
From *Delegatus* to the Duty to Make Law

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As the scope of government regulation has increased, legislatures have found it convenient and necessary to delegate the task of legislating the details of regulatory schemes to administrative bodies, which in turn have subdelegated their powers to inferior but specialized agencies. The courts, however, have often resisted the trend towards subdelegation by the primary delegate, invoking the maxim *delegatus non potest delegare*. The author notes that the maxim has long been recognized as a presumption of statutory interpretation rather than a strict rule of law, but he argues that the content of that presumption has changed through time. Courts had earlier confined themselves to balancing the confidence principle (the presumption that the legislature intended the named delegate to exercise its power personally) against the fact of administrative necessity (which permitted greater subdelegation). As the administrative necessity argument has become more persuasive, justifications derived from the rule of law have been added in order to restrict the scope of subdelegation. The author finds that the concern that regulations be clear, fair, and equal in their application has led the courts to impose a duty to make law, that is, a duty to make explicit regulations before delegating the implementation of those regulations to inferior bodies. He concedes that this vigilance is well-founded, but argues that the inability to translate the broad rule of law principles into specific guidelines for determining the necessary content of delegated legislation may result in excessive judicial intervention. In many cases, the determination of how much detail is required prior to subdelegation should be considered part of the delegated power. This is particularly true when considering Provincial and Federal administrative agencies, but may be less persuasive in relation to municipal councils.

Avec l'élargissement du champ de la réglementation gouvernementale, les législatures ont jugé qu'il était nécessaire et plus approprié de déléguer la tâche de fixer les détails des projets de réglementation à des organes administratifs, qui ont à leur tour sous-délégué leurs pouvoirs à des agences inférieures mais spécialisées. Les tribunaux, toutefois, ont souvent résisté à cette tendance à la sous-délégation par un organe délégué, en invoquant la maxime *delegatus non potest delegare*. L'auteur indique que cette maxime a longtemps été reconnue comme créant une présomption d'interprétation plutôt qu'une règle de droit stricte, mais il soutient que le contenu de la présomption a changé avec le temps. Au début, les tribunaux se sont contentés d'opposer le principe de la confiance (la présomption que la législature s'attendait à ce que le corps délégué exerce ses pouvoirs personnellement) aux impératifs administratifs (qui permettaient une plus grande sous-délégation). Comme l'argument des impératifs administratifs est devenu plus important, des justifications relatives à la règle de droit se sont ajoutées, afin de restreindre la portée de la sous-délégation. L'auteur juge que la préoccupation à l'effet que les règlements soient clairs, justes et d'application égale a conduit les tribunaux à imposer une obligation de faire des lois, c'est-à-dire l'obligation d'édicter une réglementation qui soit explicite avant de déléguer sa mise en application à des organes inférieurs. Il concède qu'une telle vigilance est bien fondée mais soutient que la difficulté à traduire les grands principes de la règle de droit en des indications spécifiques pour définir le contenu essentiel d'une législation déléguée peut mener à une intervention judiciaire excessive. Dans plusieurs cas, la définition du degré de précision nécessaire avant délégation devrait être laissée au pouvoir délégué. Ceci est particulièrement vrai lorsque l'on considère les agences administratives fédérales et provinciales mais peut être moins convaincant quant aux administrations municipales.

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I. Introduction

Delegatus non potest delegare is an ancient Latin maxim having surprising vitality in modern administrative law. It is also the title of a pithy article by Professor Willis¹ that captured the essence of the maxim and is still frequently cited. However, the plethora of cases on subdelegation since his article was published in 1943 justifies re-evaluating the maxim's application and Professor Willis's discussion of it.

Origin of the Maxim

The *delegatus* maxim has frequently been characterized as originating in the law of agency, but it has an equally long pedigree in public law. In the thirteenth century, Bracton appears to have enlarged a Roman law principle that a procurator could not appoint someone to act on his behalf.² He

¹J. Willis, "Delegatus Non Potest Delegare" (1943) 21 Can. Bar Rev. 257.

²H.P. Ehmke, "'Delegata Potestas non Potest Delegari,' a Maxim of American Constitutional Law" (1961) 47 Cornell L.Q. 50 at 51; Willis, *supra*, note 1 at 260 characterizes this as the "presumption of deliberate selection".

applied it both to the delegation of powers by the King to his judges³ as well as to attorneys acting on behalf of their clients.⁴

The principle underlying Bracton's enunciation of the maxim was that a 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.⁵ Subdelegation effectively vitiated the delegator's choice.

If this rationale accounts for the origin of the maxim, it does not explain its development in the public law context. In *Broom's Legal Maxims*,⁶ one finds a number of instances where it was applied in cases dealing with statutory powers. In two of these, the reasons given for not permitting subdelegation had nothing to do with the confidence principle. Instead, the courts were concerned with those affected by the exercise of power, and not the delegator.⁷

When one considers legislative powers, the insufficiency of the confidence principle becomes even more apparent. There abound numerous examples where subdelegation has been prohibited for reasons other than the confidence that the delegator reposed in the delegate. In fact, the maxim has been applied not only when delegated legislation is used by one authority to confer power on another, but also when it is used by an authority to confer power on itself.⁸ In terms of the maxim's origin as a means of protecting the *delegator's* choice of delegate, this extension suggests a fundamental change in rationale: the focus shifts from the delegator and the delegate to third parties who may be affected by delegated legislation.

³G.E. Woodbine, ed., *Bracton on the Laws and Customs of England*, trans. S.E. Thorne (Cambridge, Mass.: Belknap Press of Harvard University Press, 1968) at 308.

⁴*Ibid.* vol. IV at 104 and 145.

⁵Ehmke, *supra*, note 2 at 52.

⁶J.G. Pease & H. Chitty, *A Selection of Legal Maxims, Classified and Illustrated by Herbert Broom*, 8th ed. (London: Sweet & Maxwell, 1911) at 653-56.

⁷In *Wilson v. Thorpe* (1840), 6 M. & W. 721 (Ex. Ct), a sheriff conducting a trial under the *Writ of Trial Act* purported to refer the matter to an arbitrator. In setting aside the sheriff's verdict, Alderson B. stated:

It would be very inconvenient that a sheriff should have power to order a reference of cases sent to be tried before him, when the object of sending cases to be so tried is, that, where they are of a nature so simple and of so small an amount, the parties ought not to be put to the expense of trying them before a judge at Nisi Prius, or to the expense of a reference.

In the second case, *Miles v. Bough* (1842), 12 L.J. 74 (Q.B.), the court considered the validity of a notice that, pursuant to *An Act for building a bridge*, was to be signed by three or more trustees or their clerk. The notice was signed by a clerk of the trustees' clerks and was considered insufficient. Lord Denman stated:

The persons who are called on to pay money have a right to know that the call is made by the proper authority. That is the object of sect. 109.

⁸See below, section 5: "The Duty to Make Law."

Modern writers attach little importance to the maxim's roots in the law of agency. Professor Willis maintained that "[t]he maxim does not state a rule of law"; it is "at most a rule of construction".⁹ When a statute confers a discretionary power, the power is *prima facie* intended to be exercised "personally" by the person on whom the power is conferred. This presumption can be defeated either by express statutory language authorizing subdelegation,¹⁰ or by demonstrating that subdelegation is necessary to carry out the statute's objectives effectively. As Willis noted:

To determine whether in place of the word "personally" the words "or any person authorized by it" should be read into the statute and thus permit the delegation, the court weighs the importance of maintaining in the particular situation the policy of requiring the named authority to exercise the discretion itself against the importance of maintaining in the particular situation the established procedure followed by the authority, and of furthering the most convenient method of achieving the object of the Act.¹¹

This approach has since been endorsed by P.H. Thorp¹² who examined the courts' tendency to categorize powers as "administrative", "legislative" or "judicial" as a means of determining whether or not they may be sub-delegated. He concluded that this approach should be abandoned and, like Professor Willis, argued that the application of the maxim should turn solely on the construction of the legislation from which the powers flow, depending as much on the exigencies of administering the legislation as on the words used to confer power.

As the passage quoted from Willis suggests,¹³ the resolution of this question requires the balancing of a number of considerations. These include the confidence that the legislature has reposed in a particular person or body, and the practical demands of the regulatory scheme that may require a large bureaucracy for efficient implementation.

In the context of delegated legislation, the courts have identified three further concerns: first, the scope of the subdelegated power to infringe on common law rights of individuals; second, the degree to which a discretionary power renders the application of the law less certain; third, the potential for the law to be applied in a manner that will produce inequalities. The latter two considerations are related to each other and form the basis

⁹Willis, *supra*, note 1 at 257.

¹⁰See, e.g., *City of Calgary v. Reid* (1959), 17 D.L.R. (2d) 198, 27 W.W.R. 193 (Alta S.C.A.D.); *Re Taylor and City of Edmonton* (1981), 33 A.R. 244, 132 D.L.R. (3d) 341, 17 M.P.L.R. 1 (C.A.); *Brown v. City of Vancouver* (1986), 24 D.L.R. (4th) 434, 69 B.C.L.R. 308 (S.C.).

¹¹Willis, *supra*, note 1 at 264.

¹²"The Key to the Application of the Maxim 'Delegatus Non Potest Delegare'" (1972) 2 Auckland U.L. Rev. 85.

¹³See *supra*, note 11 and accompanying text.

for a duty to use delegated legislative powers to make law. If the common law rights are important, and if the subdelegated discretion is unduly broad, the courts may require the subdelegator to define more precisely how and under what circumstances the rights will be affected.

In this article, I propose to examine the development of the *delegatus* maxim in the context of delegated legislation in Canada, particularly since Professor Willis's article. My objective is to test the validity of his argument that the permissibility of subdelegation depends only on legislative language and administrative exigencies.

Part II of the article examines subdelegation in municipal by-laws. This examination suggests that, as an exercise in statutory interpretation, the application of the *delegatus* maxim scarcely turns on the language of the statute and involves rather more than a consideration of the administrative exigencies. The courts tend to apply the maxim on the basis of not only the confidence principle, but also principles derived from the rule of law, namely equality and the notion that the law should be in a relatively accessible and definite form. From these principles, the courts have developed a set of factors for analysing subdelegation and determining whether it is authorized. Although these factors include the administrative exigencies noted by Professor Willis, they also focus on the nature of the subdelegated power and the character of the subdelegate.

This development has not, however, eliminated doubts and inconsistencies in the application of the maxim. In Part III of the article, these become readily apparent as attention shifts to non-municipal delegated legislation. Although the same principles appear to be at work, the results in the various cases are sometimes difficult to reconcile.

From the municipal and non-municipal case law a clear distinction emerges: there is generally much greater scope for subdelegation in the latter cases. Part IV analyses this distinction and the rise of the "alter ego" principle in relation to subdelegation by a Minister of the Crown to departmental officials. In this context, the confidence principle is indeed weak as a buttress of the *delegatus* maxim. Thus, Part V pursues the ascendancy of the rule of law as the primary rationale in modern administrative law. This Part concludes with the emergence of a duty to make law embracing not only subdelegation, but other forms of exercising statutory powers. Essentially, this duty requires that delegated legislative powers be used to make law that defines rights and obligations, rather than being used to confer discretionary powers.

II. Subdelegation in Municipal By-laws

The legislative powers of municipalities flow exclusively from the provincial legislatures.¹⁴ Municipalities are usually incorporated by a special statute and find the bulk of their authority to make by-laws in a general statute regulating and defining their powers and responsibilities.¹⁵ In addition, they frequently receive powers under particular regulatory schemes established by other statutes.

A considerable body of jurisprudence has developed on the extent to which municipalities may subdelegate their regulatory powers. In earlier cases, the courts focused on the confidence principle (the reliance by the delegator on the particular capabilities of the delegate), and the possibility of discrimination in dealing with common law rights. As the law has developed, however, the focus has shifted to the breadth of the discretion conferred on the subdelegate. This in turn has led to the characterization of powers as "administrative", "legislative" or "judicial" — a characterization that some consider unproductive.¹⁶ As noted above, it is the issue of discretion that is most closely related to a duty to make law.

Much of the case law has developed out of two decisions of the Supreme Court of Canada: *Bridge v. R.*¹⁷ and *Vic Restaurant v. City of Montreal*.¹⁸

In *Bridge*, a by-law made under a power to "provide for the issuing of permits"¹⁹ prohibited service stations from remaining open between 7:00 P.M. and 7:00 A.M. without first obtaining an extension or emergency permit. A limited number of these were to be issued by the city clerk on a rotational basis to persons named on a list. However, the by-law also provided that the clerk could omit from the list persons who, "according to evidence satisfactory to the city clerk," failed to keep their shops open as authorized. The Court held that the provision for omission from the list was *ultra vires*. Cartwright J. stated:

It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words.²⁰

¹⁴The capacity of provincial legislatures to delegate legislative powers to municipalities was established by the Privy Council in *Hodge v. R.* (1883), 9 A.C. 117 (P.C.).

¹⁵See, e.g., the *Cities and Towns Act*, R.S.Q. c. C-19; the *Municipal Act*, R.S.O. 1980, c.302.

¹⁶See Thorp, *supra*, note 12.

¹⁷[1953] 1 S.C.R. 8, [1953] 1 D.L.R. 305, 104 C.C.C. 170 [hereinafter *Bridge* cited to S.C.R.].

¹⁸[1959] S.C.R. 58, 17 D.L.R. (2d) 81 [hereinafter *Vic Restaurant* cited to S.C.R.].

¹⁹*Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194, ss 82(3) and 82a.

²⁰*Bridge*, *supra*, note 17 at 13.

As for the issue of permits under the provisions of the by-law, the Court, with the exception of Rand J., considered the clerk's powers to be "administrative" since the Council had "provided with sufficient particularity for the issuing of the permits." Although the court cited no case law²¹ and gave little indication of its rationale, the dissent of Rand J. makes it clear that the potential for discrimination must have been considered. He dissented on the basis that the rotational formula provided in the by-law was not specific enough to ensure the equal treatment of all service station owners.

Six years later, in *Vic Restaurant*, the discrimination issue figured more prominently. The majority judgements of Locke J. and Cartwright J. seized upon it in considering a by-law made under a power to "license, regulate or prohibit establishments where intoxicating liquors are sold" and to "fix the amount, terms and manner of issuing licences."²² The by-law required applicants to obtain the approval of the director of police before a licence would be issued.

The Court went much further than it had in *Bridge* in outlining its reasons for striking down the by-law. Locke J. found on the facts that

to say that before the Director of Finance may issue a licence, the Director of Police, in his discretion, may prevent its issue by refusing approval is not to fix the terms, but is rather an attempt to vest in the Chief of Police power to prescribe the terms, or some of the terms, upon which the right to a licence depends.²³

He concluded "that the power was not exercised by the council but delegated to someone else,"²⁴ and that this delegation was improper because the legislature intended that the council itself exercise the power. This finding was based on citations from a number of early cases, most of which were decided in the nineteenth century, which suggested that the principal question is whether the legislature had reposed special confidence in the council. Typical of the passages cited was that of Bain J. in *Re Elliott*:

This, it seems to me, is a delegation of authority that cannot be justified; for the council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself.²⁵

²¹Note however, *R. ex rel. Fletcher v. Joy Oil Co.* [1950] O.R. 766, [1951] 1 D.L.R. 632 (C.A.) dealing with another by-law under the same statute; this by-law established "a system for the issuing of permits" and was found to be valid on the basis that the legislature had not intended that the city council itself consider and issue the permits.

²²*Supra*, note 18 at 73.

²³*Vic Restaurant*, *supra*, note 18 at 82.

²⁴*Supra*, note 18 at 83.

²⁵*Re Elliot* (1896), 11 Man. R. 358 at 363, cited in *Vic Restaurant*, *supra*, note 18 at 79.

This stress on the confidence principle, however, obscures a second basis for striking down subdelegation. On close inspection, many of the cases cited by Locke J. turned on interpretive presumptions against discrimination²⁶ or interference with common law rights.²⁷

Cartwright J. concurred in the result, but based his decision on very different reasons. He did not invoke the older case law, but relied on an American text, *McQuillan on Municipal Corporations*.²⁸ He considered the central question to be whether the subdelegated power was legislative in nature, or whether it was merely administrative. *McQuillan on Municipal Corporations* stated that legislative power could never be delegated. If the guidelines provided to a subdelegate for the exercise of a power were found to be insufficiently precise, the power would be considered legislative, and the delegation would be improper. Thus, he found that the by-law was

fatally defective in that no standard, rule or condition is prescribed for the guidance of the Director of the Police Department in deciding whether to give or withhold his approval.²⁹

Although this principle rested on the American constitutional guarantees of due process and equal protection of the law,³⁰ its application in

²⁶For example, *R. v. Webster* (1888), 16 O.R. 187 (Ch. D.) involved a by-law that prohibited the use of steam engines, except with the written consent of the owners of neighbouring buildings and the approval of the chairman of the local board of works. The by-law had been made under a power "for preventing or regulating the carrying on of manufacturing or trades dangerous in causing or promoting fire." Ferguson J. concluded at 192 that the by-law was unjustifiable on the ground that it delegates in part the exercise of judgment and discretion that should be exercised by the enacting body alone, and does not place all the inhabitants in the same position in regard to the matters affected by the enactment.

²⁷*Merritt v. City of Toronto* (1895), 22 O.A.R. 205 [hereinafter *Merritt*] involved the question of whether or not a city council was competent to regulate an activity through a discretionary licensing scheme. Although it was empowered to make by-laws "for licensing, regulating and governing auctioneers," Osler J.A. held that this did not include the power to "prohibit" and stressed that the by-law purported to limit the plaintiff's "common law right" to undertake a lawful calling. He then granted *mandamus* to compel the issue of the licence, emphasizing that the powers of municipal corporations were to be strictly construed, particularly when they affected common law rights.

²⁸E. McQuillan, *The Law of Municipal Corporations*, 3d ed. (Willmette: Callaghan & Co., 1950) at 138, 141 and 142.

²⁹*Vic Restaurant*, *supra*, note 18 at 99.

³⁰McQuillan, *supra*, note 28 at 140, citing *Smith v. Hosford*, 106 Kan. 363, 187 Pac. 685 (1920). The importance of these guarantees is clearly illustrated by one of the seminal cases in the development of the principle: *Yick Wo v. Hopkins*, 118 U.S. 356 (1885). It concerned an "order" of the city of San Francisco that prohibited a person from engaging in a laundry business "without having first obtained the consent of the board of supervisors." The order was struck down by Mr Justice Matthews whose reasons at 369 were redolent of U.S. constitutional law and history:

When we consider the nature and the theory of our institutions of government, the

1959 by Cartwright J. to Canadian law is not so startling as one might imagine. The common law recognizes interpretive presumptions against discrimination or interference with common law rights, and these presumptions parallel the American guarantees of due process and equal protection. The difference between them rests mainly in the constitutional entrenchment of the latter.

Bridge and *Vic Restaurant* demonstrate that the courts have reached no consensus as to the principles which underlie the *delegatus* maxim. The maxim has been viewed by some judges as a reflection of the confidence principle, and by others as a means of protecting common law rights. In both cases the breadth of the delegated discretion is relevant, and in the latter case the courts also consider the severity of the impact on the common law rights. However, one finds little guidance to assist in determining what breadth of discretion will suffice to invoke the maxim (thus nullifying the delegated power), or how great the impact on the common law rights must be.

Since the decision in *Vic Restaurant*, most Canadian cases dealing with municipal by-laws that subdelegate power have focused on whether or not the power is sufficiently narrow to be subdelegated. In some instances this issue has been considered in terms of whether the subdelegated power is "administrative" as opposed to "legislative" or "judicial". If discretion is limited, the power is characterized as administrative, and the subdelegation is permitted without express statutory authority. However, this approach has not been adopted in all cases and appears to be nothing more than a particular way of formulating the question of whether or not too much discretion has been subdelegated.

Two judgments of the Ontario Court of Appeal provide some guidance as to the factors that a court is likely to take into account in answering this

principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

...

[T]he fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men". For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

question. Both *R. v. Joy Oil Co.*³¹ and *R. v. Sandler*³² involved municipal by-laws made under the same statutory authority dealing with fire prevention. In the former, the by-law regulated bulk storage of flammable liquids, requiring that storage facilities

be provided with foam fire-extinguishing equipment and such quantities of foam-producing materials ready for immediate use as may be directed by the Chief of the Fire Department.

In the latter case, the by-law empowered the Fire Chief to

inspect the fire protection equipment in any premises and to make such orders for the installation, repair or replacement of fire protection equipment as he deems necessary.

In neither case was there any express provision for the subdelegation of powers to the Fire Chief. However, the court in *Joy Oil* adverted to the administrative exigencies of the situation and proceeded on the assumption that administrative powers were delegable. Without specifically considering the terms of the enabling provision, Roach J.A. responded to the contention that the by-law was *ultra vires* as follows:

I think the words "as may be directed by the Chief of the Fire Department" qualify both the "foam fire extinguishing equipment" and the "quantities of foam producing materials ready for immediate use", but I also think that the power of direction thereby conferred on the Fire Chief is an administrative power only and it was competent for the council to delegate that power to him. Legislatively the by-law is as specific as it could possibly be, having regard to the great variety of conditions of hazards that might arise in the circumstances, with respect to which the Council was exercising its legislative powers. It specifies that the equipment shall be "foam fire-extinguishing equipment" and the materials shall be "foam-producing materials". Accordingly there is no discretion vested in the Fire Chief as to the type of fire-extinguishing equipment or the material to be used therein.

The capacity and location of that equipment and its efficiency and the sufficiency of the materials will, of course, vary, and are matters that of sheer necessity would have to be left to the decision of the Fire Chief as matters of administration.³³

In *Sandler*, Kelly J.A. examined the relationship between the enabling legislation and the by-law more critically, noting that the provisions of the

³¹(1963), [1964] 1 O.R. 119, 41 C.R. 223, [1963] 3 C.C.C. 260, 41 D.L.R. (2d) 291 (C.A.) [hereinafter *Joy Oil* cited to O.R.].

³²[1971] 3 O.R. 614, 21 D.L.R. (3d) 286 (C.A.) [hereinafter *Sandler* cited to O.R.].

³³*Joy Oil*, *supra*, note 31 at 121-22.

*Municipal Act*³⁴ under which the by-law was made included a power that was substantially broadened by a subjective test of validity. Despite this breadth, he found the by-law to be *ultra vires*. The decision reflects both the confidence principle and the rule of law principles. With respect to the former, Kelly J.A. indicated that the character of the subdelegate was a factor by concluding that the legislature

did not contemplate that any municipal council would attempt to evade its responsibility for making regulations by substituting for its judgment that of a non-elected official in its fire department.³⁵

Rule of law principles are reflected in Kelly J.A.'s finding that the sub-delegated powers held great scope for discrimination and entailed penal consequences for non-compliance with the orders made under them. In this context, he noted a particular facet of the rule of law:

When a municipal council purports to legislate under the powers found in the *Municipal Act* and thereby creates obligations to be observed by its citizens the failure to observe which attracts punishment, it is to be expected that the by-law creating such obligations will itself be so explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law, without the enlargements of its requirement by the order of a municipal servant, be able to satisfy himself that he has complied with its requirements. When, as here, the by-law itself denies him that exposition of his obligation and purports to make him liable for non-compliance with any order the chief may make, even if that order applies solely to his particular premises, I consider the by-law to be an unwarranted delegation of a legislative power, the exercise of which was confined by the Legislature to the Municipal Council itself.³⁶

Although the court spoke in terms of the *delegatus* maxim, it was in fact advancing a duty to make law by requiring that the by-law be more explicit. Kelly J.A. also suggested a number of other factors to be used in determining whether subdelegation would be permitted. He rejected the contention that the fire chief's powers were merely "administrative" and distinguished *Joy Oil* on the basis that

³⁴R.S.O. 1960, c. 249, s. 379(1):

By-laws may be passed by the councils of local municipalities:

38. For requiring buildings and yards to be put in a safe condition to guard against fire or other dangerous risk or accident. . . .
40. For authorizing appointed officers to enter at all reasonable times upon any property in order to ascertain whether the provisions of the by-law are obeyed, and to enforce or carry into effect the by-law. . . .
43. For making such other regulations for preventing fires and the spread of fires as the council may deem necessary.

³⁵*Sandler, supra*, note 32 at 619.

³⁶*Ibid.* at 620.

(a) the property interests of a greater number of people were affected more seriously; and

(b) in *Joy Oil*, the by-law contained a prescription of some standard or guidance to direct the exercise of the power.³⁷

These factors clearly reflect the rule of law principles underlying the *delegatus maxim*. The first focuses on the degree to which common law rights have been affected while the second assesses what legal safeguards exist to protect those rights from abuse of discretion.

The interaction of the factors outlined in *Sandler* can be seen in numerous cases. However, these demonstrate that the factors do not act as a rigid formula for deciding questions of subdelegation. Although it seems clear that subdelegation is usually permissible where the subdelegated powers are limited by standards or criteria governing their exercise, it is not altogether clear how the courts decide whether the powers that are not so limited can be subdelegated.

Examples of where standards or criteria were provided for the exercise of subdelegated powers occur in the context of the licensing of massage parlours,³⁸ maintenance requirements for hotels and public houses,³⁹ and the regulation of meat processing plants.⁴⁰

In each case, the subdelegated power involved the application of various standards. The discretion was considered to be subject to judicial review, leaving the courts with the last word on both the meaning and application of the standards. Thus, in the hotel maintenance case, the court responded to the contention that the vagueness of the standards effectively subdelegated broad discretionary powers to the chief licence inspector by stating:

Of necessity standards of maintenance must be stated in general terms in a by-law such as the one in question. Certainly the words "in good repair" or "in a good workman-like manner" are used on a regular basis in commercial contracts. At times there has to be a judicial determination of the meaning of those words and whether there is compliance in a given case but that is a far cry from saying that the words are so vague and uncertain as to be unenforceable.⁴¹

³⁷*Ibid.* at 619-20.

³⁸*Re Moffat and City of Edmonton* (1978), 84 D.L.R. (3d) 705 (Alta Dist. Ct).

³⁹*D & H Holdings Ltd v. City of Vancouver* (1985), 15 Admin. L.R. 209 (B.C. Sup. Ct) [hereinafter *D & H Holdings Ltd*].

⁴⁰*Reggio Foods Inc. v. C.U.M.* (1985), 21 Admin. L.R. 266 (Que. C.A.).

⁴¹*D & H Holdings Ltd*, *supra*, note 39 at 221; but note *Signcorp v. City of Vancouver* (1986), 35 M.P.L.R. 16 (B.C. Sup. Ct.).

Among the cases where no standards or criteria were prescribed, the permissibility of subdelegation appears to depend largely on the Courts' assessment of the importance or effect of the subdelegated powers.

In *Re Figol and City of Edmonton*,⁴² *C.R. Aggregate Sales Ltd v. District of Squamish*⁴³ and *Kirkpatrick v. District of Maple Ridge*⁴⁴ the courts sanctioned the subdelegation of power to approve certain aspects of municipal development and soil removal. Although there appears to have been no specific guidance on the exercise of these powers, the activities in question were generally regulated by the by-laws and the approvals were considered to relate

only to certain phases of the construction of the proposed development which would, it appears to me, normally be dealt with by the officials referred to therein,⁴⁵

or to reflect

only reasonable requirements of administration, minor in nature, having to do with the orderly and informed administration of the scheme.⁴⁶

By the same token, the Supreme Court of Canada has held that the power to make zoning by-laws, by its very nature as a device for controlling land use and development in accordance with the demands of the community, permits some subdelegation to members of the community. In *Lamoureux v. City of Beaconsfield*,⁴⁷ the court approved a by-law prohibiting the issuance of a permit for a service station if two thirds of the neighbours within 1,000 feet of the service station objected. Martland J. stated:

It is of the essence of zoning legislation that limitations are imposed upon the right of a landowner to use his land in any manner which he chooses. The limitations are imposed for the benefit of other landowners.

....

The by-law does not delegate ... to them a general power of decision, as in the *Vic Restaurant* case and the *City of Verdun* case, as to whether or not service station permits shall issue. Instead the by-law takes into account, in each particular case, the wishes of adjacent landowners, who are the very people affected by the proposed use, as one of the conditions precedent to the obtaining of a

⁴²(1969), 8 D.L.R. (3d) 1, 71 W.W.R. 321 (Alta C.A.) [hereinafter *Figol* cited to D.L.R.].

⁴³(1980), 115 D.L.R. (3d) 81 (B.C.S.C.) [hereinafter *C.R. Aggregate*].

⁴⁴(1983), 49 B.C.L.R. 134, 8 D.L.R. (4th) 66 (C.A.) [hereinafter cited to B.C.L.R.], rev'd on other grounds [1986] 2 S.C.R. 124, [1986] 6 W.W.R. 97, 69 N.R. 100 [hereinafter cited to S.C.R.].

⁴⁵*Figol*, *supra*, note 42 at 16.

⁴⁶*C.R. Aggregate*, *supra*, note 43 at 89; see also *Beynon v. City of Victoria* (1981), 28 B.C.L.R. 362 (S.C.) where the court stressed the fact that the subdelegation related to only "one element" of the relevant regulatory function.

⁴⁷(1976), [1978] 1 S.C.R. 134, 10 N.R. 413 [hereinafter *Lamoureux* cited to S.C.R.].

specific permit. In my opinion this is in accord with the principle of zoning legislation and the provision was not *ultra vires* of the respondent municipality.⁴⁸

When one turns to the cases where subdelegated powers were struck down, the breadth of judicial discretion in applying the *delegatus* maxim emerges quite clearly. At the outset it should be noted that there is a well-established line of cases holding that the power to make by-laws "regulating" a particular activity does not permit the subdelegation of any discretionary powers.⁴⁹ The rationale for this rule is that such powers could be used to *prohibit* the activity and, if the legislature had intended to allow its prohibition, a "prohibiting" power would have been conferred.

Apart from the regulating-prohibiting cases, it is difficult to establish any clear guidelines on what sort of powers cannot be subdelegated without standards or criteria to govern their exercise. For example, in *R. v. Carland*⁵⁰ a provincial magistrate struck down a by-law that required used car dealers to "keep in force a bond in the sum of \$20,000, issued by the company and in a form both to be approved by the City Solicitor indemnifying the city" Although the magistrate considered that approval of the form was permissible, he ruled otherwise with respect to the approval of the bond company.

*Madoc v. Quinlan*⁵¹ and *Tiny v. Srenk*⁵² provide two further examples in relation to the regulation of concerts and festivals. In *Madoc*, the judgment does not indicate the nature of the subdelegated power, although it appears to have entailed approval of health related aspects of a rock festival. The court merely concluded that the municipal council had subdelegated its powers "in a very vital respect to the medical officer of health."⁵³ In *Tiny*, the by-law contained a number of requirements relating to the payment of licence fees, posting security and maintaining health and sanitation. In each instance, power was subdelegated to determine the amounts of the fees and security and to assess whether there was compliance with the health and sanitation requirements.

Finally, in *Kirkpatrick*, discussed above, the by-law also subdelegated to the city engineer the power to grant relief from a prohibition against the

⁴⁸*Ibid.* at 141-43.

⁴⁹See, e.g., *Re T.W. Hand Fireworks Co. and City of Peterborough* [1962] O.R. 794 (H.C.); *Merritt*, *supra*, note 27; *Township of Madoc v. Quinlan* (1971), 21 D.L.R. (3d) 136 (Ont. H.C.) [hereinafter *Madoc*]; *Tiny v. Srenk* (1978), 6 M.P.L.R. 49 (Ont. H.C.) [hereinafter *Tiny*]; and *Willard G. Hallman Lumber Ltd v. County of Grey* (1985), 15 Admin L.R. 224 (Ont. H.C.).

⁵⁰(1962), 38 W.W.R. 439 (Sask. Mag. Ct) [hereinafter *Carland*].

⁵¹*Madoc*, *supra*, note 49.

⁵²*Tiny*, *supra*, note 49.

⁵³*Madoc*, *supra*, note 49 at 138.

removal of soil below the established street grade. While approving the subdelegation of powers to assess compliance with the by-law and to determine the volume of soil removed pursuant to a permit, Seaton J.A. struck down the relieving power, stating:

The appellant says that the power given to the engineer is purely a matter of engineering to ensure that further excavating will not endanger the street. That may have been the intention of the municipality but it is not an intention that I can discover in the by-law. It seems to me that the engineer is given an unlimited discretion to permit whatever he sees fit for whatever reason he sees fit.⁵⁴

Although the emphasis here is on the amount of discretion, it seems clear that the scope of the power was an equally critical factor in striking down the subdelegation of this power. Otherwise, the powers to assess compliance with the by-law and determine soil volume would have been struck down as well. As in *Carland*, *Madoc*, and *Tiny*, the Court appears to have considered the relieving power to constitute an important or substantial aspect of the regulatory scheme. Yet, one is left with little guidance on how the courts came to this conclusion or, more generally, how the scope of the *power* operates as a factor in applying the *delegatus* maxim. Conceivably, their conclusions may have more to do with the way in which a particular power was exercised in the cases before them than with its subdelegation.

Municipal By-laws: Summary

Although it is certainly correct to emphasize that the *delegatus* maxim is essentially a rule of statutory construction, the cases examined above indicate that most often the enabling statute provides very little guidance. Instead, the maxim is applied on the basis of factors that reflect a number of general principles, many of which are related only peripherally to questions of statutory interpretation.

The first factor may be described as the scope of the power. It entails both the range of subjects affected by the exercise of the power as well as the degree to which they are affected.

The second factor is the breadth of discretion that the exercise of the power entails. It is characterized by the degree to which the exercise of the power is determined by the person on whom it is conferred.

To a large extent the scope and breadth of discretion of a subdelegated power are determined in relation to the power of the subdelegator. Where the two powers are of similar scope, or where the subdelegated power con-

⁵⁴*Kirkpatrick, supra*, note 44 at 138.

stitutes a substantial part of the subdelegator's power, it is unlikely that the subdelegation will be permitted.

The third factor is the character of the subdelegate in relation to both the delegator and the delegated power. In *Sandler*, Kelly J.A. mentioned that the subdelegate was a non-elected official, suggesting that the powers were such as the legislature had intended to place only in the hands of elected officials. In *Lamoureux*, Martland J. asserted that subdelegation to neighbouring residents of the service stations was consonant with the purposes of zoning by-laws. Finally, in *Figol* the court noted that the by-law subdelegated responsibility to officials for matters with which they would normally deal.

The fourth factor is administrative exigency which, although persuasive in arguing for the subdelegation of matters that the courts characterize as "administrative," will not prevail over the *delegatus* maxim when broad discretionary powers are in issue.

While the first three factors have their roots in the confidence principle, the first two also reflect principles derived from the rule of law. These entail the right to equality and the notion that the law should be in a definite written form that makes it accessible to those affected by it and permits judicial review of its application.⁵⁵ In the context of municipal by-laws, this indicates a serious deficiency in Professor Willis's approach to the *delegatus* maxim. His approach overlooks the primary reason for granting by-law making powers, namely to permit the making of law. The subdelegation of powers erodes the degree to which a by-law expresses the law, leaving part of its expression to be determined through *ad hoc*, unpublished decisions. Thus, the determination of whether a power may be subdelegated must take account of not only the confidence principle, but also the principle that the law be accessible and definite. In fact, the latter principle predominates in the context of delegated legislative powers and forms the basis for the duty to make law. This duty extends beyond subdelegation to prevent the erosion of the rule of law by other techniques discussed in Part V of this article.

It is possible to argue that conclusions derived from municipal law do not apply to other delegated legislative authorities. The strict construction of municipal powers expressed in *Merritt* and approved by Locke J. in *Vic Restaurant* has accuracy in so far as most municipal statutes still confer powers in a very detailed fashion that invites the application of the principle

⁵⁵See *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 at 638, [1975] 2 W.L.R. 513, [1975] 1 All E.R. 810 (H.L.) per Lord Diplock; *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721 at 747ff.

of *expressio unius est exclusio alterius*.⁵⁶ In addition, many municipal cases involve the infringement of common law rights and for this reason also invite strict construction. Hence, one must examine non-municipal sub-delegation cases to discover whether there are any significant differences in the application of the *delegatus* maxim.

III. Subdelegation in Non-Municipal Delegated Legislation

Most of the non-municipal case law on subdelegation has been generated since the *Reference Re Validity of the Regulations in relation to Chemicals*.⁵⁷ This case has become something of a *locus classicus* on subdelegation outside the municipal context. This is in no small measure due to Professor Willis's article, where he took the case as his point of departure and used it as a principal buttress for his conclusions.

In the *Chemicals Reference* the Supreme Court approved virtually unlimited subdelegation of the Governor in Council's powers under the *War Measures Act*. While the Act did not expressly authorize subdelegation, the Court found implied authority to do so.

The impact of the case on the *delegatus* maxim is far from clear when one examines the opinions of the five concurring justices. Four suggested that the maxim was entirely inapplicable. For example, Duff C.J., who did not even mention it, stated:

Ex facie such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.⁵⁸

In turn, Rinfret, Davis and Kerwin JJ. found the Governor in Council's powers to be so broad that there was no need to consider the maxim. In particular, Rinfret and Davis JJ. characterized the conferral of war-time regulatory powers on the Governor in Council as the creation of an independent source of original legislation, analogous to the creation of original legislative capacity in the Federal and Provincial legislatures by the *Constitution Act, 1867*. Citing *Hodge v. R.*,⁵⁹ they held that this did not constitute delegation.⁶⁰

Only Hudson J. considered in any detail the scope and content of the maxim, concluding:

⁵⁶The vitality of this approach has most recently been affirmed by the Supreme Court of Canada in *Kirkpatrick*, *supra*, note 44 at 127-28.

⁵⁷[1943] S.C.R. 1, [1943] 1 D.L.R. 248 [hereinafter *Chemicals Reference* cited to S.C.R.].

⁵⁸*Ibid.* at 12.

⁵⁹*Supra*, note 14 at 132.

⁶⁰*Chemicals Reference*, *supra*, note 57 at 18-19 and 25-27.

In light of the necessity for delegation and what took place during the last war and the decision of the courts in the case of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*⁶¹ I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case.⁶²

Arguably, the majority of the court considered the *delegatus* maxim to be entirely irrelevant because of the overwhelming breadth of the Governor in Council's powers. If they can be said to have commented on it at all, they did so only in the sense of recognizing a highly unusual exception to its application, namely that it does not apply to an authority exercising such broad, plenary powers as those conferred by the British Parliament on a dominion or colonial government.⁶³

The only generally applicable principle that can be extracted from the decision is that the *delegatus* maxim is merely a rule of construction that can be excluded by express or implied authority to subdelegate. The case does not, however, provide much useful guidance on how or in what circumstances this authority may be implied. Although Professor Willis made much of the court's references to administrative necessity,⁶⁴ the degree of administrative necessity present in the *Chemicals Reference* is hardly likely to arise in any but war-time cases. Hence, the judgement can always be distinguished on this point.⁶⁵

Similarly, any assertion that broad language in an enabling provision will permit extensive subdelegation is bound to falter for the same reason. The wording of the *War Measures Act* was of unprecedented breadth and was construed in light of the purpose of the Act to confront a grave national emergency. It is most unlikely that one would ever find such a combination of language and purpose in any other statute.

⁶¹*Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.* [1923] A.C. 695 (P.C.).

⁶²*Chemicals Reference*, *supra*, note 57 at 37.

⁶³*Ibid.* at 18-19, Rinfret J.; at 30, Kerwin J.; and at 36-37, Hudson J.

⁶⁴Willis, *supra*, note 1 at 261-62.

⁶⁵See, e.g., *Re Clark and A.G. Canada* (1977), 17 O.R. (2d) 593 at 609-10, 81 D.L.R. (3d) 33 (H.C.) [hereinafter *Re Clark* cited to O.R.] where Evans C.J.H.C. stated:

The approach of the Supreme Court of Canada in the *Chemicals Reference* case is dictated by the exigencies of the war-time situation. That is not so in the present case. In the first place, it is not an over-burdened Executive delegating to a subordinate. It is a federal board delegating to a Member of the Cabinet. There is nothing in the *Atomic Energy Control Act* which justifies the conclusion that the Board is entitled to delegate the powers granted to it by the Act. Finally, the Board is established to carry out the "policing" of the atomic energy field. One can assume that the Board is comprised of people who are experts in the field and are experienced in administrative practice. Consequently, the Board and not a Minister is best suited to handle the powers given to it by Parliament.

The limited application of the *Chemicals Reference* is best demonstrated by its minimal impact in the next significant non-municipal sub-delegation decision of the Supreme Court: *A.G. Canada v. Brent*.⁶⁶ This case involved a provision of the *Immigration Act* that authorized the Governor in Council to make regulations "respecting ... the prohibiting or limiting of admission of persons" for a number of reasons specified in the Act.⁶⁷ A regulation made under this provision subdelegated to special inquiry officers the power to refuse admission on the basis of these reasons. Speaking on behalf of the court, Kerwin C.J. held the regulations to be invalid, adopting the reasons of Aylesworth J.A. in the Ontario Court of Appeal.⁶⁸

Although Aylesworth J.A. cited the *Chemicals Reference* as authority for the *delegatus* maxim, it hardly appears to have affected his application of it. He did not consider the administrative exigencies of the case before him, but rather applied the maxim on a basis that clearly suggests the confidence principle and the rule of law notions discussed above in relation to municipal by-laws. Thus, he suggested that the regulation-making power in question was intended to be used to prescribe "standards for the general guidance of immigration officers." In turn, he held that the Governor in Council had failed to exercise this power, but had instead merely distributed it among the immigration officers.⁶⁹ Once again one finds the Court advancing what is essentially a duty to make law in the context of subdelegation.

The *Brent* case represents perhaps the most vigorous statement by the Supreme Court of the principles underlying the *delegatus* maxim. In two subsequent decisions the court applied the maxim much less restrictively: in one case they inferred that the subdelegated powers entailed only the application of standards prescribed by the enabling statute⁷⁰ and in the

⁶⁶[1956] S.C.R. 318, 2 D.L.R. (2d) 503, 114 C.C.C. 296 [hereinafter *Brent* cited to S.C.R.].

⁶⁷R.S.C. 1952, c. 325, s. 61.

⁶⁸*Ex parte Brent* [1955] O.R. 480, [1955] 3 D.L.R. 587, 111 C.C.C. 323 [hereinafter cited to O.R.].

⁶⁹*Ibid.* at 490.

⁷⁰*Espallat-Rodrigues v. R.* (1963), [1964] S.C.R. 3, 42 D.L.R. (2d) 1, 41 C.R. 195 [hereinafter cited to S.C.R.], where the regulations in question required an immigrant seeking landing in Canada to be in possession of "a valid and subsisting immigrant visa issued to him by a visa officer. . . ." They contained no guidelines for issuing visas and the appellant argued that broad discretionary powers had been improperly subdelegated to visa officers. The Court held otherwise, with Abbott J. for the majority ruling that visa officers exercised only an "administrative responsibility." He went on to state at 8:

As I have said, the administrative responsibility of granting or refusing the immigrant visa required by regulation 28(1) has been entrusted to certain designated officers located outside of Canada. It must be entrusted to someone and the duty of such officers is to ascertain whether or not an applicant for permanent landing in Canada comes within one of the prohibited classes. That question is a question

second they characterized the subdelegated power as “administrative” in spite of its broad impact and unfettered discretion.⁷¹

The latter case, *Desrosiers v. Thinel*, concerned regulations made pursuant to section 25 of the *Department of Transport Act* which provided that:

The Governor in Council may from time to time make such regulations as he deems necessary for the management, maintenance, proper use and protection of all or any of the canals or other works under the management or control of the Minister, and for the ascertaining and collection of the tolls, dues and revenue thereon.⁷²

The regulations purported to prohibit the operation of a commercial passenger vehicle service “without the authority in writing of the Minister.”

The Court upheld the regulations. Fauteux J. first distinguished a similar municipal case⁷³ by asserting that, since the regulations governed the use of the property of the Crown, they did not limit any common law right. He then noted the enabling provision and concluded:

With the unlimited discretion given by Parliament to the Governor-in-Council, the latter, had he deemed it necessary, might well have determined, by regulations, the circumstances in which the Minister should grant the authority. This, however, Parliament did not require the Governor-in-Council to do. In the exercise of the power given to him by s. 4A, the Minister performs an act which, of its nature, is clearly administrative.⁷⁴

These conclusions recall the decision of Duff C.J. in the *Chemicals Reference*, where the broad wording of the enabling provision seemed sufficient in itself to permit unlimited subdelegation. However, Fauteux J.’s emphasis on the enabling provision was coupled with his characterization of the Minister’s power as “administrative,” suggesting that broad statutory language alone was not sufficient to justify the subdelegation.

Abbott J. reached the same conclusion in a separate opinion, although he seems to have done so solely on his characterization of the Minister’s power as non-legislative:

of fact.

Cartwright J., who dissented, expressed no conclusive opinion on the scope of the visa officers’ powers and did not share the majority’s confidence in construing the visa officers’ powers so narrowly. This is not surprising given the absence of any express statement in the regulations that the issue of a visa should turn solely on whether or not an applicant was a member of a prohibited class.

⁷¹*Desrosiers v. Thinel* [1962] S.C.R. 515, 33 D.L.R. (2d) 715 [hereinafter *Desrosiers* cited to S.C.R.].

⁷²R.S.C. 1952, c. 79, s. 25.

⁷³*City of Verdun v. Sun Oil Co.* (1951), [1952] 1 S.C.R. 222, [1952] 1 D.L.R. 529.

⁷⁴*Supra*, note 71 at 519.

The granting of such authority to the Minister by Order-in-Council is not a delegation of legislative authority. It merely indicates how the Minister shall exercise his responsibility of managing and controlling the public work entrusted to him by the statute.⁷⁵

On its face, *Desrosiers* suggests that even a broad unfettered discretionary power may be characterized as “administrative” and thus subdelegated. However, a crucial factor in this case was the subject matter of the Governor in Council’s regulation-making power, the management of government property. Arguably, the court considered this to be an essentially administrative function that would ordinarily be undertaken by a minister of the Crown without any regulations. This characterization was reinforced by the limited impact of the powers in question in so far as no common law rights were affected. The regulation-making power merely provided the Governor in Council with an additional, albeit formal and public, tool for directing the management of government property. In the absence of such a power, the Governor in Council could have accomplished the same result through internal directives.

Although this explanation goes some distance toward accounting for the result, it does not address the question of why the regulation-making power was conferred. Conceivably, Parliament’s objective was to regularize the management of “canals or other works” that were established primarily for the use of the public. The fact that no common law rights were in issue does not mean that the public would have been indifferent to the government’s management practices. No such rights were affected in *Brent*, yet the court there considered that Parliament had intended that there be substantive regulations on which visitors and immigrants could rely in seeking admission to Canada. As in *Brent*, one can argue that Parliament did not intend the management of canals or other works to be conducted on the basis of varying practices unknown to the public and subject to change without notice. Rather, Parliament intended that there be regulations with content indicating how the public might use the canals and works.

The Supreme Court decisions examined above provide limited guidance on the application of the *delegatus* maxim in non-municipal cases. A more complete picture, similar to that derived from the municipal cases, emerges from an examination of a number of lower court decisions. Here, the courts appear reluctant, even when faced with very broadly worded enabling provisions, to imply authority to subdelegate powers that entail a high degree of discretion and a significant aspect of the subdelegator’s pow-

⁷⁵*Ibid.* at 517.

ers.⁷⁶ By the same token, the subdelegation of narrow powers is generally tolerated.⁷⁷

It is arguable that administrative exigencies carry greater weight in the non-municipal cases. In *P.G. Canada v. Corporation Pharmaceutique Française Ltée*,⁷⁸ Dugas J. dwelt at some length on the constantly and rapidly changing nature of the drug manufacturing industry. The enabling authority for the regulations in question was both broad and detailed⁷⁹ and the sub-delegated powers concerned the approval of methods of drug analysis and the evaluation of the sufficiency of the training of drug inspectors. In upholding the validity of the regulations, Dugas J. stated:

Il faut d'abord se rappeler que la matière dont traite la Loi F-25 et le règlement est une matière en constante évolution sous l'impulsion des milliers de chercheurs et de fabricants de tous les coins du monde. Non seulement voit-on chaque jour apparaître un produit nouveau qu'il faut bientôt faire place à de nouveaux formats, à des copies et à des combinaisons. De nouvelles techniques de production et d'analyse apparaissent constamment. C'est une matière où le remède de l'un est le poison de l'autre. L'état se doit de contrôler la matière avec des outils aussi variés que ceux que possède l'industrie et doit contrôler les drogues avant qu'elles n'atteignent les marchés. Mais il ne faut pas que ces contrôles découragent l'invention et paralysent l'évolution. Le contrôle doit être assez souple pour s'adapter au changement et assez ferme pour garantir l'innocuité des produits.⁸⁰

In support of his conclusion, Dugas J. emphasized the large scope that the regulations left to drug manufacturers to regulate themselves. Drug analysis

⁷⁶See, e.g., *Robertson v. R.* [1972] F.C. 80, 30 D.L.R. (3d) 383 (T.D.): power to require retirement of employees before the mandatory retirement age fixed by regulation; *Re Clark*, *supra*, note 65: unfettered power to grant exemptions from a regulation prohibiting the disclosure of certain information; *R. v. Ouimet* (1978), [1979] 1 F.C. 55 (C.A.): power to "extend" a probationary period prescribed by regulations made under a power to "establish" such periods; *Sarafinchan v. Alberta Hail and Crop Insurance Corp.* (1979), 14 A.R. 242, 5 Alta L.R. (2d) 52 (C.A.): power to prescribe forms that were to be prescribed by regulations; *Forget v. P.G. Québec* [1984] C.A. 492: power to prescribe the grade necessary to pass a mandatory language test.

⁷⁷See, e.g., *Re Alberta Teachers' Association* (1973), 39 D.L.R. (3d) 528, [1973] 1 W.W.R. 269 (Alta C.A.) and the cases cited *infra*, notes 78 and 81.

⁷⁸[1977] C.S. 675 [hereinafter *Corporation Pharmaceutique*].

⁷⁹*Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 25(1):

The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, and, in particular, but not so as to restrict the generality of the foregoing, may make regulations

. . . .

(o) respecting

- (i) the method of preparation, manufacture, preserving, packing, labelling, storing and testing of any new drug, and
- (ii) the sale or the conditions of sale of any new drug.

⁸⁰*Supra*, note 78 at 682.

methods were to be developed by the manufacturers rather than dictated to them, while the inspectors were to be employees of the manufacturers, not government officials.

Although the greater significance of administrative exigency in non-municipal cases is supported by a number of other cases,⁸¹ one should note that it can be a two-edged sword. In *Re Clark and A.G. Canada*⁸² Evans C.J.H.C. considered a regulation of the Atomic Energy Control Board prohibiting the disclosure of information relating to certain "conversations, discussions or meetings" without the consent of the Minister of Energy, Mines and Resources. He struck down the regulations after observing, *inter alia*, that the Board had the expertise and administrative capacity to regulate such matters, and was therefore more capable than the Minister to decide which conversations should remain confidential:

There is nothing in the *Atomic Energy Control Act* which justifies the conclusion that the Board is entitled to delegate the powers granted to it by the Act. Finally, the Board is established to carry out the "policing" of the atomic energy field. One can assume that the Board is comprised of people who are experts in the field and are experienced in administrative practice. Consequently, the Board and not a Minister is best suited to handle the powers given to it by Parliament.⁸³

Re Clark can also be viewed as a case where the court disapproved of the choice of subdelegate. Thus, as in the municipal cases, the character of the person or body on whom powers are conferred may be an important factor in determining whether their conferral is permissible.⁸⁴

Most of the non-municipal cases where subdelegation was struck down involved the subdelegation of very broad powers, unfettered by standards or guidelines. *Dene Nation v. R.*⁸⁵ is a rather exceptional case in which the court was not satisfied that a subdelegated power was sufficiently circumscribed by guidelines or standards. Madam Justice Reed held that a regulation to authorize water use without a licence under the *Northern Inland Waters Act*⁸⁶ was *ultra vires*. Section 26 of the Act empowered the Governor

⁸¹See, e.g., *Re Denison Mines Ltd and Ontario Securities Commission* (1981), 32 O.R. (2d) 469, 122 D.L.R. (3d) 98 (Div. Ct) [hereinafter *Re Denison Mines*]; *Senecal v. R.* [1984] 1 F.C. 169 (T.D.); *Re Merrick and Director of Vocational Rehabilitation Services* (1985), 49 O.R. (2d) 675, 7 O.A.C. 255 (Div. Ct).

⁸²*Supra*, note 65.

⁸³*Ibid.* at 609-10.

⁸⁴See also *Calder v. Minister of Employment and Immigration* (1979), [1980] 1 F.C. 842, 107 D.L.R. (3d) 738, 80 C.L.L.C. 14, 009 (C.A.) and *Re Denison Mines*, *supra*, note 81 where the subdelegate already had power, for other purposes, to perform the function entailed by the subdelegated power.

⁸⁵[1984] 2 F.C. 942 (T.D.) [hereinafter *Dene Nation*].

⁸⁶R.S.C. 1970 (1st Supp.), c. 28.

in Council to make regulations authorizing such use, but stipulated that the use or class of uses, or the maximum quantity or rate of use, was to be "specified" in the regulations.

The regulations stated that water could be used without a licence if a number of conditions were met, one of which was that "the controller has stated in writing that he is satisfied that the proposed use would meet the applicable requirements of section 10(1) of the Act" In striking down the regulation, Reed J. concluded:

I agree that the controller was not authorized to act legislatively e.g., by making regulations or rules. What occurred instead was the transformation by regulation of a legislative power into an administrative or a quasi-judicial power, and the conferral of that power on the controller.

Parliament clearly intended two procedures for authorizing water uses: one through the Yukon and Northwest Territories Water Boards, exercising the quasi-judicial and discretionary powers which such bodies characteristically exercise. The other through regulation in which it was clearly intended that all the requirements to be met in order to use water without a licence would be specifically and exhaustively set out by the Governor in Council in the Regulations. There is nothing in the Act from which one can infer any intention that part or all of that power should be conferred on a sub-delegate to be exercised in a discretionary fashion.⁸⁷

Reed J. then acknowledged that the subdelegation was not "wholesale," as in the *Brent* case, since some legislative guidance was given to the controller:

The proposed use must be for municipal or water engineering purposes; the quantity must be less than 50,000 gallons a day; and the requirements of subsection 10(1) must be met. However, not enough legislative guidance has been given to escape the conclusion that an unauthorized sub-delegation has occurred. Subsection 10(1) does not provide a sufficiently complete code of requirement. Instead it sets up parameters within which discretionary judgments must be made.⁸⁸

The key to this conclusion lies in the subjective requirement of the regulations that the controller be "satisfied" that the applicable requirements were met. Notwithstanding the strictures governing the controller's discretion, Reed J. concluded that this term imported a discretionary power that too closely paralleled the powers of the water board, and that its subdelegation was not permitted under the regulation-making power to "specify" license exemption requirements.

Two recent decisions indicate a measure of uncertainty in the application of the *delegatus* maxim in non-municipal case law. They both con-

⁸⁷*Supra*, note 85 at 947-48.

⁸⁸*Ibid.* at 948.

cerned regulations under section 34 of the *Fisheries Act*⁸⁹ and suggest that the appellate courts in Ontario and British Columbia have substantially different views on the permissible degree of subdelegation.

The enabling provision permitted the Governor in Council to “make regulations for carrying out the purposes and provisions of this Act” It went on to recite a number of particular powers, most of which were stated to be “respecting” particular aspects of the fishing industry. Although paragraph 34(m) specifically authorized subdelegation, it did so only in relation to the variation of a “close time or fishing quota that has been set by the regulations.”

In *R. v. Tenale*,⁹⁰ the British Columbia Court of Appeal struck down a regulation that permitted the Minister of Recreation and Conservation for British Columbia to publish notices specifying a wide variety of limits on fishing.⁹¹ Seaton J.A. adopted the reasoning of Andrews Co. Ct J., from whose judgement the appeal was taken. Andrews Co. Ct J. said:

To be valid subdelegation, it must be authorized specifically or the maxim must be displaced by general language and objective of the statute. Contrary to the trial Judge, I do not find in the *Fisheries Act* itself any wording to support an argument that delegation was either intended or contemplated other than to those limited persons described in s. 34(m). Unlike the licensing cases referred to, the *Fisheries Act* contains no specific authority to delegate and certainly contains no suggestion that the whole subject of inland fisheries may be sub-delegated to a Province with power and authority to legislate or regulate.⁹²

The conclusion rested on Andrews Co. Ct J.’s characterization of the regulation as “a total divesting and abdication of jurisdiction by the federal authorities over inland fisheries.”⁹³ He conceded that, prior to 1978, the regulations set out detailed requirements in accordance with the wishes of the provincial authorities, and that this entailed a rather lengthy procedure “that was far too long to respond in a timely way to the provincial requests.”⁹⁴ Nevertheless, he was not prepared to permit subdelegation merely on the basis of administrative exigency.

The reasoning and results in the Ontario case, *Re Peralta*,⁹⁵ were much different. Here, the impugned regulation authorized the Minister of National Resources for Ontario to “designate” in any commercial fishing licence

⁸⁹R.S.C. 1970, c. F-14.

⁹⁰(1982), 145 D.L.R. (3d) 52, 3 C.C.C. (3d) 254 (B.C.C.A.) [hereinafter *Tenale* cited to D.L.R.].

⁹¹*British Columbia Fishery (General) Regulations*, C.R.C. 1978, c. 840, s. 58(1).

⁹²(1982), 134 D.L.R. (3d) 655 at 662, 66 C.C.C. (2d) 180 (B.C. Co. Ct).

⁹³*Ibid.* at 659.

⁹⁴*Ibid.* at 662.

⁹⁵(1985), 49 O.R. (2d) 705, 16 D.L.R. (4th) 259 (C.A.) [hereinafter *Re Peralta* cited to O.R.] (leave to appeal to the Supreme Court of Canada granted 27 June 1985).

various limitations and restrictions, including limits on the quantity of fish to be taken, and to

impose such terms and conditions as he deems proper and that are not inconsistent with these Regulations.⁹⁶

Pursuant to these powers, the Minister imposed restrictions limiting fish catches to the quotas allocated by him to the various licensees.

MacKinnon A.C.J.O. examined the subdelegation question in more detail than did the British Columbia Court of Appeal in *Tenale*. He was clearly influenced by Professor Driedger's approach to subdelegation⁹⁷ and began by emphasizing that the word "respecting" in the enabling provisions conferred broader powers than did the earlier provisions that had used the term "prescribed." MacKinnon A.C.J.O. went on to comment that a court should consider both the manner in which a statutory power has been exercised as well as the "administrative necessity" involved:

In the Act there is no indication of the person or body to whom the Governor in Council may delegate, and the fact that it has been to provincial ministers cannot by itself establish the right. However, the exercise of the right may be considered to show that interpreting the legislation as conferring the power of subdelegation does not lead to an absurdity. When courts have considered whether delegation of ministerial powers was intended, considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful: see Lanham, "Delegation and the Alter Ego Principle", 100 L.Q.R. 587 (1984).⁹⁸

He then found that subdelegation of the "necessary powers to carry out the object of the regulations" was "intended by necessary implication" and that the Minister's powers could be classified as such.⁹⁹ To reinforce these conclusions, he discussed the *Chemicals Reference*, *Brent* and *Brant Dairy Co. v. Milk Commission of Ontario*,¹⁰⁰ rejecting the contention that the first was relevant only to war-time situations, distinguishing the second as a case where the Governor in Council had "delegated all its powers" and asserting that the third applied only when delegated legislation merely "repeats" its enabling authority.¹⁰¹ In contrast to the broad discretion which was attacked

⁹⁶*Ontario Fishery Regulations*, C.R.C. 1978, c. 849, s. 29(5).

⁹⁷E.A. Driedger, *The Composition of Legislation*, 2d ed. (Ottawa: Department of Justice, 1976) at 193, cited by Mackinnon A.C.J.O. in *Re Peralta*, *supra*, note 95 at 718.

⁹⁸*Supra*, note 95 at 717.

⁹⁹*Ibid.* at 718 and 723.

¹⁰⁰(1972), [1973] S.C.R. 131 [hereinafter *Brant Dairy*], discussed below, Section 5.

¹⁰¹*Supra*, note 95 at 720.

in those cases, MacKinnon A.C.J.O. found the Minister's powers in *Re Peralta* to be circumscribed by provisions in the regulations that

detail[ed] the general conditions applicable to commercial fishing and to gill-nets and trawl-nets (ss. 30 to 43, 46, 57 to 59). They divide the waters of Ontario [into] special areas and they establish global quotas for commercial fishing of particular species from those waters (ss. 34, 39(5) and (6), 46(2), 59(1)). Commercial fish are defined in the definition section, and their minimum sizes are set out in Sch. VIII of the *Ontario Fishery Regulations*. The effect of the regulations was to set general policy and in setting the individual quotas within those policy guide-lines, the Minister was acting in a fashion consistent with the regulations.¹⁰²

The inconsistencies in the approaches to the *delegatus* maxim become clear from a comparison of *Tenale* and *Re Peralta*. The subdelegated powers in each case were substantially similar since they both entailed the imposition of a wide variety of limits on fishing. In addition, the powers in *Tenale* seem to have been just as circumscribed by regulatory provisions as those in *Re Peralta*.¹⁰³

The most obvious distinction between the two cases lies in the manner in which the fishing limits were imposed. In *Tenale*, they were imposed generally through a public notice, while in *Re Peralta* their imposition was on an individual basis through the licensing process. However, it is difficult to see why this distinction should have made any difference in applying the *delegatus* maxim. Arguably, the real difference was in each court's conception of the scope and breadth of discretion permissible in subdelegating powers under section 34 of the *Fisheries Act*.

IV. Distinctions between Municipal and Non-Municipal Subdelegation Cases

In both the municipal and non-municipal context the case law manifests considerable uniformity with respect to the factors and principles underlying the application of the *delegatus* maxim. In fact, one often finds references to municipal case law in cases dealing with non-municipal subdelegation,¹⁰⁴ although the reverse does not appear to be true, probably because the volume of municipal cases is somewhat greater. There are, however, several distinctions between the two groups of cases. In the municipal cases, the courts repeatedly advert to the potential for discrimination and inequality inherent in the exercise of discretionary powers. This aspect of discretionary powers receives far less attention in the non-municipal cases, suggesting that the

¹⁰²*Ibid.* at 723.

¹⁰³*Supra*, note 91, ss 55-68.

¹⁰⁴See, for example, *Dene Nation*, *supra*, note 85; *Re Peralta*, *supra*, note 95.

courts more readily accept the propriety, if not the necessity, of some discretion in this context.

A second distinction rests on the fact that, in the non-municipal cases, enabling provisions are generally construed more broadly and are not subject to the stricter interpretation accorded municipal statutes. The scope for subdelegation is especially broad in relation to delegated legislative powers such as those in *Desrosiers* that neither impose penalties nor affect common law rights.

Although the latter distinction rests on the traditional strict construction of municipal powers, it also demonstrates the significance of the wording used in enabling provisions.¹⁰⁵ When these prescribe in some detail what is to be set out in delegated legislation, its content must reflect this detail. Thus, the detail of the enabling provisions considered in cases like *Brent* or *Dene Nation* was unquestionably important in precluding subdelegation, while the more generally worded provisions in cases like *Desrosiers* or *Corporation Pharmaceutique* permitted greater scope for subdelegation.

The detail of the enabling provision as a factor in applying the *delegatus maxim* accords with the judicial disapproval of the subdelegation of a substantial portion of the delegated legislative powers in question. Although it is often difficult to predict whether a power will be characterized as substantial, as opposed to minor or administrative, there appears to be a greater tendency towards the latter characterization in non-municipal cases.

In explaining the distinctions between the municipal and non-municipal case law, one should also bear in mind that the administrative exigencies for subdelegating are less persuasive in relation to municipal authorities whose duties and powers are usually far less comprehensive than those of federal or provincial Ministers of other governmental bodies. Since municipal authorities are generally capable of personally exercising most of the powers delegated to them, and since Ministers are not, there is less reason to allow municipal authorities to subdelegate than there is to allow subdelegation by Ministers.

The distinctions may also result from the influence exerted by the notion crystallized in *Carltona v. Commissioner of Works*¹⁰⁶ and most recently characterized by David Lanham as the "alter ego principle."¹⁰⁷ It applies mainly to the delegation of functions by a Minister of the Crown to members of the department over which the Minister presides. This principle has been

¹⁰⁵See *supra*, note 56 and accompanying text.

¹⁰⁶[1943] 2 All E.R. 560 (C.A.).

¹⁰⁷D. Lanham, "Delegation and the Alter Ego Principle" (1984) 100 L.Q. Rev. 587; note the reference to this article in *Re Peralta*, *supra*, note 98 and accompanying text.

seen either to preclude the application of the *delegatus* maxim or, more frequently, to hold that no delegation takes place in this situation since the minister and his departmental staff are legally the same.¹⁰⁸

The alter ego principle rests almost entirely on administrative exigency and the choice of the subdelegate as someone under the control of the delegator. The courts have frequently observed that the complexity and multitude of functions assigned to a minister cannot possibly be meant for his personal performance, but must be capable of performance by departmental staff.¹⁰⁹

The development of the alter ego principle suggests that considerations springing from the rule of law are now more important than the confidence principle as a basis for the *delegatus* maxim. This trend is reinforced by the constitutional¹¹⁰ and legislative¹¹¹ reforms of the last five years to protect the public from governmental intrusion and permit greater access to information about government activities. Although subdelegation can be a useful administrative tool, it can equally serve to conceal government regulatory activity, particularly as it relates to the exercise of law making powers.

Arguably, the shift in the basis of the *delegatus* maxim signals the rise of a duty to make law in the context of delegated legislative powers. In essence, the factors used by the courts in applying the maxim entail balancing the interests of those affected by a subdelegated power against the interests of those involved in its exercise. The scope of the power, the breadth of discretion it entails, the character of the subdelegate and the administrative exigencies are the elements of a rough equation used to protect the principles inherent in the *rule* of law, without restricting unduly the *administration* of law.

Support for the existence of a duty to make law is not confined to cases on subdelegation. Rather, it encompasses several other forms of exercising statutory powers. In Part V, I propose to examine these forms in order to delineate further the duty to make law and to analyse critically its merits and weaknesses as a judicial tool for controlling statutory powers.

¹⁰⁸*Ibid.* at 587.

¹⁰⁹See, e.g., *Carltona*, *supra*, note 106 at 563 and *Ahmad v. Appeal Board established by the Public Service Commission* [1974] 2 F.C. 644 at 651, (*sub nom. Ahmad v. Public Service Commission Appeal Board*) 6 N.R. 287, (*sub nom. Re Ahmad and Appeal Board established by the Public Service Commission*) 51 D.L.R. (3d) 470 (C.A.).

¹¹⁰*Canada Act 1982* (U.K.), 1982, c. 11; note *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 at 592, 147 D.L.R. (3d) 58 (Div. Ct) [hereinafter *Re Ontario Film and Video Appreciation Society* cited to O.R.], *aff'd* (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.).

¹¹¹*Access to Information Act*, S.C. 1980-81-82-83, c. 111 (Schd. I); *Privacy Act*, S.C. 1980-81-82-83 (Schd. II).

V. The Duty to Make Law

Under the rubric of subdelegation, one finds numerous cases that do not involve transfers of power from a delegate to a subdelegate. Rather, they arise when an authority transforms its delegated legislative power into a power exercisable by the authority itself on a less formal basis, either by issuing policy guidelines or through *ad hoc* decisions in individual cases. Although the confidence principle is not violated in such cases, the rule of law principles underlying the decisions on subdelegation clearly apply. These entail the concerns raised by Kelly J. in *Sandler*, namely, that citizens will not know what the law is with sufficient detail to permit them to observe it or obtain benefits under it.¹¹²

*Brant Dairy*¹¹³ is the best example of the prohibition of the transformation of a delegated legislative power into an "administrative", *ad hoc* decision-making power. The Ontario Milk Commission was empowered to make regulations "with respect to regulated products generally or to any regulated product."¹¹⁴ In addition, the enabling provision permitted regulations "providing for" a number of elements of a marketing scheme, one of which was a quota system. Superimposed on all of these powers was a provision permitting the Commission to delegate its regulation-making powers to a marketing board. The Commission did so, conferring its powers on the Ontario Milk Marketing Board. In turn, the Board made a regulation that virtually repeated the wording of the enabling provision concerning the establishment of a quota system. Rather than "providing for the fixing and allotting to persons of quotas," the regulation merely stated that the Board "may fix and allot to persons quotas ... on such basis as the Board deems fit."

The Supreme Court struck down the regulation. Laskin J. stated for the majority:

The fact that the powers conferred are to be carried out on a basis that the Board deems proper does not entitle it to keep its standards out of the regulation. The "deem proper" clause of the empowering statute gives the Board (as subdelegate) a wide scope in setting up a quota system and in fixing quotas but it does not allow the Board to escape its obligation, as I read the statute, to embody its policies in a regulation.

A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in

¹¹²See *supra*, notes 32-34 and accompanying text.

¹¹³*Supra*, note 100; note, however, that it is by no means the earliest such case: see, e.g., *Re Nash and McCracken* (1873), 33 U.C.R. 181.

¹¹⁴*The Milk Act, 1965*, S.O. 1965, c. 72, s. 8(1).

the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one.¹¹⁵

As authority for this proposition, he cited *Brent* and *City of Verdun v. Sun Oil Co.*¹¹⁶ and enunciated the general principle that law making powers must be used to make law:

What is objectionable, in my view of the law, is not the breadth of the delegation or the subdelegation but the failure of the subdelegate (and it would equally be a failure in the Commission itself as delegate) to provide even a minimum of direction and specification in s. 4 of O. Reg. 52/68. The Commission was given a discretion to fix the "law" on enumerated matters, and was authorized to subdelegate its power to the Board. Either one, as the regulation-making authority, could retain discretion as to the execution or application of the "law", but that is not this case so far as s. 4 is concerned. There was no "law" stated.¹¹⁷

Finally, Laskin J. noted a policy statement that the Board had published indicating the bases upon which quotas would be awarded, transferred and adjusted. He also mentioned other parts of the regulations that provided standards for the regulation of other facets of the milk industry. These observations clearly negated any arguments related to administrative exigency.

The decision in *Brant Dairy* is a landmark judgement recognizing a principle that has long been shrouded in the *delegatus* maxim. It broadens the basis for applying the maxim to law-making powers by recognizing that they are granted to permit skeletal statutory schemes to be fleshed out, firstly to enable those whom they regulate to know the law and order their affairs accordingly and, secondly, to ensure a measure of equality in the application of the law, confining discretion to what is necessary for effective administration.

Brant Dairy is also noteworthy in bridging the municipal and non-municipal case law by wedding to the *Verdun* case the logic of *Brent*. Thus, the *Brant Dairy* principle has since been applied to cases in both areas.¹¹⁸

¹¹⁵*Supra*, note 100 at 146.

¹¹⁶*Supra*, note 73, where the Court struck down a municipal building by-law that conferred on the municipal council the power to grant or refuse building permits; the decision was rooted in the concern that the council not evade the formalities governing the making of by-laws and that the by-law not give rise to discrimination.

¹¹⁷*Supra*, note 100 at 150.

¹¹⁸For municipal cases, see *Canadian Institute of Public Real Estate Companies v. City of Toronto* [1979] 2 S.C.R. 2, 25 N.R. 108, 103 D.L.R. (3d) 226; *Air Canada v. City of Dorval* [1985] 1 S.C.R. 861, 59 N.R. 177, 19 D.L.R. (4th) 401 [hereinafter *Air Canada* cited to S.C.R.]. For non-municipal cases see *Builer Metal Products Co. v. Canada Employment and Immigration Commission* (1982), [1983] 1 F.C. 790, 44 N.R. 271 (C.A.); *Re Normand and Registration Committee of the Royal College of Dental Surgeons of Ontario* (1985), 50 O.R. (2d) 443, (*sub nom.* *Normand v. Royal College of Dental Surgeons of Ontario*) 10 Admin. L.R. 196 (Div. Ct); *Dene Nation, supra*, note 85.

However, the subsequent case law demonstrates a degree of ambivalence ranging from *Dene Nation*, with its rigorous demand for standards to guide the subdelegate, to *Re Peralta*, where the Court dismissed the relevance of the principle. In *Re Peralta*, the court considered the *Brant Dairy* principle to apply only where the delegate merely repeated the terms of the enabling provisions, prescribing no standards at all.

When one examines *Brant Dairy* closely, it becomes clear that the regulations in question were far from barren of standards. Rather, Laskin J. looked at specific elements of the Board's regulation-making powers and required that some standards be prescribed for each one. The fact that other elements of milk marketing were regulated by standards did not save the provision relating to quotas.

This point has most recently been affirmed by the Supreme Court of Canada in *Air Canada*.¹¹⁹ This decision involved a power to "impose by by-law and collect certain annual dues or taxes" with the further provision that "such dues or taxes may consist of a fixed amount or be proportionate to the annual rental value." Purporting to act under this power, the city made a by-law imposing an annual tax on businesses "at a rate to be fixed annually by resolution of the City Council."

In striking down the by-law, the court noted the various procedural requirements that attended the making of by-laws, as opposed to resolutions, and concluded:

In the case at bar the Council of the City of Dorval did not simply reproduce the provisions of s. 526 of the *Cities and Towns Act* in By-law 577. It enacted provisions in accordance with the Act by making certain of the choice offered to it. However, it did not exercise its powers respecting the rate. To use the language of Laskin J. in *Brant Dairy Co.*, the Council, in which the power to set a rate by by-law was vested, redelegated to itself the power to set it by way of resolution. The Council did not have the power to thus make a redelegation to itself.¹²⁰

The *Air Canada* decision reveals a further reason for requiring delegated legislation to have content, namely to ensure that the safeguards that attend its making are not circumvented.¹²¹ This of course resonates with the rule of law considerations that the law be public and accessible. If a process is prescribed to permit public participation in the making of delegated legislation, it too cannot be nullified by the conferral of discretionary powers.

Brant Dairy by no means represents the only situation where the duty to make law may be imposed. One also finds this duty expressed in cases

¹¹⁹*Ibid.*

¹²⁰*Ibid.* at 871.

¹²¹See also *Fralick v. Grand Trunk Ry* (1910), 43 S.C.R. 494.

where delegated legislation does not enunciate any generally applicable rules or standards. Thus, the power to “prescribe by regulation” exceptions to a statutory visa requirement has been held to confer

authority to make exceptions to the rule in subsection 9(1) for certain categories or classes of immigrants or visitors rather than to grant exemptions from the rule in individual cases. It contemplates exceptions of a general, legislative nature to be applied to individual cases. That is what is implied, I think, by the word “prescribed.”¹²²

Similarly, a regulation made under a power to “fix the minimum and maximum number of permits ... and prescribe the conditions on which a person may hold a permit” was struck down for prescribing “the public interest” as the sole criterion for their issue.¹²³ The latter case is particularly interesting in its approval of the thesis held by Professors Dussault and Borgeat:

[L]e règlement doit contenir des normes de comportement qui soient le plus précises possible. Cette exigence, provenant des tribunaux, nous paraît tout à fait justifiée. Alors que la loi ne contient la plupart du temps que les grandes lignes de l'ordre juridique que le législateur veut établir, le règlement est censé venir compléter ce cadre général par des règles d'application précises. Le citoyen est donc en droit de s'attendre à ce que les normes de comportement contenues dans le règlement ne soient pas de même niveau que celles que l'on retrouve dans la législation: permettre le contraire serait aller à l'encontre de l'esprit qui fonde la délégation du pouvoir de légiférer.¹²⁴

The duty to make law can also be seen underlying cases where an authority has attempted to use an administrative power to accomplish something that should have been done through delegated legislation. Thus, the Canadian Transport Commission was prohibited from imposing conditions in air carrier licences through a general order.¹²⁵ Similarly, the Nova Scotia Rent Review Commission was found to have improperly fettered its discretion by considering internal policy guidelines that should have been,

¹²²*Jiminez-Perez v. Minister of Employment and Immigration* [1983] 1 F.C. 163 at 169 (C.A.), rev'd on other grounds [1984] 2 S.C.R. 565.

¹²³*Voyageur Inc. v. Commission des transports du Québec* [1986] R.J.Q. 2577 (C.S.) at 2584; one should note that the power to issue permits was conferred by the enabling statute, the *Transport Act*, R.S.Q. 1977, c. T-12, s. 32, but was subject to being exercised “within the scope of the regulations”; hence, the regulation effectively enlarged the discretion to issue permits.

¹²⁴R. Dussault & L. Borgeat, *Traité de droit administratif*, t. I, 2d ed. (Quebec: Presses de l'Université Laval, 1984) at 542.

¹²⁵*North Coast Air Services Ltd v. Canadian Transport Commission* [1968] S.C.R. 940, 69 D.L.R. (2d) 425. See also *Re Phillips and Registrar, Mortgage Brokers Act* (1978), 86 D.L.R. (3d) 518 (B.C.C.A.).

and subsequently were, promulgated as regulations.¹²⁶ Although these cases focus on administrative powers and are rooted in administrative law doctrine regarding natural justice and fettering discretion, they also suggest that the action in question would have been valid if it had been accomplished through the delegated legislative powers conferred by the relevant statutes.

Perhaps the furthest reaching decision is *Re Garden of the Gulf Court & Motel Inc.*¹²⁷ which involved a telephone company's refusal to connect a private switchboard. The owner of the switchboard applied to the Public Utilities Commission for review of this decision under the Prince Edward Island *Electric Power and Telephone Act*¹²⁸. Subsection 33(2) of the Act conferred broad discretion on the Commission to settle such disputes and "make such order ... as seems reasonable and just." In reviewing the Commission's ratification of the refusal to connect, the court noted both the complexity of the issues involved and the absence of any regulations indicating how the Commission would exercise its powers. The court ordered a stay of the proceedings before the Commission pending the promulgation of regulations, stating:

In my opinion some such requirements set out in regulations should be prescribed in this Province so that customers such as the appellant will be in a position to know definitely what type of equipment is acceptable to the Commission and what particular requirements must be met if such equipment is to be connected. It is neither fair nor practical that such an important part of the telecommunications industry in this Province be without specific regulations. The Commission should move without delay to establish such regulations.¹²⁹

This conclusion is rather startling considering that neither the *Electric Power and Telephone Act* nor the *Public Utilities Commission Act*¹³⁰ conferred any express authority on the Commission to make regulations and the court did not mention what the authority might be.¹³¹

¹²⁶*Dale Corp. v. Rent Review Commission* (1983), 58 N.S.R. (2d) 138, 123 A.P.R. 138, (sub. nom. *Re Dale Corp. and Rent Review Commission*) 149 D.L.R. (3d) 113 (S.C.A.D.); *Investment Property Owners' Association of Nova Scotia Ltd v. Rent Review Commission* (1984), 63 N.S.R. (2d) 133, 141 A.P.R. 133 (S.C.T.D.). See also *Hui v. Minister of Employment and Immigration* [1986] 2 F.C. 96, 65 N.R. 69 (C.A.).

¹²⁷(1981), 32 Nfld & P.E.I.R. 476, 91 A.P.R. 476, 126 D.L.R. (3d) 281 (R.E.I. S.C.) [hereinafter *Garden of the Gulf*].

¹²⁸R.S.P.E.I. 1974, c. E-3.

¹²⁹*Supra*, note 127 at 292.

¹³⁰R.S.P.E.I. 1974, c. P-31.

¹³¹Note, however, s. 13(1) of the *Public Utilities Commission Act*, *ibid.*, which stated:

The Commission has, in addition to the powers in this Act or any other specific Act mentioned and indicated, all additional, implied and incidental powers which may be necessary to carry out, effect, perform and execute all the powers of this Act or any other Act, specified, mentioned and indicated.

Garden of the Gulf unquestionably stretches the bounds of judicial creativity in applying the duty to make law. Arguably, these bounds may be stretched even further under the *Canadian Charter of Rights and Freedoms*. Section 1 provides that the fundamental rights and freedoms are subject only to reasonable limits "prescribed by law", while subsection 15(1) guarantees "equal protection and equal benefit of the law without discrimination...".¹³² In addition, Muldoon J. in the Trial Division of the Federal Court has recently held that section 26 of the Charter "confirms all rights and freedoms which have long been imported by the rule of law." Accordingly, he struck down the broad, discretionary powers conferred by section 34 of the *Excise Tax Act*:

Thus it may be seen that section 34 of the Excise Tax Act is no paradigm of the rule of law. It is indeed, so contrary to the rule of law that it can surely be declared to be unconstitutional. It accords arbitrary administrative discretion, without any guidelines or directives, to the Minister whose determination is not subject to any objective second opinion as is inherent in an appeal provision.¹³³

Although the duty to make law parallels, if not arises from, the *delegatus maxim*, it is qualified to some extent by the decision of the Supreme Court in *Capital Cities Inc. v. Canadian Radio-Television and Telecommunications Commission*.¹³⁴ Laskin C.J.C. held that the *Broadcasting Act* did not compel the C.R.T.C. to use its regulation-making powers, but rather permitted it to regulate the burgeoning cable television industry on an *ad hoc* basis, laying down only informal "guidelines" for the exercise of its licensing discretion:

In my opinion, having regard to the embrative objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to imple-

¹³²See, e.g., *Re Ontario Film and Video Appreciation Society*, *supra*, note 110 where the Divisional Court stated at 592:

[L]aw cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

Note also *Comité pour la République du Canada v Canada* [1987] 2 F.C. 68 t 78 (C.A.); *Stoffman v. Vancouver General Hospital* (1986), 30 D.L.R. (4th) 700, [1986] 6 W.W.R. 23 (B.C.S.C.) where the court considered that a regulation providing for mandatory retirement did not contravene section 15(1) since it prescribed a reasonable basis on which exceptions to mandatory retirement were to be granted.

¹³³*Vanguard Coatings and Chemicals Ltd v. M.N.R.* (1986), [1987] 1 F.C. 367 at 394 (T.D.).

¹³⁴(1977), [1978] 2 S.C.R. 141, 18 N.R. 181, 81 D.L.R. (3d) 609 [hereinafter *Capital Cities* cited to S.C.R.]. See also *Wimpey Western Ltd v. Director of Standards and Approvals of the Department of the Environment* (1983), 49 A.R. 360, 2 D.L.R. (4th) 309, 28 Alta L.R. (2d) 193 (C.A.). For comment on the promulgation of directives and guidelines generally, see M. Filion, "Le pouvoir discrétionnaire de l'administration exercé sous forme de normes administratives: Les directives" (1979) 20 C. de D. 855.

menting the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.¹³⁵

The decision in *Capital Cities* flows from a broad reading of the C.R.T.C.'s twin administrative and legislative powers. Laskin C.J.C. refused to divide these powers, but rather recognized the administrative exigencies that warranted the flexibility of issuing informal guidelines or "quasi-law" to provide direction for the exercise of the C.R.T.C.'s administrative powers without binding its discretion as regulations would have done. The decision suggests that when the regulation of a particular area is in its initial stages, the considerations underlying the duty to make law can be satisfied otherwise than by making delegated legislation, namely by issuing guidelines on the basis of "extensive hearings at which interested parties were present and made submissions."

Another factor urging caution in requiring the making of law is the recent move toward regulatory reform. At both the federal and provincial levels one finds a number of measures designed to improve the process of making delegated legislation by permitting greater public participation. Advance publication and comment provisions are becoming a standard feature in legislation that authorizes or governs the making of delegated legislation.¹³⁶ Although the efficacy of these provisions depends on the willingness of delegated legislative authorities to listen to public comments, they nevertheless introduce a degree of public scrutiny that, arguably, reduces the need for judicial scrutiny.¹³⁷

In the United States the duty to make law is usually discussed under the rubric of "required rule-making" and is somewhat more developed than in Canada. One finds an extensive tradition of informal or "interpretive" rules¹³⁸ which the courts have not, until quite recently, questioned. However,

¹³⁵*Capital Cities*, *ibid.* at 171.

¹³⁶See, e.g., the *Regulations Act*, R.S.Q. c. R-18.1, ss 8-14; the *Aeronautics Act*, R.S.C. 1970, c. A-3, ss 5-5.2; D.J. Miller, "Regulatory Reform in Manitoba: A Blueprint for Change" (1986) 15 *Man. L.J.* 219.

¹³⁷See *Wright v. T.I.L. Services Pty Ltd* (1956), 56 S.R.(N.S.W.) 413 at 423 where the court drew on the existence of parliamentary scrutiny procedures as a basis for not striking down a regulation that incorporated by reference a set of electrical equipment standards.

¹³⁸See K.C. Davis, *Administrative Law Treatise*, vol. II, 2d ed. (San Diego: K.C. Davis Pub., 1979) at 46-54; *Skidmore v. Swift & Co.*, 323 U.S. 134 at 138 (1944). See also S. Estreicher, "Policy Oscillation at the Labour Board: A Plea for Rulemaking" (1985) 37 *Admin. L. Rev.* 163, which presents a number of compelling arguments for rules.

with the development of "required rule-making," these rules have sometimes been held to attract the requirements of the *Administrative Procedures Act*,¹³⁹ which generally apply to formal, "legislative" rules. In addition, the courts have invalidated administrative action that was unregulated by legislative rules, often doing so on the basis of due process requirements that resonate with the rule of law principles found in Canadian case law.¹⁴⁰ Finally, one should note that further impetus for required rule-making is provided by the notion that administration without enunciated standards tends to be "inherently irrational and arbitrary."¹⁴¹

Although the cases cited in both notes 140 and 141 demonstrate a trend towards required rule-making in American jurisprudence, this trend has not been clearly defined or free from criticism. The courts themselves have expressed concern about unduly restricting the discretionary powers necessary to develop policy or respond to variable circumstances. The detail of required rules varies with these needs¹⁴² and the ability of administrative agencies to develop policy through adjudication remains largely intact,¹⁴³ although there are indications that major departures from adjudicatively established law will attract rule-making requirements¹⁴⁴ or an obligation to give a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."¹⁴⁵

The decision of the U.S. Supreme Court that goes the furthest towards required rule-making has, coincidentally, attracted the greatest criticism from Professor Davis. The broad language and vaguely articulated principles of *Morton v. Ruiz*¹⁴⁶ potentially tie the hands of administrative agencies by disallowing any scope to use adjudicative methods or interpretive rules. Davis has commented as follows:

The courts *should* push agencies to develop guides for decisions, but they can hardly insist on legislative rules in all instances Courts could soundly prohibit unnecessary *ad hoc* decisions if doing so were practical. Operating without any standards of eligibility would be judicially condemned; ... a good system

¹³⁹Davis, *ibid.* at 78-94.

¹⁴⁰Davis, *ibid.* at 128-40; see, e.g., *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969); *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

¹⁴¹*Harnett v. Board of Zoning, Subdivision and Building Appeals*, 350 F.Supp. 1159 (V.I. Dist. Ct. 1972); *Kent Farm Co. v. Hills*, 417 F.Supp. 297 (D.D.C. 1976).

¹⁴²See, e.g., *Sherrill v. Knight*, *supra*, note 140.

¹⁴³*Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947); *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

¹⁴⁴*National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

¹⁴⁵*Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d 841 at 852 (D.C. Cir. 1971), cert. denied, 403 U.S. 923 (1971).

¹⁴⁶415 U.S. 199 (1974).

— one that could properly be judicially required — is the one the BIA (Bureau of Indian Affairs) used in the *Ruiz* case, involving an explained decision based on a meaningful standard stated in a Manual that was open to public inspection. The Court's prohibition of *ad hoc* decisions is a move in the right direction that went much too far; the Court can and should fashion more refined instruments to influence or require agencies to supplant *ad hoc* decisions with decisions guided by rules or standards. The *Ruiz* case may be a crude beginning that is susceptible of gradual refinement.¹⁴⁷

Professor Davis's plea for a flexible doctrine of required rule-making is appealing in its functional emphasis and should not be too hastily dismissed as applicable only to the U.S. Although there are certainly differences between Canada and the U.S., the reasoning that lies at the core of both the *Brant Dairy* principle and the concept of "required rule-making" is essentially the same.

In the United Kingdom, the notion of a duty to make law has recently met substantial criticism from Robert Baldwin and John Houghton.¹⁴⁸ Commenting on the suggestion that the courts should go beyond requiring disclosure of existing internal administrative rules and require that rules be made in cases where they have not previously existed, they have stated:

There are serious problems in taking the second step. Unfairness in the first instance has an immediate quality: if a rule exists and is applied then, I have a right to know about it. With the "duty to develop," it may not be plain that injustice has occurred when all the merits of the individual case have been considered. An authority's failure to structure is not the same thing as its committing acts of injustice. Nor does traditional British emphasis on consideration of the merits of a case (as opposed to rule-making and structuring) seem particularly welcoming to such a rule.

The evidential difficulties in enforcing compulsory rule-making would be huge. In order to say that a body should have structured a decision, the court would have to be able to assess the ability of the agency to formulate and state a rule with precision and clarity. To do this properly would involve detailed analysis, often in a complex and specialist regulatory area. This is not something which the courts are manifestly competent or willing to undertake.¹⁴⁹

The suggestion that the courts are unwilling to enforce a duty to act legislatively overstates the situation in Canada. The cases on subdelegation and the duty to make law demonstrate that Canadian courts are often prepared to require the making of law by preventing the conferral of broad, *ad hoc* decision-making powers. However, one cannot as easily dismiss the argument that the courts are not competent to enforce compulsory law-

¹⁴⁷Davis, *supra*, note 138 at 153-54.

¹⁴⁸"Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] Public Law 239 at 277-78.

¹⁴⁹*Ibid.* at 278.

making. In a previous article,¹⁵⁰ Mr Baldwin and Mr Hawkins suggested that delegated legislation is not a panacea for regulatory problems, but is merely one of a number of techniques for improving regulatory processes. Not only is it ineffective in some circumstances,¹⁵¹ but it can in fact be retrograde.¹⁵²

Capital Cities demonstrates a degree of sensitivity to the limitations on delegated legislation as a regulatory technique. However, not one of the Canadian cases discussed contains the detailed analysis that Mr Baldwin and Mr Houghton suggest is necessary. No evidence as to the feasibility of embodying rules or standards in delegated legislation or as to its probable impact ever seems to have been introduced. At best, one can only presume that the courts simply interpreted the pertinent statutory provisions against a factual background of which judicial notice was taken.

VI. Conclusions

The *delegatus* maxim has long outgrown its origins as a device for protecting the confidence placed by a delegator in his delegate. In the sphere of delegated legislation, the maxim has now been largely subsumed by the duty to make law. This broader duty more accurately reflects the various interests that either direct, or are affected by, modern regulatory activities. Within the bounds of the duty administrative exigencies contend against the need for openness, fairness and equality that springs from the rule of law. Although the confidence principle still has some leverage in cases of subdelegation, it is clearly not the critical element that it once was. The cases discussed in Part V demonstrate that the rule of law principles underlying the *delegatus* maxim are also capable of operating on their own in situations that do not involve subdelegation.

The duty to make law depends primarily on the wording of enabling provisions. However, this wording is most often very general and offers little assistance in determining the extent to which delegated legislation may confer discretionary powers. Consequently, the duty turns largely on a number of factors that determine what powers may be conferred.¹⁵³ Although these factors are informed by the confidence and rule of law principles, they hardly operate in a precise fashion. Considerable room is left for judicial discretion in applying the duty to make law.

¹⁵⁰R. Baldwin & K. Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] Public Law 570.

¹⁵¹Note the *Criminal Justice (Scotland) Act 1980* (U.K.), 1980, c. 62, discussed *ibid.* at 576.

¹⁵²See S.B. Long, "Social Control in the Civil Law: The Case of Income Tax Enforcement" in H.L. Ross, ed., *Law and Deviance* (Beverly Hills, California: Sage Publications, 1981) 185 at 206-07, discussed in Baldwin & Hawkins, *supra*, note 150 at 577-78.

¹⁵³See above, text accompanying notes 37-42 and 105-09.

If the duty to make law is hazy in some respects, it nevertheless clearly prohibits delegated legislation that merely passes on its enabling powers or a substantial element of them. In determining whether or not this has been done, the courts consider the specific elements of the enabling provisions and then decide whether the delegated legislation provides any elaboration of them. The more detailed these provisions are, the more content will the courts expect and the narrower will be the scope for conferring discretionary powers.

Difficulties with the duty to make law arise when delegated legislation confers powers that are somewhat less extensive than its enabling powers. In these situations one finds considerable variation in the judicial application of the duty. This variation is most apparent between municipal and non-municipal cases. However, even among the non-municipal cases, decisions such as *Dene Nation*¹⁵⁴ and *Re Peralta*¹⁵⁵ illustrate distinctly different attitudes towards the conferral of discretionary powers.

There is unquestionably a need for the courts to enforce the duty to make law. Delegated legislative powers are conferred with some expectation that rules or standards will be promulgated to flesh out statutory schemes. However, the American and British commentators noted above¹⁵⁶ all suggest that the task of determining how much content delegated legislation should have is exceedingly complex and for the most part unsuited to resolution by the courts. Although this determination rests on the intention of the body that delegates legislative powers, the generality of the language customarily used to express this intention suggests that these bodies have no clear idea of the extent to which the law is to be elaborated in delegated legislation. In turn, one can argue that the power to make this determination is part of the power conferred on the delegated legislative authority.

The application of the *delegatus* maxim and the duty to make law raise fundamental questions about the role of the courts in interpreting statutes and reviewing the exercise of statutory powers. One can hardly deny the judicial creativity in this area; the central issue is the degree to which the courts should wrest decisions about the amount of regulatory detail from the hands of those who are charged with embodying that detail in delegated

¹⁵⁴*Supra*, note 85.

¹⁵⁵*Supra*, note 95.

¹⁵⁶Davis, *supra*, note 138 at 153-54; Baldwin & Houghton, *supra*, note 148; Baldwin & Hawkins, *supra*, note 150.

legislation. There is of course no easy answer, or at any rate the answer can only be found in the dialectic between the demands of the rule of law on the one hand and the administration of law on the other. One can only hope that the courts will recognize as fully as possible the issues before them and act neither legislatively nor administratively, but judiciously.
