

MASTERING THE ART OF DELEGATION

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I. INTRODUCTION

Tent cities have been all over the news lately, but did you know the Manitoba Court of Appeal in 1919 was called on to consider the validity of a tent-controlling bylaw enacted by the tiny town of Winnipeg Beach?¹ Back then Manitoba's *Municipal Act* authorized its municipalities to pass bylaws "for licensing and regulating or preventing and prohibiting or restricting ... tents and other similar structures". Winnipeg Beach, established at the turn of century on the southern shore of Lake Winnipeg, had quickly blossomed into a popular resort destination. Its population fluctuated between 100 and 15,000. Not surprisingly, there were growing pains, so to "protect the health of the inhabitants" the town's council passed a bylaw under the aforementioned authority. The bylaw limited the number of tents an owner could erect on a parcel, required a permit for any tent, and included clauses related to "sanitary arrangements and scavenging". Despite a careful and unobjectionable delegation to a secretary-treasurer of the power to issue tent licences, the bylaw failed, largely because it also delegated to the mayor the power to cancel them.

Why was Winnipeg Beach's delegation of the power to grant tent licences to a town employee acceptable, but its delegation of the licence cancellation power to the mayor fatal? The identity of the different delegates had nothing to do with it. The answer lies in how courts apply an easily stated but often violated legal maxim: *delegatus non potest delegare* (a delegate may not re-delegate). Though saying things in Latin always seems to give them a certain inscrutable gravitas, in a 1943 article² John Willis says this rule against re-delegation is not a rule of law, but is at most "a rule of construction"; in other words, it simply tells courts how to interpret statutes conferring a provincial or federal power on another person or entity.

Whatever its precise status, the rule against re-delegation should be familiar to local governments, whose entire authority comes from above. As delegates who can only do what they have been told, local governments also require special permission before letting any other person or entity exercise their powers for them. In other words, as a general rule, they can't re-delegate.

This paper begins by explaining the general rule against re-delegation, and some of the policy reasons underlying it; the second and third sections turn to the exceptions, touching on both express legislative provisions as well as the common law nuances that allow for re-delegation of certain local government powers, in certain circumstances; the final section offers a few suggestions for avoiding the pitfalls of improper re-delegation.

¹ *Re By-Law 92, Town of Winnipeg Beach*, 1919 CanLII 422 (MB CA).

² John Willis, "Delegatus non potest delegare" (1943) 21 *Can Bar Rev* 257.

II. THE RULE AND THE REASONS FOR IT

In *Trinity Western University v. The Law Society of British Columbia*, the BC Court of Appeal explained the delegatus maxim as follows:

The rule against sub-delegation is easily stated: where an enactment delegates rule-making or decision-making authority to a particular person, that person is entitled to exercise the power directly, but is generally not entitled to delegate its exercise to another. The maxim that a delegate is not entitled to re-delegate is a basic principle of administrative law.³

Legally speaking, the concept of delegation has elements of the plain or dictionary meaning, but it also has a special meaning, apparently derived from its origins in the law of agency.⁴ Before it was widely adopted in the context of public administrative bodies exercising government powers and carrying out government duties, the rule against re-delegation was invoked to protect the special interests of the delegator him or herself. It was assumed the delegator had selected the particular delegate because of some expertise or personal characteristics the delegate possessed, and further that the delegator wanted the chosen delegate, and no one else, to personally carry out the duties or exercise the power entrusted to her. The delegator was assumed to be confident only the chosen delegate, not someone else, was the right person for the job.

This principle of confidence, or “deliberate selection”, is now given short shrift in attempts to justify the rule against re-delegation, at least in the public law context, because protecting the interests of the delegator isn’t seen as a compelling policy basis for the rule.⁵ Nevertheless, a legislature’s choice of elected municipal councils and regional boards for carrying out such a broad range of provincial functions and powers strongly suggests a sense of confidence that these bodies are right for the job. The confidence principle takes this reasoning one step further, and says they are not only capable, but also they are uniquely capable, and it must be presumed the Legislature doesn’t want anyone else doing any of the work instead.

In the *Winnipeg Beach* case, for example, the Court said:

powers which are given to a council constituted to act as one deliberative body to the end that the members may assist each other by their united wisdom and experience cannot even by vote be delegated to the mayor alone.⁶

³ 2016 BCCA 423, at para 62.

⁴ Willis, *supra* note 2 at 257.

⁵ John Mark Keyes, “From Delegatus to the Duty to Make Law” (1987) 33 *McGill L J* 49.

⁶ *Supra*, note 1 at 716.

Section 114 of the *Community Charter* echoes a similar sentiment: “The powers, duties and functions of a municipality are to be exercised and performed by its council”. Section 5 of Ontario’s *Municipal Act* is even more emphatic: “the powers of a municipality shall be exercised by its council”. Finally, just as confidence in a delegate can discourage further delegation, the principal can be invoked to justify it:

Clearly one of the purposes of conferring the broad powers of delegation is to permit a municipal council to delegate powers and authorities to a person or body that is, in the view of the council, better able to deal with or handle issues or matters given the person or body’s expertise, qualifications or background.⁷

So even if confidence in the confidence principle as a basis for the rule against re-delegation is waning, it’s worth bearing in mind, to avoid breaking the rule.

Modern justifications for the rule against re-delegation tend to be more concerned with protecting “those affected by the exercise of the [delegated] power, and not the delegator.”⁸ And even in an era of interpreting local government powers broadly, the rule against re-delegation tends to be more strictly applied in municipal as compared to non-municipal cases.⁹ This tendency is consistent with relying on the rule to protect the interests of people subject to delegated decisions more than the interests of the delegator.

Again, a central thesis in this paper is that understanding the reasons for the rule against re-delegation is an important first step in mastering the art of delegation itself, especially in local government. So, what other concerns underly the rule against re-delegation, if not only the principle of confidence in the individual delegate as being the right person for the job?

One further reason, apparent in many of the leading sub-delegation cases, is courts’ eagerness to protect common law rights. In *Winnipeg Beach* the Court worried about curtailing the right of property owners to erect whatever structures they pleased on their property; in two other early cases the Courts guarded the common law rights of hackmen (taxi drivers) to engage in a “lawful calling”, against the whims of officials purporting to exercise improperly delegated authority;¹⁰ in *Bridge v the Queen*¹¹ the Court picked apart an elaborate scheme delegating the power to issue permits allowing gas stations to remain open beyond certain hours, and decided it was unacceptable to allow the City Clerk to rely “on evidence satisfactory to him”; in *R v Sandler*¹² the Court struck down a bylaw which gave “direct unguided control” to a fire chief to create a punishable offence from otherwise unobjectionable conduct; in *Vic Restaurant v*

⁷ *Jackson v Vaughan (City)*, 2010 ONCA 218 at para 60, citing Mascarin.

⁸ Keyes, *supra* note 5 at 51.

⁹ Keyes, *supra* note 5 at 53.

¹⁰ *R v Sparks*, (1912) 18 BCR 116; *Hall v Moose Jaw*, 1910 CanLII 127 (SK QB).

¹¹ [1953] 1 SCR 8.

¹² [1971] OJ No 1684 at para 11.

*Montreal*¹³ the Supreme Court of Canada said the City couldn't let its police director refuse to approve an application for a liquor licence "upon any ground which he considered sufficient". Courts today might not be so quick to strike down local government attempts to pass off some of their powers, but the early cases provide a useful reminder of the circumstances in which courts might be critical of re-delegation schemes.

Another reason for guarding against re-delegation of discretionary power lies in courts' pre-occupation with the rule of law, which "dictates that people should be governed by laws, not arbitrary individual decisions."¹⁴ In a 1992 article, Chief Justice McLachlin explained the rule against re-delegation as an example of how the rule of law is applied to administrative decision-makers, like local governments, who are authorized only to exercise authority with which they have been expressly clothed. The rule of law traditionally relied on a clear division of labour between three branches of government: the legislative branch makes law; the executive branch implements and enforces the law; judges interpret and apply the law. In this framework it's okay for the legislative branch to delegate some of its law-making power to administrative tribunals, but the rule against re-delegation is necessary to "to ensure that the discretionary power is wielded by those to whom it is given", and no one else.¹⁵

Another way of understanding how the rule of law justifies the rule against re-delegation is to see the latter as a way of ensuring certainty and equality in the way laws are applied.¹⁶ When municipal bylaws leave too much room for interpretation, requiring sub-delegates to decide how the law will actually be applied to different people in different circumstances, the spectre of arbitrariness arises. So, for example, municipalities couldn't leave any of the following to "subordinate officials": a decision as to what technical standards will apply to private roads;¹⁷ the power to define the amount of development costs charges payable;¹⁸ the location of a proposed roof sign;¹⁹ the power to grant or deny permission to alter a structure in a creek setback area;²⁰ or the power to approve building permit plans that did not conform with Council-approved development permit plans.²¹

¹³ [1959] SCR 58.

¹⁴ Justice Beverly McLachlin, "Rules and Discretion in the Governance of Canada," (1992), 56 *Sask L Rev* 167.

¹⁵ *ibid.*

¹⁶ Keyes, *supra* note 5 at 53.

¹⁷ *Fache v West Vancouver (District)*, [1989] BCJ No 978.

¹⁸ *Dorad Construction Ltd v Surrey*, 1982 CanLII 654.

¹⁹ *Outdoor Neon Displays Ltd v The City of Toronto* (1959) 16 DLR (2d) 624.

²⁰ *Barthropp v West Vancouver* [1979] BCJ No 1467.

²¹ *Stewart v Victoria (City)*, [1993] BCJ No 278.

These kinds of cases almost never come before courts unless a particular person is aggrieved by a particular administrative decision, but judges are concerned less with the decision itself than the administrative framework in which the decision was taken. Did that framework leave too much room for a sub-delegate to make the kind of decision the legislature intended to be made by the delegate alone? If the answer is yes, then there is a risk of arbitrariness that offends the rule of law, regardless of how careful, well qualified and fair-minded the sub-delegate might have been in reaching his or her decision.

McLachlin paints an evocative picture of the “stereotypical character involved in administrative decision-making”:

a harried, blue-shirted (male) bureaucrat, with his tie undone, hair askew and bloodshot eyes, barely visible above a foot-deep pile of files, clearing his desk at 4:30 in the afternoon on a day he would rather be playing golf. His (female) secretary sits patiently taking notes. "Yes," he says, throwing a file in her direction. "No," he says as he throws another, and so on, until the files are finally off his desk and on his secretary's lap.²²

Historically, courts have been suspicious of this character's ability to respect the rule of law by making consistent, non-discriminatory decisions, and while they now seem more comfortable with the increasing delegation of legislative-type decisions to non-elected administrative decision-makers, the rule against re-delegation is still alive and well. Far from being eclipsed by legislation, it remains a touchstone for the interpretation of statutes.

III. THE STATUTORY FRAMEWORK FOR LOCAL GOVERNMENT DELEGATION

Against this backdrop, the legislature in British Columbia has provided some clear guidance as to the kinds of decisions local governments may or may not pass off. The starting point for municipalities is ss. 154-156 of the *Community Charter*, with parallel provisions for regional districts in Division 6, Part 7 of the *Local Government Act*.

Section 154(1) says a council may, by bylaw, delegate its powers, duties and functions to a member or committee of council, a municipal officer or employee, or “another body established by the council”. Although this clause on its face suggests a wholesale rejection of the rule against re-delegation, the scheme is not as broad as it first appears. It says delegation must be by bylaw, to enumerated persons or entities. Delegation is further curtailed in s. 154(2) of the *Community Charter*, which prohibits the delegation of, among other things: the making of a bylaw; a power or duty exercisable only by bylaw; a power or duty to give approval or consent to, recommendations on, or acceptance of an action; a power or duty to terminate the appointment of an officer; and the power to impose a remedial action requirement.

²² *supra*, note 14.

Finally, s. 156 allows councils to establish a right of reconsideration (by bylaw), and mandates the establishment, by bylaw, of procedures for reconsiderations. Note the obligation to establish procedures applies if council itself has provided a right of reconsideration, as well as if the legislation authorizing the delegation demands a right of reconsideration. Under s. 52 of the *Community Charter*, for example, if a council delegates the exercise of its authority in relation to trees, “the owner or occupier of real property that is subject to a decision of a delegate is entitled to have the council reconsider the matter.” Similarly, s. 60(5) provides an automatic right of reconsideration if “a municipal officer or employee exercises authority to grant, refuse, suspend or cancel a business licence”. Therefore, it would be an unlawful delegation to allow the director of parks to issue tree cutting permits, or to allow the manager of bylaw services to suspend a business licence, if council has not adopted a bylaw establishing reconsideration procedures for those decisions. The reconsideration procedures can be generic to all delegated decisions, or tailored to different types of decisions. In all cases, s. 156 further establishes that if there is a right of reconsideration, “the person making the decision must advise the person subject to the decision of this right,” and that council in a reconsideration has the same authority as the delegate.

Although ss. 154-156 of the *Community Charter* are the starting point, further re-delegation rules for local governments, and some exceptions to the rules, can be found in other statutes. The *Local Government Act* is one obvious place to look. Section 486(2), for example, says an officer or employee may be authorized, by bylaw, to require “development approval information”. This provision says more about how the legislature views re-delegation by local governments than you might think. As mentioned above, the common law rule against re-delegation is primarily concerned with allowing subordinates to make laws, and decisions, that directly affect individual rights. The re-delegation of a decision whether or not to require an applicant to provide “information” isn’t something courts under the common law rule would necessarily be worried about. Nevertheless, having delegated to local governments the power to require development approval information, the legislature seems to have assumed this was a power that could not be re-delegated without express permission, which it also granted.

Other delegation rules to supplement the basic provisions in the *Community Charter* can be found outside the *Local Government Act*. For example, the *Liquor Control and Licensing Act* (LCLA) prohibits the issuance or amendment of a licence unless a local government has been given notice and an opportunity to provide comments or recommendations on the application. For this purpose, despite s. 154(2)(c) of the *Community Charter*, which prohibits the delegation of a power or duty to make recommendations, s. 40 of the LCLA says a council may delegate the making of comments and recommendations on a liquor licence application. Section 40 also replicates the right of reconsideration provisions under the *Community Charter*, which means the local government must establish reconsideration procedures, and also seems to mean the delegate must advise the applicant of the right to reconsideration.

In the case of recommendations, a local government is required to make under the *Agricultural Land Commission Act*, there is no parallel provision to override the *Community Charter* prohibition against delegation, so recommendations to the Land Commission must be made by

a resolution of council (or by bylaw, which seems unlikely), and not by a delegate. However, it seems likely the delegation of a hearing or information meeting, which a local government may, or in some cases, must hold before it forwards an application with recommendations to the Land Commission, can be made under s. 155 of the *Community Charter*.

Another commonly-invoked delegation provision is in s. 242 of the *Strata Property Act*, which requires the approval of an “approving authority” (in most cases a municipal council or regional board) before the submission of a strata plan that includes a previously occupied building. The giving of that approval can, “with respect to a specified type of previously occupied building” be delegated “to an approving officer or other person”. Once again in contrast to the general rule in s. 154 of the *Community Charter*, this delegation can be by resolution; a bylaw is not required.

IV. THE COMMON LAW EXCEPTION(S)

The aforementioned rules for the delegation of local government powers, duties and functions are, taken together, an elaborate scheme of exceptions to the general rule against re-delegation. But again, because so many local government powers can only be exercised by bylaw, and the statute prohibits the re-delegation of those powers, the scope for delegation by local governments is still limited, so the common law exceptions are still important. There are two broad categories: 1) where re-delegation is permitted by necessary implication; and 2) where the sub-delegate is exercising a ministerial or administrative function rather than a legislative or judicial one.

One helpful example of a successful re-delegation scheme during the era of enthusiastic judicial intervention comes from *R v Joy Oil Co Ltd*, in which the Ontario Court of Appeal upheld a city scheme requiring every “property where flammable liquids are stored in bulk storage” to “be provided with foam fire extinguishing equipment, and such quantities of foam producing material ready for immediate use as may be directed by the Chief of the Fire Department.”²³ The Court found this language was “as specific as it could be”, and therefore determined the Fire Chief’s power was “administrative only”.

A more recent example of the distinction between a legislative or policy type decision that can’t be re-delegated, and an administrative or implementation type decision that can, is *Sierra Club of Canada v Comox Valley Regional District*.²⁴ In that case the Court said a development permit was issued when the local government passed a resolution that approved the permit, subject to significant conditions, and authorized the Manager of Legislative Services to execute the permit when the conditions were met. The Manager signed the permit about 15 months after the

²³ 1963 CanLII 293, [1964] 1 OR 119.

²⁴ 2010 BCCA 343.

board resolution. Though the Court didn't specifically consider whether the stated conditions gave the Manager enough direction to avoid a re-delegation problem, it did not question that staff could be left to decide when those conditions had been fulfilled – presumably because this was seen as a purely administrative or implementation type decision.

In *Jackson v Vaughan*²⁵ the Ontario Court of Appeal explicitly relied on common law exceptions to the rule against re-delegation, after a city council passed a bylaw authorizing legal proceedings against its mayor. The bylaw authorized a lawyer to determine which charges should be laid and, “in his sole discretion”, to withdraw charges, conduct pre-trial proceedings, and enter into negotiations and binding plea agreements (among other things). The Court rejected the argument that the bylaw was “a wholesale and unlawful delegation” of Council's authority to commence legal proceedings, on the following basis:

There is a difference between making a decision (to commence a legal proceeding) and implementing that decision (deciding what charges to lay and how to handle them) ... it was Council who had the power to decide whether a legal proceeding would be commenced against the appellant and it was Council who exercised that power. However, as a corporate body, the municipality can only act through its agents. Having made the decision to prosecute, it was necessary to give effect to that decision. Council did so by retaining outside counsel.²⁶

In this passage the Court relies on both the necessary implication principle (the power to commence legal proceedings necessarily implies the power to delegate the actual conduct of the proceeding), and the administrative or ministerial principle (making decisions versus implementing decisions).

Whether a particular grant of discretion will be characterised as purely administrative, or unlawfully broad, can be difficult to predict. Though it was fair to delegate significant discretion in the conduct of a legal proceeding to a lawyer, on the basis that the lawyer was just implementing a decision of Council, the same might not be said of an attempt to give discretion to a bylaw enforcement officer in the implementation of a sign bylaw.

V. TRICKS OF THE TRADE

Local governments are authorized to re-delegate many of their powers, duties and functions, but as with any delegated authority, the authority to re-delegate is subject to limits and exceptions, and should be carefully exercised. To that end, this section offers a few rough guidelines to consider:

²⁵ *supra*, note x7.

²⁶ *Ibid*, at para 50.

A. Distinguish Delegation from Appointment

One distinction worth noting at the outset is between granting part of a local government's authority by delegation, and appointing a person or body to a position of independent authority. Examples of the latter include a board of variance, which has decision-making power under the *Local Government Act*; a subdivision approving officer, whose authority comes directly from the *Land Title Act*; and the head of a public body, which must be appointed by bylaw under the *Freedom of Information and Privacy Protection Act*. Once appointed, these entities exercise powers independent of the local government. Unlike in the case of delegates, who can and sometimes must be given clear guidance to limit the extent of their discretion, appointed entities with independent discretion should generally be left to their own devices.

B. Always be Alive to the Possibilities and Pitfalls of Delegation

Delegation can be an indispensable tool. It can make a local government more nimble, more responsive to local needs, better equipped to deal with decisions on highly technical issues, and better oriented to serve the needs of individual citizens. For these reasons local governments may be looking for opportunities to delegate their powers, duties and functions. Sometimes, however, improper delegation can happen unwittingly. For example, works and services standards can only be set by bylaw, so the power to set those standards cannot be delegated, but bylaws setting standards for works and services often include provisions for municipal staff to grant exemptions or alter standards in particular cases. Similarly, the authority to regulate in relation to signs must be exercised by bylaw, but setting standards for every sign you might be able to imagine is almost impossible, so it's very tempting to include provisions for municipal staff to exercise significant discretion rather than force applicants to return to council for what amount to minor variances. In both cases, bylaws often end up including unauthorized re-delegation provisions.

C. Make Sure any Delegations are Authorized by Statute

The default rule is that the delegation of local government powers, duties and functions, while broadly permissible, must be done by bylaw. Subject to some exceptions, this means council resolutions aren't sufficient. In *Air Canada v Dorval*,²⁷ for example, the City passed a tax rate bylaw, which said the City would set tax rates annually by resolution. This was an unlawful re-delegation, albeit to the City itself, of the power to do by resolution something that could only be done by bylaw.

Similarly, a permit issuable by resolution shouldn't be used to delegate powers that can only be delegated by bylaw, or can't be delegated at all because they are only exercisable by bylaw in the first place. One common practice to avoid is authorizing the issuance of a permit subject to conditions that require the delegate to make the kind of assessment the council or board should be making. For example, it's not unheard of for a development permit to be issued

²⁷ [1985] 1 SCR 861.

subject to the applicant satisfying the director of planning or engineering that some specific feature of the development conforms to one or more of the applicable permit area guidelines. These types of conditions really just leave the delegate to do the job reserved for council or the regional board, which is to decide whether or not the proposed development meets the guidelines.

D. Avoid the Language of Broad Discretion and Provide Clear Guidelines for Delegates

When drafting and reviewing any bylaw, remember that if the bylaw is required in the first place, then further delegation is generally offside thanks to s. 154(1)(c) of the *Community Charter*. Many powers can only be exercised by bylaw, and therefore can't be delegated, but it's easy to inadvertently include problematic delegation provisions in bylaws. Watch for words and phrases like "to his or her satisfaction", or "subject to the approval of", or "unless first authorized by". In one case a municipal bylaw prohibited certain soil removal without prior "approval in writing ... from the Engineer".²⁸ That provision was held to be an unlawful delegation.

This type of language may be unobjectionable if accompanied by detailed directions or guidelines, but it should at least make your spidey senses tingle. If bylaws do include provisions leaving discretion to be exercised by staff, be sure to limit that discretion as much as possible, by setting out the particular circumstances in which an exemption might be available, or by giving explicit guidance on the conditions to be met before an approval is given. To use the development permit example noted above, a proper condition might be something like: "subject to confirmation that the building to be constructed on Lot A will not cast shadows over the adjacent play ground during school hours, except in December and January". Even with this type of direction, there could be an argument about the delegate's discretion to determine the nature of the confirmation required; for example, to insist on a shadow analysis prepared by a professional engineer rather than accept some other evidence.

E. Watch Out for Potential Inconsistencies in Delegation Bylaws

Given the wide range of powers, duties and functions a local government might want to delegate, and the requirement in most cases to do so by bylaw, it can be hard to keep track of all the delegation provisions a local government has enacted. If delegation provisions are sprinkled throughout different bylaws, it's conceivable, if not inevitable, to end up with some overlap or redundancy across different bylaws. This is fine, unless there is some discrepancy in the way a particular delegation situation is handled in different bylaws. It's also conceivable a delegation provision might be hidden in an old bylaw everyone has forgotten about. Again, this might be inconsequential, but its best to avoid if possible.

²⁸ *Kirkpatrick v Maple Ridge*, 1983 BCCA 677.

One way to avoid the overlap or inconsistency problem is to have a kind of omnibus “delegation bylaw”, which is home to all of the delegations a local government has decided to enact. This is a common approach, but is not necessarily any better or worse than leaving delegation clauses to be included in the bylaws that relate to the subject matter of the delegation. A hybrid approach is fine too. But whatever is taken, it’s a good practice to keep track of various delegation schemes in some unified or consistent manner.

F. Don’t Sweat the Small Stuff

Although the *Community Charter* requires municipal “functions” to be delegated by bylaw, this statement probably doesn’t displace the general view that carrying out purely administrative tasks is an exception to the rule against re-delegation. If a council authorizes a municipality to enter into an agreement, or dispose of a highway, it’s probably unnecessary to direct or authorize the municipality’s authorized signatories to execute the agreement, or to direct staff to give notice of the disposition as required by the legislation; staff are likely authorized to do these things without a delegation bylaw authorizing them.

In a similar vein, when adopting reconsideration procedures, it’s perfectly lawful, but also unnecessary, to prescribe an elaborate and detailed series of steps to be followed, either by the person seeking reconsideration or by the local government itself. It would be sufficient to say something like: “a person who is entitled to have council reconsider the decision of a delegate may request a reconsideration by notifying the corporate officer, in writing, within 60 days of the date of the delegate’s decision, and may make oral or written submissions to council, but not both.”

VI. CONCLUSION

In Vancouver, a development proposal on a site across the street from the Dr. Sun Yat Sen Garden in Chinatown has been attracting consistent media attention. After repeated attempts to convince council to increase permitted height and density on the site, the developer settled on a plan that would fit within existing zoning, and therefore only required approval of the City’s development permit board, not the council. Before ultimately making a decision not to approve the project even though it complied with zoning, the development permit board deferred its decision on the highly contentious project. Gil Kelley, the City’s director of planning, who sits on the board, was reported as asking: “How narrow or how broad is our discretion as a board under our city rules ... should this matter be referred to city council?”²⁹

²⁹ Justin McElroy, “Vancouver defers decision on contentious Chinatown development” CBC news, October 31, 2017 www.cbc.ca/news/canada/british-columbia/105-keefe-decision-vancouver-oct-2017-1.4379636.

Mr. Kelley's question raises a tricky delegation issue, which may not have been squarely addressed by the courts in Canada. Assuming the City's development permit board, as a sub-delegate of council, is called upon to make a decision it has been properly authorized to make, can it decide not to make the decision, and instead to turn the matter back to council? It's unlikely this question can be answered by even a close reading of the *Vancouver Charter*, so it falls to be governed by the common law, which says a delegate cannot re-delegate, subject to some exceptions. But even this hallowed rule, and its exceptions, doesn't answer the question whether a sub-delegate can send the decision back to the original source of the authority to make the decision.

To cut to the chase, in this author's opinion the answer is probably "no", because requiring delegated decisions to be made by the person chosen to make them is most consistent with the confidence principle and the rule of law, which are the reasons for the rule against re-delegation in the first place. These reasons likely prevail even against the possibility of sending the decision back up to the original delegator itself.

NOTES