

# THE *CARLTONA* DOCTRINE AND THE RECENT AMENDMENTS TO THE *INTERPRETATION ACT*

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*Most federal regulatory schemes are administered by individual Ministers of the Crown upon whom are conferred an enormous variety of powers, duties and functions. Does the delegatus non potest delegare principle require that the Minister personally perform every statutory responsibility? If not, who else may do so? on what basis? and subject to what if any limitations?*

*A little more than fifty years ago, the English case of *Carltona Ltd. v. Commissioners of Works* explained the basis for a special Minister's exception to the delegatus principle. Latterly, however, judicial qualifications and limitations, particularly in Canada, concerning the scope and application of the so-called *Carltona* principle have led to a measure of administrative uncertainty as to its limits. It was with this in mind that Parliament recently enacted an amendment to the federal Interpretation Act.*

*This article has two objectives: (1) to explain the scope and application of the *Carltona* principle, including apparent limitations imposed by the courts; and (2) to analyze the purpose and some of the potential consequences of this statutory amendment.*

*La plupart des plans de réglementation fédéraux sont administrés par des ministres du gouvernement à qui l'on confie une vaste gamme de pouvoirs et de fonctions. Est-ce que le principe delegatus non potest delegare exige que le ministre remplisse lui-même toutes les fonctions qui lui sont dévolues par la loi? Si ce n'est pas le cas, qui doit les remplir? En vertu de quoi? Et sous réserve de quelles limitations, si tant est qu'il y en ait?*

*Il y a un peu plus de cinquante ans, l'arrêt anglais *Carltona Ltd c. Commissioners of Works* a expliqué le fondement d'une exception au principe delegatus non potest delegare qui permet à un ministre de s'y soustraire. Mais dernièrement, les décisions judiciaires, en particulier celles rendues au Canada, ont restreint la portée et l'application de ce qu'on appelle le principe de *Carltona*, créant ainsi une incertitude au sein de l'administration quant aux limites de ce principe. C'est pour cette raison que le Parlement a apporté récemment une modification à la Loi d'interprétation fédérale.*

*Cet article a deux objectifs : 1) expliquer l'étendue et l'application du principe de *Carltona*, y compris les limitations apparentes imposées par les tribunaux; 2) analyser le but et quelques-unes des conséquences éventuelles de cette modification législative.*

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## I. INTRODUCTION

Last year marked the fiftieth anniversary of *Carltona Ltd. v. Commissioners of Works*.<sup>1</sup> While it may not be a decision that has gained the limelight and degree of attention received by other “breakthrough” cases in administrative law,<sup>2</sup> for lawyers concerned about the manner in which Ministers of the Crown exercise the multitude of powers conferred on them by Parliament, *Carltona* remains worthy of our eternal gratitude. For not only does it represent a wonderful example of how the realities of the modern bureaucratic state<sup>3</sup> can be accommodated by and within principles of classical constitutional law, it also offers a sensible and workable compromise on how Departmental personnel are legally able to support their presiding Minister in carrying out his or her legal responsibilities.

One measure of the quality of the reasons for judgment of the English Court of Appeal is surely their enduring quality through the years and the recognition given to the decision by subsequent cases. This notwithstanding the fact that it was made under wartime conditions and involved the application of the Defence Regulations. Why, then, was it necessary for a case that has been paid such deference, if not reverence, to be the subject of recent amendments<sup>4</sup> to the *Interpretation Act*?<sup>5</sup> What evolution of *Carltona* led to this rather extreme solution? And what are the intended effects of these amendments?

The purpose of this paper is to examine, firstly, what the *Carltona* case decided including the conditions for the application of its principle, and, secondly, the potential impact of these *Interpretation Act* amendments on this area of the law. Because the two are so interrelated and interdependent, the amendments are considered within the context of the more general discussion of the *Carltona* principle. For ease of reference the amended subsection 24(2) of the *Interpretation Act*, with the actual changes to this provision emphasized in bold, is set forth immediately below.

24. (2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

<sup>1</sup> [1943] 2 All E.R. 560 (C.A.). [hereinafter *Carltona* cited to All E.R.]. For earlier precursors of the so-called *Carltona* principle, see *R. v. Chiswick Police Station Superintendent Ex parte Sacksteder*, [1918] 1 K.B. 578 (C.A.) [hereinafter *Chiswick*]; *Theodore v. Duncan*, [1919] A.C. 696 at 706 (Australia P.C.), (1919) 26 C.L.R. 276 at 282; *Yasny et al. v. Lapointe*, [1940] 3 D.L.R. 204 at 210-11 (Man. C.A.), 74 C.C.C. 29 at 36-37.

<sup>2</sup> The case never found its way into the “official” Law Reports and even in the report in the All England Reports, the Editorial Note does not identify the wider significance of the decision.

<sup>3</sup> Note, however, the reliance placed by Young J. in *LS v. Director-General of FACS* (1989), 18 N.S.W.L.R. 481 at 488-89 (Eq. D.) [hereinafter *FACS*], on the common knowledge that in Australia many decisions are made by ministers themselves attaining recommendations that have been made by departmental officers. Accordingly it may be that one should not in Australia merely take it as read that bureaucrats make their own decisions in the name of the minister on very many occasions but actually look at what departmental practice is.

<sup>4</sup> *Miscellaneous Statute Law Amendment Act*, 1991, S.C. 1992, c. 1, s. 89.

<sup>5</sup> R.S.C. 1985, c. I-21.

(a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;

(b) the successors of that minister in the office;

(c) his or their deputy;

**(d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.**

## II. WHAT DID *CARLTONA* DECIDE?

In *Carltona*, the Commissioners of Works had sent the plaintiff a notice indicating that they were taking possession of its premises. This authority was allegedly based on subsection 51(1) of the Defence (General) Regulations under which a

competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm....may take possession of any land....<sup>6</sup>

While “competent authority” was defined to include the Commissioners of Works, the notice had been signed by a Mr. Morse for and on behalf of the Commissioners rather than by the Commissioners personally. Moreover, the Commissioners were a body that never met. The argument made on this point proceeded from the fact that the Commissioners had never brought their mind to bear on the legal questions posed by subsection 51(1) and, consequently, it had never been made to appear to the Commissioners that the requisition of property in this case was “necessary or expedient”. As a result, the requisition must be bad.

Lord Greene, M.R. did not regard this argument as having any substance:

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

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<sup>6</sup> *Carltona*, *supra* note 1 at 561.

to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.<sup>7</sup>

Mr. Morse was characterized as “a high official of the Ministry” and hence as acting in the capacity of “a competent authority” under the Regulations. Interestingly, Lord Greene cited no precedent for his conclusion on this point. And, if one may judge from the relative dearth of authority cited by Professor Willis<sup>8</sup> in his classic article on delegation with respect to this specific type of devolution of Ministerial authority, *Carltona* may indeed have been the first time this principle was so amply and well expressed and explained in terms of constitutional principles and administrative realities.

The Master of the Rolls then proceeded to consider the jurisdictional question of whether Mr. Morse failed to direct his mind to a matter which under the Regulations he was obligated so to do, and concluded that there had been no such failure in this case.

### III. WHAT DID *CARLTONA* NOT DECIDE?

There are a number of closely related situations which lie beyond the reach of the Court of Appeal’s decision in *Carltona* on who, if anyone, may act for a Minister.

#### A. *Who May Sign Notice of Decision Made Personally by Minister?*

First, there is the situation where the Minister does direct his or her mind personally to the exercise of the power or function in question but then the notice or letter to the citizen to that effect is signed by some Departmental official. This was the situation in the case of *Point of Ayr Collieries Ltd. v. Lloyd-George*<sup>9</sup> a judgment written again by Lord Greene and reported just a few pages before *Carltona*, in which it was “accepted that the Minister of Fuel and Power himself did direct his mind to the making of this Order” but the order itself was signed by the Secretary of the Department “in accordance with the Minister’s own decision”.<sup>10</sup>

#### B. *Is the Principle Based on Delegation?*

The *Carltona* case was not decided on the basis that Mr. Morse had been, expressly or impliedly, delegated the Commissioners’ powers. It is clear from later cases like *Metropolitan Borough of Lewisham v. Roberts*<sup>11</sup> and *Blackpool Corp. v. Locker*,<sup>12</sup> where the express delegation provisions of section 51(5) of the Defence (General) Regulations were in issue, that a rather different theory of authority devolution lies at the root of

<sup>7</sup> *Ibid.* at 563.

<sup>8</sup> J. Willis, “Delegatus Non Potest Delegare” (1943) 21 Can. Bar Rev. 257.

<sup>9</sup> [1943] 2 All E.R. 546 (C.A.) [hereinafter *Lloyd-George*].

<sup>10</sup> *Ibid.* at 547. On this issue of whether the person responsible for a document must personally sign it or may have an agent or delegate do so on his behalf, see also *London County Council v. Agricultural Food Products Ltd.*, [1955] 2 Q.B. 218 at 223-24 and 225-26 (C.A.); *R. v. Fredericton Housing Ltd.*, [1973] F.C. 196 at 214-18 (T.D.), aff’d (1974), 40 D.L.R. 392 (C.A.); *O’Reilly v. Commissioners of the State Bank of Victoria* (1983), 153 C.L.R. 1 at 10-11 [hereinafter *O’Reilly*].

<sup>11</sup> [1949] 2 K.B. 608, [1949] 1 All E.R. 815 (C.A.) [hereinafter *Roberts*].

<sup>12</sup> [1948] 1 K.B. 349, [1948] 1 All E.R. 85 (C.A.) [hereinafter *Locker*].

*Carltona*.<sup>13</sup> So, in *R. v. Skinner*,<sup>14</sup> Lord Widgery noted that the *Carltona* doctrine "is not strictly a matter of delegation".<sup>15</sup> On the other hand, though considered the seminal Canadian case on *Carltona*, the judgment of the Supreme Court of Canada in *R. v. Harrison*<sup>16</sup> does link, or confuse, the two principles by referring to "implied authority....to delegate" and to a "power to delegate [being] often implicit in a scheme empowering a Minister to act".<sup>17</sup> The Court's subsequent discussion of *Carltona*, however, appears to have provided the basis upon which *Harrison* has generally been applied in later cases although, as we shall see from the rigour with which some Canadian courts have applied the doctrine, there may still be some residual confusion in some judicial minds between the two.

The difference between the two principles does have practical ramifications. In the case of delegation of authority, where there has been conferred on the delegate the very authority reposed in the principal by the legislation, the delegate may exercise that authority independently of the principal and in his or her own name. However, as was noted in the *Carltona* decision:

The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department....Constitutionally, the decision of such an official is, of course, the decision of the minister.<sup>18</sup>

This was further explained in *Skinner* where it was pointed out that it must necessarily follow that we are not here concerned with a strict matter of delegation. Rather, "the official acts as the Minister himself and the official's decision is the Minister's decision."<sup>19</sup> It is understandable then, why the principle has sometimes been described as the "alter ego principle". It necessarily follows that an official ought not exercise the Minister's authority in his or her own name but only in the name of the Minister. The official should therefore sign any document evidencing the exercise of that authority "for and on behalf of the Minister".<sup>20</sup>

Under the *Interpretation Act* amendments, section 24(2)(d) provides that wherever an enactment uses "Minister" that word "includes" an appropriate official. Can it therefore be said that under this provision an appropriate official "acts as the Minister himself and the official's decision is the Minister's decision"? Does the official act simply as the "alter ego" of the Minister? For the official to do so would require that the Minister alone be identified with the exercise of the discretion in question. While this may have been an objective of the amendments, this characterization does not seem to

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<sup>13</sup> For a deeper discussion of the theory and basis for a doctrine, see D. Lanham, "Delegation and the Alter Ego Theory" 100 L.Q. Rev. 587; W. Atkinson & M.C. Lévesque, "Délégation de pouvoirs et délégation de signature: l'exercice par des fonctionnaires des pouvoirs confiés à leur ministre" (1982) 42 R. du B. 327.

<sup>14</sup> [1968] 2 Q.B. 700, [1968] 3 All E.R. 124 [hereinafter *Skinner*].

<sup>15</sup> *Ibid.* at 707.

<sup>16</sup> Lanham, *supra* note 13.

<sup>17</sup> *R. v. Harrison*, [1977] 1 S.C.R. 238 at 245, 66 D.L.R. (3d) 660 at 665 [hereinafter *Harrison* cited to S.C.R.].

<sup>18</sup> *Carltona*, *supra* note 1 at 563.

<sup>19</sup> *Skinner*, *supra* note 14 at 707.

<sup>20</sup> *FACS*, *supra* note 3 at 489.

fit exactly the language of section 24(2)(d) which does not provide for an appropriate official to act for a Minister so much as impose a construction or interpretation upon a word in the same way as the definition provisions of any legislation does.

The words in question are construed by this legislation to "include...." an appropriate official. As a result, those words then include both the Minister and an appropriate official; that official, acting on the basis of his own office or position, can then exercise the Minister's authority. In *R. v. Huculak*,<sup>21</sup> it was held that the authority of the Clerk of the Privy Council to certify copies of orders in council could be exercised by the Assistant Clerk of the Privy Council acting as such on the basis of the predecessor of section 24(4) of the *Interpretation Act* which provided that "words....empowering any other public officer or functionary to do any act or thing....include his....deputy". For purposes of exercising the powers of the Clerk, the Assistant Clerk was not transformed by this definition into the Clerk; the definition simply extended the meaning of Clerk to encompass the Assistant Clerk. On the basis of this reasoning, an appropriate official exercising a Minister's power on the basis of section 24(2)(d) would not be acting "as the Minister himself" or for and on behalf of the Minister, but rather as one who in consequence of this provision may under his own name and title exercise the Minister's authority.

This conclusion is given further support by the context in which paragraph (d) finds itself. Paragraphs (a) and (b) recognize that, in the circumstances there described, other Ministers may exercise the powers of the Minister in question. On the basis of this statutory language, would not, for example, the Minister acting for another exercise the latter's power in the capacity of acting Minister rather than for and on behalf of the other? Moreover, because a successor Minister is filling an office that has already been vacated, that Minister is legally unable to exercise such a power for and on behalf of the previous Minister.

### C. Non-Discretionary Responsibilities of Minister

Thirdly, like delegation, the *Carltona* doctrine applies to discretionary responsibilities. So, in the *Chemicals Reference*<sup>22</sup> Hudson J. quoted with approval the following from the definition of "delegatus non potest delegare" in Broom's *LEGAL MAXIMS*:

This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion.

It follows that the limits imposed by *Carltona* and the *delegatus* principle have no application to the situation where the responsibility in question is non-discretionary in nature. Therefore, in *Greenfield v. Canadian Order of Foresters*,<sup>23</sup> contrary to the

<sup>21</sup> (1969), 69 W.W.R.(N.S.) 238 (Sask. C.A.). See also *R. v. Jones*, (1961), 35 W.W.R.(N.S.) 278 (B.C.C.A.); *Re Chrétien*, [1962] C.S. 116.

<sup>22</sup> [1943] S.C.R. 1 at 33-34.

<sup>23</sup> (1919), 45 O.L.R. 136 at 141-42 (C.A.). See also *Walsh v. Southworth*, (1851), 155 E.R. 492 at 495 (Ex.D.); *L.C.C. v. Hobbs* (1896), 75 L.T. 687 (K.B.D.); *Horder v. Scott*, (1880), 5 Q.B.D. 552; G.H.L. Fridman, *The Law of Agency*, 5th ed. (London: Butterworths, 1983) at 145.

prohibition against an agent appointing another to exercise the authority in question, a sub-agent was found properly appointed to perform non-discretionary tasks.

Under section 24(2) of the *Interpretation Act Amendments* the officers and officials identified in paragraphs (a) to (d) are to be included, *inter alia*, in "words directing or empowering a minister of the Crown...." This language is consistent with the view that the *Carltona* doctrine only applies to discretionary authority or powers. However, later in that provision is to be found the far more sweeping language, "[w]ords....otherwise applying to that minister as the holder of the office", which is not at all confined to Ministers in the exercise of a discretion. Contrast the English version of this provision with the simpler and more straightforward French version whereby "[L]a mention d'un ministre par son titre ou dans le cadre de ses attributions....vaut mention...." the persons listed in paragraphs (a) to (d).

Both language versions of section 24(2) make it clear that the provision is not limited to ministers in the exercise of discretionary authority. To that extent, therefore, this statutory provision is broader in scope than the *Carltona* doctrine.

#### D. *Distinction Between Fact-finding and Exercising a Power*

A series of recent cases has distinguished *Carltona* on the basis that it is limited to where the exercise of a power or the performance of a duty by a Minister was involved and hence does not apply where the legislation makes only a bare reference to the fact of a Minister's opinion or belief unaccompanied by any language of power or duty.<sup>24</sup> The latter is to be contrasted with statutory language of opinion or belief coupled with a power or duty,<sup>25</sup> which simply underscores the discretionary nature of the Minister's responsibility.

Section 244 of the *Income Tax Act*<sup>26</sup> contains no reference to a power or duty. Rather, on the basis of this provision by which an information may be laid

within one year from the day on which evidence, sufficient in the opinion of the Minister to justify a prosecution....came to his knowledge,

"[t]he Minister is not taking a decision and he is not exercising a discretionary power. So far as he is concerned he is testifying as to a fact".<sup>27</sup> Therefore, it was concluded that *Carltona* has no application and the knowledge of the fact must be that of the Minister personally.

<sup>24</sup> *Re P.S. & E. Contractors Ltd. v. R.* (1988), [1989] 46 C.C.C. (3d) 64 (Sask. C.A.); *R. v. Tamco Ltd.* (1988), [1989] 46 C.C.C. (3d) 545 (Ont. Prov. Ct.); *Fee v. Bradshaw*, [1982] 1 S.C.R. 608 at 617 [hereinafter *Fee*]; *Re Medicine Hat Greenhouses Ltd. v. German (No. 3)* (1978), [1979] 45 C.C.C. (2d) 27 at 36 (Alta C.A.); *Procureur Général du Canada v. Marcotte*, [1975] Que. A.C. 570.

<sup>25</sup> See e.g. statutory provisions in *Ahmad v. Public Service Commission*, [1974] 2 F.C. 644 (C.A.) [hereinafter *Ahmad*]; *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375, 81 D.L.R. (3d) 687 [hereinafter *Ramawad* cited to S.C.R.]; *Re Golden Chemical Products*, [1976] Ch. 300, [1976] 2 All E.R. 543 [hereinafter *Golden Chemical* to Ch.]; *Mancuso Estate v. R.*, [1980] 1 F.C. 269 (T.D.) [hereinafter *Mancuso* cited to F.C.], aff'd [1982] 1 F.C. 259, (1981) 35 N.R. 344 (C.A.); *Pulp, Paper and Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)*, (1991), [1992] 50 F.T.R. 43.

<sup>26</sup> R.S.C. 1985, c. 1 (5th Supp.),

<sup>27</sup> *Fee*, *supra* note 24 at 617.



It is certainly true that the *Carltona* decision and those that have followed it have generally been concerned with the exercise of a power or discretion. But if no such discretionary exercise is found to be in issue in these income tax cases, then it must follow that the act in question is non-discretionary in nature. If so, then the principle of delegation discussed above should apply with the result that this non-discretionary act ought to be even more eligible for escaping the application of the *delegatus non potest delegare* principle.

But is it accurate to conclude that under section 244 the Minister “is not taking a decision”? While section 244 may not represent the exercise of a power, it does require a decision to be made as to whether and when the “evidence [is] sufficient....to justify a prosecution”. There is no doubt that that “decision”, when acted upon by either laying or refusing to lay an information has legal consequences for the taxpayer. Moreover, such a “decision” implies the exercise of judgment and hence discretion. Surely then the situation should have been considered as analogous to the exercise of a power and therefore, within the parameters of *Carltona*.

Perhaps, the courts in question considered the legal consequences for the taxpayer to be so serious that Parliament must have intended that the Minister would give personal attention to the matter. As will be seen below, this has always been an accepted basis for excluding the application of the *Carltona* principle. But that was not the reason given by the courts for deciding these cases as they did.

Finally, and perhaps most importantly of all, these decisions completely ignore the constitutional principle on which Lord Greene relied in disposing of the appeal in *Carltona*. Recalling the words of the Master of the Rolls in *Lloyd-George*:

All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament.<sup>28</sup>

What is relied upon here is the constitutional principle of a Minister’s individual responsibility which, in turn, is an essential element of responsible government. The latter is described by Sir Ivor Jennings as follows:

The peculiar contribution of the British Constitution to political science is not so much representative government, which is an obvious solution, as responsible government. Added to representative government, it means that government is carried on by persons who are responsible to the representative House of the legislature, the House of Commons. Responsibility is secured by placing control of administration in the hands of politicians who are either members of or who are represented by political subordinates in the House of Commons....

The responsibility of ministers to the House of Commons is no fiction, though it is not so simple as it sounds. All decisions of any consequence are taken by ministers, either as such or as members of the Cabinet. All decisions taken by civil servants are taken on behalf of ministers and under their control. If the minister chooses, as in the large Departments inevitably he must, to leave decisions to civil servants, then he must take

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<sup>28</sup> *Lloyd-George*, *supra* note 9 at 547.

the political consequences of any defect of administration, any injustice to an individual, or any policy disapproved by the House of Commons.<sup>29</sup>

In recognition of this principle of responsible government, any statute intended to be administered by a department usually confers the various responsibilities thereunder on the departmental Minister. In doing so, Parliament ensures that that Minister remains responsible to Parliament for the administration of that statute, whether the act of administration is one personally performed by the Minister or is one taken on his or her behalf by public servants within the Minister's department. It is difficult to resist the conclusion that the courts deciding the cases discussed here which refused to apply *Carltona* may not have had their attention drawn to these rather fundamental principles.

Finally, there is the question of whether subsection 24(2) of the *Interpretation Act*, in either its amended or unamended state, has any application. The answer depends on the opening words:

Words directing or empowering a minister of the Crown to do an act or thing....or otherwise applying to that minister as the holder of the office....

Even if under the *Income Tax Act* provisions in question, the Minister "is not taking a decision and he is not exercising a discretionary power", they surely must "otherwise apply to the minister as the holder of the office".

#### IV. HOW HAS *CARLTONA* BEEN APPLIED: ONLY TO MINISTERS?

*Carltona* occasionally has been applied to non-Ministers. That case itself involved Commissioners of Works who, though Ministers of the Crown, were not exercising their authority as such under the provision of the Defence (General) Regulations in question. The principle has been applied to the Treasury Board,<sup>30</sup> to the Public Service Commission,<sup>31</sup> to Commissioners of Customs and Excise,<sup>32</sup> to a deputy minister,<sup>33</sup> to the Commissioner of Taxation<sup>34</sup> and even to a University Senate.<sup>35</sup>

To the extent that the underlying theory that supports *Carltona* is reflective of the constitutional principles of ministerial responsibility, its application to these non-Ministerial officials and bodies does not make much sense. So, whereas there is a Minister who, directly or indirectly, is responsible to Parliament in the case of the Treasury Board, the Commissioners of Customs and Excise and deputy ministers, it is much more difficult to accept this conclusion in the case of a body like the Public Service Commission that is so independent of the Government and Ministers that its members are only removable on the joint address of both Houses of Parliament. It is therefore not

<sup>29</sup> I. Jennings, *The British Constitution*, 5th ed. (Cambridge: University Press, 1968) at 148-49.

<sup>30</sup> Mancuso, *supra* note 25.

<sup>31</sup> *Brooker v. A.G. (Canada)*, [1973] F.C. 327 at 332 (C.A.).

<sup>32</sup> *Commissioners of Customs and Excise v. Cure & Deeley Ltd.*, [1962] 1 Q.B. 340, [1961] 3 All E.R. 641 [hereinafter *Cure & Deeley*].

<sup>33</sup> *Ahmad*, *supra* note 25; but see *Canadian Bronze Co. v. Deputy Minister of National Revenue* (1985), 57 N.R. 338 (Fed. C.A.) [hereinafter *Canadian Bronze*].

<sup>34</sup> *O'Reilly*, *supra* note 10.

<sup>35</sup> *Ex parte Forster: Re University of Sydney* (1963), 63 S.R. (N.S.W.) 723 at 733 (C.A.).

surprising that *Carltona* was not applied to the Commissioner of Police for the Metropolis,<sup>36</sup> or that the Manitoba Court of Appeal refused to follow the Queen's Bench which had employed the principle in favour of a school principal.<sup>37</sup>

Herein lies one reason why the amendments to subsection 24(2) of the *Interpretation Act* cannot be considered simply a codification of *Carltona*. That provision applies only to "a minister of the Crown".

#### V. EFFECT OF NATURE OF MINISTER'S POWER

One of the areas of greatest uncertainty in the application of *Carltona* relates to the nature of the Minister's power in issue. On the one hand, Brightman J. concluded that case law did not support the position that "potentially damaging" powers must be exercised personally by a Minister.<sup>38</sup> On the other hand, it has been held that case law does not support the devolution of Ministerial authority "when the power in question is an important one".<sup>39</sup>

This rather vague "important question" test has been applied to the following powers. In the early case of *R. v. Chiswick Police Station Superintendent*,<sup>40</sup> where the power in question was to detain a person subject to a deportation order, Pickford L.J. concluded that the Secretary of State could not give a general order to detain on the basis of which officials would be authorized to detain specific individuals.

....it is a question of the liberty of a person living under the protection of our laws; and when power is given to a dignified high officer to restrict that person's liberty, I am inclined to think—it is not necessary to decide it—that it must be done by that high officer himself; that he cannot make a general order without considering the circumstances of each case, but that he must examine and see whether the particular person ought to be detained in custody.<sup>41</sup>

To the same effect are decisions in which the authority in question was a warrant ordering the return of a fugitive offender<sup>42</sup> and where the power in question authorized a ward of the state to be dealt with as an intellectually handicapped person.<sup>43</sup> In addition, there was the *obiter dictum* that the principle would not apply to detention orders.<sup>44</sup> However, a recent House of Lords decision has held that the Minister's power to deport under the *Immigration Act, 1971* was exercisable by immigration officers.<sup>45</sup>

<sup>36</sup> *Nelms v. Roe*, [1969] 3 All E.R. 1379 (Q.B.).

<sup>37</sup> *Snow Lake School District 2309 v. Snow Lake Association of Teachers*, [1987] 4 W.W.R. 763 (Man. C.A.) [hereinafter *Snow Lake*].

<sup>38</sup> *Golden Chemical*, *supra* note 25 at 310.

<sup>39</sup> *R. v. Horne & Pitfield Foods Ltd.*, [1982] 5 W.W.R. 162 at 165, 20 Alta. L.R. (2d) 289 at 292 (C.A.) [hereinafter *Horne & Pitfield*], *aff'd* [1985] 17 D.L.R. (4th) 191 (S.C.C.).

<sup>40</sup> *Chiswick*, *supra* note 1.

<sup>41</sup> *Ibid.* at 585-86.

<sup>42</sup> *R. v. Governor of Brixton Prison Ex parte Enahoro*, [1963] 2 Q.B. 455 at 466, [1963] 2 All E.R. 477.

<sup>43</sup> *FACS*, *supra* note 3.

<sup>44</sup> *Lloyd-George*, *supra* note 9 at 548.

<sup>45</sup> *R. v. Secretary of State Ex parte Oladehinde*, [1990] 2 All E.R. 367 (H.L.) [hereinafter *Oladehinde*].

There have been other cases as well where the powers in question did not directly affect the physical liberty of the individual and yet where *Carltona* was not applied. In one matter, the Australian High Court<sup>46</sup> concluded that the power of a Minister to establish a Land Trust for the benefit of Aborigines had to be exercised personally. The "importance" of the power was evidenced by the fact that the Minister's function is central to the scheme; that its exercise has important consequences for Aborigines who will benefit from the Trust and for others who may suffer a detriment in consequence; that the preliminary procedures require an inquiry and a favourable report by a superior court judge; and that the Minister may act only if "the Minister is satisfied". In a second case, where procedural fairness was found to be required before the Minister exercised the power in question and the *Act* authorized the Lieutenant Governor in Council to establish a board to provide the hearing but no appointments to the board had ever been made, the Saskatchewan Court of Appeal concluded that the required hearing was so obviously a very important matter that the Minister had to conduct it personally.<sup>47</sup> Finally, there was the decision of the Federal Court-Trial Division that the power of the Minister to exempt information from disclosure under the *Access to Information Act* had to be "exercised by him personally, or at least to be closely controlled by him".<sup>48</sup> The Court applied the third principle of Professor Garant<sup>49</sup> that *Carltona* does not apply if the legislature intended to confer "un large pouvoir discrétionnaire à être exercé personnellement par le ministre".

In *Horne & Pitfield*, the power in question that was held not to be subject to the *Carltona* principle was the requirement under the *Lord's Day Act* that the Attorney General consent to prosecution. The Alberta Court of Appeal referred to the following factors in support of its conclusion: the fiat power of the Attorney General in this *Act* was intended to prevent abusive and vexatious prosecutions; that power is "so personal and discretionary" and is quasi-judicial in nature; and the power "is an important one".<sup>50</sup>

In *R. v. Sunila and Soleyman*,<sup>51</sup> the *Criminal Code* under which the prosecution in issue was launched required the consent of the Attorney General. The evidence was to the effect that the Assistant Deputy Attorney General of Canada responsible for criminal litigation within the Department of Justice had signed the consent to prosecution but only after the Attorney General had personally confirmed his consent. Notwithstanding this subsequently tendered evidence, the Crown on appeal argued on the basis of the *Carltona* doctrine that the original consent signed by the Assistant Deputy Attorney General was sufficient. In order to overcome the *Horne & Pitfield* case, Hart J.A. concluded on this point that the Supreme Court of Canada

has recognized a distinction between the type of consent of the Attorney General or his deputy which requires a judicial decision and the type of consent of the Attorney

<sup>46</sup> *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* (1986), 162 C.L.R. 24.

<sup>47</sup> *Kennibar Resources Ltd. v. Saskatchewan (Minister of Energy and Mines)* (1991), 80 D.L.R. (4th) 766, 88 Sask. R. 35 (C.A.).

<sup>48</sup> *Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment)*, [1987] 1 F.C. 610 at 616 (T.D.) [hereinafter *Société de transport*].

<sup>49</sup> P. Garant, *Droit Administratif*, vol. 1, 3d ed. (Cowansville, Québec: Yvon Blais, 1991) at 331.

<sup>50</sup> *Horne & Pitfield*, *supra* note 39.

<sup>51</sup> (1987), 78 N.S.R. (2d) 24 (C.A.) [hereinafter *Sunila*].

General demanded by the *Criminal Code* and other statutes which is administrative in nature and may be delegated to officials.

Under the *Lord's Day Act*, the consent of the Attorney General was to some extent political as to whether the *Act* would be enforced in any particular province at any particular time whereas the consent in the *LeMay* and *Harrison* cases under the *Criminal Code* would appear to be administrative and part of the overall management of the judicial system. The consent in the case at Bar, in my opinion, does not fall in the administrative category but rests in the political judgment of the Minister....<sup>52</sup>

because the international relations of Canada, and possibly international agreements, are involved in an offence like this committed on the high seas.

In addition, one case refused to apply the principle to the more legislative function of approving by-laws.<sup>53</sup> In an earlier case, Denning L.J. expressed the view that the "administrative, as distinct from legislative, functions" of a Minister would be exercisable by officials.<sup>54</sup> Then there are the cases that have applied the dichotomy between quasi-judicial and administrative in holding that a quasi-judicial power is not capable of taking advantage of the *Carltona* principle. The distinction was expressly relied on in two contrasting decisions of the Federal Court of Appeal. On the one hand, in *Ahmad*,<sup>55</sup> the recommendation of a deputy minister to release an employee from employment was found to be preliminary and nondispositive only and hence administrative in nature. Consequently, a subordinate in the deputy minister's department could perform the function. On the other hand, where the power in question was a statutory appeal to the Deputy Minister of Customs and Excise, it was characterized as quasi-judicial in nature for purposes of the analysis leading to the conclusion that *Carltona* did not apply.<sup>56</sup>

Moreover, *Carltona* was held available where the authority in question was deciding whether there was sufficient evidence to proceed with a prosecution under the *Income Tax Act*.<sup>57</sup> Somewhat similar was the *Golden Chemical* case,<sup>58</sup> where the Board of Trade had the statutory responsibility to decide whether "it is expedient in the public interest" that a company should be wound up for purposes of a petition being made by the Board to the court to that end. Brightman J. acknowledged "that the power given to the Secretary of State by section 35 is of a most formidable nature, which may cause serious damage to the reputation and financial stability of the company."<sup>59</sup> However, he could find nothing in the case law that would characterize a power which "is so potentially damaging" as one which a Minister must exercise personally. On the other hand, "there are important cases in which the Minister will exercise a statutory discretion personally, not because it is a legal necessity but because it is a political necessity."<sup>60</sup>

Can one find any congruence in the reasoning, if not conclusions, of *Horne &*

<sup>52</sup> *Sunila*, *supra* note 51 at 37.

<sup>53</sup> *Horton v. St. Thomas Elgin General Hospital*, [1983] 39 O.R. (2d) 247, (1982) 140 D.L.R. (3d) 274 (Ont. H.C.) [hereinafter *Horton*].

<sup>54</sup> *Roberts*, *supra* note 11 at 621.

<sup>55</sup> *Ahmad*, *supra* note 25.

<sup>56</sup> *Canadian Bronze*, *supra* note 33.

<sup>57</sup> *Pica v. R.* (1985), 9 Admin. L.R. 303 (Ont. H.C.) [hereinafter *Pica*].

<sup>58</sup> *Golden Chemical*, *supra* note 25 at 303.

<sup>59</sup> *Ibid.* at 310.

<sup>60</sup> *Ibid.*

*Pitfield, Sunila and Golden Chemical?* In all of these cases, the liability of the subject has not yet been reached. All that an exercise of the powers in question accomplishes is to set a prosecution, winding-up proceedings or some other judicial process<sup>61</sup> in motion. Consequently, the powers relate only to a preliminary stage of the process, that is, for example, one where the principles of fairness or natural justice tend to operate, if at all, at a rather modest level.<sup>62</sup> Moreover, is it accurate to characterize the responsibility of an Attorney General for consenting to prosecution as "political" in nature? It is debatable whether this responsibility is, strictly speaking, "political" in character. Is it likely that such a "political" responsibility would be conferred expressly on an official, even high-ranking ones like the Director of Public Prosecutions or the Director of the Serious Fraud Office, as is the case in Great Britain?<sup>63</sup>

Other examples of a Minister's powers that, on the basis of this functional quasi-judicial/administrative dichotomy, would have been classified as administrative and that were, in any event and without reference to this distinction, held subject to *Carltona* include the appointment of a tribunal,<sup>64</sup> the designation of "qualified technicians" under the breathalyzer provisions of the *Criminal Code*,<sup>65</sup> approval of breath test equipment,<sup>66</sup> entering into contracts on behalf of the Crown<sup>67</sup> and informing a refugee claimant of the Minister's determination.<sup>68</sup> In any event, it may well be asked how useful the quasi-judicial test alone really is when *Carltona* has been applied to the power to make deportation orders<sup>69</sup> and to renew a grant.<sup>70</sup>

Moreover, it is difficult to deny that the power to expropriate property is both an important and a highly discretionary one. And yet, *Carltona* has been applied to the power to expropriate and requisition property,<sup>71</sup> to destroy plants or other matter that has been the subject of confiscation by an inspector<sup>72</sup> and to grant subdivision and development permits.<sup>73</sup>

<sup>61</sup> So, in *R. v. Bujold et Goyette* (1987), 4 Q.A.C. 148 (C.A.), *Carltona* applied to enable an official to sign an application for wire-tap authorization; and in *R. v. Harrison*, *supra* note 17, in issue was the authority to instruct counsel to appeal.

<sup>62</sup> See e.g. *Wiseman v. Borneman*, [1971] A.C. 297 (H.L.).

<sup>63</sup> See paras. 639 and 640 of vol. 11(1) of *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1990). See also J.L.I. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 22-25.

<sup>64</sup> *Woollett v. Minister of Agriculture and Fisheries*, [1955] 1 Q.B. 103, [1955] 3 All E.R. 529 (C.A.) [hereinafter *Woollett*]; *Re Board of Education for London and Fenn* (1970), 17 D.L.R. (3d) 129 (Ont. H.C.) [hereinafter *Fenn*].

<sup>65</sup> *R. v. Cleveland* (1986), 49 Sask. R. 96 (Q.B.).

<sup>66</sup> *Skinner*, *supra* note 14.

<sup>67</sup> *R. v. Transworld Shipping*, [1976] 1 F.C. 159 (C.A.).

<sup>68</sup> *Re Wieckowska and Lanthier* (1979), 108 D.L.R. (3d) 492 (F.C.T.D.).

<sup>69</sup> *Oladehinde*, *supra* note 45.

<sup>70</sup> *École commerciale Bluteau Inc. v. Morin*, [1977] C.S. 1061. See also *Mancuso*, *supra* note 25 at 291.

<sup>71</sup> *Piccirillo v. British Columbia (Minister of Forests and Lands)*, (1988), 47 D.L.R. (4th) 513 (B.C.S.C.); *Carltona*, *supra* note 1; *Roberts*, *supra* note 11; *Locker*, *supra* note 12.

<sup>72</sup> *Bertram S. Miller Ltd. v. R.* (1986), 31 D.L.R. (4th) 210, [1986] 3 F.C. 291 (Fed. C.A.).

<sup>73</sup> *Re Butler and Land Use Commission* (1977), 78 D.L.R. (3rd) 164 (P.E.I.S.C.) [hereinafter *Butler*].

### A. Application of Interpretation Act Amendments

It is evident from the foregoing that there remains great uncertainty and confusion concerning which of a Minister's powers may lay claim to the application of the *Carltona* principle. Resorting to functional classification, particularly to the administrative/quasi-judicial distinction, does not seem to be very helpful except perhaps as a first step to providing a more rational explanation, rather than one based simply on an inexplicable label, for excluding the application of *Carltona*. By inserting the phrase "regardless of whether the act or thing is administrative, legislative or judicial" into the amended subsection 24(2) of the *Interpretation Act*, Parliament must have intended to limit or eliminate the emphasis that is sometimes placed on the nature of the Minister's power.

This amendment to subsection 24(2) still leaves the courts with the same task, this time based on subsection 3(1) of the *Act*, of determining whether, in the context of the legislation considered as a whole, Parliament must have intended the power in question to be exercised personally by the Minister. For example, did it make sense to refuse to apply *Carltona* to a power for no other reason than that it is "quasi-judicial" in nature whereas a power that was far more Draconian in character but was traditionally characterized as "administrative", such as the expropriation or requisition of property, was not subject to this limitation? This is not to say that in assessing whether subsection 24(2) applies, courts will not have regard to such labels which do serve the initially useful purpose of helping to focus attention on such matters as whether an exercise of the power in question affects legal rights and, if so, to what extent; whether that exercise has a more general legislative effect or is only adjudicative or party-specific in its impact; or whether that exercise involves political or policy judgment. *Horne & Pitfield* and *Golden Chemical* offer a couple of helpful illustrations of this approach.

Nevertheless, the truly legislative function of making regulations is expressly excepted by subsection 24(3) from the application of paragraphs (c) and (d) of subsection 24(2). It is doubtful, however, whether the courts would look favourably upon an argument that sought to draw the inference that other so-called "legislative" powers must therefore always be subject to the operation of these two paragraphs. In other words, this factor alone will not likely be allowed to function alone.

## VI. WHO MAY ACT FOR THE MINISTER?

By way of introduction, practical considerations and constitutional principle, as Lord Greene noted, lead to the conclusion that the powers and duties of a Minister may be "normally exercised under the authority of the ministers by **responsible officials of the department**".<sup>74</sup> In *Golden Chemical*,<sup>75</sup> Brightman J. referred to "appropriate officials". This theme was repeated in a modified way by the Supreme Court of Canada in *Harrison*:

It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister

<sup>74</sup> *Carltona*, *supra* note 1 at 563 (emphasis added). See also Mahoney J. in *Canadian Bronze*, *supra* note 33 at 350.

<sup>75</sup> *Golden Products*, *supra* note 25 at 306. In proposition two, which with the other four appears to be referred to with approval by Brightman J.

is accountable to the Legislature, will act on behalf of the Minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities.<sup>76</sup>

Who clearly cannot act for the Minister under the *Carltona* principle? Firstly, the doctrine does not permit the powers of one Minister to be exercised by another.<sup>77</sup>

Secondly, in Canada, at least until recently, the principle probably did not permit a Minister of State to exercise the statutory powers of the Minister he or she was appointed to "assist".<sup>78</sup> While a Minister of State appointed to "assist" another Minister may appear to be subordinate to the latter, he or she was nevertheless a full member of Cabinet and hence to that extent was in a horizontal relationship with that other Minister. This may explain why express delegation authority in favour of Ministers of State was considered necessary in a number of recent federal enactments.<sup>79</sup> On the other hand, with the appointment on November 4, 1993 of federal Ministers of State (designated as Secretaries of State) who do not sit in Cabinet, their present status in Canada now more nearly resembles the situation in Britain where their clearly junior and vertical relationship to their senior Minister has led the courts to apply *Carltona* to Ministers of State.<sup>80</sup>

Thirdly, the officials in one department cannot act for and on behalf of the Minister presiding over another department.<sup>81</sup> It may then be asked whether a Minister who has two portfolios and therefore, presides over two distinct departments, may have the officials of one department exercise powers which relate to the Minister's other portfolio. Constitutional principle strongly suggests a negative answer to this question. This is confirmed in a case<sup>82</sup> where a person was at one and the same time an official in a department and the secretary of a tribunal. The reasons of the Court of Appeal took great pains to determine the capacity in which this person performed the act in question, because as secretary of the tribunal he could not act on behalf of the Minister. It is doubtful that the *obiter dictum* of Nicholson C.J. in *Butler*,<sup>83</sup> which suggested the Minister had the authority to delegate to persons within his department "or under his control", provides sufficient support for the conclusion that members of the political staff of the Minister, who as such are neither public servants nor employed within the Minister's department, may exercise the Minister's powers for and on his or her behalf.

Who then within a department may exercise the Minister's powers on the basis of *Carltona*? As noted above, the cases have placed general limits on which officials may act. So, according to *Carltona*, the officials have to be "responsible"; according to

<sup>76</sup> *R. v. Harrison*, *supra* note 17 at 245-46.

<sup>77</sup> *Jackson, Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558 at 565 (C.A.); *H. Lavender & Son Ltd. v. Minister of Housing and Local Government*, [1970] 3 All E.R. 871 (Q.B.D.). Compare *Interpretation Act* at s. 24(2)(a).

<sup>78</sup> *Ministries and Ministers of State Act*, R.S.C. 1985, c. M-8; see especially ss. 9, 11(1) and (2).

<sup>79</sup> See e.g. *Bank Act*, S.C. 1991, c. 46, s. 560; *Insurance Companies Act*, S.C. 1991, c. 47, s. 704; *Cooperative Credit Associations Act*, S.C. 1991, c. 48, s. 464; *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 532, all of which authorize the Minister of Finance to "delegate any of the Minister's powers, duties and functions under this Act to any Minister of State appointed....to assist the Minister" (emphasis added).

<sup>80</sup> *Doody v. Secretary of State for the Home Department*, [1993] 3 W.L.R. 154 at 174, [1993] 3 All E.R. 92 at 111-12 (H.L.), adopting the reasons of Staughton L.J. in [1993] Q.B. 157 at 194-96, [1992] 3 W.L.R. 956 at 984-87 (C.A.).

<sup>81</sup> *Mancuso Estate*, *supra* note 25.

<sup>82</sup> *Woollett*, *supra* note 64.

<sup>83</sup> *Butler*, *supra* note 73 at 170.



*Golden Chemical*, "appropriate officials"; and according to *Harrison*, "departmental officials of experience and competence".

The *Harrison* case appears to offer a practical and authoritative example of how the principles are meant to function. The power in question was that of the "Attorney General or counsel instructed by him" to "appeal....against a judgment or verdict of acquittal".<sup>84</sup> The notice of appeal had been signed by S. whose authority was allegedly derived from a letter on "Attorney General of British Columbia" letterhead signed by M., Director, Criminal Law. Dickson J. drew a number of conclusions. First, "it is reasonable to assume the 'Director, Criminal Law' of the Province would have [the] authority to instruct" counsel in accordance with paragraph 605(1)(a) of the *Code*. Secondly, while there was "no evidence that the Attorney General of British Columbia personally instructed" M., this did not derogate from the principle that the duties imposed on the Attorney General "are to be exercised....by responsible officials" of his or her department.<sup>85</sup>

Consequently, in the same way that an agency relationship based on usual or ostensible authority does not require written or oral evidence that the principal expressly conferred authority on an agent, so here too the duties, title and position of an official within the Minister's department clothe that official with certain responsibilities in respect of which that official is ostensibly authorized to act for and on behalf of the Attorney General. The facts in *Harrison* support this conclusion. As noted above, there was no evidence that the Attorney General had selected M. to instruct counsel; rather, the Court concluded that "it is reasonable to assume the 'Director, Criminal Law' of the Province would have that authority to instruct". Therefore, unlike delegation of authority where evidence is necessary to show that the power in question had been delegated to the person purporting to exercise that power, the *Carltona* principle operates without the need for documentary or other evidentiary links in the chain of authority between the Minister and the departmental official acting for and on his or her behalf. As the matter was described in three of the propositions submitted by counsel for the Secretary of State, and apparently adopted by the Court, in the *Golden Chemical* case:

(2) As a general rule it is for the Minister or his appropriate officials to decide which of his officers shall exercise a particular power. (3) Unless the level at which the power is to be exercised appears from the statute, it is not for the courts to examine the level or to inquire whether a particular official entrusted with the power is the appropriate person to exercise that power. (4) As a general rule officers of a government department exercise powers incidental and appropriate to their functions. In the absence of a statutory requirement it is neither necessary nor usual for specific authority to be given orally or in writing in relation to a specific power.<sup>86</sup>

Where the power is a serious or important one, greater care in choosing who in the department may act for the Minister may be required. So, where the power was to deport, the official had to be one "of suitable seniority in the Home Office".<sup>87</sup>

<sup>84</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 605(1)(a).

<sup>85</sup> *Harrison*, *supra* note 17, applying *R. v. Wiens* (1970), 74 W.W.R. 639 at 640 (Alta. C.A.), which provide an excellent example of the analysis which the application of *Carltona* to this particular issue may require.

<sup>86</sup> *Golden Chemical*, *supra* note 25 at 306. See also *Roberts*, *supra* note 11 at 618-19.

<sup>87</sup> *Oladehinde*, *supra* note 45 at 374.

What then is one to make of the more general principle stated by Dickson J. that "[I]t is to be supposed that the Minister will select deputies and departmental officials of experience and competence"?<sup>88</sup> First of all, this statement is clearly inconsistent with the actual holding in *Harrison* that there was no evidence that the Attorney General personally instructed M. to act on his behalf. Secondly, to the extent that it suggests that the Minister must personally designate those officials who may act, it does not reflect the state of English law as summarized in the preceding paragraph by Brightman J. in *Golden Chemical*.

Thirdly, at least insofar as departments of the Government of Canada are concerned, this statement seems inconsistent with the legal regime governing the federal public service. While the Minister may be able to reorganize and restructure the department over which he or she presides, matters concerning the quantum of personnel resources for that department, classifying and setting terms and conditions for departmental positions and employing individuals to fill those positions are in the exclusive preserve of the Treasury Board and the Public Service Commission. It is therefore difficult, at least in the case of the federal government, to credit the validity of the supposition made by Dickson J. in the context of the *Carltona* principle that the Minister will personally select departmental officials who will perform specific Ministerial powers, duties and functions.

The reliance placed by *Harrison* on both *Carltona* and implicit delegation to reach the conclusion that S. had been lawfully instructed to file a notice of appeal may have led Dickson J. to confuse the two. Unfortunately, *Harrison* is not the only Canadian case to view *Carltona* through a delegation lens. In a recent Ontario decision,<sup>89</sup> the willingness of Smith J. to apply *Carltona* was translated into

the underlying assumption by Lord Greene....that the Minister will *permit* the responsible officials of the department to relieve him of certain duties. The court cannot be satisfied that the Minister has fulfilled his responsibility in any given case unless there is evidence that he has permitted others to act on his behalf in the matter under review or that he had, as a very strict minimum requirement, applied his mind to the question by laying down a predetermined procedure within his department.<sup>90</sup>

It is difficult to know whether this reasoning is based on judicial confusion of principles, inadequate submissions by counsel, or judicial ignorance of the fundamental principles of constitutional and administrative law, including the functioning of modern Parliamentary government.

*Horton* referred approvingly to an earlier Ontario decision, *Fenn*,<sup>91</sup> which was decided before the approval of the *Carltona* rationale by *Harrison*. The issue was whether the Minister's authority to grant a Board of Reference had been properly exercised when made by the deputy minister. As an alternative to the application of section 27(m) of the Ontario *Interpretation Act*,<sup>92</sup> Osler J., who made no reference to the *Carltona* case and its progeny, appeared to rely on implied delegation. This follows from

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<sup>88</sup> *Harrison*, *supra* note 17 at 245.

<sup>89</sup> *Horton*, *supra* note 53.

<sup>90</sup> *Ibid.* at 276.

<sup>91</sup> *Fenn*, *supra* note 64.

<sup>92</sup> R.S.O. 1960, c. 191.

the fact that he first noted there was evidence that upon assuming office, the Minister “applied his mind to the question of Boards of Reference under this Act and decided that in every case where a Board was requested he would permit his Deputy Minister to deal with such a request affirmatively and without actual reference to the Minister”;<sup>93</sup> and then followed this by an express reference to “delegation”.

The single thread running through these cases, in part at least, seems to lead back to agency principles. Therefore, the *Carltona* principle ordinarily will enable a departmental official to exercise those powers, duties and functions of that department’s Minister which are “incidental and appropriate to [the] functions” of that official. As noted above, the official acting for the Minister is properly doing so in determining whether the courts are using the principle of ostensible or usual authority.

Moreover, as noted in *Golden Chemical*, generally speaking “it is for the Minister or his appropriate officials to decide which of his officers shall exercise a particular power.”<sup>94</sup> In other words, the Minister may identify which of his or her officials are to exercise a particular power of the Minister. If the Minister does so, then presumably those officials are the “appropriate” ones to exercise that power on the basis of the Minister’s express authority to do so. That certainly seems to be what Dickson J. was addressing in *Harrison* when he spoke of the Minister “select[ing] deputies and departmental officials of experience and competence”; and what could be said to lie behind the reference by Osler J. in *Fenn* to the explicit instructions given by the Minister as to how applications for Boards of Reference were to be decided.

Where *Carltona* is applied on the basis of the ostensible or usual authority of an official, it is “neither necessary nor usual for specific authority to be given orally or in writing”.<sup>95</sup> Such “specific (or express) authority” would be either supererogatory or, because of the choice of official to exercise the power in question, incongruent with the consequences of applying a test based on the functions and responsibilities of the official purporting to act on the Minister’s behalf. Where there is sufficient concern that the latter situation may be in issue, then it is obviously advisable that there be evidence, preferably in writing, of the Minister’s selection of who among the officials in the department is to exercise the power in question.

#### A. Application of Interpretation Act Amendments

##### 1. Paragraph 24(2)(d) of the Interpretation Act

“appointed to serve in the department or ministry of state over which the minister presides”

This section places restrictions on which officials are authorized to act for and on behalf of the Minister. “Appointed to serve in the department” limits that class of persons to public servants who are usually appointed by the Public Service Commission pursuant to the *Public Service Employment Act*.<sup>96</sup> This would exclude private contractors engaged

<sup>93</sup> *Fenn*, *supra* note 64.

<sup>94</sup> *Golden Chemical*, *supra* note 25 at 306.

<sup>95</sup> *Ibid.*

<sup>96</sup> R.S.C. 1985, c. P-33, s. 39.

by the Minister. It may be asked whether this language would not also exclude persons who themselves or whose organizations may report to a Minister,<sup>97</sup> and who may even form part of a departmental structure<sup>98</sup> but who are, for example, appointees of the Governor in Council or the Minister.

The phrase would also exclude Ministers of State to "assist" a "presiding" or so-called senior Minister.<sup>99</sup> Also left out are the personal staff members of a Minister. While such persons, like public servants, are appointed pursuant to the *Public Service Employment Act*, they are dealt with under Part IV, entitled "General", rather than under Parts I to III which regulate the role of the Commission, the manner of appointing public servants in general and the legal consequences for public servants employed under the *Act*. Also to be borne in mind is that Ministers, strictly speaking, are appointed members of the Queen's Privy Council of Canada.<sup>100</sup> They therefore exist as such quite apart from whatever departments they may, in addition, be made responsible for. That is clear from departmental statutes which, while formally establishing the department for which a particular Minister may be responsible, make it clear that that Minister "presides" over and not within the department. Consequently, a person whom the Minister may appoint as "required in his office"<sup>101</sup> would not necessarily also be appointed to serve in the Minister's department.

## 2. Paragraph 24(2)(d) of the Act

"in a capacity appropriate to the doing of the act or thing, or to the words so applying"

The other phrase in paragraph 24(2)(d) limiting who may act for and on behalf of the Minister requires that person to be serving in the Minister's department. As discussed above, a person's "capacity appropriate" to the doing of the act or thing which forms the subject-matter of the Minister's power requires, *inter alia*:

- (1) harmonizing the nature of the formal responsibilities, including the title and geographical location of the position or office, of that person and the particular power in question;
- (2) consideration of how "important" or "serious" that power is and, as a result, what level in the departmental hierarchy would be an "appropriate" or suitable one for exercising that power; and
- (3) consideration be given to any explicit instructions by the Minister, particularly any in writing, that a designated official, position or office, or class or level of positions, exercise the power in question. It, of course, may be asked whether this factor has, or should have, any relevance. In other words, is not "appropriate capacity" to exercising a particular power an objective matter determinable on the basis of, *inter alia*, factors

<sup>97</sup> Such as members of independent agencies or tribunals, or of departmental advisory committees established pursuant to statute and appointed by the Minister or the Governor in Council.

<sup>98</sup> Such as the Commissioner of Patents or members of the Canadian Pension Commission.

<sup>99</sup> See discussion under section V above.

<sup>100</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 11.

<sup>101</sup> *Public Service Employment Act*, *supra* note 96 at s. 39(1).

(1) and (2)? Consequently, what, if any, force can be given to this third factor which would enable a Minister to designate some official whose responsibilities and hierarchical position, for example, may well make him an otherwise “inappropriate” choice?<sup>102</sup>

In the end, what the courts appear to be looking for is whether, on the basis of these and other factors, the specific departmental official exercising the Minister’s power could reasonably have been expected to do so.

#### B. *Sharing of Power by Minister and Official*

This leads to other related issues. If the Minister has specified which departmental officials may exercise a particular power for and on his or her behalf, does the Minister retain the authority to exercise that power? Delegation cases are clear that

....delegation does not imply a denudation of power and authority....The word “delegation” implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating....<sup>103</sup>

To the same effect were these words of Wills J.:

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.<sup>104</sup>

Thus, delegation is not to be confused with transfer or assignment. Moreover, given that in the case of Ministers “the better view is that there is no delegation as such at all; the responsible officers are the “alter ego” of the minister who maintains responsibility before parliament”,<sup>105</sup> it is all the more evident that under the *Carltona* or “alter ego” principle a Minister can never be considered to have parted with his or her powers.

#### C. *Effect of Appointment of New Minister*

If a Minister does specify in some written instrument the departmental officers who are responsible for exercising particular powers, does that written instrument remain operative when that Minister is replaced? Again, not surprisingly, the cases here are based on delegation. The acts of the delegating Minister

represent the authority of the office, not of the individual, and they do not cease to have effect because the incumbent changes, unless the statute otherwise declares.<sup>106</sup>

<sup>102</sup> See discussion at section VII.B below.

<sup>103</sup> *Huth v. Clarke* (1890), 25 Q.B.D. 391 at 394, Lord Coleridge C.J.

<sup>104</sup> *Ibid.* at 395. See also *Gordon, Dadds & Co. v. Morris*, [1945] 2 All E.R. 616 at 621 (Ch.); *Halsbury's Laws of England*, vol. 1(1), 4th ed. (London: Butterworths, 1989) at para. 32. Dicta to the contrary by Scott, L.J. in *Locker*, *supra* note 12 at 377-78, are wrong and “at variance with basic legal principles”; *Roberts*, *supra* note 11 at 622, Denning L.J., disagrees with the observation of Scott, L.J.

<sup>105</sup> P.P. Craig, *Administrative Law*, 2d ed. (London: Sweet & Maxwell, 1989) at 310.

<sup>106</sup> *Re Putnoki and Public Service Grievance Board* (1975), 7 O.R. (2d) 621 at 633, 56 D.L.R. (3rd) 197 at 209 (Ont. Div. Ct.), leave to appeal to C.A. refused (1975), 7 O.R. (2d) 621 (note), 56 D.L.R. (3rd) 197 (note). See also *Samson Indian Band No. 137 v. Canada (Minister of Indian Affairs*

On the basis of identical reasoning, the authorizing instrument of the outgoing Minister would continue to have effect under his or her successors.

#### D. *May Minister Redetermine after Official's Exercise of Power?*

Once the responsible departmental official has exercised the Minister's power, to the extent that it is otherwise applicable to the situation, the principle of *functus officio* would operate in respect of that exercise. The situation is analogous to that of delegation. If the delegate has made a valid determination in the proper exercise of the delegated power, the principal cannot then repudiate that determination in favour of his or her own decision.

### VII. LEGISLATIVE INTENT TO EXCLUDE *CARLTONA*

#### A. *In General*

Proposition (1) in *Golden Chemical* notes that the general *Carltona* principle does not apply "...if there is a context in the statute which shows that the power is entrusted to the Minister personally".<sup>107</sup>

Two recent Supreme Court of Canada decisions are illustrative of this exception. In the first, *Ramawad v. Minister of Manpower and Immigration*,<sup>108</sup> the Supreme Court of Canada closely examined the language of the legislation and the allocation of powers among the various levels of officials identified therein. Pratte J. concluded that they

....make a clear distinction between the authority conferred on the Minister on the one hand and on his officials on the other hand.

Indeed, in the Act and in the Regulations, the most important functions have been reserved for the Minister's discretion while authority in other areas have been delegated directly to specified officials.

The general framework of the Act and of the Regulations is clear evidence of the intent of Parliament and of the Governor-in-Council that the discretionary power entrusted to the Minister be exercised by him rather than by his officials acting under the authority of an implied delegation, subject of course to any statutory provision to the contrary. To put it differently, the legislation here in question, because of the way it is framed and also possibly because of its subject-matter, makes it impossible to say, as was the situation in *Harrison*, that the power of the Minister to delegate is implicit; quite the contrary.<sup>109</sup>

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and Northern Development) (1988), 18 F.T.R. 29, (1989) 33 Admin. L.R. 141 (*sub nom Omeasoo v. Canada (Minister of Indian Affairs and Northern Development)*) [1988] 3 F.C. 153, [1989] 1 C.N.L.R. 107 (T.D.); *Kelly v. Watson* (1985), 64 A.L.R. 113 (F.C. Gen. Div.).

<sup>107</sup> *Golden Chemical*, *supra* note 25 at 106.

<sup>108</sup> *Ramawad*, *supra* note 25.

<sup>109</sup> *Ibid.* at 381-82. See also *Laneau v. Rivard* [1978] 2 F.C. 319, (1977), 87 D.L.R. (3rd) 474 (*sub nom. Re Laneau and Minister of Immigration*) (T.D.); *Société de transport*, *supra* note 45; *Campbell v. Unitow Services (1978) Ltd.*, (1983), 43 B.C.L.R. 231, 4 C.C.C. (3d) 375 (S.C.).

Parliament itself had indicated quite clearly the particular classes of public officers, including the Minister, who were assigned to perform specified powers, duties and functions. In the face of this Parliamentary intent to be very specific about which class of officials was to perform each statutory responsibility, there was no room for a reallocation of responsibilities on the basis of *Carltona* to permit departmental officials to exercise the Minister's powers in direct conflict with this explicit Parliamentary distribution of responsibilities.

A second case demonstrated an even clearer example of contrary legislative intent. In *A.G. of Québec v. Carrières Ste-Thérèse Ltée.*,<sup>110</sup> it was the Deputy Minister of the department who made the order in question. However, the relevant Québec statute provided that "the Minister may himself...." (in the French version, "le ministre....lui-même") make the order.<sup>111</sup> In a relatively brief judgment, the Court concluded that "only the Minister in person could validly have signed the order...."<sup>112</sup>

In contrast, in the House of Lords decision in *Oladehinde*,<sup>113</sup> it was concluded that the *Act* in question conferred powers on the Minister under three provisions which expressly indicated that only the Minister could act thereunder. The obvious inference is that in respect of powers conferred under other provisions of the *Act* it was not intended that the Minister should act personally.

#### B. *Effect of Express Delegation Provision*

Many statutes contain express delegation provisions. This gives rise to the following interrelated questions: what is the effect on the application of *Carltona* of an express authority to delegate which has been properly exercised? does it make any difference that the authority to delegate remains unexercised?

Where a statutory delegation of a Minister's power has, in fact, been made in favour of certain specified officials, it has been held that that power cannot then be performed by other officials on the basis of *Carltona*. The statutory act "can only be done by a person duly authorized" in the express delegation.<sup>114</sup> Nevertheless, it has also been held that if official X has been properly delegated the power in question, then he or she is authorized to act either on the basis of that instrument of delegation or on the basis of *Carltona*.<sup>115</sup>

The difference, of course, relates to the identity of the official who exercises the Minister's power in question. If, as in the *Ahmad* case, the official exercising the power in question is the same person as has been specified in the delegation instrument, then all that Jakkett C.J. was saying for the Court was that "[i]n any event [and] quite apart from special statutory authorization",<sup>116</sup> the official in question could act for the Deputy Minister on the basis of *Carltona*. This is very different from *Cure & Deeley* where the departmental official exercising the authority was not the one identified in the delegation instrument.

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<sup>110</sup> [1985] 1 S.C.R. 831, 26 D.L.R. (4th) 602 (S.C.C.).

<sup>111</sup> *Ibid.* at 837.

<sup>112</sup> *Ibid.* at 839.

<sup>113</sup> *Oladehinde*, *supra* note 45 at 400.

<sup>114</sup> *Cure & Deeley*, *supra* note 32 at 371. See also *Pica*, *supra* note 57.

<sup>115</sup> *Ahmad*, *supra* note 25.

<sup>116</sup> *Ibid.* at 650.

More problematic is the situation where that delegation authority has not in fact been exercised. Does *Carltona* still apply, or is the presence of a statutory provision decisive of legislative intent that the power of the Minister in question can only be exercised by a properly exercised delegate or by the Minister personally? In cases like *Carltona* and *Roberts*, it is assumed that the mere presence in legislation of an unexercised general delegation provision does not preclude the applicability of the *Carltona* principle. Arguments to the contrary were cogently rebutted in the following words of Jenkins J. in *Roberts* where the delegation instrument had been signed by a departmental official:

A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation as between the minister and Mr. O'Gara [the departmental official in question] seems to me to arise at all....The delegation [pursuant to the express delegation provision of the Regulations] effected by the letter of November 12, 1946, must therefore, in my view, be regarded as a delegation by the minister, acting through one of his departmental officials, in the person of Mr. O'Gara and not as a purported delegation by Mr. O'Gara of functions delegated to him by the minister.<sup>117</sup>

Another argument in support of this position is that in the absence of reasonably clear statutory language indicating that the power in question – here the authority to delegate – is intended to be the exclusive means by which the Minister is to exercise his Ministerial powers, the statute is merely empowering. Therefore, other lawful means of accomplishing the same objective remain open to the Minister. Such an argument succeeded in the case of *J.E. Verreault & Fils Ltée. v. A.G. of Québec*,<sup>118</sup> where notwithstanding express statutory language requiring Lieutenant-Governor in Council authority for certain contracts entered into by the Minister, the latter was not precluded from recourse to the common law authority of the Crown to enter into contracts.

However, the case law is not entirely consistent on this issue. In *Ramawad*, Pratte J. was influenced in his conclusion by the delegation provision in the *Immigration Act* which only permitted the Minister to “authorize the Deputy Minister or the Director to perform and exercise any of the duties, powers and functions” of the Minister. He stated, “[T]he effect of this section is, by necessary implication, to deny the Minister the right to delegate powers vested in him to persons not mentioned therein.”<sup>119</sup>

Thus, based on section 67 of the *Immigration Act*, Parliament intended that only the Minister, the Deputy Minister or the Director should exercise any of the powers, duties or functions specified.

A few years later, the Federal Court-Trial Division decided that in the face of a delegation provision which had to be exercised by order, the *Carltona* principle did not

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<sup>117</sup> *Roberts*, *supra* note 11 at 629.

<sup>118</sup> [1977] 1 S.C.R. 41, (1976) 57 D.L.R. (3d) 403.

<sup>119</sup> *Ramawad*, *supra* note 25 at 382.



apply.<sup>120</sup> However, the Court tried to bolster its conclusion by underscoring “the great responsibility of the Minister” in granting exemptions under the *Access to Information Act*.

Finally, there is the judgment of a single judge in the Equity Division of the New South Wales Supreme Court where the Minister’s authority to make an intellectually handicapped person a ward of the state had been exercised by someone who had not been properly constituted a delegate. The Minister thereupon fell back on *Carltona* to which Young J. replied:

[I]t is hard to see how the “alter ego” doctrine can apply in a case where the statute makes specific provision for ministers to delegate their functions and the person who exercises the function does not do so in the name of the minister but expressly as the delegate of the minister.<sup>121</sup>

In other words, this decision is distinguishable on the ground that the departmental officer had exercised the power in his capacity as a delegate rather than as the minister’s “alter ego”. If, proceeds Young J., “an administrative officer clearly bases his or her decision on a particular power, it is inappropriate for a court to uphold the validity of that decision by reference to some other power which could have been exercised but was not in fact exercised”.<sup>122</sup>

In the end, it should make no difference to the availability of the *Carltona* principle that under a particular scheme express provision is made for the general delegation of the Minister’s powers. Of course, as in *Ramawad*, that delegation provision may contain something more from which it can be inferred that *Carltona* cannot be relied upon. Such a result, however, will likely depend on the presence of additional factors such as the nature or importance of the Minister’s power, specific reference in the delegation provision to those who may assume the role of the Minister’s delegate,<sup>123</sup> or other language of exclusiveness.

### C. Application of Interpretation Act Amendments

Subsection 3(1) of the *Interpretation Act* makes “every provision of this Act appl[y]....to every enactment” unless “a contrary intention appears”. Consequently, the proposition enunciated by Brightman J. in *Golden Chemical* and applied in many Canadian cases, that the legislative context governs, will continue to have force on the question of whether in the circumstances a contrary Parliamentary intention to the operation of paragraph 24(2)(d) has been demonstrated.

It is therefore likely that the rationales relied upon by the Supreme Court of Canada in cases such as *Ramawad* and *Carrières Ste-Thérèse Ltée*. will continue to govern, albeit with subsection 3(1) of the *Interpretation Act* as an essential link in the analytical chain. Similarly, courts will probably persist in employing the “important power” concept as

<sup>120</sup> *Société de transport*, *supra* note 48 at 616.

<sup>121</sup> *FACS*, *supra* note 3 at 489.

<sup>122</sup> *Ibid.*

<sup>123</sup> The third proposition in *Golden Chemical*, *supra* note 25 at 306 stipulates that the courts will not second-guess whether the official acting for and on behalf of the Minister is the appropriate one to do so “[u]nless the level at which the power is to be exercised appears from the statute.”

a major factor in circumventing the effects of paragraph 24(2)(d). No longer, however, should reliance on the characterization of a Minister's power as administrative, legislative or judicial suffice.

On the issue of whether the departmental official acting for and on behalf of the Minister served "in a capacity appropriate to the doing of the act or thing", this aspect of the operation of paragraph 24(2)(d) is also capable of being ousted where a "contrary intention appears". For example, the legislation may itself identify who other than the Minister may be expected to exercise the power in issue. It may even be that a delegation authority limited in this respect can be construed in a way that does not completely oust the operation of the paragraph or, as in the *Ramawad* case, of the *Carltona* principle itself, but rather limits who may act for the Minister to those whom Parliament has expressly and specifically identified.

Another possible example originates in an instrument of authority by which the Minister or Deputy Minister indicates precisely which officials may exercise the Minister's power in question. Subsection 3(1) does not explicitly limit the source of "contrary intention" in any way. Certainly, it is not limited to "enactments". That may therefore leave open to the Minister to indicate expressly who in the Department is expected to exercise a particular power on his or her behalf. In the event that there was inconsistency between the class of officials having appropriate capacity according to principles of ostensible or usual authority and the Minister's choice of official, the latter could then form the basis of a "contrary intention appear[ing]" from the circumstances.

#### VIII. CONCLUSION

It is evident that the recent amendments to section 24 of the *Interpretation Act* were prompted by rather modest objectives. No major reform of common law principles as reflected in *Carltona* and its progeny was intended or considered necessary. Rather the amendments simply seek to clarify the application of *Carltona* to the Canadian government, including the modification and elimination of those few unnecessarily confusing and limiting accretions to be found in some of the Canadian case law.

While the amendments, like the *Carltona* doctrine itself, can be characterized as legal lubrication necessary to facilitate the operation of the executive machinery of modern Parliamentary government, it is important to bear in mind that neither is driven exclusively by administrative expediency. In other words, the fact that it would be impossible for individual Ministers to exercise personally all of the multifarious powers, duties and functions which have been conferred by statute and subordinate legislation on him or her may reveal the "mischief" of rigorously applying *delegatus non potest delegare*, but that in itself does not provide any principled basis for satisfactorily resolving this potential problem. Rather *Carltona* and paragraph 24(2)(d) of the *Interpretation Act* were developed to accommodate and balance the other important inter-related considerations:

- the constitutional principle of a Minister's individual responsibility to Parliament;
- conferring on individual Ministers statutory powers and responsibility for administering regulatory schemes;
- employment of public servants within a department that has been established to support a particular Minister in the performance of the latter's responsibilities; and

- the continued relevance of the principle of *delegatus non potest delegare*.

This last consideration is accommodated by avoiding its application. Implicit in that principle is that the person who has been delegated a power not himself purport to delegate it to someone else. But under *Carltona* and the subsection 24(2) amendments the Minister-delegate is passive; he or she does nothing at all as regards having some other person exercise the power in question. Moreover, the exercise of the Minister's power is limited to appropriate officials in the Minister's department. In other words, the antidote to concerns relating to any abuse or misuse of a Minister's power by departmental officials lies in the legal limitations imposed by the common law and by the language of the *Interpretation Act* with regard to whether that power may be exercised by another and, if so, by whom.

