to determine which applies, it must be understood what the court means by each of these. Otherwise, how can we identify which discretion cannot be sub-delegated?

Administrative

Most cases of administrative powers refer to the issuance of licences, permits, or the institution of legal proceedings. Essentially, these are matters that require little discretion or are heavily regulated by policy.⁵⁹

Often, however, the distinction between administrative, legislative or judicial powers is established through a comparison between them, rather than a

⁵⁶ *Mancuso v R*, [1980] 1 FC 269; John Mark Keyes, “From Delegatus to the Duty to Make Law” (1987) 33 McGill L J 49

⁵⁷ J.H. Grey, “Discretion in Administrative Law”(1979) 17 Osgoode Hall L J 1

⁵⁸ *Northeast Bottle Depot Ltd v Alberta (Beverage Container Management Board)*, 2000 ABQB 572

⁵⁹ David J Mullan, *Administrative Law* (Irwin 2001)

direct definition. The Supreme Court of Canada, in *British Columbia Development Corp v British Columbia (Ombudsman)* [1984] 2 SCR 447 used the following reasoning to identify what is legislative versus administrative in nature:

“A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot exactly be defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements or policy of expediency or administrative practice.”⁶⁰

In determining if the discretion is administrative, it will require a close examination of the actual discretion exercised, the level of control over the “decision maker” and the nature of the matter, whether routine or likely to effect a significant consequence.

Judicial

Interestingly, matters that touch on administrative law are not necessarily “administrative”. They may be considered judicial or quasi-judicial. An administrative tribunal can be considered quasi-judicial if the decisions it makes require the exercise of discretion and have significant consequences on the individuals being heard.⁶¹ When trying to determine if the discretion is judicial:

“... the answer to the question whether a body is acting in a judicial capacity when performing a particular function does not necessarily depend upon the degree in which the body’s general characteristics resemble those of an ordinary court, although the degree of resemblance may be a major factor influencing a decision that the function in question is judicial.”⁶²

⁶⁰ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995) 1000

⁶¹ David Lanham, “Delegation and the Alter Ego Principle” (1984) 100 LQR 587

⁶² de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995) 1012

Therefore one should look more closely at the procedures being followed to determine if the nature is judicial:

“They determine matters in cases initiated by parties; they must normally sit in public; they are empowered to compel the attendance of witnesses, who may be examined on oath; they are required to follow the rules of evidence; they are entitled to impose sanctions by way of imprisonment, fine damages or mandatory or prohibitory orders, and to enforce obedience to their own commands.”⁶³

It is important to consider as well, that if the body is advisory or does not exercise discretion themselves but just applies the already established criteria, it will not be considered to be an exercise of discretion.⁶⁴ :

“... a body exercising powers which are merely advisory, deliberative, investigatory or conciliatory character, or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity.”⁶⁵

Moreover, if the matter involves a determination⁶⁴ of an essential aspect of a benefit, where discretion must be exercised, it will likely be considered judicial or quasi-judicial.⁶⁶ One again, an in depth analysis of the nature of the discretion being exercised will provide guidance on whether the matter is judicial.

⁶³ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995)

⁶⁴ *Forget v Quebec (Attorney general)*, [1988] 2 SCR 90. The court allowed that a committee established to develop and evaluate a standardized language test for nurses did not exercise discretion; they simply complied with the criteria established by the governing body. As a result the court found that there had been no sub delegation of authority.

⁶⁵ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995)

⁶⁶ *Mancuso v R* [1980] 1 FC 269. This was a pension case where a crucial finding as to who would receive the survivor benefit required a determination as to whether a widow could be entitled to maintenance. Because the consequence was significant and it was not simply a direct application of rules or guidelines, the determination needed to be made by the minister.

Legislative

The authority to create legislation, regulations, by-laws or in some circumstances develop policy is considered as “legislative”.⁶⁷ These powers are not delegable except expressly in the legislation. No intent to delegate is inferred or implied by the court as the matters are too important and Parliament is deemed to have intended the named individual to exercise the discretion. Of course, that is not to suggest that the named individual is actually drafting the legislation. They will, however, control the process and approve the final product. It is in this manner that they exert their control over the discretion.

As part of the analytical process in applying the ‘modern principle’ it will be necessary to determine whether the discretion is judicial, legislative or administrative in nature in order to determine whether Parliament intended for the power or discretion to be further delegated.

Case study: Powers of an ‘Acting’ Commanding Officer

The analysis conducted so far suggests that *delegatus* and *Carltona* can be viewed as alternative expressions of the ‘modern principle’, and that applying the ‘modern principle’ alone should be sufficient to resolve any issue of delegation. There is no value in adopting the *delegatus* and *Carltona* concepts when interpreting allowable delegation.

To demonstrate how the ‘modern principle’ is sufficient to explain whether delegation is allowable in a given circumstance. I will provide a practical example. I will consider whether a Commanding Officer’s (CO’s) authority can be

⁶⁷ *Québec (Attorney General) v Carrières Ste-Thérèse Ltée* [1982] 69 CCC (2d) 251; David J Mullan, *Administrative Law* (Irwin 2001) 370; John Mark Keyes, *Executive Legislation* (2nd edn, LexisNexis2010) 426; Paul Salembier, *Regulatory Law and Practice* (2nd edn, LexisNexis 2015) 223

delegated to an 'acting' Commanding Officer in the Canadian Armed Forces (CAF). In order to narrow the scope of the inquiry, I will look at whether the 'acting' CO can exercise the CO's authority to preside at a summary trial in two cases: 1. Where the CO is established through an organizational order; and 2. Where the CO is established through a designation.

Context

In Canada, our military forces are subject to civilian oversight. The government (elected civilian representatives) has full control of the military through the exercise of Ministerial authority and the application of relevant legislation and regulation.⁶⁸ The CAF is intended to achieve the policy intent as established by the civilian authority.

The principle legislation that guides CAF members on military matters is the *National Defence Act (NDA)*. The Act authorizes the creation of regulations by the Minister of National Defence (MND), the Governor in Council (GIC) and the Treasury Board (TB).⁶⁹ Those regulations, and the orders issued by the Chief of Defence Staff (CDS), are found in the Queen's Regulations and Orders (QR&O).⁷⁰ Further direction is provided to members of the military through the orders provided in the Defence Administrative Orders and Directives (DAOD).⁷¹ Additional local orders and policy direction also exists. It is this body of law that

⁶⁸ The *Emergencies Act*, the *Emergency Preparedness Act*, the *Visiting Forces Act* and the *Financial Administration Act* are examples of legislation that affect the CAF and DND. "Guidance for Members of the Canadian Forces and Employees of the Department of National Defence" (2nd edn, September 1999) http://www.queensu.ca/dms/DMS_Course_Materials_and_Outline/Readings-MPA834/NDHQ-Accountability%20and%20Organization-Sept1999.pdf accessed 5 June 2016

⁶⁹ *National Defence Act* RSC 1985 c N-5 s 4, 5, 6

⁷⁰ *Queen's Regulations and Orders* <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page> accessed 14 Aug 2016

⁷¹ *Defence Administrative Orders and Directives* <http://www.forces.gc.ca/en/about-policies-standards-defence-admin-orders-directives/index.page> accessed 16 Aug 2016

will guide the following analysis, as well as the application of the 'modern principle'.

What authority does a CO exercise?

When we consider the delegation of the CO's authority, to what are we referring? What authority does the Commanding Officer exercise? In the modern Canadian military, commanding officers, whether they are directing flying squadrons, training schools, Her Majesty's Canadian Ships, infantry battalions or support staff, have multifarious responsibilities with respect to their subordinates and their superiors. These can, however, be divided into four main categories:

1. **Command** This consists of the day to day requirement to run the unit and direct the activities of their subordinates in order to accomplish the mission. This could include anything from authorizing group or individual training to commanding deployed troops on operation.

2. **Financial** Commanding officers are responsible for their unit's budget and the proper allocation of resources to fulfill their mandate. This can range from buying office supplies to authorizing travel expenses to paying the salary of reservists working in the unit.

3. **Administrative** These refer to administrative decisions such as acting as the initial authority in grievance matters or recommending the release of a member.

4. **Disciplinary** Commanding Officers are expected to address performance and behavior concerns through the issuance of remedial measures

for poor performance as well as by presiding over summary trials as part of the Military Justice system.

What is a CO?

The CAF is a hierarchical entity with strict reporting requirements. Its members are divided up, normally, into units, formations, elements and commands.⁷² At the head of each of these is an officer entrusted with command over the group of individuals, these are referred to as Commanding Officers. For the sake of our analysis we will confine ourselves primarily to the consideration of the unit which has been defined as “an individual body of the Canadian Forces that is organized as such pursuant to section 17 of the *National Defence Act*, with the personnel and material thereof.”⁷³ We will also consider groups of individuals who do not fit this definition very well but who still have a Commanding Officer. These groups of individuals occur where a unit or formation has not been established but where there is a collection of individuals who require direction.⁷⁴

⁷² *National Defence Act* RSC 1985 c N-5 s 17 (1)

⁷³ *Queen’s Regulations and Orders* s 1.02 <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/ch-01.page#cha-001-02> accessed 10 Jun 2016

⁷⁴ An example of such an entity is the office of the Judge Advocate General. The JAG is the head of all the lawyers working for the CAF. The JAG’s role and responsibilities are defined in the *National Defence Act* and the QR&Os. The role and responsibilities of the legal officers are defined in QR&Os. However, there is no established formation or unit in the Office of the JAG, despite the fact that there are well over 200 full-time and 100 part-time lawyers in uniform. The lawyers are spread across Canada and posted to positions that are established by the Vice chief of Defence Staff. The JAG has established a structure for organizing his staff and these are divided into Divisions based on the nature of the law being practiced. The normal requirement to respond to a superior officer applies to all the legal officers, therefore day to day activities and responsiveness is not an issue despite the lack of a formal unit or formation. However certain actions can only be taken by COs (such as granting leave, issuing remedial measure, presiding over summary trials, adjudicating grievances etc) therefore there is a need for a CO. To address this, the CDS has named certain senior officers as individuals who can designate COs. The JAG has designated COs based on our internal reporting structure which allows for the management of personnel. These COs, and others established in the same manner, are “designated COs” who received their authority indirectly.

A unit is created when the Minister authorizes the establishment of a unit through a Ministerial Organization Order (MOO)⁷⁵ and the CDS then orders the creation of the unit through a Canadian Forces Organizational Order (CFOO).⁷⁶ The CFOO directs that the officer appointed to command the unit is a Commanding Officer.

While most groups of military members in the CAF are part of a unit, formation or command; some are not formally organized in this manner. In essence, they are a group of individuals who have a common purpose and who have an officer commanding them. They are organized and have an internal chain of command and are a named entity, but they are not a unit. Because they are not created through a MOO and CFOO, the officer in charge is not automatically a Commanding Officer. There is, however significant value in ensuring that they have a Commanding Officer who has the authority to exercise command, financial, administrative and disciplinary jurisdiction over them. In order to address this concern the CDS will designate that the person who occupies the position is a Commanding Officer. Hence we have two types of Commanding Officers: the CFOO CO who is established under an order as a

⁷⁵Section 17 of the *National Defence Act* states: “(1) The Canadian Forces shall consist of such units and other elements as are from time to time organized by or **under the authority** of the Minister. (2) A unit or other element organized under subsection (1) shall from time to time be embodied in such component of the Canadian Forces as may be directed by or under the authority of the Minister.” QR&O 2.08 provides that: “(1) the minister may authorize: (a) the establishment of commands and formations; and (b) the allocation to commands and formations of such bases, units and elements that the Minister considers expedient.” <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/ch-02.page#cha-002-08> accessed on 12 July 2016.

⁷⁶ Canadian Forces “Interim Organization and Establishment Policy” <http://vcds.mil.ca/sites/CProg/Resources/DDFP%20files/Updated%20CFP%20219%202012.pdf> accessed 5 July 2016

CO; and the designated CO who is, arguably, delegated the authority to be a CO by the CDS.⁷⁷

What is an 'acting' CO?

During the absence of the Commanding Officer (CO), whether for operations or personal reasons, in order to ensure the smooth functioning of the unit and the maintenance of discipline, COs will routinely name an individual to act on their behalf. This person is the 'acting' CO. The question has arisen as to whether the assignment of an 'acting' works to delegate all of the powers of the CO. In the present case I will explore whether the authority to act as a presiding officer at a summary trial can be delegated to an 'acting' CO and consider whether this answer would change depending on how the CO was established.

Can an acting CO preside over a summary trial?

Explicit summary trial jurisdiction

Before we can engage the 'modern principle' we need to establish the relevant law that will apply to the analysis. Section 163(1) of the NDA provides that a "commanding officer" may try an accused person at summary trial.⁷⁸

Section 160 of the NDA defines a commanding officer as:

⁷⁷ *Gallagher v R* Standing Court Martial 1999. The court argues that designated COs are COs through delegation and therefore cannot further delegate.

⁷⁸ *National Defence Act* RSC 1985 c N-5 s 163 states: 163. (1) A commanding officer may try an accused person by summary trial if all of the following conditions are satisfied:

1. the accused person is either an officer cadet or a non-commissioned member below the rank of warrant officer;
2. having regard to the gravity of the offence, the commanding officer considers that his or her powers of punishment are adequate;
3. if the accused person has the right to elect to be tried by court martial, the accused person has not elected to be so tried;
4. the offence is not one that, according to regulations made by the Governor in Council, the commanding officer is precluded from trying; and

“In this Division, *commanding officer*, in respect of an accused person, means the commanding officer of the accused person and **includes an officer who is empowered by regulations made by the Governor in Council to act as the commanding officer** of the accused person.”(emphasis added)

QR&O 1.02 defines a “commanding officer” as

“a. except when the Chief of Defence Staff otherwise directs, **an officer in command** of a base, **unit** or element, or
b. any other **officer designated as a commanding officer** by or under the authority of the chief of Defence Staff.”

QR&O 101.01 states:

(1) For the purposes of proceedings under the Code of Service Discipline, “commanding officer”:
a. means, **in addition to** the officers mentioned in the definition of commanding officer in articles 1.02 (Definitions), a detachment commander; ...

On a strict reading of the legislation and regulations in order to exercise summary trial jurisdiction, a person must be a CO. A CO includes:

1. an officer in command of a unit;
2. an officer designated as a commanding officer; and
3. a detachment commander.

Explicit authority to delegate

In the summary trial context the CO has jurisdiction over certain ranks and offences.⁷⁹ The commanding officer, however, can delegate certain matters to a

-
5. the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

(1.1) A commanding officer may not try an accused person by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed.

⁷⁹ QR&O 108.07 provides for the offences, established under the *National Defence Act*, over which a commanding officer has jurisdiction. Certain matters can only be tried at court martial, generally matters that engage more serious penalties or that engage complex legal concepts not appropriate for a commanding officer to determine. <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page> accessed 12 Jul 2016.

delegated officer.⁸⁰ The jurisdiction and powers of punishment of a delegated officer are limited. However, that delegation is only with respect to summary trial jurisdiction.

Delegation of command

The above delegation applies exclusively to summary trial jurisdiction. However, the military has long had a means of transferring command in the absence (temporary or otherwise) of a commander.⁸¹ A general power of “delegation” contained in section 49 of the *National Defence Act*, states:

“Any power or jurisdiction given to, and any act or thing to be done by, to or before any officer or non-commissioned member may be exercised by, or done by, to or before any other officer or non-commissioned member for the time being authorized in that behalf by regulation or according to the custom of the service.”

The relevant regulations are found in Chapter 3 of the QR&Os which address issues of command succession. The general rule is that the most senior officer present assumes command.⁸² However, in the case of an officer in command of a unit, there is an option for the officer in command to direct otherwise.⁸³ There is no clear indication as to what is meant by “otherwise direct”

⁸⁰ Section 163(4) of the *National Defence Act* states: “A Commanding officer may, subject to regulations made by the Governor in Council and to the extent that the commanding officer deems fit, delegate powers to try an accused person by summary trial to any officer under the commanding officer’s command...”. QR&O 108.10 provides for further restrictions as to whom the CO can delegate his powers to. <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-108.page> accessed 10 Jun 2016

⁸¹ In a construct such as the military, where combat can remove, permanently, the commanding mind of the force, there needs to be an established means of transferring authority “on the fly” to ensure that there is always a clear command authority. Nowhere is this more important than in the field of battle. There has, therefore, been established a standardized means of transferring command automatically. QR&O chapter 3 explores how command is transferred. The usual rule, with exceptions for ships and aircraft, is that the next most senior officer assumes command.

⁸² QR&O 3.20 <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/ch-03.page#cha-003-20>

⁸³ QR&O 3.23 <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-01/ch-03.page#cha-003-20>

but a plain reading would suggest that this means the CO can indicate whom they wish to take command in their absence (appoint as their acting).

The regulations provide for a CO of a unit to transfer command directly to another officer. There is also provision for the automatic transfer of command to the most senior officer present when there is no direction by the CO of the unit. In the case of a designated CO, there appears to only be specific regulation that allow for the ability to transfer command to the senior officer present. Any other authority would have to be inferred.

Applying the 'modern principle' to the case

Textual analysis

The Act and regulations allow for a commanding officer or a delegated officer to have summary trial jurisdiction. There is a specific scheme established to allow for the CO to delegate some authority over matters dealt with at summary trial. A CO for the purpose of delegation will include:

1. an **officer in command** of a unit;
2. a designated commanding officer; and
3. a detachment commander.

There is a clear authority to delegate. Given that this is the case, *expressio unius* can be applied to argue that no other delegation can take place. The clear expression of an authority to delegate implies that no further delegation was intended; otherwise the law would have been expressly drafted to do so.

However, there is also an alternative means of viewing this. Is the acting officer "in command" and therefore a CO for summary trial purposes?

If we consider the case of the unit CO, we note that section 49 of the NDA allows for all the powers of the individual to be exercised by another officer in accordance with regulations. The unit CO has the authority to transfer command, other than by seniority, if that officer “otherwise directs”. If the CO indicates that they have selected an officer to take over command in their absence that officer would be “in command” of the unit during the absence of the CO. The definition of CO for summary trial purposes is “the officer in command of the unit” therefore the ‘acting’ CO fulfils the definition and has summary trial jurisdiction.

In the case of a designated CO, while the powers of the CO can be transferred in accordance with section 49, command can only be transferred to the next most senior officer. Therefore the designated CO cannot truly appoint an ‘acting’ CO as there is no exercise of discretion. Command authority automatically flows to the next most senior officer.

The officer exercising the command authority is not a designated CO simply by virtue of exercising command.⁸⁴ Therefore there is no automatic authority to exercise summary trial jurisdiction. If the drafters had wished to ensure that an ‘acting’ CO could exercise jurisdiction, they could have drafted the section similarly to that of command. CO could have been defined as “the officer in command of a unit, the designated commanding officer, the detachment commander or an officer

⁸⁴ While it could be argued that taking command from the designated CO would establish the new officer as a designated CO, in practice this would be unlikely. Some designation letters identify the officers by name, which would prohibit the presumption of the new officer being designated. In other cases the designation is to the person in command of XYZ or posted to the position of XYZ with a minimum rank. In most cases only the CO has the requisite rank and only the CO is posted to the position in question. However, it could be argued, if the designation is made to a named command and no restrictions on rank are established, the officer assuming command by virtue of QR&O could be the designated CO and therefore exercise summary trial jurisdiction.

appointed by that person to act on their behalf.” However, it wasn’t and we must assume that there was a reason that this was not done.

On the basis of a textual analysis, the unit CO can appoint someone to take command of the unit and exercise summary trial jurisdiction. The designated CO can have the most senior officer present take command in their absence but they are not a CO for summary trial purposes.

Purposive analysis

What was the intent of the legislature when it passed the law and issued the regulations? An express delegation of authority to a defined entity was created. This suggests that the individual was selected based on their personal characteristics.

The CO was provided with the ability to delegate the less serious matters to a delegated officer. This implies that more serious matters should be kept with the CO and not passed along to another. Inferring an alternate delegation scheme, would likely be at odds with the intent.

Additionally, the scheme allows for an alternative CO if the unit CO is unavailable. The Base Commander can act as the CO in that circumstance.⁸⁵ This also suggests that the legislature intended for summary trials to be conducted by the CO and not a delegate.

However, the scheme also allows for us to consider that if an officer assumes command by virtue of regulations, they are the CO and not a delegate. This is also clearly the intent of Parliament as expressed in section 49 of the Act.

⁸⁵ QR&O 101.01 <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders-vol-02/ch-101.page#cha-101-01>

While there was likely no intent to allow a general authority to delegate, there was an intent to ensure that command continued uninterrupted.

The purposive analysis supports the textual analysis and the idea that the officer assuming command of a unit can exercise summary trial jurisdiction but the officer assuming command in replacement of a designated officer would likely not.

Consequential analysis

The consequence of allowing the 'acting' to take command is to allow the continuous functioning of the unit in managing disciplinary issues. In a wartime scenario where command replacements could be taking place due to casualties, it would be important to ensure that command transfer was efficient and that the ability to maintain discipline is retained. It could be effectively argued that for both designated COs and unit COs it would be essential to maintain continuity.

If we adopt the interpretation that the officer taking over command from the designated CO can exercise all the other command authorities, it seems unusual that only discipline would be excluded. While alternative means of addressing discipline matters exist, suggesting that the ability to command troops and send them into danger will be transferred but the ability to deal with disciplinary matters will not, appears nonsensical. Underlying this, however, is the principle that judicial powers are very important and should not be delegated without express authority.⁸⁶

⁸⁶In *R v Gallagher*, a charge was referred to court martial by the 'acting' CO of a designated CO. The court determined, on the basis of a rudimentary application of the *delegatus* principle, that there existed no authority to delegate summary trial jurisdiction from a designated CO to an 'acting' CO. The analysis suggested that since the authority to act as a CO was already delegated by the CDS (as the CO was designated) the authority could not be further delegated. There was no consideration of the analysis proposed above or a strict consideration of how the transfer of command might have allowed the next most senior officer to take over the designation. Fundamentally the analysis appears to be a flawed and supports

Determination of the 'modern principle'

Applying the 'modern principle' to determine if an 'acting' CO, be it of a unit or on behalf of a designated CO, can exercise summary trial jurisdiction has revealed that it is allowable in the case of a unit CO and likely not allowable in the case of a designated CO. While on the surface, the issue initially appeared to be one of sub-delegation, a closer analysis reveals that, it is primarily a strict application of the Act and regulation that allows us to determine that the unit CO can appoint an acting. The designated CO cannot appoint an acting but the most senior officer can take command during the absence of the CO. It is unlikely, due to the nature of the designation instrument, that the officer taking over command can exercise summary trial jurisdiction.

Conclusions

Delegatus and *Carltona* provide us with no appreciable benefit when conducting an analysis as to whether delegation or devolution is allowable in certain circumstances. There are so many exceptions to when and how they apply that as independent constructs they no longer hold much value. While the concepts have proved helpful in guiding the law to where it is today, they no longer assist in the process of interpreting law. The principles they express are fully incorporated in the 'modern principle' and no longer necessary.

These concepts also provide little assistance to drafters as they try to ensure that the message from the legislature is clearly expressed. Rather than considering whether *delegatus* or *Carltona* could apply, drafters should focus on providing a

the argument that it would be better to apply the modern principle than to try to engage *delegatus*. *R. v Gallagher*, 1999 Standing Court Martial (transcript available upon request)

clear statement as to who may exercise the authority and to whom and in what circumstances it may be delegated. While drafting, they should always bear in mind that the 'modern principle' will apply and provide guidance in the text as to the intent of the legislature.

Despite the best efforts of the drafters, there may remain ambiguous sections of the legislation. When interpreting these uncertainties, it is best to approach any delegation questions by applying the 'modern principle' systematically. In the example above, we can see that when applied to a question of delegation within the Canadian Armed Forces, this tool is sufficient to respond to any question of delegation or perceived delegation. The 'modern principle' is the best tool for the job.

BIBLIOGRAPHY

Canadian Forces “Interim Organization and Establishment Policy”
<http://vcds.mil.ca/sites/CProg/Resources/DDFP%20files/Updated%20CFP%20219%202012.pdf> accessed 5 July 2016

“Guidance for Members of the Canadian Forces and Employees of the Department of National Defence” (2nd edn, September 1999)
http://www.queensu.ca/dms/DMS_Course_Materials_and_Outline/Readings-MPA834/NDHQ-Accountability%20and%20Organization-Sept1999.pdf accessed 5 June 2016

“Review of Accountabilities and Responsibilities of Ministers” <https://www.tbs-sct.gc.ca/report/rev-exa/ar-er-eng.pdf> accessed 12 July 2016

Beaulac s and Côté P A, “Driedger’s ‘modern principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) *Revue Juridique Thémis*, forthcoming
<https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/1352/BeaulacCôtéRJT40-1.pdf> accessed 6 January 2015

Chaplin A, “*Carltona* Revisited: Accountability and the Devolution of Statutory Powers” (2008) 39 *Ottawa L Rev* 495

Cloutier de Repentigny P, “Precaution, Sub-delegation and Aquaculture Regulation: *Morton v Canada* (fisheries and Oceans)” (2015) 28 *J Env L & Prac* 125

Côté P A, *The Interpretation of Legislation in Canada* (2nd edn, Carswell 2011)

de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1995)

Dixon M L, “Delegation, Agency and the Alter Ego Rule” (1987) 11 *Sydney L Rev* 326

Forcese C and Freeman A, *The Laws of Government* (Irwin Law 2005)

Freedland M, “The rule against delegation and the *Carltona* doctrine in an agency context” (1996) *PL* 19

Grey J H, “Discretion in Administrative Law” (1979) 17 *Osgoode Hall L J* 1

Hall G H, "Statutory Interpretation in the Supreme Court of Canada: the Triumph of a Common Law Methodology" (1998) 21 Adv Q

Hogg P W, *Constitutional Law of Canada*, vol 1 (5th edn, Thomson Canada Ltd 2007)

Jones and de Villars, *Principles of Administrative Law* (5th edn, Carswell 2009)

Keyes J M, "From Delegatus to the Duty to Make Law" (1987) 33 McGill L J 49

Keyes J M, *Executive Legislation* (2nd edn, LexisNexis2010)

Lanham D, "Delegation and the Alter Ego Principle" (1984) 100 LQR 587

Molot H, "The *Carltona* Doctrine and the Recent Amendments to the Interpretation Act" (1994) 26 Ottawa L Rev 257

Mullan D J, *Administrative Law* (Irwin 2001)

Salembier P, *Regulatory Law and Practice* (2nd edn, LexisNexis 2015)

Sullivan R, "Statutory Interpretation in a New Nutshell" (2003) 82 Can Bar Rev 51

Sullivan R, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014)

Taggart M, "From 'parliamentary powers' to privatization; the checkered history of delegated legislation in the twentieth century" (2005) 55 U Toronto LJ 575

Willis J, "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1

Willis J, "Delegatus Non Potest Delegare" (1943) 21 Can Bar Rev 257