THE CHOICE OF DECISIONMAKING METHOD: ADJUDICATION, POLICIES AND RULEMAKING

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The point at issue here has nothing to do with the question of whether the regulations justifying the actions of government are uniform for the whole country or whether they have been laid down by a democratically elected assembly. There is clearly need for some regulations to be passed by local ordinances, and many of them, such as building codes, will necessarily be only in form and never in substance the product of majority decisions. The important question again concerns not the origin but the limits of the powers conferred. Regulations drawn up by the administrative authority itself but duly published in advance and strictly adhered to will be more in conformity with the rule of law than will vague discretionary powers conferred on the administrative organs by legislative action.

Friedrich August von Hayek[1]

1. *Introduction*

One of the most distinctive aspects of the administrative process is the flexibility it affords in the selection of methods of decisionmaking. While a legislature must normally confine itself to the declaration of generally applicable standards of conduct and a court must deal with a problem as defined by the particular controversy before it, an administrative agency may often choose between these approaches or may even reject

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[1] F.A. Hayek, *The Constitution of Liberty*, (Chicago: Henry Regnery, 1972) 226.

them both in favour of more informal means of decisionmaking. Indeed, it was this freedom to choose between rules, policies and adjudication (along with the power to investigate and prosecute) which caused John Willis to characterize the administrative tribunal as "government in miniature".[2]

I propose in this lecture to develop the thesis that we place too much emphasis on adjudication and not enough on policies and rulemaking. Rulemaking, it will be suggested, remains singularly underdeveloped in Canadian administrative law while policies, where resorted to, are not always readily reconcilable with the grant of legal authority.[3]

I will, of necessity, have to pitch my argument at a fairly high level of generalization. This may prove my undoing because,as the title to this iteration of Special Lectures, "Administrative Law: Principles, Practice and Pluralism", suggests, a degree of desirable tension exists between general principles of administrative law and the actual practice of particular administrative agencies. This means that one may only generalize at one's peril. However, I set off on this journey in part because as an academic whatever comparative advantage I possess suggests that I would be wise to avoid the particular and cloak myself about with a protective mantle of generalization, and in part because I believe that the wide variety of administrative functions does not preclude the existence of common ground. Indeed, I would urge that respect for pluralism should never lead to an entire abandonment of common underlying principles.

To a considerable extent, I am emboldened in my determination to generalize about the choice of decisionmaking methodologies, even in the face of an assertion of pluralism, by the comforting presence of commen-

[2] J. Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual And The Functional" (1935) 1 U.T.L.J. 53 at 56. While Willis did not address the issue of choice directly, having recognized that legislative powers to set new standards and adjudicative powers to decide particular cases, ("functions traditionally exercised by separate arms of government") had been combined in the administrative tribunal, it followed that choices would have to be made as to which way to proceed.

[3] See H.N. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions And Ministerial Responsibility," in Special Lectures of the Law Society of Upper Canada 1989, *Securities Law in the Modern Financial Marketplace*, (Toronto: De Boo, 1990) 78.

Rulemaking has for many years been a central issue in the study of administrative law in the U.S., and choice of decisionmaking methodology a staple in public policy discussions. However, as the General Counsel of the U.S. Administrative Conference has noted: "It is a challenge to address the recurring dispute over the agency's freedom to choose between rulemaking and adjudication as a means of developing policy. The subject is, as we know, a hardy perennial in administrative law, but inasmuch as the features and relative advantages of rulemaking and adjudication are constantly subject to change, it is doubtful that the issues surrounding the choice between them will ever be put to rest". R.K. Berg, "Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication" 38 Admin. L. Rev. 149 (1986).

sts who come from the more practical side of the admin-
ld. Should we combine our insights into the relative roles
and adjudication, the whole, I am sure, will prove greater
he parts thereof!

Opening Word (or Two) for Rule-making

e outset to call attention to two forceful proposals that
encies make greater use of rulemaking in their day to day
ry contemporary and specific; the other somewhat less
ıt much broader-based. I believe that both will be useful
e overall context in which I would urge that the choice of
ıate be conducted. The first is to be found in the June 26,
he Ontario Human Rights Code Review Task Force,
ty: A Report on Human Rights Reform. The second was
985 *Report on Independent Administrative Agencies, A
Decision-Making* of the Law Reform Commission of

ɔrce, in what I shall call the "Cornish Report" after its
ɔrnish, concluded that the Ontario Human Rights
become "...little more than a claim processing unit".[4]
·gy and resources have been dissipated in an endless task
up with the volume of claims:

> en reactive, not proactive, and geared to individual cases of dis-
> ɔt systemic discrimination. Placing almost all resources into pursu-
> claims and leaving out a broad, strategic approach is costly, time-
> ıd unlikely to bring about positive results. Even if an individual
> ssful, it usually changes the circumstances of the individual only
> e difference in overcoming widespread, systemic discrimination in

legal tool to be relied upon in a shift from a reactive to a
was rulemaking. At present, the Commission does not
o make regulations. The *Code* allows only the govern-
d then only in relation to relatively minor matters. Even
ation-making power has never been used.
d that, under the *Canadian Human Rights Act*,[6] the
Rights Commission has the power to make "guidelines"
ɔn Human Rights Tribunals and that this power had been

y: A Report on Human Rights Reform, 67.

Rights Act, R.S.C. 1985, c. H-6, s.27.

widely employed. It was also noted that agencies responsible for human rights in the United States, such as the Equal Employment Opportunities Commission, have "a long tradition" of making regulations to enforce human rights laws.[7]

In a research paper for the Task Force, Robert Reid stated:

> In ordinary constitutional and administrative law practice, general initiatives are not accomplished by decisions in individual cases, but by regulation. I do not know how the Commission was expected to carry out its broad mandate without wider powers of regulation-making than what at present may be accomplished under s.48, which deals with relatively trivial matters. *The Commission was given a sweeping mandate to eradicate discriminatory practices in this province, but no apparent power to carry it out.*[8]

The Task Force concluded: "The setting of regulations will create clear standards that will bring about systemic change. Pursuing a great many individual cases can take many years and have haphazard effect".[9] In coming to its recommendation that a reconstituted agency, Human Rights Ontario, "...be given the express power to issue legally binding rules and regulations in order to carry out its mandate to advance full and effective achievement of the *Code's* purposes",[10] the Task Force quoted with approval a fulsome American assessment of the manifold benefits of rule-making.

> ...The rulemaking process can be both fairer and more efficient than case-by-case adjudication. Rulemaking proceedings can put all affected parties on notice of impending changes in regulating policy, and give them an opportunity to be heard before the agency's position has crystallized. A rule can also resolve in one proceeding issues which might remain unclear for years if the case-by-case approach were followed. A clear general rule can produce more rapid and uniform voluntary compliance... than standards which are linked to the facts of particular cases.[11]

Whether it is compatible with the traditions of Canadian parliamentary government to grant extensive rulemaking authority to an independent administrative agency, and whether the benefits of rulemaking are quite as compelling, are matters to which we shall have to return. In the meantime, the Cornish Report may act as a forceful contemporary call to rulemaking arms.

In turning to the Law Reform Commission of Canada's report, it should be borne in mind that it grew out of a decade of extensive empirical

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[7] See, *supra*, note 4 at 68.
[8] *Ibid.*, at 69. Emphasis added.
[9] *Ibid.*, at 68.
[10] Recommendation 7 at 70.
[11] The quote was from Ernest Gellboir and Barry Bayer, *Administrative Law and Process in a Nutshell* (Culest Publishing, 1982) 237-238.

research (which included detailed examinations of 11 federal administrative agencies) and widespread consultation. This process reflected an ambitious response to the Commission's recognition that "...the practice of a tribunal cannot be understood without reference to its context and the legal framework for a tribunal makes little sense without an understanding of its practices".[12]

The Commission noted that no provision of an agency's formal mandate, whether embodied in a statute or a regulation, is so precise that the agency need not interpret it. In many situations an agency must exercise considerable discretion when applying governing provisions to specific situations. "In administrative law", as Frankfurter had noted, "we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions".[13] Nevertheless, it was thought that agencies should be encouraged to work, both formally and informally, at structuring their discretion and at communicating the criteria upon which they base their decisions.

> Administrative agencies are not courts. They are not required to rely on the evolutionary, case-by-case method traditionally associated with court process in the common law world. They are not, and should not be, faced with the same constraints on prejudging the meaning of a legislative provision. The emphasis should be on administration, not dispute resolution writ large. While adjudication is, and will remain, an important aspect of agency process, there is ample scope for the agency to play a normative role that complements adjudicative discretion.[14]

Given the potential of this broader and more flexible approach, the Commission urged that agencies, especially those which handle large volumes of cases, should consider carefully "...the advantages of developing policy statements about how they will exercise their discretion or interpret their legislation, before they are required to do so in a specific application".[15] It was suggested that policies could be developed outside of the context of specific applications in what might be called "generic hearings".[16] It was recognized, however, that there would be many decisions which cannot be reached by resorting solely to pre-established standards, either because there has been insufficient accumulated experience on

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[12] *Second Annual Report 1972-73* (Ottawa: Law Reform Commission of Canada) 24.

[13] F. Frankfurter, "The Task of Administrative Law" 75 U. Penn. L. Rev. 614 at 619 (1927). He then added a cautionary admonition of particular relevance to the choice between rulemaking and adjudication. "Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of 'law in action'."

[14] *Report 26, Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985) at 29

[15] *Ibid.*, at 30.

[16] *Ibid.*

which to base a general policy or the heterogeneity of those subject to regulation makes the imposition of inflexible standards either impossible or undesirable. Nevertheless, the Commission urged agencies to overcome their reluctance "...to signal in advance their general approach to issues falling within their range of discretion".[17]

The Commission recognized that no specific legislative authority is needed for policy statements and that the Supreme Court of Canada had recognized them as not only permissible but "eminently proper" under existing law.

> We would go even further, and suggest that agencies should be authorized to issue binding policy statements...to structure, in a definitive way, areas of discretion left to the agency by Parliament. Working criteria expressed in non-binding policy statements should be allowed to crystallize into binding ones wherever an agency has a firm view of what ought in all cases to condition the exercise of its discretion. This eliminates needless and repetitive argument in individual cases about the appropriateness of the policy.[18]

At the same time as it urged greater reliance on policies and rules, the Commission conceded: "We sense a strong bias towards the case-by-case exercise of discretion. Most agencies as yet display only a cautious willingness to structure discretion, and then only informally through non-binding statements."[19] What I hope to do in this lecture is to further explore this reluctance. But before this can be done, we must grapple (for a time at least) with the issue of definitions.

3. *Of Regulations, Rules, Policies and Adjudication*

The essence of a rule, as opposed to an adjudicative order, is that the former lays down a norm of conduct of general application while the latter deals only with the immediate parties to a particular dispute. Of course, some rules may only affect a very limited class of persons and, in a regime of precedent, an adjudication may affect many persons. Nevertheless, it is usually true that a rule is of general application and an order of particular application.[20]

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[17] *Ibid.*, at 31.

[18] *Ibid.*

[19] *Ibid.*, at 33.

[20] Breyer and Steward suggest that "rulemaking" and "adjudication" are useful and familiar paradigms of law-making whose distinguishing features can be briefly stated. "Rulemaking consists in the promulgation of generally applicable requirements or standards governing future conduct. Adjudication consists in determining the legal consequences of past events in a particular controversy between specific parties." S.G. Breyer & R.B. Steward, *Administrative Law and Regulatory Policy* (Boston: Little Brown, 1979) 398.

Let me expand somewhat on this. A rule is therefore an agency statement of general applicability and future effect. It is binding on all those to whom it is addressed - including the agency itself. It may be possible, however, to waive a rule under some circumstances. Absent waiver, a rule is law that is directly binding on all those within its terms, whether or not they participated in the rulemaking proceeding from where the rule originated. An adjudication leads to an order of particular application determining the rights of specific parties on the basis of their special circumstances. Adjudication allows for the *ad hoc* adoption of principles of law that are necessary to solve specific cases, but they may serve as precedent in similar future cases. Strictly speaking, any order which flows from an adjudication is not directly binding on any persons other than the parties to that particular case. Other persons are entitled to argue that the agency should consider *de novo* the principle on which the precedent rests. In practice, principles of law declared in particular cases can come to have the same effect as rules. This is because once decided upon, tribunals tend to follow an established principle uncritically and apply it without serious re-examination in all similar future cases.[21] To that extent, the practical effect of law issued in the form of orders pursuant to an adjudicative methodology or rule pursuant to a rulemaking methodology may be essentially similar.

In Canada we still tend to think of the universe of "rules" as being coextensive with formal "regulations" made in accordance with the federal *Statutory Instruments Act*,[22] or the *Regulations Act*[23] in Ontario. We have relatively little experience of agency-made binding rules because, without legislative authority, this could amount to an unlawful fettering of discretion. An example of statutorily authorized rules already mentioned are guidelines made under the *Canadian Human Rights Act*[24] and rules and guidelines to be issued under the new *Immigration Act*.[25]

Non-binding rules or policies are part of what the Law Reform Commission of Canada felicitously called "law-elaboration".[26]

> Law-elaboration amounts to a quasi-legislative power and involves both the making of policy by an agency and the articulation of that policy through rulemaking. The ensuing rules and standards will represent the agency's own interpretation of its parent statute. They will be used to guide and structure the agency's regulatory

[21] It would seem likely that agencies which sit in panels will give more weight to rules promulgated by the agency as a whole than by an individual panel in the course of an adjudication of a dispute.
[22] *Statutory Instruments Act*, R.S.C. 1985, c.S-22.
[23] *Regulations Act*, R.S.O. 1990, c.R-21.
[24] *Supra*, note 6.
[25] Bill C-86, First Reading, June 16, 1992, s.55.
[26] *Working Paper 25, Independent Administrative Agencies*, (Ottawa: Law Reform Commission of Canada) at 23.

> decision-making. ...This process of law elaboration is a major function of independent regulatory agencies involving the translation of a general legislative mandate into specific policies and rules of conduct for those to be regulated.[27]

Terminology here is very fluid as "policy" may include "manuals", "guidelines", "standards" and the like. Nothing turns on the precise term employed. The important thing is that unless an agency is given legislative authority to make binding rules, it must always consider exceptions to its general approach. However, as we shall see, the modern law on fettering allows for a good deal of structuring of discretion so that in practice administrative agencies may approach, but not fully achieve, what the Law Reform Commission called structuring "in a definitive way".[28]

4. *In Praise of Rulemaking*

In a valuable article in a recent issue of the *Administrative Law Review*,[29] Professor Bonfield of the University of Iowa Law School documented a number of justifications for his contention that, "State agencies should normally elaborate their law by rule rather than by ad hoc order". These included:

(1) Public participation

(2) Legitimacy

(3) Visibility

(4) Comprehensibility

(5) Efficiency

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[27] T.H. Jones, "Regulatory Policy and Rule-Making" (1991) 20 Anglo-American L. Rev. 131 at 132.

[28] *Report 26*, *supra*, note 14 at 31.

[29] A.E. Bonfield: "State Administrative Policy Formulation and the Choice of Lawmaking Methodology" (1990) 42 Admin. L. R. 121 at 122-131. In this regard it is most interesting to keep in mind an observation in L'Heureux-Dubé J.'s dissent in *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1026 in which she indicated that an agency's novel interpretation of its statute that has a wide-ranging impact is more likely to attract judicial deference if adopted after hearing from, not only the parties to an adjudication, but also those likely to be affected by the agency's interpretation. Here, the labour relations board had sought, by way of adjudication, to fill in a void in the labour code. "The Board's policy decision goes well beyond the specific interests of the parties before it and acquires an importance akin to the enactment of a new legislative provision. This additional significance accentuates the necessity for the Board to meet head on the arguments based on the development of harmonious labour relations" (at 1031-1033). And this broader perspective could only be attained by a broadening of the scope of participation.

(6) Abstraction
(7) Appropriate Factual Basis
(8) Initiative
(9) Easier Participation
(10) Prospective Application
(11) Consistency

(1) Public Participation

Normally, only those persons who are actually parties to a particular dispute giving rise to an adjudication are notified of, or have a right to participate in, that proceeding. This means that other persons who may subsequently be affected by the precedential value of a particular adjudicative decision will not usually have an effective opportunity to participate in its formulation. It also means that members of the general public do not have an opportunity to influence law made on a case-by-case, precedential basis. More liberal rights to intervene and to file amicus briefs in adjudications will not be substitutes for a direct opportunity to participate in rulemaking proceedings. As Glen Robinson has succinctly put it: "Notice and opportunity to participate are commonly regarded as among the foremost advantages of rulemaking proceedings."[30]

(2) Legitimacy

Trial-type procedures tend to protect agencies seeking to implement their own policy preferences while notice and comment procedures provide an opportunity to block, through the use of external political pressure, agency preferences that are inconsistent with the will of the community at large as reflected in the balance of power in current interest group politics.

This is, of course, a particularly American view of legitimacy. To the extent that we give the matter any thought, we probably subscribe to a delegation theory of legitimacy - the popularly elected Legislature has delegated authority to deal with essentially technical matters in a manner which dictates a relatively narrow range of results. But the reality is that modern legislative delegations tend to be very imprecise and vague and

[30] G.O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedural Reform" (1970) 118 U. Pa. L. Rev. 485 at 514.

that legitimacy may only be achieved by way of a decision-making methodology which allows for the reflection of the same forces that work upon the popularly elected Legislature itself. This will, undoubtedly, make Canadian administrative lawyers nervous as we have inherited more hierarchical, less fragmented and overtly political notions of administrative law-making. However, it will be my contention towards the conclusion of this lecture that we now live in a far more interest group dominated political context than our established institutions acknowledge.

(3) Visibility

Rules are almost always more highly visible than agency case law to members of the public. Compilations of state administrative rules may be readily consulted in public libraries while case law is almost never published and is usually available only in the labyrinthine files of the agency. Given the continuing uneven publication practices of Canadian administrative tribunals, this argument for requiring agencies to make their law by rule is particularly compelling.[31]

(4) Comprehensibility

It is likely to be easier for members of the general public to discern current agency law from rules than from adjudication because decisional law is normally more difficult for lay persons to understand. The interpretation of adjudicative orders depends to a great extent on the particular facts involved in cases; rules are not as dependent on the particular facts from which they first emerge.

(5) Efficiency

Law-making by adjudication is likely to require litigation before the agency in a multiplicity of cases - a single rulemaking may settle the policy questions involved in many instances without need for litigation to resolve them. As well, law-making by rule is more efficient than law-making by order because it allows agencies to focus upon a few proceedings raising comparatively few, but major, policy issues. When agencies make law by adjudication, they often have to spread their attention thinly over

[31] While there has been some improvement in recent years, not as much has changed as one might have expected since the first (and only) comprehensive study of this issue. See A.H. Janisch, *Publication of Administrative Board Decisions in Canada* (London: CALL, 1972).

large numbers of cases that raise an even larger number of minor, as well as major, policy issues. As Robinson noted, "Rulemaking may be very efficient in eliminating the burden of individual case-by-case adjudications."[32]

(6) Abstraction

Rulemaking may be superior to adjudication for agency law-making because it requires the agency to focus on the issues of law that must be decided without being diverted, as in adjudication, by the more specific and parochial concerns of particular parties who wish to have their unique problems resolved. It may be argued that a general preference for law-making by rule is undesirable because it requires agencies to make decisions in the abstract, without the benefit of any actual case to test their wisdom or help clarify the issues involved. This, however, goes more to the issue of choice: the fact that rulemaking requires an agency to make its decision more in the abstract should be a factor that the agency considers in determining whether, in a particular situation, rulemaking is feasible or practicable.

(7) Appropriate Factual Basis

In adjudication, where the agency both makes the applicable law and determines whether it has been violated, there tends to be some confusion over the precise facts which must be established and the burden of persuasion for establishing them. The parties and decision makers in such a situation often confuse the necessary facts and burden of persuasion associated with the law-applying function with the necessary facts and burden of persuasion associated with the law-making function.

(8) Initiative

Law-making by rule may be more desirable than law-making by order because rulemaking allows an agency to initiate its own changes; in adjudication the initiative for change is left to private parties. Thus an agency need not await the occurrence of a set of facts involving a particular individual to make law by rule. Rulemaking, unlike adjudication, allows an agency to create its own law-making timetable and implement its own system of law-making priorities.

[32] *Supra*, note 30 at 516.

(9) Easier Participation

Informal notice and comment rulemaking procedures are generally more accessible to persons who do not have the assistance of lawyers and are less intimidating than formal, trial-type procedures. This argument in favour of rulemaking is especially compelling where individual matters dealt with are not of a sufficient financial value as to attract professional representation, although cumulatively they may be of the greatest overall importance to the achievement of a just society.

(10) Prospective Application

Rules are normally prospective - they indicate the law which the agency will rely upon in the future. Adjudication has the disadvantage of being inherently retrospective, declaring rights based on past acts. The most serious adverse effect of using adjudication for agency law-making is its retroactive effect on parties who may have legitimately relied upon the prior state of the law. This may lead either to unfairness to the parties or timidity towards change by the agency. Rulemaking avoids the problems associated with retroactive sanctions.

(11) Consistency

Primary reliance on rulemaking for agency law-making is more likely to ensure uniform treatment of similarly situated persons than is the use of adjudication for that purpose. All persons subject to a rule are affected at the same time and in the same way. Agency law-making by adjudication increases the likelihood that agencies will draw irrelevant distinctions between substantially similar cases. Adjudication is moreover a particularly inappropriate means of formulating legal principles applicable to a broad class of persons because it permits low visibility, differential agency decision-making of a potentially arbitrary or capricious nature.

5. *The Limits of Rules*

We must, of course, all "beware the man of one book". *To favour greater resort to rules is not to suggest that there is no role for ad hoc*

elaboration and application of law through case-by-case adjudication.[33] Indeed, Professor Bonfield himself readily acknowledged this to be so.

> Case-by-case agency law-making may be better than rulemaking, for example, in those particular situations in which the agency does not yet feel it is in a position to make generally applicable law on a subject due to the agency's lack of sufficient expertise at the time or because the distinctions in the area are likely to be so numerous or complex that it is not yet in a position to articulate them or because the lack of a concrete factual setting would make any principle of law adopted too theoretical to be really useful or sensible. Further, in some situations agency law made by adjudication may be superior to agency law made by rulemaking because the former is less likely to be overinclusive or underinclusive than the latter.[34]

As well, while it is useful to contrast adjudication and rulemaking (with policies somewhere in the middle depending on their degree of flexibility in application) we must also recognize that rules need not always eliminate the discretion of an agency to tailor its actions to particular factual circumstances. Rules may expressly confer discretion on an agency, specifying some or all of the factors that are to be considered in such discretion. As always, the trick is to recognize useful differences of degree without demanding rigid black and white categories. As Oliver Wendell Holmes wisely observed: "I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions in my opinion are of that sort, and are none the worse for it".[35]

Some commentators, however, have somewhat greater reservations about the role of rules in the achievement of a just administrative system.[36] Jowell, for instance, has pointed out that rules are used by superordinates to control subordinates who, in turn, go strictly "by the book" in a manner which avoids innovation by developing an exaggerated dependence upon regulations and quantitative standards. Bureaupathic behaviour reflects a tendency of officials to hide behind rules.

> The obligation of a reasoned decision *de novo*, while not guaranteeing the absence of official ignorance or prejudice, constitutes at least some protection

[33] The classic article on the issue of the pros and cons of rulemaking and adjudication is David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy" (1965) 78 Har. L. Rev. 921. See as well, G.O. Robinson, "Another Look at Rulemaking", *supra*, note 30 and R.K. Berg, "Re-Examining Policy Procedures..." *supra*, note 3.

[34] "State Administrative Policy Formulation and the Choice of Law-making Methodology", *supra*, note 29 at 132-133.

[35] *Haddock v. Haddock*, 201 U.S. 443 at 631 (1906).

[36] See, for example, R. Baldwin, "Why Rules Don't Work" (1990) 53 Mod. L. Rev. 321. However, Baldwin is here primarily concerned with compliance, not selecting between rulemaking and adjudication.

> against the mechanical application of rules. At best, it provides an assurance of personal attention and 'individualized justice'.[37]

On a somewhat different tack, Baldwin and Hawkins have argued that the accelerating fusion in modern government of policy-making and adjudication call for the exercise of judgment necessarily based on broad grants of discretion. Proponents of rulemaking are said to subscribe to a "transmission belt" model of administration "...in which statutory objectives are applied to particular facts in unproblematic fashion, but this model may be of diminishing utility in systems of government that delegate ever-broader powers to peripheral bodies".[38]

The danger here is that rigid rulemaking will be contrasted with an idealized view of adjudication. Thus Jowell adopted Lon Fuller's definition of adjudication as "...a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour". The problem, of course, is how effect is to be given to this notion of institutionally guaranteed participation in which parties to the dispute have an effective opportunity to present proofs and arguments. In any event, as Jowell himself acknowledged, "...for a participant to present proofs and arguments for a decision in his favour, he must appeal to some decision-making guide, which ideally is sufficiently specific to qualify as a rule, principle or standard. If there were no such narrowly drawn guides, the participation of the litigants would not be meaningful because they would be joining issue in an 'intellectual void'."[39]

As well, while I would agree that, "In polycentric issues, many factors interact so as to shift the grounds of decision-making from beneath the lawyer's feet",[40] this reflects more a concern with overinclusive rulemaking (and the over-ambitious nature of modern government) and does not suggest that adjudication will be any more capable of delivering sound "judgment" than rulemaking.

All in all, Jowell strikes the right note of agnosticism for me when he warns against any *a priori* assessment which does not take into account the costs of concrete application.

> It is clearly futile to propose legal control of administrative discretion in the abstract, for in the abstract the relative merits of devices of legal control may seem evenly balanced by their defects. In assessing whether any given adminis-

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[37] J.L. Jowell, *Law and Bureaucracy, Administrative Discretion and the Limits of Legal Action* (Port Washington, New York: Dunellen Publishing, 1975) at 24.

[38] R. Baldwin and K. Hawkins, "Discretionary Justice: Davis Reconsidered" (1984) Pub. Law 570 at 590.

[39] *Supra*, note 37 at 25.

[40] Baldwin and Hawkins, *supra*, note 38, at 591.

> trative task ought to be subjected to legal control (by way of rules) it is necessary first to recognize that costs and benefits exist and then to weigh one against the other.[41]

It is important to note that much of the critical comment on rules is predicated on a concern that rigid determinants will be imposed from above without any opportunity for the affected community to have any input.[42] A more positive view of rules will usually be premised on an assumption that there will be effective consultation in rulemaking.

Let us consider again the *Cornish Report*. It concluded:

> Human Rights Ontario should be given the power to make regulations that enable it to play a strategic and proactive role. In deciding how to play this role, however, it should listen carefully to the views and wishes of the disadvantaged group whose rights are at stake.
>
> The regulations should be developed through a process of public consultations seeking the input of all interested parties. The Government itself should be required to participate in the public consultations and present its views from the standpoint of the various important roles it plays as the major employer and service provider in the province, as the body representing all the people of Ontario, as the body responsible for setting public policy and as the body responsible for managing the finances of the province.[43]

Regrettably, there is as yet nothing in judicial or general statutory administrative law in Ontario or federally which guarantees an opportunity for public participation in rulemaking. However, as we shall see, this does not mean that there has not been significant developments in administrative law practice, especially at the federal level.

6. *Judicial Indifference and Administrative Concern*

In *Attorney General of Canada v. Inuit Tapirisat of Canada*,[44] the judgment of the Supreme Court of Canada was delivered by Estey J. At

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[41] *Supra*, note 37 at 30-31.

As Jowell noted, in any checklist of the relative merits and defects of rules and adjudication, each possess costs and benefits to the bureaucrat, affected persons and general public. "What is gained in uniformity may be lost in flexibility; rules to prevent the arbitrary may encourage the legalistic; case-by-case adjudication may prevent comprehensive planning; rules that may shield the bureaucrat from pressures and allow the speedy and efficient dispatch of cases, may offend the client who desires individually tailored justice". *Ibid.*, p. 30.

[42] See, for example, P. Harris Auerback, "Discretion, Policy and Section 19(1)(a) of the Immigration Act" (1990) 6 Jour. Law & Soc. Pol. 133.

[43] *Achieving Equality: A Report on Human Rights Reform* at 69.

[44] *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

issue was the question of whether the federal Cabinet was required to observe procedural fairness in dealing with an appeal to it from a decision of the Canadian Radio-television and Telecommunications Commission. Estey J. started out by acknowledging that in the post-*Nicholson* era, a duty of fairness no longer depended on classifying the power involved as "administrative" or "quasi-judicial". "It is not helpful", he went on "in my view to attempt to classify the action or function by the Governor in Council ...into one of the traditional categories established in the development of administrative law".[45]

However, while he was prepared to put "traditional" categories to one side, he was not about to abandon a labelling approach. The fixing of rates for a public utility such as a telephone system was "...legislative action in its purest form".[46] He then went on to agree with Megarry J. in *Bates v. Lord Halisham of St. Marylebone*[47] that the dictates of procedural fairness did not apply to the processes of legislation. "Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy".[48]

The court quite clearly balked at the prospect of having to design procedures appropriate to multi-party rulemaking. Unable to analogize to its own judicial processes, the court lamely concluded:

> There are many subscribers to the Bell Canada services all of whom are and will be no doubt affected to some degree by the tariff of tolls and charges authorized by the Commission and reviewed by the Governor in Council. All subscribers should arguably receive notice before the Governor in Council proceeds with its review.[49]

And, indeed, they should, but not, of course, actual notice and an oral hearing. As Paul Craig has observed: "The courts have been dormant, anaesthetized by the mention of the word legislative".[50] Fortunately, those with less limited legal imaginations were to prove capable of creative institutional design.

In the 1960s the prevailing attitude towards consultation was that it

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[45] *Ibid.*, at 752.
[46] *Ibid.*, at 754.
[47] *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373.
[48] *Ibid.*, at 1378.
[49] *Supra*, note 44 at 754.
[50] P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) at 174.
For a critical assessment of the courts' performance see G.J. Craven, "Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing" (1988) 16 Melbourne Univ. L. Rev. 569.

was a "good thing" best left informal and unstructured.[51] The McRuer Commission stated that extensive consultations usually take place and that a notice and comment requirement ... "would cause unnecessary delay and merely duplicate the time already spent in informal consultation".[52] In 1969 the MacGuigan Committee recommended that there be the "widest feasible consultation", but was of the opinion that no useful purpose would be served by laying down a requirement of consultation in legislation.[53]

The experience in the United States has been substantially different. The federal government and all of the states have legislation imposing rights to participate in rulemaking. The federal statute is the *Administrative Procedure Act* (APA).[54] It establishes two different procedures: "on the record" rulemaking and "notice and comment" rulemaking. On the record rulemaking is essentially a trial type process, is relatively uncommon and has been generally unsuccessful. Notice and comment rulemaking is more simple. The agency must publish notice of the proposed rules in the *Federal Register* and must give "interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation". It must consider the submissions and "incorporate in the rules adopted a concise general statement of their basis and purpose". One or the other of these procedures is required for all rulemaking that is not excluded by the exceptions in the Act. Two of the exceptions are paramount; the entire scheme does not apply to rules about "a military or foreign affairs function of the United States" or to rules about "agency management or personnel, or ...public property, loans, grants, benefits or contracts". Notice and comment rulemaking is required for all other rulemaking, except for rules that are specifically required "by statute", to be made on the record, and for "interpretive rules, general statements of policy, or rules of agency, organization, procedure or practice", unless the

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[51] H.W.R. Wade was of the view that although not legally entrenched, "... the duty to consult the interests and organizations most likely to be affected is one of the firmest and most carefully observed conventions." *Administrative Law*, (Oxford: Clarendon Press, 1961) at 273. Later he was to observe: "Consultation before rulemaking, even when not required by law, is in fact one of the major industries of government. It is doubtful whether anything would be gained by imposing general legal obligations and formal procedures. At least, there is no demand for any such reform." *Ibid.*, 4th ed., 1977, at 730. While Wade's views remain unchanged (see *Ibid.*, 6th ed., 1988, at pp. 884-885) there is a growing body of critical legal writing in the U.K. calling for the adoption of more structured participatory mechanisms. See, for example, "Regulatory Policy and Rule-making", *supra*, note 27 at 147-148.

[52] *Royal Commission Inquiry Into Civil Rights, Report Number One* (Toronto: Frank Fogg Queen's Printer, 1968) at 362, 364.

[53] *Third Report*, Special Committee on Statutory Instruments, (Ottawa: House of Commons, 1968) 43-48.

[54] *Administrative Procedure Act*, 5 USCS, s.553.

agency decides that the process is "impracticable, unnecessary or contrary to the public interest".

Overall, it is widely agreed that as long as the trial type process is avoided, the APA's s. 553 notice and comment procedure has worked very well. As Kenneth Culp Davis put it: "The system is simple and overwhelmingly successful".[55]

In the late 1970s, a decade after the *McRuer* and *MacGuigan* reports, three major reports appeared that included discussions of rulemaking. The first was an interim report from the Economic Council of Canada, which had been requested by Prime Minister Trudeau as an extensive review of economic regulation. Rather than await the completion of numerous studies spanning many areas of regulation, the Council - in *Responsible Regulation* - set out its proposals with respect to procedural matters and urged that there be the earliest possible informal consultation about rulemaking.[56]

In addition to informal consultation, the Council wished to see the establishment of a formal opportunity to comment. It proposed a requirement of publication of notice of intent to create a new regulation and an opportunity to comment on draft regulations.[57] While not as ambitious as the Economic Council of Canada's proposals, the recommendations of the other two reports were unanimous in their criticism of the status quo and in their insistence on substantial improvements in procedures for rulemaking.

The federal Standing Joint Committee on Regulations and Other Statutory Instruments concluded: "Despite the reluctance of the *MacGuigan* Committee to recommend a mandatory notice-and-comment procedure, your Committee believes that it should now be introduced in Canada". The Standing Joint Committee had been impressed by what it

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[55] K.C. Davis, *Administrative Law of the Seventies* (Rochester, N.Y.: Lawyers Coop. Pub., 1976) at 170. Looking back to the 1941 Report of the Attorney General's Committee on Administrative Procedure some forty years on, Davis was of the view that the proposal in the minority report for notice and comment has proved to be that era's "truly great idea". "Under the APA the agency can do its thinking and propose the rule and get the response. It is a wonderful system. It wasn't until 1970 that I began saying that it was one of the great inventions of modern government." "Present at the Creation: Regulatory Reform Before 1946" (1986) 38 Admin. L. Rev. 511 at 520.

See, however, note 73, *infra*, for more recent concerns with notice and comment procedures.

[56] Economic Council of Canada, *Responsible Regulation* (Ottawa: Min. Supply & Services Canada, 1979) at 69-74.

[57] *Ibid.*, at 74-77.

These procedural proposals were endorsed in the final report. Economic Council of Canada, *Reforming Regulation 1981* (Ottawa: Min. Supply & Services Canada, 1981).

had learned of the workings of s. 553 of the APA and emphasized that an "opportunity to participate" need seldom involve a "true hearing". Indeed, it was the "modesty of the aims" of s. 553 which had led to its success.[58]

The third report was one made by the House of Commons Special Committee on Regulatory Reform (known as the Peterson Committee after its chairman, Jim Peterson MP). It didn't support a general requirement, but it did encourage the creation of better voluntary and informal opportunities for participation. However, it felt that this type of notice and comment procedure should complement and not substitute for even earlier, informal consultation.[59]

Further momentum for change was to be seen in legislation itself. In 1969 the MacGuigan Committee had noted that only two Canadian statutes provided for formalized consultation.[60] By the 1980-81-82-83 session of the federal parliament, most new statutes that gave major regulation-making powers contained a consultation clause. Typical was s. 17 of the *Canada Post Corporation Act*,[61] which provided that the Corporation may - with the approval of the Governor in Council - make regulations for the efficient operation of its business and for carrying the Act into effect; Section 17(3) required that a copy of each regulation shall be published in the *Canada Gazette* and "...a reasonable opportunity shall be afforded to interested persons to make representations ... with respect thereto".

On February 13, 1986, the federal government announced its "Regulatory Reform Strategy". In addition to appointing a Minister Responsible for Regulatory Affairs, the Strategy set out ten "Guiding Principles of Regulatory Policy". These included a commitment to "increase public access and participation in the regulatory process". Two additional elements of the Strategy were announced by the Minister Responsible for Regulatory Affairs on March 6, 1986. These were the "Citizens' Code of Regulatory Fairness" and a package of "Regulatory Program Reform Initiatives". As well, a Regulatory Affairs Secretariat was established in the Privy Council.[62]

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[58] Standing Joint Committee on Regulations and Other Statutory Instruments, *Fourth Report* (1980) at 7:21.

[59] House of Commons Special Committee on Regulatory Reform, *Report*, First Session, Thirty-Second Parl. (Dec. 1990) at 9.

[60] Special Committee on Statutory Instruments, *supra*, note 53 at 43.

[61] *Canada Post Corporation Act*, S.C. 1980-81-82-83, c.54.

[62] This description of developments is taken from Chapter III, "Rule Making" in J.M. Evans, H.N. Janisch, D.J. Mullan & R.C.B. Risk, *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 1989) 3rd ed. at 234-237.

It must be acknowledged that some may see the expansive language of the Citizens' Code of Regulatory Fairness as a political agenda for less government intervention. Indeed, participation and cost benefit analysis is likely to place qualitative limits on such intervention. However, it is to be hoped that consultation will lead

The Citizens' Code of Regulatory Fairness provided in part:

> When a government regulates, it limits the freedoms of the individual. In a democratic country, it follows that the citizen should have a full opportunity to be informed about and participate in regulatory decisions. Moreover, the citizen is entitled to know the government's explicit policy and criteria for exercising regulatory power in order to have a basis for "regulating the regulators" and judging the regulatory performance of the government.
>
> In recognition of these important principles, the federal government has developed this Citizens' Code of Regulatory Fairness. It is based on the government's fundamental commitment to openness, fairness, efficiency and accountability.
>
> 1. Canadians are entitled to expect that the government's regulation will be characterized by minimum interference with individual freedom consistent with the protection of community interests.
>
> 2. The government will encourage and facilitate a full opportunity for consultation and participation by Canadians in the federal regulatory process.
>
> 3. The government will provide Canadians with adequate early notice of possible regulatory initiatives.

On May 27, 1986 another element of the Regulatory Reform Strategy was announced. The "Regulatory Process Action Plan" was specifically designed to increase information about proposed regulations. It provided:

> Planning
>
> A regulatory planning system will be implemented in which all departments and agencies will prepare and submit to Cabinet Annual Regulatory Plans which indicate their proposed regulatory activities in the upcoming year.
>
> Cabinet will establish overall government priorities for the consideration and approval of regulations.
>
> Public Consultation and Information
>
> All departments and agencies will encourage and facilitate an equitable opportunity for all the interests affected by regulation to participate in the regulatory process. All departments and agencies must consult with the public on regulatory policies, objectives, rules, methods and approaches to program delivery and compliance. The government will improve communication of regulatory information to the public and, thereby, enhance public participation in the regulatory process by:
>
> > providing early notice of all possible regulatory initiatives (statutes, policy, regulations) in the Regulatory Agenda which will be published once a year, with a semi-annual update;

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to better regulation which is less characterized by unthinking reliance on command-and-control and more by incentive-oriented policy instruments. See, for example, R. Howse, J.R.S. Prichard & M.J. Trebilcock, "Smaller or Smarter Government?" (1990) 40 U.T.L.J. 498.

> pre-publishing all draft regulations, including amendments to existing regulations; and republishing draft regulations which were considerably amended following pre-publication or which have not been approved within eighteen months after pre-publication.
>
> No regulatory initiative will come into effect sooner than sixty days after early notice, or thirty days after pre-publication. Exemptions from the early notice, pre-publications and republication policies will be considered for emergencies on a case-by-case basis by Cabinet, and will be kept to an absolute minimum.
>
> The following information must be disclosed in Explanatory Notes to be published with draft and final regulations:
>
> the policy objective of the regulation
> the need for the regulation the content of the
> regulation changes from the existing regulation
> the timing of consultation and implementation
> of the regulation results of previous consultation
> a summary of the impact analysis
> identification of contact person(s).

In 1987, *Regulatory Agendas* were replaced by an annual *Federal Regulatory Plan* compiled by the Office of Privatization and Regulatory Affairs. The *Federal Regulatory Plan 1991* is a bit over 300 pages (English version) in length and constitutes a compendium of 716 proposed regulatory initiatives being considered by 27 federal departments and 11 independent regulatory agencies.[63]

In summary, an annual federal regulatory plan is published. This contains a brief statement of an intention to initiate or complete a regulation. No regulation should come into effect within the following 60 days, a period during which the public has an opportunity to express its views to designated contact persons. In principle, all draft regulations must be "prepublished" in the *Canada Gazette Part I*. Final regulations cannot be made during the next 30 days. The public is advised in the *Gazette* as to where to send submissions.

There is an interesting contrast at the provincial level. Despite evidence of some shift in attitude at the federal level, the first (and still only) general statutory reform was to come in Quebec. As Michel Leclerc, Director, Quebec Regulations Office, explained to the Ontario Standing Committee on Regulations, there were already 79 provisions in the *Revised Statutes of Quebec* prescribing publication in the *Gazette officielle du Québec* before regulations could be made.[64]

The *Regulations Act*[65] now provides:

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[63] Office of Privatization and Regulatory Affairs, *Federal Regulatory Plan 1991* (Ottawa: Min. Supply & Services, 1990).

[64] *Administrative Law: Cases, Text and Materials*, *supra*, note 62 at 231.

[65] *Regulations Act*, S.Q. 1986, c 22.

PUBLICATION OF PROPOSED REGULATIONS

8. Every proposed regulation shall be published in the *Gazette officielle du Québec*.

9. Section 8 does not require the publication in the *Gazette officielle du Québec* of any text referred to in a proposed regulation.

10. Every proposed regulation published in the *Gazette officielle du Québec* shall be accompanied with a notice stating, in particular, the period within which no proposed regulation may be made or submitted for approval but within which interested persons may transmit their comments to a person designated in the notice.

11. No proposed regulation may be made or submitted for approval before the expiry of 45 days from its publication in the *Gazette officielle du Québec*, or before the expiry of the period indicated in the notice accompanying it or in the Act under which the proposed regulation may be made or approved, where the notice or the Act provides for a longer period.

12. A proposed regulation may be made or approved at the expiry of a shorter period than the period applicable to it, or without having been published, if the authority making or approving it is of the opinion that a reason provided for in the Act under which the proposed regulation may be made or approved, or one of the following circumstances, warrants it:

(1) the urgency of the situation requires it;

(2) the proposed regulation is designed to establish, amend or repeal norms of a fiscal nature.

13. The reason justifying a shorter publication period shall be published with the proposed regulation, and the reason justifying the absence of such publication shall be published with the regulation.

14. A proposed regulation may be amended after its publication without being published a second time.

It should be noted that the 45-day comment period is a minimum which may be extended where the empowering act provides for a longer period. It is not clear what is meant in s. 12 by an exemption from publication "...if the authority making or approving it is of the opinion that a reason provided for in the Act under which the proposed regulation may be made ... warrants it". As Leclerc conceded, "In all earnestness, I must admit that I know of no case where a specific Act provides a reason for non-publication. No doubt the legislator wished to ensure that should such

a case exist, the regulation-making authority could continue to avail itself of it".[66]

It should also be noted that exemption from notice and comment is not left entirely to the determination of the regulation-making authority as objective "circumstances" must exist as a prerequisite to the subjective "opinion". Interestingly, Leclerc is of the view that notions of urgency and fiscal nature "...are subject to the test of reasonableness; the courts could be called on to decide whether the grounds asserted by the authority-making the regulation are reasonable or not".[67]

There appears to have been little difficulty in making the Quebec act work in practice. Initially, there was a tendency to grant a large number of exemptions to advance publication. "The current tendency, however, is to the opposite effect", Leclerc explained to the Ontario Committee. "It is my belief that within six months to a year, the general rule will be full compliance with the Act and derogations will have become the exception."[68]

Until recently, McRuer's reassurance of extensive informal consultation has muted proposals for change in Ontario. However, in 1979 David Mullan, in a study for the Ontario Commission on Freedom of Information and Individual Privacy, concluded that a strong case could be made for the adoption of general legislation along the lines of s. 553 of the APA.[69]

While Mullan's proposal was not acted on, in 1983 the Standing Committee on Regulations and Private Bills did recommend that a notice and comment procedure should be incorporated into appropriate legislation on a statute-by-statute basis. However, as a subsequent committee was to report in 1988, "Unfortunately, we can find few signs of its implementation. In theory, this option may be well suited to meeting Ontario's needs; but in practice, as the past five years have shown, it just does not work. What can best be described as 'inertia' appears to have set in."[70]

The Fleet Committee, after carefully reviewing the federal comprehensive, but non-statutory, option, the Quebec general statute option and its own earlier statute-by-statute option, unanimously concluded that a general notice and comment procedure along the lines of the 1986 Quebec statute was most appropriate in that it could improve public participation "...without impeding the efficient operation of government".[71]

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[66] *Administrative Law: Cases, Text and Materials*, *supra*, note 62 at 232.

[67] *Ibid.*

[68] *Ibid.*, at 233.

[69] D.J. Mullan, *Rule-Making Hearings: A General Statute for Ontario?* Research Study, Ontario Commission on Freedom of Information and Individual Privacy (Toronto: Queen's Printer, 1979).

[70] *Administrative Law: Cases, Text and Materials*, *supra*, note 62 at 237.

[71] Ontario Standing Committee on Regulations and Private Bills, *Second Report 1988* at 14. The Committee is popularly known as the "Fleet Committee" after its chairman, David Fleet, M.P.P.

Once the report was before the government, Premier Peterson was not sanguine about the prospects of legislative reform.

> Premier David Peterson said that he had not yet seen the report, but he defended the way his Government makes regulations.
>
> "They're vetted right through the system; they're vetted by a committee of Cabinet" he said. "They're not just made up out of the air."
>
> "The Government consults interest groups before the Cabinet passes regulations," he said, adding "The reality of the situation is that most people don't care about all these regulations."
>
> He said the Government is prepared to discuss the committee's report, but he warned: "This is not exactly the most exciting political stuff. This is the hard slugging of politics."[72]

A new *Regulations Act* has not proved to be any more exciting political stuff to the new government.

7. *Why Little Enthusiasm for Agency Rulemaking in Canada?*

In 1976 K.C. Davis boldly proclaimed: "The United States is entering the age of rulemaking, and the rest of the world, in governments of all kinds, is likely to follow. The main tool of getting governmental jobs done will be rulemaking, authorized by legislative bodies and checked by courts."[73] While this may be largely true in the United States, Canada has

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[72] *The [Toronto] Globe & Mail* (27 June 1988) 27, col.1.

For valuable comparative insights see G. Craven, "Consultation in Rule-Making — Some Lessons from Australia" (1991) 4 C.J.A.L.P. 221.

[73] K.C. Davis, *Administrative Law of the Seventies*, *supra*, note 55 at 168.

However, it should be noted that the blush is now somewhat off the rulemaking rose. The 1970's were clearly the "era of rulemaking" in federal administrative law. "To an astounding degree", Antonin Scalia noted, "a system which had previously established law and policy through case-by-case adjudication... began setting forth its general prescriptions in rules, leaving little to be decided in subsequent adjudications beyond the factual issues of compliance or non-compliance with the rules..." "Back to Basics: Making Law Without Rules", Regulation (July/Aug 1981) at 25.

However, a cyclical swing away from rulemaking may now be observed. "Notice and comment procedure for rulemaking is generally regarded as a solid success," Michael Asimow of UCLA Law School explains", ...but like most good ideas, it can easily be pushed to extremes". This appears to be just what has happened in California where the idea of rulemaking due process has been pushed "past its logical stopping point". "California Underground Regulations" (1992) 44 Admin. L. Rev. 43 at 76-77. And see, T.O. McGarity, "Some Thoughts on Deossifying the Rulemaking Process" (1992) 41 Duke L.J. 1311.

been reticent about agency rulemaking. Why has this been so? There are a number of possible explanations:

(1) Bureaucratic Inertia

(2) Lawyers' Values

(3) Lack of Established Consultation Mechanisms

(4) Insensitivity to the Interplay Between Discretion and Rules

(5) Exaggerated Fears of Fettering

(6) Commitment to Individualized Justice

(7) Lack of Legitimacy

(8) The Politics of Purposeful Ambiguity

(1) Bureaucratic Inertia

It is often easier to particularize than to generalize. Under constant pressure to "get decisions out the door", it is perfectly understandable that adjudication will be resorted to. The problem is that it is easier for a regulator to immerse herself in a mass of individual decisions rather than go through the often agonizing process of stating the general criteria she proposes to apply in her individual decisions. As Gresham's Iron Law of Administration has it, "Daily routine drives out planning". As I pointed out in an "agency study" for the Law Reform Commission of Canada:

> What a policy statement calls for essentially is a willingness to venture out and deal with problems before they arise as concrete cases demanding immediate solution. It requires foresight, an ability to generalize and the courage to risk being wrong. In return, policy statements and guidelines can lead to more effective and considerate regulation in that it gives parties some advance indication of what they should do by way of preparation.[74]

Moreover, generalization calls for a significant degree of initiative and advance planning. While the benefits will accrue to those subject to regulation, the costs and risks fall on the regulatory agency. As Michael Asimow has noted:

> To produce any new rule the agency must incur the substantial bureaucratic costs of overcoming inertia. The internal process includes research, resolution of staff conflicts, informal consultation with interested outsiders, agreement upon precise language, consensus-building and multilevel review. The financial and psycho-

[74] H.N. Janisch, *The Regulatory Process of the Canadian Transport Commission*, (Ottawa: The Law Reform Commission of Canada, 1978) at 112.

> logical costs of forging consensus within an agency on the contents of a new rule may be quite substantial.[75]

(2) Lawyers' Values

Abstract legal values such as consistency and predictability favour rulemaking. However, most lawyers are not concerned with the overall effective functioning of the administrative system.[76] Actual legal values are developed through representing clients against bureaucrats. If there is a rule favouring a client, a lawyer may well not be involved. When the rule is against the client, a lawyer will denounce it and praise the benefits of flexibility and discretion, which she will be confident may be bent in favour of the client's interests. This is what lies at the heart of John Willis' brilliant attack on received orthodoxy in which he contrasts lawyers' values with those of civil servants.[77]

This overall attitude originates in our system of legal education which still places too little emphasis on legislation.[78] In the law schools, as D. Gordon Blair observed many years ago, we look at administration "through the wrong end of the telescope" when we focus on judicial review.[79] We seduce our students with dreams of Perry Mason - when did you ever hear of a Mock rulemaking? Even when we establish an administrative law moot, The Laskin, which is both national and bilingual, it only focuses on judicial review and the *Charter*.

(3) Lack of Established Consultation Mechanisms

Despite developments at the federal level, as we have seen, we have not yet established general rulemaking procedures at the agency level. We

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[75] M. Asimow, "Rule-making and Regulatory Reform" (1985) Duke L.J. 381 at 403-404.

[76] As Bernard Schwartz insightfully noted:

> The lawyer tends to concern himself, as it were, only with the outer periphery of the administrative process i.e. with only those cases that flower into formal controversy.... His picture of the administrative process is of necessity a limited and even a distorted one, for he normally shuts his eyes to what constitutes the great proportion of the normal work of administration.

B. Schwartz, *Administrative Law* (Boston: Little Brown, 1976) at 28.

[77] J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351.

[78] H.N. Janisch, "Teaching of Legislation at Canadian Law Faculties" (1987) 11 Dal. L.J. 262.

[79] D. Gordon Blair, "The Practice of Administrative Law," (Prospects in the Law, Ontario Law Students' Association, 1968) at 58.

still continue to assume, as we do with the *Statutory Powers Procedure Act*,[80] that the only procedures worthy of codification concern adjudicative hearings. By contrast, the typical state administrative procedure act in the United States contains two separate sets of procedures - one for rulemaking and one for adjudication.[81]

In the absence of uniform procedures, agencies have developed *ad hoc* rules for "issue" or "generic" hearings. Yet without the assurance of an effective opportunity for participation, it is understandable that affected parties cling to assured adjudicative participatory rights. Indeed, this phenomenon was recently noted by the Ontario Human Rights Code Review Task Force:

> Some equality seeking groups told the Task Force they did not favour giving the Commission regulation making power; they felt better results could be achieved by taking cases to a hearing; they also felt that regulation making power might take the control away from equality seeking groups to bring about change in the way they wanted.[82]

Nevertheless, as we have already noted, the Cornish Report came down squarely in favour of rulemaking - provided, that is, there were adequate opportunities for participation.

(4) Insensitivity to Interplay Between Discretion and Rules

My impression is that relatively few Canadian administrative lawyers have any real sense of the nature of the interplay between rules and discretion. Like Mr. Justice Estey in *Inuit Tapirisat*, we still want to put things in rigidly segregated categories. As one who was fortunate enough to study under Kenneth Culp Davis at the University of Chicago in the 1960's while he was working on his highly influential book, *Discretionary Justice*,[83] I have always been struck by the ever shifting nature of deci-

[80] *Statutory Powers Procedure Act*, R.S.O. 1990, S-22.

[81] For a short, clear and straightforward description of rulemaking which refers to both the APA and the Revised Model State Administrative Procedure Act, see B. Schwartz, *Administrative Law* (Boston: Little, Brown, 1984) c.4, "Rules and Rulemaking" at 143-199. For the views of an enthusiastic proponent of rulemaking and the undoubted virtues of notice and comment procedures, see K.C. Davis, *Administrative Law Treatise* (San Diego: K.C. Davis Pub. Co., 1980) at 3-30; *Administrative Law of the Eighties* (San Diego: K.C. Davis Pub. Co., 1989) at 192-221.

[82] *Achieving Equality: A Report on Human Rights Reform* at 69.

[83] K.C. Davis, *Discretionary Justice, A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). For a particularly valuable review which places the Davis thesis in a Canadian context, see P. Anisman, "Book Review" (1969) 47 Can. Bar Rev. 670. And see c.14 "Confining and Structuring Discretion", *Administrative Law: Cases, Text and Materials*, *supra*, note 62 at 755-858.

sion-making methodologies. In the on-going dynamics of regulation there should be a constant exchange between adjudication and rulemaking as issues move from case-by-case resolution involving a maximum degree of flexibility and experimentation through a growing use of policy as the agency becomes more confident and on to guidelines and rules as that policy is crystallized in legislative form. Indeed, as I argued at the Special Lectures three years ago with respect to the Ontario Securities Commission, "...there needs to be more systematic, on-going promotion from draft policy to policy, policy to regulation and regulation to statute. There needs, as well, to be a periodic weeding of the policy garden in order to reduce its bulk and complexity because there has been an inevitable tendency to add on and not to consolidate".[84]

(5) Exaggerated Fears of Fettering

In the past, it has sometimes been thought than an administrative tribunal had to exercise its discretion *de novo* on each occasion and that if it adopted a consistent policy this would amount to an unlawful fettering of its discretion. As a result, there has been some reluctance by legal advisers to regulatory agencies to advise what common sense and good administration would seem to dictate. If an agency is going to be confronted by a whole series of all but identical applications for licences, for example, it is surely fairer to the parties and administratively more convenient to announce in advance the policy which the agency intends to follow. This leads both to greater predictability which will assist applicants and to a higher degree of consistency which is, after all, a hallmark of fairness.

In *Capital Cities Communications Inc. v. Canadian Radio-television & Telecommunications Commission*,[85] the Supreme Court of Canada has endorsed the use of policy guidelines by the CRTC, and has thereby cleared the way for far greater use of similarly imaginative techniques by other regulatory agencies. Here the CRTC had applied a guideline to permit a cable licensee to delete commercial messages. Rather than deal with the issue of the random deletion of commercials from American stations on a case-by-case basis, the Commission had stated its general approach in a lengthy policy document, *Canadian Broadcasting "A Single System", Policy Statement on Cable Television.* In amending the licence of Rogers Cablevision to allow for deletion, it stated that it was doing so "in accor-

[84] H.N. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility," in Special Lectures of the Law Society of Upper Canada 1989, *Securities Law in the Modern Financial Marketplace* (Toronto: De Boo, 1990) at 91.

[85] [1978] 2 S.C.R. 141.

dance with" its earlier policy statement. It was argued that the Commission had fettered its discretion by applying the policy statement as a guideline rather than by considering the licence amendment on a purely individual basis.

In rejecting this attack on CRTC procedures, Chief Justice Laskin and a majority of the Court not only said that they would not strike it down, but also endorsed the use of guidelines as a desirable regulatory technique.

> In my opinion, having regard to the embracive objects committed to the Commission under s.15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", *it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.*[86]

However, it must be carefully noted that this endorsement of the use of policy guidelines was predicated on an opportunity being given to the affected station to argue against the policy of deletion in general and the merits of applying it at a Commission hearing. In other words, *a "guideline" cannot become a rigid rule*. An opportunity will always have to be given to an affected party to question the guideline and its applicability to his case.

A distinction has thus to be maintained between a "guideline" and a "regulation", for with the latter, of course, there is no need to maintain a "reserve clause" willingness to depart from it in a deserving case. However, in practice, this requirement to maintain a reserve clause willingness to recognize the exceptional may not seriously affect a regulatory agency's desire for consistency. This was well illustrated in *Re North Coast Air Services Ltd.*[87] Here, a regulation governing charter operations had been struck down as being *ultra vires* the Commission. The Commission then sought to "adopt" the invalid regulation, and this was struck down as well. It then announced that it had adopted the substance of the impugned regulation as a policy and that it proposed to amend each and every charter licence to conform to that policy. At the same time, it indicated that it would be prepared to consider deviating from the policy in individual cases. In the end, no exceptions were made. Nevertheless, it was held that enough of a reserve clause willingness to recognize the exceptional had been maintained. As Chief Justice Jackett of the Federal

[86] *Ibid.*, at 171. [Emphasis added]
[87] *North Coast Air Services Ltd., Re* [1972] F.C. 390 (C.A.).

Court of Appeal laconically noted: "I might add on this aspect of the matter that I do not find it too surprising that, of over 400 charter carriers affected, only some 58 filed representations and that none of them persuaded the Commission to change its policy. We must assume that the Commission had given care to working out a policy that met all problems".[88]

The way is now largely clear for Canadian agencies to articulate their policy by rulemaking as well as by way of less formal policy statements and guidelines. However, as recent cases continue to remind us, they cannot yet move to the development of inflexible rules.[89] This requires statutory authorization.

(6) Commitment to Individualized Justice

As we have already noted, the Law Reform Commission of Canada reported in 1985 that it sensed "...a strong bias towards the case by case exercise of discretion".[90] Not only has there been reluctance to employ rulemaking, but this bias has even led to a very soft position on precedent. Much of Canadian administrative law has flowed from a conscious rejection of the common law's "dead hand of precedent". Consider, for example, sub-section 73(1) of the Ontario *Workers' Compensation Act*[91] which still provides: "Any decision of the Board shall be upon the real merits and justice of the case and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing". Shades indeed, of the ossification of late 19th Century common law on voluntary assumption of risk, contributory negligence and the fellow servant rule!

The danger is that in the swing of the pendulum away from a rigid form of precedent in favour of justice in the particular case, inequality of treatment can easily result. In the mass adjudication of social welfare rights it is all very well to say that each application will be dealt with on its merits, but this can easily lead to equal cases being dealt with unequally. A refusal to strive for a reasonable degree of consistency can be just as unfair as any mechanical application of precedent which refuses to take into account the particular merits of individual cases. Moreover, isolating each case and treating it on its merits alone deprives an applicant of any

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[88] *Ibid.*, at 406-407.

[89] See, for example, *Cabalfin v. Canada (Minister of Employment & Immigration)*, (1991), 49 Admin. L. R. 100 (Fed. T.D.) and *Brown v. Alberta* (1992), 2 Admin. L. R. (2d) 116 (Alta. Q.B.). And see, *Practical Shooting Institute v. Commissioner of Police*, [1992] 1 N.Z.L.R. 709 (H.C.).

[90] *Report 26, Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985) at 33.

[91] *Workers' Compensation Act*, R.S.O. 1990, c. W-11.

yardstick against which to measure the relative fairness of the decision in his or her case, substantially reduces any predictability and makes it extremely difficult to assess the overall performance of an agency.

(7) Legitimacy

Two questions need to be dealt with here. First, to what extent is the overall push for rulemaking in the United States a unique product of a congressional, separation of powers, system of government? Second, would it ever be legitimate in a parliamentary system of government to grant an independent agency autonomous rulemaking authority?

In their 1972 comparative study of American and British administrative law, Bernard Schwartz and H.W.R. Wade suggested that different political and constitutional traditions may have led to different approaches to discretion.

> The American conception is that discretion, whether judicial or administrative, should in all possible cases be exercised in accordance with rules ascertainable in advance, and that the policy to be applied should somehow be fixed or standardized. The British conception is that within its legal limits administrative discretion must be free, and that the object of policy should be to produce the best solution as it appears at any particular time. ...The main cause of the difference, such as it may be, is probably the constitutional background in each country. Abuse of political discretion may be a more imminent danger in the United States where the executive is not directly responsible to the elected legislature and where so much vital power is in the hands of independent agencies which are responsible to no-one. The American yearning for the crystallization of policy by rules may be prompted by the desire to fill this void.[92]

Can it be realistically said in contemporary Canada (or Britain for that matter) that executive responsibility to the legislature effectively reduces the need for rulemaking? Discretionary power is commonly granted here to independent administrative agencies. Moreover, the widespread delegation of discretionary power well down the hierarchy of decisionmaking makes it unlikely that political accountability will be an effective alternative to the confining and structuring of discretion by rulemaking.

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[92] B. Schwartz and H.W.R. Wade, *Legal Control of Government* (Oxford: Clarendon Press, 1972) at 106. See, as well, K. Hawkins, "Rule and Discretion in Comparative Perspective: The Case of Social Regulation" (1989) 50 Ohio State L.J. 663. Hawkins notes that far greater reliance is placed on rules and rulemaking in the US than in the UK. The American liking of certainty and continuity of specific legal rules rather than discretion in regulation was thought to have a number of political sources - the scale of the task, multiple jurisdictions and a "greater population of strangers". To this he added lack of faith in the quality and competence of the civil service and pervasive distrust of government (at 669-670).

Nevertheless, as Schwartz and Wade caution, it will be important to bear in mind the overall constitutional and political context in which the choice of decision-making methodology has to be made.

This brings us to a crucial issue in legitimacy which was raised in stark fashion in the Cornish Report. As we have seen, the Report came out very strongly in favour of agency rulemaking, but it saw government not as a facilitator of effective human rights enforcement but as having a clear and debilitating conflict of interest.

> While usually the Government is responsible for regulations, the Task Force believes that it would not be appropriate for the Government to have the power to pass regulations in an area in which the Government is the most frequent respondent under the *Code* and has such wide-ranging and costly *Code* responsibilities.[93]

From a broader perspective this shows how highly problematic the whole notion of "empowerment", enthusiastically adopted in the Cornish Report, can be. How can one say on the one hand that government stands in a conflict of interest and then, on the other hand, expect the same government to delegate sweeping powers to an autonomous agency? Moreover, the government is expected elsewhere in the Report to assume a leading role in advancing equality rights.[94] As well, while denouncing the limitations of adjudication in favour of rulemaking, the Report also calls for the establishment of a Significant Case Fund to assist equality seeking groups to bring forward test cases to achieve broad-based systemic change.[95] The Task Force appears to have been somewhat unselective in its enthusiasm for change.

Be that as it may, there are more specific concerns with the conflict of interest/autonomous agency model, especially in a system of parliamentary government. It is true, as the Report notes, that the *Regulations Act*[96] defines a regulation as a rule "...made or approved under an Act of the Legislature by the Lieutenant-Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant-Governor in Council...". However, this must be read in the context of well-established constitutional practice.

Thus the McRuer Report insisted that the general constitutional principle be maintained that the ultimate decision on policy affecting civil rights must rest with the political authorities.

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[93] *Supra*, note 82 at 69.
[94] *Supra*, note 82 at 155-163.
[95] *Supra*, note 82 at 58.
[96] *Regulations Act*, R.S.O. 1990, c. R-21, s.1.

> Subordinate legislative power is a law-making power exercised by persons or bodies subordinate to the Legislature. In its exercise rules having the force of law are formulated as a result of a decision or decisions made on grounds of policy. In accordance with constitutional principles [of accountability] the exercise of powers to make decisions affecting rights of individuals on grounds of policy by persons or bodies other than the Legislature should be subject to political control. As in the case of administrative powers, political control of subordinate legislative power should be maintained by conferment of power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers.[97]

McRuer concluded his chapter on "Persons On Whom Subordinate Legislative Power May Be Properly Conferred" with an observation of striking relevance here.

> In any case all regulations made by an independent person or body should be reported to a minister, who should have power to disallow them. So-called independent boards or bodies should never be given legislative powers free from political control as a subterfuge, or to relieve the political authorities from embarrassing duties.[98]

At the federal level, the MacGuigan Report asserted that only the Governor in Council should be given authority to make regulations having "substantial policy implications".[99] The Committee was advised that the choice of person upon whom a rulemaking power was to be conferred was a matter of judgment in each individual case. "Nevertheless", the Committee said that it wished to emphasize "that the first safeguard respecting the device of delegating power to legislate is that the power should be given to a responsible authority".[100]

As for regulations made by independent bodies, the Committee noted that while independence is the hallmark of the judicial branch of government "...it should be quite alien to the executive branch".[101] The government of the day should be fully responsible to Parliament, and through it to the people, for all subordinate laws which are made, whether or not the policy embodied therein was initiated within the existing departmental structures or elsewhere. Therefore, all regulations made by independent bodies which do not require governmental approval before they become effective should be subject to disallowance by the Governor in Council.

The Law Reform Commission of Canada which, as we saw at the outset of this lecture, strongly approved of agency rulemaking, was some-

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[97] *Royal Commission Inquiry Into Civil Rights, Report Number One* (Toronto: Frank Fogg Queen's Printer, 1968) at 356.
[98] *Ibid.*, at 360.
[99] *Third Report*, Special Committee on Statutory Instruments (Ottawa: House of Commons, 1968) at 35-36.
[100] *Ibid.*, at 36.
[101] *Supra*, note 99.

what less insistent on immediate political accountability, although it recognized from the outset that definitive agency rulemaking raises a substantial constitutional question.

> Should agencies be given regulation-making autonomy? Frequently agencies are expected to initiate a request for regulations, to prepare and consult on them, yet are not formally empowered to make them. In part this seems to reflect the notion that our constitutional traditions require all political responsibility to Parliament to be channelled through the executive. In part it has to do with the political sensitivity of certain issues that may have important economic implications or substantial interministerial aspects, affect the protection of the public or touch upon fundamental human rights.[102]

The Commission concluded that it might be appropriate in some circumstances to grant an agency responsibility for developing by rulemaking some or all of the policies which are to guide its decisions. But there should not be a "total absence of government control". This could be achieved by making the agencies accountable to Parliament. Their rules would stand permanently referred to the Standing Joint Committee on Regulations and Other Statutory Instruments which would be given a clear power of disallowance.[103]

Finally, it should be noted that this issue of legitimacy of autonomous agency rulemaking was addressed in a brief to the Task Force by David Lepofsky. He was strongly in favour of rulemaking, but also sensitive to the legitimacy issue.

> Cabinet should still have a role to play, as the traditional regulation-making body. To integrate the Cabinet into this process, it is recommended that after consultation is undertaken by the Commission, the Commission should be required to lodge a copy of the enacted regulation with the Cabinet. Cabinet would then have a prescribed period of time within which it could review the regulation. Unless Cabinet vetoes the regulation, within that prescribed period, the regulation would come into force as a law. It would be binding on Boards of Inquiries, the Commission and the Courts, though only prospectively and not retroactively.
>
> Through this process, Cabinet would have the opportunity to stop a regulation from going ahead if, in its judgment, it would be inappropriate. However, the onus would be on Cabinet to stop the regulation. Any inaction by the Cabinet for the prescribed period of time would lead to the regulation coming into effect automatically. This would ensure that there is a political accountability process infused into the regulation-making process. It would at the same time prevent Cabinet from simply sitting on a regulation for an indefinite period of time, delaying its implementation, through claims that it was "studying" or "reviewing" the matter.[104]

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[102] *Report 26*, *supra*, note 90 at 21.
[103] *Supra*, note 90 at 22.
[104] M.D. Lepofsky, *Brief to the Task Force on the Ontario Human Rights Code* (May 5, 1992) at 9.

In the end, this may prove to be the best way of addressing the legitimacy issue in a manner which allows for a high degree of independent initiative, and yet does not sacrifice ultimate political accountability. If nothing else, the Cornish Report's abrupt and unthought through recommendation for autonomous rulemaking will serve as a reminder of the constitutional constraints of parliamentary government. In an age of *Charter* enthusiasms, empowerment and equality seeking groups, we would do well not to lose sight of the fundamentals of our constitution.

(8) The Politics of Purposeful Ambiguity

To understand the notion of "purposeful ambiguity" requires a very brief excursion in intellectual history. In 1917, Ernst Freund of the University of Chicago published his pioneering study *Standards of American Legislation*[105] which was followed in 1928 by his monumental *Administrative Powers Over Persons and Property*.[106] His central thesis was that the legislature could, and should, do a better job of laying down standards in legislation. In the 1960's, Davis developed the powerful insight that there were finite limitations on the capacity of the legislative process and that if there was ever to be greater clarity in standards it would have to come from administrators not legislators. He saw the problem as one of "responsible discretion" in which one should seek to realize more definitive standards through the administrative process. The key to responsible discretion is rule and rulemaking where a rule is understood not simply to be a generalization from prior experience in regulating, but an anticipation of that which is likely to come in advance of its arrival. Agencies delegated discretionary power by legislative bodies must not simply adjudicate individual claims but must develop standards at the earliest feasible time and confine their discretion through principles and rules. But this assumes that, in so doing, the agencies are fulfilling a task started, but not completed, by the legislator. *But does the legislature necessarily want clear standards with the inevitability of political winners and losers?*

This is the political dimension of discretion identified by Wayne Leys in 1943, approximately midpoint between the Freund and the Davis eras.[107] Leys pointed out that legislatures are indefinite in their language for a number of reasons and that these reasons may include, but are not exhausted by, the usual catalogue of explanations. After citing a recognition of

[105] E. Freund, *Standards of American Legislation* (Chicago: University of Chicago Press, 1917).

[106] E. Freund, *Administrative Powers Over Persons And Property* (Chicago: University of Chicago Press, 1928).

[107] W. Leys, "Ethics and Administrative Discretion" (1943) 3 Public Administration Review 1.

lack of skill and experience, the possibility that it may be a subject which is not susceptible to general rules and even evidence of unwillingness to "spend the time required to hit the nail on the head", Leys concluded that such a catalogue ignores "purposeful ambiguity" on the part of the legislature. This comes into play when there is inability to "muster a clear majority in favour of a clear standard". This explains why broad mandates are delegated to be "filled in" by the agencies. In turn, agencies are often the "fall guys" subject to criticism for vagueness from private parties, as well as governmental and judicial bodies, because the legislature knows just how political public regulation really is.

This analysis suggests that the legislature may well not want the "filling in" to be at all dispositive as it may wish to perpetuate ambiguity so as not to offend. While not, perhaps, as powerful an insight for a parliamentary system in times of majority government, the notion of "purposeful ambiguity" is still one possessed of significant explanatory power. It suggests that agencies should not rush in with rules where politicians tread only with discretion.

While these explanations for reticence in rulemaking are of great importance, they do not, at least in my estimation, undermine to any significant extent arguments for rulemaking. While they do suggest caution in analogizing to developments in the United States and highlight issues we still have to address, they do not persuade me that greater resort cannot, and should not, be had to rulemaking.

I propose in drawing to a close to identify briefly two illustrative examples of contemporary over-reliance on adjudication and then to discuss whether there might be a role for the courts in bringing about the structuring and confining of discretion through rules. Finally, I will seek in my conclusion to make an overall assessment which places the choice of decision-making methodology in a somewhat broader context.

8. *Overloaded Adjudication*

In *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*,[108] the Supreme Court of Canada upheld a technique of "full Board" consultations employed to ensure consistency in a multi-member agency which operates by way of many panels. I have argued elsewhere,[109] and wish to do so again here, that while this is an important decision which will have widespread application in agency practice, it is essential that it be placed in context with other tech-

[108] [1990] 1 S.C.R. 282.

[109] "Consistency, Rulemaking and *Consolidated-Bathurst*" (1991) 16 Queen's L.J. 95.

niques such as rulemaking and less formal guidelines and policies. When this is done, it will be evident that the "full Board" mechanism employed in *Consolidated-Bathurst* is only one of several ways of achieving greater consistency and not even, necessarily, the best way of doing so.

Without detracting from the significance of the full Board technique as an innovative internal administrative arrangement for achieving greater consistency in decision-making by a multi-member tribunal, or from the importance of the way in which this procedure was affirmed in the Supreme Court of Canada, it must be recalled that the Board had relied on an exclusively adjudicative mode for dealing with policy. As seen by the Board, the challenge was to inject greater coherence into its decisions, and to maintain a high level of quality in individual Board decisions:

> [A]ccepting that no one panel of the Board can bind another panel by any decision rendered, what institutional procedures has the Board developed to foster greater insightfulness in the exercise of the Board's powers by particular panels? What internal mechanisms has the Board developed to establish a level of thoughtfulness in the creation of policies which will meet the labour relations community's needs and stand the test of time? What internal procedures has the Board developed to ensure the greatest possible understanding of these policies by all Board members in order to facilitate a more or less uniform application of such policies?[110]

There are two principal reasons, one negative the other positive, why consideration should be given to breaking away from any single-minded commitment to an exclusively adjudicative mode of operation. There may be positive advantages in moving to rulemaking in the form of openly articulated guidelines and policies. However, despite victory in the Supreme Court of Canada, significant difficulties remain in relying on full Board type procedures.

For instance, counsel for Consolidated-Bathurst found himself in a very unpleasant situation when he saw members of the Board, in addition to those on the panel before whom he had argued, assembling to discuss the policy implications raised with respect to his client's conduct, knowing he was to be excluded. No matter how fulsome the reassurance that the integrity of panel decision-making will not be compromised, residual resentment over exclusion is bound to remain. As well, there will be doubts as to the efficacy, in practice, of the safeguards the Supreme Court of Canada insisted on with respect to new factual matters and grounds. Much will depend on the confidence that parties have that the reasons adduced really reflect the actual basis for the decision and that unarticulated and untested considerations have not crept into the decision. While the Board in *Consolidated-Bathurst* did a highly commendable job in this

[110] *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, *supra*, note 108 at 315.

respect, it is by no means certain that this will always be the case. Finally, the Board was somewhat disingenuous in drawing a parallel between its internal arrangements for ensuring greater consistency and consultation between fellow judges or between a judge and her law clerk. This ignores the likelihood of hierarchical influence in a multi-member tribunal with many part-time members and the dominant role full and part-time chairs are likely to play. Indeed, it may be simply naive to envisage post-panel decision discussion as merely an informal chat amongst equals. All in all, sufficient nagging doubts remain about the full Board procedure to justify consideration of alternative techniques for ensuring greater consistency.

The great strength of adjudication is its focus on the particular. But this is also its great weakness for an agency seeking to develop an overall coherent approach because it can so easily lead to "that wilderness of single instances" of which Tennyson warned. Rather than shift away from its single-minded commitment to adjudication, what the Board has done in this instance is to create another (sealed) level in the adjudicative process. This, in turn, risks compromising the integrity of that process because, if Board members are sufficiently unaware of the possible policy implications of their decisions to be in need of an extra level in adjudication, will not the parties themselves (who, after all, are the engines which drive adjudication) be even more out of touch with policy? Will this not reduce the effectiveness of their participation before the panels and, by perpetuating ignorance, undermine respect for panel decisions? In short, while the Board has identified its problem, has it come up with the most effective solution?

In his paean to rulemaking, Bonfield noted that where an agency makes the applicable law *and* determines whether it has been violated, there tends to be confusion over the precise facts which must be established and the burden of persuasion for establishing them.[111] This confusion was very evident at the recent massive "adjudication" of the desirability of long distance telephone competition in Canada. And massive it certainly was - regional hearings held in each province and territory, a central hearing which lasted more than eleven weeks and produced more than 16,000 pages of transcript evidence and 4,000 pages of written submissions and final argument.

Technically speaking, the CRTC decision[112] (which itself was over 200 pages in length) grew out of two specific applications for interconnection with the established telephone companies. However, this proceeding was soon "converted" into a broad-ranging review of the merits and

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[111] A.E. Bonfield, "State Administrative Policy Formulation and the Choice of Lawmaking Methodology" (1990) 42 Admin. L.R. 121 at 128.

[112] *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, Telecom Decision CRTC 92-12, June 12, 1992.

demerits of competition and monopoly. It was never clear just who had to prove what, and on what basis. Did the applicants have to prove the benefits of competition and the respondents that they controlled a "natural monopoly" characterized by declining long run costs? And if so, on what basis? Was the proof required in setting the basis for contribution to local rates different from the proof required that the levels of contribution actually proposed would be sufficient? In the end, massive amounts of very specific information was simply ignored in the decision itself because, as Bonfield had warned, no distinction had been made between the necessary facts and burden of persuasion associated with the law-applying function and the necessary facts and burden of persuasion association with the law-making function. The process also reflected the need to try and distinguish more rigorously between fact finding and choice, and to recognize that while a trial-type hearing may be appropriate for the former, the latter is a value judgment and not susceptible to a trial in a traditional adjudicatory setting.

9. Should the Courts Nudge Agencies into Rulemaking?

D.J. Galligan in his most valuable 1986 study, *Discretionary Powers: A Legal Study of Official Discretion*[113] urged that the courts should have a role in encouraging administrative initiatives to set clearer standards. He acknowledged that the diversity of factors that bear on the shaping of the normative framework of decision-making makes it inappropriate for the courts simply to insist that all discretionary powers be rendered into a system of clear and binding rules. This would, as Davis and Bonfield would agree, ignore the reasons for having discretion in the first place, and would fail to recognize that there are good reasons sometimes for retaining a "highly incremental approach".

> For these reasons, the choice of decision strategies should remain primarily in the hands of the administrative authority, subject of course to statutory guidance. Nevertheless, the courts might have a legitimate role in hedging around this process with a number of principles and constraints. These would be based on the idea that administrative authorities have a general duty to direct their attention to the decision strategy to be followed, and to make public their conclusions and their reasons for them.[114]

He went on to suggest that this duty could be made more specific in a number of ways. First, the agency should direct itself to the issue of stan-

[113] D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).
[114] *Ibid.*, at 287.

dards and announce, with at least some level of particularity, the basis or which it will proceed in making decisions. Second, where standards are left at a highly abstract level, reasons should be given for adopting that approach. "A complete absence of standards would never be justified, and the question in practice would be whether standards were sufficiently specific."[115] Third, once standards had been set, an agency would be required to follow them and any change would have to be explained and justified. Fourth, where decisions are made on an incremental basis, efforts should be made to articulate the standards that are implicitly relied upon.

> The point of imposing duties along these lines would be to enhance the rational basis of decisions and to reduce arbitrariness, to provide guidance upon which expectations might be built and hence to satisfy a sense of fairness, but without forcing administrative bodies into a rigid, rule-governed framework. The courts as independent generalists are in a good position to oversee compliance with these constraints, while final responsibility for settling particular strategies remains with the discretionary body.[116]

There are some indications in the United States that the courts are in the process of creating law that will require agencies to do as much as they reasonably can to clarify standards, to develop principles, to state policies and to formulate rules. The best judicial statement of this nudging approach was in the District Circuit Court of Appeal in 1971 in *Environmental Defense Fund v. Ruckelshaus*,[117] where it was declared that a court's general purpose should be to require administrators themselves to "provide a framework for principled decision-making".

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions.[118]

K.C. Davis has argued that "...the law may be in the early stages of a massive movement toward judicially required rulemaking that will reduce discretion that is unguided by rules or precedents."[119] However, despite such academic encouragements, the courts have continued to leave the ultimate choice of decision-making methodology to the agencies. As the Supreme Court explained as early as 1947:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to

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[115] *Ibid.*
[116] *Ibid.*, at 288.
[117] *Environmental Defense Fund v. Ruckelshaus*, 439 F. 2nd 584 (D.C. Cir. C.A., 1971).
[118] *Ibid.*, at 598.
[119] K.C. Davis, *Administrative Law Treatise* (San Diego: K.C. Davis Pub. Co., 1980) at 128.

> rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of [the] Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise... Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[120]

More recent cases[121] have not substantially changed things. They recognize a broad, although not unlimited discretion in the agency to decide whether to proceed in any given instance by rulemaking or by adjudication. One limit on this discretion is where an agency formulated what looked like a general rule and then declined to apply that rule to a case before it. Of course, the absence of active judicial supervision leaves it up to the agencies themselves to make choices based on the relative strengths of, and contribution to, fair and effective administration which can be made by rules, orders and guidelines.[122]

While there are, as yet, few examples of judicial nudging in Canadian law, it should always be remembered that the Supreme Court of Canada gave a green light to agencies for firm, but not absolutely rigid, policy guidelines in *Capital Cities*. Recall that there Chief Justice Laskin went out of his way to endorse the CRTC's use of guidelines, and that this use of rulemaking was deemed "eminently proper". "An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. *Although one could mature as a result of a succession of applications, there is merit*

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[120] *SEC v. Chenery Corp.*, 332 U.S. 194 at 202 (1947).

[121] *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

[122] Bonfield, *supra*, note 111, suggests that at the state level the courts have been more willing to intervene and that the potential basis for a relatively broad judicially imposed preference for administrative law-making by rule rather than adjudication has been established (at 152-180).

In Canada, where this issue has been addressed, courts have held that the choice rests with the agency. See for example, *Tomen v. F.W.T.A.O.* (1989), 70 O.R. (2d) 48 (Ont. C.A.) (discretion rests with the association to choose informal rules over regulations) and *Matthews v. Board of Directors of Physiotherapy* (1987), 43 D.L.R. (4th) 478 (Ont C.A.) (agency has discretion to choose adjudication over rulemaking). Occasionally, the reviewing court will insist that a legislative route be followed. See, for example, *Buck v. Courtenay (City)* (1991), 84 D.L.R. (4th) 349 (B.C. S.C.) (escort agencies may only be banned, if at all, by general by-law, not by cumulative impact of individual discretionary refusals of licenses).

in having it known in advance."[123]

In addition to this encouragement and continued judicial expressions of concern at grants of untrammelled discretion, the courts have developed three minor techniques for nudging, and stand on the brink of employing two more significant techniques. Of the latter, the legitimate expectations doctrine is grounded in conventional administrative law, the other is drawn from the requirement in Section I of the *Charter* that reasonable limits demonstrably justified in a free and democratic society be prescribed "by law".

In a few instances, the courts have insisted that where an issue can only be effectively resolved by a broader legislative approach, the agency cannot continue in an adjudicative mode. In *Garden of Gulf Court and Motel Inc. v. Island Telephone Co.*[124] decided by the Prince Edward Island Supreme Court *en banco* in 1981, an application had been made by the motel to use telephone equipment not provided by the local telephone company. This application was rejected by the regulator, the Public Utilities Commission, on the grounds that the widespread adoption of this practice would be detrimental to The Island Telephone Co. and to its subscribers. What had been a single application to be dealt with in a narrow adjudicative fashion was converted by the court into an essentially legislative process dealing with the whole issue of terminal attachment. In so doing, what had been a single adjudicative application was converted into a multi-party rulemaking proceeding. Somewhat similarly and more recently, the Québec Court of Appeal has mandated that the Régie des permis d'alcool must make regulations spelling out the meaning of "public tranquillity", even though the statute only provided that the Régie may make regulations.[125]

As well, it has been held that where a securities commission changed its policy in a manner detrimental to a broker/dealer of mutual funds, it could not enforce the new policy without adequate promulgation of the change.[126] In effect, the court sought to avoid the unfairness of retroactive policy-making by way of adjudication by insisting that a rulemaking process of only prospective application be adopted. And, as a supplement to concerns for fettering, it has been held that where a labour relations board developed a binding policy in the absence of statutory authority, it

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[123] *Capital Cities Communications Inc. v. Canadian Radio-television & Telecommunications Commission*, [1978] 2 S.C.R. 141. [Emphasis added]

[124] *Garden of Gulf Court & Motel Inc. v. Island Telephone Co.* (1981), 126 D.L.R. (3d) 281.

[125] *Thibodeau-Labbée v. Québec (Régie des permis d'alcool)* (1991), 2 Admin. L.R. (2d) 69.

[126] *W.G. Knight v. Manitoba (Securities Commission)* (1991), 47 Admin. L.R. 234 (Man. Q.B.).

had to do so by way of a formal regulation under the provincial *Regulations Act*.[127]

In the third edition of our casebook in 1989, we thought that the administrative practice of consulting in rulemaking would soon be converted to an enforceable legal right and that by this means the courts would finesse the restrictive labelling approach adopted in *Inuit Tapirisat*.[128] As Lord Scarman had noted, "The doctrine of legitimate expectation has an important place in the developing law of judicial review".[129] Subsequently the House of Lords upheld an expectation that accepted practices on trade union consultation would be adhered to in the GCHQ case.[130] An interesting incident in England was also noted in which the Lord Chancellor, after being adversely criticized by Lord Chief Justice Lane for breaking off promised negotiations on legal aid fees, capitulated mid-trial and went back to the negotiating table.[131]

However, we did recognize that it might not all be plain sailing.

> There remain difficult conceptual problems in any extension of legitimate expectations to rulemaking. How, for example, can an expectation be "legitimate" when, at common law, there is no right to consultation at all? May this conundrum simply be avoided by talking of "reasonable", "well-founded" or "settled" expectations which avoid any overtly legal connotation? As well, it must always be borne in mind that in the Legal Aid affair the promise of further consultation had been specifically made directly to the representatives of the Bar.
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> Nevertheless, it would seem that a combination of proclaimed practice and resulting legitimate expectations may well create a legally binding right to consultation in rulemaking even in the continued absence of any general legislation such as the American *Administrative Procedure Act*.[132]

Regrettably, our apprehension has so far proved largely warranted. For instance, in *Apotex Inc. v. Ontario (Minister of Health)*[133] it was held that despite an established practice of extensive consultation in the designation of drugs by regulation, this could not be used to create a binding expectation of such a practice. And in *Furey v. Conception Bay Centre Roman Catholic School Board*[134] it was held that in light of *Inuit Tapirisat*,

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[127] *Prospect Investments v. N.B. Liquor Licensing Bd.* (1991), 48 Admin. L.R. 105 (N.B. Q.B.).

[128] J.M. Evans, H.N. Janisch, D.J. Mullan & R.C.B. Risk, *Administrative Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 1989) 3rd ed. at 245-247.

[129] *Findlay, Re*, [1985] 1 A.C. 318 at 338 (H.L.).

[130] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.)

[131] *Administrative Law: Cases, Text and Materials*, *supra*, note 128 at 247.

[132] *Ibid.*

[133] *Apotex Inc. v. Ontario (Minister of Health)* (1991), 44 Admin. L.R. 130 (Ont. Div. Ct.).

[134] *Furey v. Conception Bay Centre Roman Catholic School Board* (1992), 2 Admin. L.R. (2d) 263 (Nfld. T.D.)

and the more recent *Reference re Canada Assistance Plan*,[135] when a task is one of broad application (i.e. "legislative" in nature according to Estey J.) there was no duty to consult, nor can a legitimate expectation of consultation arise.

This is a disappointing development as David Mullan has noted in a case comment on another restrictive decision, *Sunshine Coast Parents for French*.

> Despite the liberating effects of *Re Nicholson* (1978), Canadian courts have been generally slow to recognize the applicability of the rules of procedural fairness to the arenas of policy and rulemaking. In many instances, however, participatory elements have been brought about by legislative change and voluntary recognition. This recognition of the democratization of many policy formulation processes should, at the very least, act as a spur to the courts to accept the general applicability of legitimate expectation, if not procedural fairness to such functions.[136]

Moreover, the legitimate expectations doctrine loses its creative potential if it is strictly confined to pre-existing legal "rights". This need not be so as Lord Roskill recognized in the GCHQ case. "Legitimate expectations such as are now under consideration" he noted there, "will always relate to a benefit or privilege to which the claimant has no right in private law and it may even be to one which conflicts with his private law rights."[137]

Turning to a possible *Charter* impetus for participatory rights in rulemaking, it will be recalled that *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*[138] had been concerned with the validity of film censorship. The *Theatres Act* gave the Ontario Board of Censors wide authority to censor films. There was authority to make regulations prescribing the terms and conditions on which films could be exhibited as well as the circumstances in which exhibition could be prohibited. No regulations had been enacted and the board proceeded on a case-by-case basis. However, it did issue a number of pamphlets describing its activities in general terms. It was conceded that none of these publications had any legal status; they were distributed merely for the assistance of the public in order to indicate the general approach of the board.

This censorship was held to be contrary to s.2(*b*) of the Charter which provides: "Everyone has the following fundamental freedoms ...(b) freedom of thought, belief, opinion, and expression. ..." The question then was whether the board had acted within s. 1, which maintains that the *Charter*

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[135] *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, 1 Admin. L.R. (2d) 1.

[136] D.J. Mullan, "Confining the Reach of Legitimate Expectations" (1991) 44 Admin. L.R. 245.

[137] *Council of Civil Service Unions*, *supra*, note 130.

[138] *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.), affirmed (1984), 5 D.L.R. (4th) 766 (Ont. C.A.).

guarantees are subject only to "such reasonable limits prescribed *by law* as can be demonstrably justified in a free and democratic society". With respect to "prescribed by law", the Divisional Court, in a judgment affirmed by the Ontario Court of Appeal, concluded:

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[139]

As for the pamphlets, they were not binding on the Board and did not qualify as law. It appeared that to be acceptable, concrete standards had to be contained, preferably in the act itself, but at least in regulations. While a welcome recognition of the need for standards, this approach may be too rigid.

> How helpful is it in this day and age to say that authority is not "legal" which depends on the "discretion of an administrative tribunal"? Is this a reversion to a restrictive view of the Rule of Law which cannot tolerate broad grants of discretionary power? Are regulations "established democratically" simply because they are enacted by the Lieutenant-Governor in Council? What of guidelines or policy statements arrived at after wide opportunities for direct participation in their formulation which indicate with some precision how the board proposes to exercise its discretion? Should judicial precedents be placed in the same category as legislation?
>
> What of the wider implications of this approach? So far the courts have tended to find violations of fundamental freedoms rather readily and have then placed the burden on the government to justify its actions under s.1 of the *Charter*. This means that "prescribed by law" will be a phrase of critical significance. The *Ontario Board of Censors* case appears to give a Charter base to structuring of discretion, but need this always be by way of legislative standards and regulations? Might not informal rulemaking suffice, provided it meets functional concerns to move away from that which is "vague, undefined and totally discretionary" and "left to the whim of an official" in favour of that which is more "ascertainable and understandable"?[140]

It is most interesting to note in the context of these reservations that the Supreme Court of Canada seems to be in the process of backing away from any "law" = statute-law-and-regulations-and-nothing-else approach. This was first signalled in *Slaight Communications*[141] where the court was prepared to find that a *prima facie* violation of freedom of expression

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[139] *Ibid.*, at 67.

For an ambitious claim to a *Charter*-based right to participate, not only in adjudicative contexts, but in "rulemaking in the broadest sense", see Martha Jackman, "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process" (1991) 4 C.J.A.L.P. 23.

[140] *Administrative Law: Cases, Text and Materials*, *supra*, note 128 at 789.

[141] *Slaight Communications Inc., v. Davidson*, [1981] 1 S.C.R. 1038.

could be saved by treating the exercise of discretion as being "prescribe by law". This is the so-called "as applied" approach, *i.e.* the reviewin court will look to see whether the discretion as applied is reasonable a opposed to looking to see whether the grant of the discretion itself wa vague. This allows the administrator a curative opportunity. In *Committe for the Commonwealth of Canada*[142] an initial violation of the *Charter* wa found in a government policy of preventing persons from disseminatin information at an airport. In the Supreme Court of Canada, Lamer C.J.C and Sopinka J. followed the *Ontario Film and Appreciation Societ* approach and concluded that government policies and directives were no law. Such documents, they noted, "...are generally not published and so ar not known to the public". On the other hand, La Forest, Gonthier an McLachlin JJ. followed *Slaight Communications* and were prepared t accept that a reasonable exercise of the discretion could be classified a "prescribed by law" if the empowering statute allows for such discretion "From a practical point of view", they noted that it would be wrong t limit Section I to "enacted laws or regulations".[143] While it is thus true tha of the five judges who addressed this issue, three would appear to suppor an "as applied" approach, it should be noted that two of those who did si on this case expressed no view on this issue (L'Heureux-Dubé and Cor JJ.) and the views of Iacobucci J., and the replacement for Stevenson J. are also not known.

10. Conclusion

It is striking how little sustained public discussion there has been on this issue of the choice of decision-making methodology despite prompting from the Law Reform Commission of Canada in the mid-1980s.

This is, of course, not to say that there has been no innovation. Far from it. Consider, for example, highly innovative techniques such as "expanded panels", "grouping cases", "leading case strategies" and "practice notes" as highlighted by Beth Symes in her insightful comments on this lecture.

A particularly striking example of what should be done may be seen in the initiatives of Howard Wetston, Director of Investigation and Research under the *Competition Act*. In November 1990, he issued a set of *Draft Merger Enforcement Guidelines*. In the introduction, Wetston indicated that he was fully appreciative of the interplay between rules, guidelines and discretion.

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[142] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.
[143] *Ibid.*, at 245.

> The Director's principal objective in issuing this document is to provide insight and guidance to business persons and their counsel regarding the manner in which the Bureau of Competition Policy (the "Bureau"), of the Department of Consumer and Corporate Affairs, approaches the assessment of mergers under the Act. It is hoped that this will promote a better understanding of the Bureau's endorsement policy; promote public confidence in this policy; assist business planning; and improve the quality of information that is supplied to the Bureau with respect to particular mergers.
>
> This document provides enforcement *guidelines* only. As such, it sets forth the general approach that is taken to merger review and is not intended to be a binding statement of the method in which the Director will exercise his discretion in connection with any particular case. Persons seeking more specific guidance regarding a particular transaction should consider requesting an advisory opinion from the Bureau, pursuant to its Program of Advisory Opinions. These Guidelines are not intended to be a substitute for the advice of merger counsellors.[144]

In April, 1991 he issued a final version of the *Merger Enforcement Guidelines*. Thereafter, another draft for comment and a final version of *Predatory Pricing Enforcement Guidelines* were issued, followed in January, 1992 by *Draft Price Discrimination Enforcement Guidelines* and final *Price Discrimination Enforcement Guidelines* on May 21, 1992. There has been a sharp debate amongst competition law experts as to the value of these guidelines,[145] but they do seem to have gone some way to achieve the Director's objectives. Naturally, the guidelines may seem to be rather obvious to experts in the field, but this is not the test which should be applied. Moreover, this exchange is exactly the type of choice discussion we need as a necessary prelude to continuing reform.

However, it does seem to me that any enhanced awareness of the choices inherent in administrative decision-making will always be too limited in scope until we disperse the legitimacy cloud which, we have seen, hangs over agency rulemaking if definitive standards are to be achieved. This, in turn, requires us to address once again the even broader issue of the role of administrative agencies in our system of government.

The *Constitution Act* still proclaims in the Preamble that we have a constitution "similar in Principle to that of the United Kingdom". This means a parliamentary form of government along with its central notion of ministerial accountability. This in turn, as Schwartz and Wade noted, carries with it very different notions of legitimacy from those in the United

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[144] Director of Investigation and Research, Competition Act, *Draft Merger Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, Nov., 1990) at iii.

[145] See R.M. Davidson, "When Merger Guidelines Fail to Guide" (1991) 12 C.C.P.R. 44; A. Kleit and M. Sanderson, "The Perfect Is Not The Enemy Of The Good: A Response to Roy Davidson's Article 'When Merger Guidelines Fail to Guide'" (1992) 13 C.C.P.R. 48.

States.[146] As my comments on the Cornish Report indicated, this raises great constitutional difficulties with respect to autonomous agency rulemaking.

It does not seem to me that we have a neat, hierarchical system of government. What I see is a government which, in the language of Baldwin and Hawkins, delegates "ever-broader powers to peripheral bodies".[147] We now live in a highly fragmented society in which interest group politics dominates (witness, if you will, the debate leading up to the October 1992 Referendum) and yet our *formal* legal institutions and traditions do not reflect this and still consider independent agencies "structural heretics".[148] Until this tension between formal structures and on-going reality is reduced, we will not be able to fully address choice in decision-making methodology, and particularly the role of agency rulemaking.

Paul Craig has recently provided us with a good starting point for the required fundamental reconsideration.[149] In applying a plurastic conception of democracy to constitutional and administrative law, Craig notes the failure to develop participating procedures in rulemaking.[150] "Our approach to participation within administrative law", he concludes, "continues to be coloured by a unitary conception of the constitution".[151] The foundation of this unitary precept is to be found in the less well-known face of sovereignty, legislative monopoly.

> The presupposition is that Parliament is either the direct initiator or the controller of all that emerges formally as legislation. Ministers are accountable to, and controlled by, Parliament. Policy issues underlying legislation or delegated legislation will have been considered by Parliament. Governmental agencies will be controlled by and accountable to Parliament through the relevant minister. A natural correlative of this conception of legislative monopoly is that a duality in the meaning of the term 'legislative' is concealed. Norms which emerge with the formal seal of Act of Parliament or statutory instrument are the sole qualifiers as legislation. Parliament controls or initiates the passage of such norms and thus the fundamental tenets of representative democracy are preserved. The realization that there are rules of a legislative character which may be substantively indistinguishable from those actually passed by Parliament, but which are not subject to parliamentary control, cannot be squarely faced without undermining the very conception of legislative monopoly.[152]

The reality which Craig insists must be faced is one of many non-

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[146] See, note 92.

[147] R. Baldwin and K. Hawkins, "Discretionary Justice: Davis Reconsidered" (1984) Pub. Law 570 at 590.

[148] See H.N. Janisch, "Independence of Administrative Tribunals: In Praise of 'Structural Heretics'" (1987) 1 C.J.A.L.P. 1.

[149] P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990).

[150] *Ibid.*, at 161-162.

[151] *Ibid.*, at 166.

[152] *Ibid.*, at 167.

departmental agencies not directly accountable to Parliament and many sources of legislation other than those directly delegated by Parliament. We are accustomed, he adds, to thinking of accountability in its traditional sense, from the "top", from Parliament. Accountability need not, however, be seen exclusively in this way - a different, but important method of accountability may come from the "bottom", from participation of those affected in decision-making or rulemaking processes. Legal rules at present protect both ends of the participatory spectrum i.e. voting and adjudication. Intermediate forms of participation, in, for example, rulemaking are not afforded analogous treatment in the absence of specific statutory provisions.

These limits on our notions of accountability and participation cannot be easily squared with contemporary realities. In recent years constitutional debate in Canada has too often not included consideration of the need to reconcile our inherited hierarchical structure of government with the demands of modern pluralistic politics. The legitimacy of rulemaking by independent agencies and opportunities for participation in rulemaking need to be made part of that debate. "If our theoretic constructs depart too much from reality", Craig warns, "they risk becoming at best empty vessels; at worst they serve as invalid premises for the development of more particular rules of conduct."[153]

We also need to rethink our participatory notions in the new context of the "information society" we have become. As K.C. Davis has urged with his customary undiminished vigour:

> Today's imagination can and should be prodded. If tens or even hundreds of millions of people of the world can listen to a television program, what is the potential for millions of responses - perhaps by electronic means? Might paper ballots become obsolete? If a governmental executive needs to know public reactions, why should he not press some television buttons and immediately have a reliable sample of responses, including valuable ideas or needed facts?
>
> Might the American half century of experience with notice and written comment gradually grow into a system of electronic notice and electronic comment, and might the result be a jump upward in the fundamental of government with the consent of the governed?[154]

The concept of "electronic notice and comment" in rulemaking has been considered very recently by Henry H. Perritt, Jr. of Villanova Law School.[155] He is of the view that the adoption of electronic information

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[153] *Ibid.*

[154] K.C. Davis, *Administrative Law of the Eighties* (San Diego: K.C. Davis Pub. Co., 1989) at 193.

[155] H.H. Perritt, Jr., "The Electronic Agency and the Traditional Paradigms of Administrative Law" (1992) 44 Admin. L. Rev. 79.

For more general studies in a Canadian context, see Canadian Legal Information Centre, *Electronic Legal Information: Exploring Access Issues* (Ottawa: April, 1991) and S.A. Rosell et al., *Governing in an Information Society* (Ottawa: Renouf Pub., 1992).

technology for rulemaking, adjudication, internal management and delivery of services will advance virtually all traditional goals of administrative law.[156]

Perritt envisages that an agency would commence a rulemaking by publishing a notice in an electronic government gazette. However, it would not be set up chronologically, but would be a database organized along the lines of a regulatory agenda by topic within the jurisdiction of the different agencies. When an agency envisions a change in policy, it would post a notice under the appropriate topic in the electronic gazette. Proposals could be structured in a manner which identifies discrete issues on which comments are to be received. Interested parties could begin to comment by sending electronic messages to the database. The electronic interface with the database could be an electronic bulletin board, accessible through dial-up telephone links and modems.

> To the extent that issues are framed by the agency in terms that could be answered yes or no or answered by choosing one of several discrete choices, comments could be processed automatically and tallied automatically. Free-form comments also would be accommodated. As comments are received, the agency could post notices responding or raising new questions. The electronic rulemaking would be a kind of running dialogue among an agency and interested parties.[157]

Whether one is, or is not, as optimistic about the role of information technology in administrative law, it remains essential that we incorporate the issue of choice in decision-making methodology more openly into our discussions of agency practice. The relative contribution which adjudication, policies and rulemaking may make to fair and effective administration needs to be included prominently in our daily lexicon. And of these three, the preeminent need is for greater facility and understanding of rulemaking and how it relates to policymaking and adjudication.

It has been noted that, "The term 'administrative rulemaking' is not one that trips off the tongues of British lawyers with the degree of facility with which it would those of American administrative lawyers."[158] I hope that it will not be too long before "rulemaking" trips off the tongues of Canadian lawyers, provided, always, that differences (changing though they may be) in basic constitutional arrangements are kept firmly in mind!

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[156] *Ibid.*, at 80.
[157] *Ibid.*, at 84.
[158] C. McCrudden, "Codes in a Cold Climate: Administrative Rule-Making by the Commission for Racial Equality" (1988) 51 Mod. L. Rev. 409.