

***THE DEVELOPMENT AND USE OF POLICIES AND
GUIDELINES IN THE DECISION-MAKING
PROCESS***

A DISCUSSION PAPER

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Executive Summary

Purpose – To prompt discussion about the development and use of policies and guidelines in the decision-making process

The purpose of this paper is to prompt discussion about the use of policies to guide decision-making by statutory decision-makers (SDMs) in British Columbia¹ and the processes used to develop those policies. It is intended to be useful as an evaluation tool for SDMs to assess their understanding of the use of existing policies. It is also intended to act as a reference for those responsible for developing policies and guidelines. The discussion may be of interest to other readers, including members of the public who are affected by policy-based decision-making.

Context

To assist SDMs in fulfilling their decision-making mandates, broad discretionary powers are often granted.² In an effort to ensure these discretionary powers are exercised fairly and consistently, SDMs and others in government may develop policy statements, directives, or guidelines. While these policies are considered to be flexible, non-binding guides (“soft law”), they are sometimes treated by SDMs, other government personnel, users and even the courts as having similar legal authority as legislation (“hard law”). This has led to some debate about the development and use of policies to guide the exercise of statutory decision-making discretion.

The information presented in this paper is intended to encompass a range of issues related to the use and development of policy in discretionary decision-making, including the benefits of using policy, some concerns about the use of policy, and current approaches to policy and guideline development, particularly as compared to legislation (both statutes and regulations). This discussion is part of a larger project related to the powers and authorities of SDMs, more fully described in the Introduction.

Overview of Contents

This paper outlines what is meant by the term “policy” when used in the decision-making process, highlights some of the benefits and concerns about using policy to guide decision-making, and compares the development of “soft law” to how “hard law” is developed both in B.C. and in other jurisdictions. Some related issues, how the *Charter of Rights and Freedoms* and the *Human Rights Code*

¹ Statutory decision-maker (SDM) is used to describe the numerous officials within government who apply laws and policies to make decisions in individual cases. The outcomes of their decisions – often about licensing, permits, or benefits or other entitlements – can have a significant impact on individuals, businesses and the general public.

² In this paper, “discretionary authority” or “discretion” refers to the power to decide or act using one’s own judgment rather than using strict legislated criteria when making a decision in individual cases. As explained below, SDMs are often granted discretionary authority through the use of optional language in legislation, such as “may” or discretionary phrases such as “in the opinion of” or as the decision-maker “considers reasonable.”

may apply to these policies and the use of automated systems in discretionary decision-making, are also explored. Specifically, the following topics are addressed:

- ***What is “discretionary decision-making policy”***

This paper begins by exploring definitional issues, including:

- how “policy” as used in the decision-making context is different than policy as used in the legislative development or ministry operational contexts;
- the differences between substantive and procedural policy; and
- different forms or types of policy.

- ***Why give SDMs discretion***

With hundreds of thousands of individual decisions that need to be made annually, the Legislature has delegated much of that individual decision-making to SDMs. For that delegation to be effective, most SDMs need to be able to exercise discretion. Some of the reasons for this are set out.

- ***The legal status of discretionary decision-making policies and the impact on their use***

How the courts may look at and consider policies when asked to review a SDM’s decision may have an impact on how the SDMs can and do use those policies. Issues discussed include if a policy improperly limited (or “fettered”) discretion or if a policy has (perhaps unintentionally) created a legal right to certain procedures being applied.

- ***Use of policy in the decision-making process***

Why policies are used in the decision-making process, the benefits of using policy, some of the concerns about the use of policy, including how the legal doctrine of “legitimate expectations” may limit or restrict changes to existing policies, are examined.

- ***Developing policy for use in the decision-making process***

The processes used to develop policies are compared to the processes used to develop statutes and regulations. Also, some alternative approaches to policy development used in other jurisdictions are described.

- ***Related issues***

Two further legal issues may arise with respect to decision-making policy: the application of the *Charter* and the *Human Rights Code* to such policy. The use of discretion in automated decision-making is also considered.

Questions for Discussion

The following sets out some of the questions that may need to be addressed when considering the development and use of policy in decision-making. A number of more detailed questions are also asked in the body of this paper.

1. Are there any limits on when policies can or should be used? Only to identify factors SDMs may consider when exercising their discretion? To convey preferred legislative interpretations?
2. Are policies and guidelines necessary tools for managing discretion? Are policies and guidelines the most effective methods?
3. How can policies be used to manage discretion without impinging on flexibility?
4. Is it possible to provide greater clarity about the legal status of policies? Should that question be left to the courts?
5. What should ministries and administrative agencies' obligation be to ensure their policies reflect what the legislature intends?
6. Can policies and guidelines be developed and applied in a way that appropriately balances consistency and flexibility?
7. Is the use of policies and guidelines an effective tool for clarifying statutory schemes, or does the use of policy overly-complicate the decision-making process?
8. Can or should anything be done to ensure that SDMs are actually exercising their discretion, and not simply rigidly applying policies and guidelines?
9. Are ministries and administrative agencies sufficiently aware of the overly rigid use of policies and guidelines can be an improper fettering of SDMs' discretion?
10. Are ministries and administrative agencies sufficiently aware of the overly rigid use of policies and guidelines can be an improper fettering of SDMs' discretion?
11. Should the public have a role in the development of all policies? If not, when and how should the public be involved?
12. How can policy makers ensure that policies respect and reflect the Charter and the Human Rights Code?
13. Would guidelines on the use of automated processes be helpful?

This list of questions is not intended to be all-inclusive; various other questions are also asked throughout the paper and there will no doubt be other questions, along with answers to those questions, which readers may identify.

You are invited to share your thoughts, ideas and comments on these issues, or any others you may have on this topic, with the Ministry of Attorney General's Administrative Justice Office (AJO) at:

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Or you can use the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo

Introduction

Statutory decision-makers (SDMs) make decisions in individual cases, often about such things as licensing, permits, or benefits or other entitlements. These decisions can have a significant impact on individuals, businesses and the general public. When making those decisions, SDMs are often called on to use their own judgement or to exercise discretion. For those impacted to accept decisions as having been fairly made, it is critical that the procedures and processes used and the authorities exercised by the SDMs are clear, consistent, and accessible.

Discretionary powers are often granted by the use of optional language, such as the word “may”, in enabling legislation. For example, under the *Forest and Range Practices Act*, an official *may* enter and inspect land and vehicles (ss. 59 and 60), *may* issue a stop work order (s. 66), and *may* exercise his or her powers of seizure (s. 67(1)(a)).³ Providing SDMs with the ability to choose a course of action (or inaction) is one way in which the Legislature grants SDMs discretion.

Another example of discretionary authority is the power to exercise judgment when making a decision. Language such as: “in the opinion of”;⁴ “as the [decision-maker] considers reasonable”;⁵ and “if the [decision-maker] is satisfied that [a decision] is not inconsistent with the purposes of this Act”⁶ are all examples of this type of discretion.

Policies and guidelines used in the discretionary decision-making process are designed to ensure that when exercising that discretion, SDMs treat like cases alike and avoid making arbitrary or inconsistent decisions. Policies and guidelines can also “flesh out” general statutory schemes, providing both SDMs and the public with greater clarity and detail about how the scheme operates.

Policies used in the decision-making process are flexible, non-binding guides (considered “soft law”) and different from statutes and regulations (“hard law”) which are legally binding on decision-makers. As explained in more detail below, important differences between “soft law” and “hard law” are reflected in the flexibility with which they are applied, the ease with which they may be changed and the processes by which they are developed

However, policies and guidelines may sometimes be considered and treated by SDMs (and the public) as if they are “hard law”, with the same rigid application, significance and legal authority as statutes and regulations. This has led to some debate about the proper use and development of policies to guide statutory decision-making.

³ [Forest and Range Practices Act](#), S.B.C. 2002, c. 69.

⁴ [Employment and Assistance Regulation](#), B.C. Reg 263/2002, s. 2(3)(b)(i) and (ii).

⁵ *Ibid.* s. 2(3)(c).

⁶ [Employment Standards Act](#), R.S.B.C. 1996, c. 113, s. 73(1)(b).

The Ministry of Attorney General, through the Administrative Justice Office (AJO), is leading a systemic review of SDMs' powers, procedures and authorities, involving research, consultation and recommendations to ensure SDMs have appropriate and proportionate powers, procedures and authorities. (A standard framework is provided for tribunals by the *Administrative Tribunals Act*.⁷)

This paper is the 4th in a series of research papers by the AJO and is intended to prompt discussion about SDMs' use and development of policy to guide in exercising their decision-making discretion.

To provide some context for the discussion, this paper:

- poses a series of questions about the use and development of policy in the decision-making process (some are list in the Executive Summary and others at various points throughout the paper);
- examines what is meant by the term “policy”;
- highlights the advantages and disadvantages of using policies and guidelines in the discretionary decision-making process;
- compares the development of policy to the development of statutes and regulations;
- describes some approaches to policy development taken in other jurisdictions; and
- identifies some related issues, like the application of the *Charter of Rights and Freedoms* and the *Human Rights Code* .

You are invited to share your thoughts, ideas and comments on the issues identified in this paper, or any other issues related to the use of discretionary decision-making policy, with the AJO.

What is “Discretionary Decision-Making Policy”

The word “policy” can have many meanings, especially within government. Depending on the context in which it is used, “policy” can mean:

- the research and analysis undertaken as the basis for legislative or program initiatives;
- the framework for carrying out ministerial operations and administration; and
- the rules or guidelines used by SDMs in their discretionary, adjudicative decision-making processes.

⁷ The *Administrative Tribunals Act*, [SBC 2004] c.45 (ATA) codifies the common law and introduces consistent authorities and powers, and then selectively applies these to the various tribunals as appropriate, reflecting the unique natures, roles and mandates of each tribunal. Background information on the ATA as well as a link to the legislation itself can be found at http://www.gov.bc.ca/ajo/popt/background_info_and_some_questions.htm

This paper is concerned with the policies used by SDMs in discretionary adjudicative decision-making, and not the broader policies which inform legislative initiatives or provide the framework for government administration and operations. While policies used in the discretionary decision-making process may be informed by those other types of government policy, the purpose and authority for decision-making policies is distinct from that of policies which inform legislative initiatives and executive operations.

Formal and informal decision-making policies

Even in the context of the decision-making process, the word “policy” is used to describe various things, from the formal – written rules, policy manuals, or publicly available “fact sheets” – to the informal – directives, memoranda, or email, based on past practice, or even simply conversations or oral instructions.⁸

Some administrative agencies, for example - securities regulators, have the express statutory authority to issue substantive, legally-binding rules or regulations (“hard law”).⁹ However, this type of policy-making power is relatively uncommon.

The more common power is to make non-binding policy statements, practice directives and procedural rules to assist in the adjudicative decision-making process. The courts have found that a decision-making entity can develop and apply these non-binding guidelines or policies without the need for any express statutory authority.¹⁰ It is this type of “soft law policy” – non-binding rules or guidelines about the exercise of discretionary decision-making – that this paper addresses.

Procedural and substantive policies

Policies can be *procedural* or *substantive*. Procedural policies are used to assist in the process for adjudicative decision-making. For example, the Employment Standards Branch has developed “rules” regarding the procedures to be followed at oral hearings conducted by its officers. Rules regarding the parties’ use of documents and witnesses, the adjudicator’s power to order a pre-hearing conference, and the proper form for requesting an adjournment are all publicly available in the form of a “factsheet”.¹¹

⁸ Laura Pottie and Lorne Sossin, “Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare” (2005) 38 U.B.C. L. Rev. 147 at 151.

⁹ For example, s. 184 of the [Securities Act](#), R.S.B.C. 1996, c. 418 gives the BC Securities Commission the power to “make rules for the purpose of regulating trading in securities or exchange contracts, or regulating the securities industry or exchange contracts industry.” Another example of an administrative agency whose guidelines or policy statements have been found to be legally binding is the Canadian Human Rights Tribunal. See *Bell Canada v. Canadian Telephone Employees’ Association*, [2003] 1 S.C.R. 884, 2003 SCC 36.

¹⁰ *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83; *Thamotharem v. Canada (Minister of Citizenship & Immigration)* 2007 FCA 198 at para. 56 (Leave to appeal refused [2007] S.C.C.A. No. 394).

¹¹ [Employment Standards Branch Factsheet: Adjudication Hearings](#)

Substantive policies outline how an administrative agency will generally exercise its discretion or interpret and apply its enabling legislation. For example, the introduction to the Liquor Control and Licensing Branch's "Licensing Policy Manual" states that "...policy statements in this manual should be understood as the way the branch interprets the legal requirements and obligations of the [Liquor Control and Licensing] Act and regulations."¹²

Questions:

- *Should all policies be set out in a standard form?*
- *Is there any one form that is better for setting out policies?*
- *Are there any forms that should be avoided?*
- *Do certain types of policy require different forms?*
- *Can flexibility in policy making be maintained if the forms to be used are limited?*
- *Are there any limits on when policies can or should be used? Only to identify factors SDMs may consider when exercising their discretion? To convey preferred legislative interpretations?*
- *Should there be a difference between how procedural and substantive policies are set out and/or communicated?*

Why Give SDMs Discretion when Making Decisions

Government activities in British Columbia (and elsewhere in Canada) have become increasingly complex, with hundreds of thousands of individual decisions being made annually. To make this possible, the Legislature has delegated much of the individual decision-making to SDMs and has provided for significant discretion to be exercised in that decision-making process.

This delegation of decision-making, and the discretion often associated with it, is typically necessary because the legislation that sets up the decision-making scheme – be it for a permit, licence, tax or benefit – can only reasonably provide the framework for making those decisions. Too much detail about how these decisions are to be made is either not possible or not desirable for a number of reasons, including:

- a degree of flexibility is required to make the specific decisions;
- the scheme or program is new and flexibility is required to structure the process;
- to avoid overly rigid or complex statutes for a subject matter that is not well suited to detailed rules or may need to operate within a (potentially) rapidly changing environment; and
- a need to act quickly to enact legislation within the available time, so that developing the detailed specific rules after the statutory framework is established makes more sense.¹³

¹² Liquor Control and Licensing Branch, "[Licensing Policy Manual](#)" at 1.

¹³ Hudson N. Janisch, "The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking" (Special Lectures of the Law Society of Upper Canada, 1992), *Administrative Law*:

The reason most commonly given for giving SDMs discretion in their decision-making is to permit some responsiveness and flexibility in making decisions. Rigid rules that must be applied in all cases can lead to hardship, injustice, and arbitrariness; discretion allows a decision-maker to take into account all of the facts and circumstances in each situation and decide on the appropriate outcome within the larger legislative framework. However, while discretion allows for flexibility and responsiveness, it can also result in uncertainty and inconsistency. The use of policies and guidelines in the decision-making process are intended to address these concerns. These benefits and concerns are discussed in more detail below.

Whatever the underlying reason, policies and guidelines are often developed by ministries and agencies as a way to structure and put some appropriate limits on the exercise of discretionary authority.

Questions:

- *Are policies and guidelines necessary tools for managing discretion? Are policies and guidelines the most effective methods?*
- *Are there other alternatives that might be more effective to guide the exercise of discretion?*
- *What else might assist, instead of or in addition to, policies?*
- *How can policies be used to manage discretion without impinging on flexibility?*

The Legal Status of Discretionary Decision-Making Policies and How that Status May Impact their Use

While the policies SDMs use to guide their decision-making are generally intended to be flexible and not legally binding, there is some lack of clarity about the legal status of these policies and what the courts may do when asked to review how the policies were applied in making decisions. For example, persons affected by a decision made by a SDM who considered policy when exercising their discretion may ask the courts to overturn the decision or otherwise change it because of how the policy was (or was not) applied in their case. So how the courts look at and consider policies when asked to review a decision may have an impact on how SDMs can and do use those policies.

For example, the courts have reviewed decisions made by SDMs

- on the basis that a policy was improperly applied or ignored;¹⁴ and

Principles, Practices and Pluralism (Toronto: Carswell, 1993) 259-308 at 293-294 also identified “purposeful ambiguity”, or the need to be somewhat ambiguous in the language of the statute in order to get a majority of lawmakers to agree on it, which agreement would not be possible if the legislation set the specific or a particular standard.

¹⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 81 at para. 60. In *Baker* the Supreme Court of Canada court reviewed an immigration officer’s decision not to exempt the applicant from being deported. That decision was overturned (“quashed”) by the Court on the basis that it reflected an unreasonable exercise of discretion, including a failure to

- to determine if the policy improperly limited (or “fettered”) the decision-maker in exercising his or her discretion.¹⁵

Policies may also be reviewed by the courts to determine if legal rights to certain procedural obligations were established, which could not be ignored or possibly even changed, although the law in this regard is still somewhat unclear.¹⁶

Whether a policy is reviewable by the courts can be confusing, as the courts recognize that certain policies are in the nature of legislation and will not review or interfere with those policies.¹⁷ This reflects the fundamental principle of legislative supremacy, with the courts recognizing and respecting their limited jurisdiction to review these policies.¹⁸ (This does not mean that “legislative policies” are never reviewable by the courts; even legislative policies are, at a minimum, subject to the rule of law¹⁹ and must be exercised within the parameters established by the authorizing statute.²⁰)

Because courts defer to the legislators with respect to “legislative” policies, when asked to review discretionary decisions (“judicial review”), the court may extend that deference to the policies that guide the decisions under review. Some commentators have suggested this deference by the courts gives ministries and administrative agencies a certain level of freedom when it comes to developing and using policies in the discretionary decision-making process. They have also suggested that because of this, ministries and administrative agencies have a corresponding obligation to be more vigilant in ensuring the policies they develop

follow ministry guidelines. (There were other reasons the Court quashed the decision, including finding a reasonable apprehension of bias.)

¹⁵ See for example *Thamotharem v. Canada (Minister of Citizenship & Immigration)* 2007 FCA 198 at para. 56 (Leave to appeal refused [2007] S.C.C.A. No. 394).

¹⁶ In *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118] an inmate appealed a disciplinary order on the basis that the Disciplinary Board failed to abide by the procedural rules set out in directives issued by the Commissioner for Penitentiaries. The Commissioner had the legal authority to issue the directives, so the legal question was whether the Board was required to apply the rules. The appeal was dismissed, with four justices concluding that the directives were simply “administrative” and so could not give rise to procedural obligations. (The fifth justice gave different reasons for dismissing the appeal.) However, the four other justices would have allowed the appeal, finding that the directives were “law” since they were authorized by legislation and affected the rights of an individual. Soon after, in *Nicholson v. Haldimond-Norfolk (Regional Municipality) Commissioners of Police* ([1979] 1 S.C.R. 311), it was found that directives and guidelines could give rise to procedural obligations, however, the decision also stated that this did not mean that such policies were to be treated synonymously with hard law. As such, the legal status of procedural policies is still not settled law.

¹⁷ Unless contrary to the *Charter of Rights and Freedoms* or the *Human Rights Code*, which apply to all legislation.

¹⁸ See for example *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106.

¹⁹ The rule of law is a complex principle with many definitions. Peter W. Hogg and Cara F. Zwibel, in “The Rule of Law in the Supreme Court of Canada” 55 U. Toronto L.J. 716 (2005) at 718 propose that, at its core, the rule of law has three elements: (1) a body of laws that are publicly available, generally obeyed, and generally enforced; (2) the subjection of government to those laws; and (3) an independent judiciary and legal profession to resolve disputes about those laws.

²⁰ *Baker supra*, note 14 at para. 53. See also *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

truly reflect what the legislature intended, and to monitor how the policies are applied to ensure they achieve the goals intended by the legislature.

Questions:

- *Is it possible to provide greater clarity about the legal status of policies? Should that question be left to the courts?*
- *Can or should the courts be directed on how much deference to give to SDMs' decisions, when asked to review how policies were applied in making decisions?*
- *If the courts don't monitor how policies are applied, who should?*
- *What should ministries and administrative agencies' obligation be to ensure their policies reflect what the legislature intends?*
- *Should there be any system to monitor how policies are applied, to ensure they achieve the goals intended by the Legislature?*
- *How can the use of policies avoid creating unintended legal obligations?*

Benefits of Using Policy

Despite any questions about their legal status, using policies to assist in decision-making has clear benefits, including:

- providing the clarity and detail necessary to supplement the legislative framework;
- providing flexibility to adjust to meet changing needs as may be necessary;
- promoting consistency in decision-making;
- providing flexibility to ensure fairness in individual cases;
- supporting efficient use of resources;
- acting as useful training and information tools; and
- providing an informal means of oversight for the decisions made .

Filling in the details

As noted above, statutes cannot set out the level of detail necessary for those government programs that require consideration of individual circumstances (for example, licences, permits, benefits or even tax schemes). Some level of flexibility or discretion about how the scheme will work in an individual case needs to be delegated to the SDMs. However, when the legislative framework gives SDMs broad discretion in their decision-making responsibilities, it can be difficult for the SDM to know what processes to follow, what facts to take into consideration and, in some cases, even the goals the Legislature intended to achieve. In addition, even when the SDMs know what is expected of them, those affected by their decisions may not be able to how the legislation is to be applied and what they need to do, by simply reading the statute. Policies can fill that gap and provide useful information to both decision-makers and program users alike, in order to clarify what is expected of them, both leading up to and when making a decision.

Flexibility to meet changing needs

Many discretionary decisions are made within environments that may be sensitive to change, but amending legislation to address those changes can take time and significant resources (discussed in more detail below). Using policies to “fill in the details” can allow a degree of flexibility to change those details to meet changes in the program environment, freeing up resources for other pressing needs. Additionally, changes can be made to policy in a much timelier manner, allowing program goals to be met more quickly. (The extent of the changes that can be made will be governed by the legislation, with changes only permitted in the areas where flexibility is given.)

Promoting coherency and consistency in outcomes and procedures

A level of coherency and consistency between the various individual decisions made is generally seen as desirable, whether there is only one or many different individual decision-makers within a program. At its core, this means that, no matter who is making the decision, similarly situated parties affected by a particular decision-making scheme should receive reasonably comparable treatment and outcomes. The Supreme Court of Canada has said:

It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be “difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one”.²¹

Although the Court was referring to decisions by administrative tribunals, the principle is also applicable to SDMs, and policies can be a valuable tool to help achieve the appropriate level consistency. (As noted below, the need consistency must be balanced with the need for fairness, and one consequence of any grant of discretion is that different decision-makers may arrive at different outcomes; if this were not possible, then there would be no discretion to be exercised – all outcomes would be identical.)

The need for consistency also extends to the procedural aspects of decision-making. For example, a recent Federal Court of Appeal case considered a procedural guideline, issued by the Immigration and Refugee Board to set a standard order for the questioning of refugee claimants at Refugee Protection Division (RPD) hearings. Prior to the guideline being issued, the order in which claimants were questioned varied hearing to hearing. Regarding procedural consistency, the Court said:

It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an ad hoc

²¹ *I.W.A. v. Consolidated Bathurst Packaging Ltd* [1990] 1 S.C.R. 282 at 327.

basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.²²

The requirement for consistent interpretation and application of the law, as well as procedural consistency, means that standard policies and guidelines may be particularly beneficial for SDMs. This may be of even greater benefit if SDMs within a program are decentralized, work only within assigned geographic regions, or even simply work in relative isolation from one another.

Providing for fairness in individual cases

While consistency is important, it should not come at the cost of fairness. Consistency means that parties that are similarly situated will be treated comparably; it does not mean that individual differences cannot be taken into consideration. Unique situations may call for unique decisions - this is what discretion is all about. Policies can allow for this type of flexibility. Regional or other differences can also be considered and expressly reflected in the policies.

Efficient use of resources

Using and applying policies to make decisions can promote efficient and proportionate use of limited resources by addressing standard matters that frequently arise in the course of decision-making, provided of course they do not restrict or limit decision-making in a way that fetters discretion.

Useful training tools

Policies and guidelines, especially those issued in the form of manuals, directives, and memoranda, are useful training tools to provide newly appointed SDMs a framework for making decisions and sometimes provide an easy way for more experienced SDMs to refresh their knowledge.

Providing information to users and the public

Setting out the policies to be used or considered in the decision-making and its processes, and making those policies easily available, can be an effective way to inform users and the public. Users can learn what they need to do in order to obtain the licence, permit or benefit or can learn how to reduce or otherwise limit their taxes or other obligations, and the public can gain a better understanding of how and why a scheme works.

Informal means of oversight

Many of the decisions made by SDMs are subject to very limited opportunities for review –by the court or a tribunal – to correct what an affected individual may consider a wrong decision or an error. For this reason, review of the policies can

²² *Thamotharem supra*, note 15 at para. 20.

be useful when reviewing decisions, either individually or on a wider basis, to determine conformity to the legislative intent and/or within the program itself.

Questions:

- *Can policies and guidelines be developed and applied in a way that appropriately balances consistency and flexibility?*
- *Is the use of policies and guidelines an effective tool for clarifying statutory schemes, or does the use of policy overly-complicate the decision-making process?*
- *Does the use of policies actually achieve the described benefits? Is there any need to try to measure the benefits? Are the described benefits really benefits, and who do they benefit?*
- *Can the described benefits of using policies be achieved by other, better means?*

Concerns about Using Policy

Despite some of the obvious benefits, some concerns have been expressed about using policy and guidelines, including the potential for:

- the decision-maker and others treating policies as having the same legal authority as legislation;
- an overly rigid adherence to policies (fettering discretion);
- a lack of individual responsibility for the decisions made; and
- application of the legal doctrine of “legitimate expectations”, which may give users a “right” to challenge changes in a procedural policy

Treating policies as if legislation

Some SDMs (depending on their training, experience or even the statutory scheme or operational environment within which they make decisions) may find it difficult to distinguish between the requirements to apply the legislation (“hard law”), which is binding on them, and policy (soft law), which is to be only a guide, and to exercise their discretionary authority properly.²³ A key aspect of discretionary decision-making is that the decision-maker must in fact exercise that discretion and cannot simply rigidly apply rules to make the decision; the decision maker must actually consider the facts in each case and the results should reflect that individual consideration. This means that a high level of care will be required to ensure the policies do in fact accurately reflect the legislation, clearly set out where discretion should be exercised and aim to ensure that that discretion is, in fact, actually exercised.

²³ For example, one survey of decision-makers in social assistance agencies across Canada found that the SDMs working in those agencies almost universally considered the policy guidelines as the primary, if not exclusive, source of guidance for day-to-day frontline decisions. Recourse to statutes and regulations occurred rarely and generally only when the policy required clarification.

Improperly fettering discretion

The rigid application of policies, as if they were equivalent to “hard law” with no flexibility to be applied, can result in an improper fettering (or limiting) of a decision-maker’s discretion. As the Federal Court of Appeal explained:

.... while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to a mandatory prescription of a guideline, despite a request to deviate from it in light of the particular facts, may be set aside, on the ground that the decision-maker’s exercise of discretion was unlawfully fettered.²⁴

Again, care will be required to ensure any policies clearly provide for discretion to be exercised and to ensure the decision-maker is well aware of the need to exercise that discretion.

Lack of responsibility for decisions made

Related to both of the concerns described above, care also needs to be taken to ensure that individual decision-makers don’t simply rely on policies so as to avoid responsibility for the specific decisions they make (“rubber-stamping”). Each decision-maker must be responsible to consider and balance whether the individual circumstances call for consistency with other decisions, or for flexibility. Policies should be a tool for making better decisions, not a shield for poor or, in effect, no real decision-making.

Creating enforceable expectations which can limit the ability to make necessary changes

An additional concern about using policies to guide the decision-making process is the possibility that the legal doctrine of “legitimate expectations”²⁵ may apply to

²⁴ *Thamotharem supra*, note 15 at para 62. See also *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 at 7. Another example of improperly fettering discretion is described in *Saunders Farms Ltd. v. General Manager, Liquor Control and Licensing Branch*, (1995) 122 D.L.R. (4th) 260 where the B.C. Court of Appeal found that the Liquor Appeal Board, when deciding whether to grant a new retail licence, improperly fettered its discretion when applying criteria set out in the *Liquor Control and Licensing Regulations*. One of the criteria was the “need of the local community for the proposed establishment” and, to assess that need, a Branch policy established a formula for a particular ratio of licences to the number of residents. The Board upheld a denial of a request for a licence on the basis of this formula alone. One of the judges found that the Board had improperly fettered its discretion, commenting:

“Need” is an objective factor to be interpreted within the meaning of the Act and regulations only. The Board may consider whether, and to what extent, population is a factor in “need”, but it may not start from the proposition that the guidelines constitute a legally binding definition of the factor. (emphasis added)

²⁵ This doctrine has been developed as part of the common law made by judges, building on earlier case (precedents). Common law is different than statute law, which is created by government, but can also involve interpreting and applying statute law.

limit the ability to make changes to that process. A person may become entitled to a specific procedure being applied if, because of a commitment or promise made by a decision-maker, that person has a “legitimate expectation” that the particular procedure will be followed when making a decision.²⁶ Policies and guidelines can be one way such commitments or promises can be seen to have been made.²⁷ As such, the court may limit the effect of changes made to procedural policies, at least in the short term, if the change negatively impacts on an individual who has relied on the original policy.²⁸

Questions:

- *Can or should anything be done to ensure that SDMs are actually exercising their discretion, and not simply rigidly applying policies and guidelines?*
- *Are ministries and administrative agencies sufficiently aware of the overly rigid use of policies and guidelines can be an improper fettering of SDMs’ discretion?*
- *Are the drawbacks to using policies and guidelines in the decision-making process of sufficient concern to require any limits on their use?*
- *Does the use of policies actually cause any of described disadvantages?*
- *Can the described disadvantages of using policies be avoided by some other, better means?*

Developing Policy for Use in the Decision-Making Process

A wide variety of policies are used by SDMs across British Columbia and elsewhere. Those policies may be developed and issued in a formal, written format, such as policy manuals, or they may be developed and communicated informally, through past practice, memoranda, email, and even conversations or oral instructions.²⁹ Despite this apparently widespread use of policies and guidelines in decision-making processes, there is no standard process for developing these kinds of policies.

²⁶ David J. Mullan, *Administrative Law: Cases, Texts and Materials*, 5th Ed. (Toronto: Edmond Montgomery Publications Ltd.) 2003 at 183.

²⁷ See for example *Johnston v. Alberta (Director of Vital Statistics)* 2008 ABCA 188 (Alta. C.A.) (Leave to appeal refused) where the Alberta Court of Appeal found that a policy did not give rise to a legitimate expectation because, in that case, the Applicant was not aware of the policy, however, states at paragraph 20:

[The Applicant] points to a breach of Policy as the source of her right to notice. Since we have already determined that the Policy is without legal effect it cannot be the source of any right [the Applicant] had to notification. If the policy had been publicly available, or previously known to [the Applicant] it might have created a “reasonable expectation” but the policy did not come to her attention until the return was filed on the judicial review application. (emphasis added)

²⁸ While the doctrine of legitimate expectations applies to procedure only and will not create any right to a particular outcome or decision, changes made to substantive policies may still generate issues for SDMs and others regarding implementation, timing, and retroactivity.

²⁹ Pottie and Sossin *supra*, note 8 at 151.

Concerns have been expressed about the lack of any or even just minimum standards for creating and communicating policy.

The lack of a standard practice is particularly pronounced when compared to the processes used to enact statutes and regulations. Although those processes differ somewhat from jurisdiction to jurisdiction, every Canadian jurisdiction has clear procedural requirements for enacting legislation (both statutes and regulations) that include public notice and some level of debate in a public forum.

Statutes

The first step is the “tabling” of a “bill” (the proposed statute) in the Legislature. Tabling also acts as the initial official public notice of all proposed statutes. Bills are then given first and second readings by the sponsoring MLA (usually but not always a government minister) in the Legislature, followed by a committee stage. Following committee stage, third reading is given by the provincial legislature or the House of Commons (followed by the Senate process).

In British Columbia, the Committee of the Whole House reviews all bills proposed as legislation. The Committee is made up of all sitting Members of the Legislative Assembly (MLAs), who may ask questions of the sponsoring MLA and debate the contents of the proposed legislation to ensure that the interests of their constituents and the broader public are served.³⁰

At the federal level, proposed legislation is reviewed by a standing committee or, in some cases, a special legislative committee. Witnesses may be invited to appear before the committee and public consultations may also be held.

Regulations

Regulations are “subordinate legislation” made by the Governor General in Council (federal regulations), Lieutenant Governor in Council (provincial regulations), a Minister or other entity under the authority of a statute. Although the process used to make regulations does not (ordinarily) involve debate in a public forum, public notice and government accountability are still fundamental to the process.

At the federal level, regulations are published in the *Canada Gazette*, both when proposed and again when the regulation comes into force. While only some proposed regulations are specifically required by statute to be published,³¹ the federal government policy is to publish all proposed federal regulations, even if

³⁰ Further information regarding the legislative process can be found on the “legislation” page of the AJO website at <http://www.gov.bc.ca/ajo/popt/legislation.htm>.

³¹ See for example the *Broadcasting Act*, S.C. 1991 c. 11; the *Canada Oil and Gas Operations Act*, R.S.C 1985 c. O-7; the *Canada Shipping Act*, R.S.C. 1985, c. S-9; and the *Competition Act*, R.S.C. 1985, s. C-34.

not legally required to do so.³² The standard publication period is 30 days, but in some cases that can be as long as 75 days.³³ A Regulatory Impact Analysis Statement (RIAS) is also published with the proposed regulation.³⁴ An RIAS typically contains a description of the problem the regulation is designed to address, any alternatives explored, any consultation undertaken, any compliance and enforcement resources required, and a costs/benefits analysis.³⁵ Contact information for public feedback is also provided. And with only a few exceptions, all federal regulations are required to be published when they are to come into force, typically in the *Canada Gazette*.³⁶

The process to enact regulations varies from province to province. In British Columbia, the entity proposing the regulation (usually the Lieutenant Governor in Council - Cabinet -, or a Minister) is required to sign a Regulatory Criteria Checklist.³⁷ The Checklist includes certification that the regulation has been developed in a transparent manner and that interested parties have been given an opportunity to present their views.³⁸ While there is no advance publication requirement for proposed regulations, most regulations must be published in the *British Columbia Gazette* in order to come into force.³⁹

Policy

By comparison, there are very few procedural requirements for the development and publication of policies. Requirements that do exist tend to be limited to those instances where the policy takes the form of a binding rule or regulation.⁴⁰ As of early 2008, no Canadian jurisdiction had any general legislative requirements for the process for developing non-binding policy.⁴¹

Nor do the courts impose any constraints on the process for creating or communicating non-binding (soft law) policies as the development of policy is typically considered a “legislative” decision of “general application” and, with no statutorily mandated process for development, the courts will not review how these are made.⁴²

³² This has been the policy since 1986 as a result of regulatory reforms. For a more in-depth discussion of the 1986 regulatory reforms see Paul Salembier, *Regulatory Law and Practice in Canada* (Toronto: Butterworths, 2004) at 16-17 and 54.

³³ Salembier *ibid.* at 54.

³⁴ *Ibid.* at 85.

³⁵ *Ibid.* at 85-90.

³⁶ *Statutory Instruments Act*, C.R.C. 1978, c. 1509, s. 11. Section 15 of the *Statutory Instruments Act* exempts certain classes of regulations. There does not seem to be any pattern to those regulations exempted; therefore, see Salembier, *ibid.* at 77-78 for a complete list of exempted.

³⁷ Salembier *supra*, note 32 at 135.

³⁸ *Ibid.* at 135.

³⁹ *Ibid.* at 135.

⁴⁰ See for example s. 185 of the *Securities Act supra*, note 3, which states that the *Regulations Act* applies to Security Commission rules. See also s. 11(4) of the *ATA supra*, note 2, which states that tribunals must make accessible to the public any rules of practice and procedure.

⁴¹ Alice Woolley, “Legitimizing Public Policy” (Spring, 2008) 58 *Univ. of Toronto L.J.* 153 at 5.

⁴² *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

Despite there being no legislated or court imposed requirements, many ministries and administrative agencies have developed processes for policy development. However, these are varied and may be *ad hoc* in nature. While some policy development processes include stakeholder consultation and public hearings, others rely solely on internal consultation.⁴³ Lack of public involvement in policy development may lead to questions about the democratic and substantive legitimacy of that policy, especially as compared to statutes and regulations.⁴⁴ However, consultations may be costly and time consuming and sometimes can be dominated by special interest groups that do not necessarily reflect the broad spectrum of users. Another concern about too much process may be to give policies and guidelines an overly important or formal status, that conflates them from soft laws into hard laws, difficult to change and overly rigid.

A related issue with regard to public accountability concerns the public dissemination of policy. Sometimes the form of the policy itself precludes public access. Emails, oral instructions, and internal memoranda are not easily or readily shared with the public. Some suggest that ministries and administrative agencies may make a conscious choice not to make certain policies publicly available. For example, one study found that while provincial policies were publicly available, regional policies were not.⁴⁵

Without a wider forum for policy development, legal issues may arise. For example, the problem of improperly fettering discretion by the use mandatory language, such as “must” or “shall not” or “only if”, where no such language is required or authorized. And policies that read “like a statute or regulation”, contain minute details and the threat of sanctions for non-compliance have been found invalid on this basis.⁴⁶

Questions:

- *Should there be a standard process for developing policies? If so, what would the process include? Should that process be set out in legislation?*
- *Does the current system provide sufficient public accountability for policy development? Are there other, better alternatives?*
- *Should there be any differences in how procedural and substantive policies are developed?*
- *Should the public have a role in the development of all policies? If not, when and how should the public be involved?*
- *Does public consultation need to be structured to provide a wide perspective and avoid being overly influenced by special interest groups?*

⁴³ Woolley *supra*, note 41 at 6.

⁴⁴ *Ibid.* See also Lorne Sossin and Charles W. Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government” (2002-2003) 40 *Alta. L. Rev.* 867.

⁴⁵ Pottie and Sossin *supra*, note 8 at 160.

⁴⁶ *Ainsley supra*, note 10 at para. 85.

- *How can public participation be balanced with the possible need to quickly adapt policies to meet changes in circumstances?*
- *How can it be ensured policies are publicly available without overwhelming the public with information and the SDMs with overly onerous obligations?*

Other Jurisdictions' approaches to Policy Development

• *US Rulemaking*

The approach in the United States to policy development, known as “rulemaking”, is an example of a legislated process for policy development. The *Administrative Procedure Act (APA)*⁴⁷ creates a public right to notice of and to participate in rulemaking by administrative agencies at both the federal and state level. The APA establishes two different procedures:

- “on the record” rulemaking and
- “notice and comment” rulemaking.⁴⁸

One of these approaches must be used for all rulemaking not excluded from the APA. (Exclusions include rules about “a military or foreign affairs function of the United States”⁴⁹ or about “agency management or personnel, or...public property, loans, grants, benefits or contracts.”⁵⁰)

“On the record” rulemaking is a formal hearing-type process and (perhaps for that reason) its use is relatively uncommon and has been generally been considered unsuccessful.⁵¹

“Notice and comment” rulemaking is a relatively simpler process and has been more successful.⁵² This process requires the rulemaking agency to publish notice of the proposed rules in the *Federal Register*. After giving notice, the agency is required to 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.”⁵³ After consideration of the submissions, “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”⁵⁴

To accomplish this, several administrative agencies began creating websites that allowed the public to comment on proposed rules electronically.⁵⁵ In 2002, the United States federal government began consolidating its individual agency websites into a single government-wide system with one common public web

⁴⁷ 5 USCS.

⁴⁸ *Ibid.* § 553.

⁴⁹ *Ibid.* § 553(a)(1).

⁵⁰ *Ibid.* § 553(a)(2).

⁵¹ Janisch *supra*, note 13 at 275.

⁵² *Ibid.* at 275 and 276.

⁵³ *Administrative Procedure Act supra*, note 47, § 553(c).

⁵⁴ *Ibid.* § 553(c).

⁵⁵ American Bar Association Committee on the Status and Future of Federal e-Rulemaking, [*Achieving the Potential the Future of e-Rulemaking: A Report to Congress and the President*](#) (2008) at 3.

portal.⁵⁶ As of 2008, more than 170 different rulemaking agencies in 15 Cabinet Departments, as well as some independent regulatory commissions, were using a common database for rulemaking documents and a single public website for viewing proposed rules and accepting on-line comments.⁵⁷

A recent review of the eRulemaking Initiative by the American Bar Association (ABA) suggests that while this initiative has been successful, there remains room for improvement. The ABA identified a number of areas of concern including:

- Architecture – the basic database and public website design are too simple while the agencies’ use of the database and website are too varied.
- Funding – existing agency budgets have been the sole source of funding, creating resistance and instability.
- Governance – All agencies wanted an equal say in the Initiative, which has led to a complex multi-level structure of collective decision-making with no clear locus of responsibility.
- Public Access – the website is designed from the viewpoint of someone familiar with rulemaking, as opposed to the general public. Also, documents can only be viewed by the public if posted by the agencies, and with some agencies failing to post materials, public access and particularly public comments is limited.

- **“Wiki-Drafting” in Australia and New Zealand**

A wiki is a collection of web pages designed to enable anyone who accesses it to contribute or modify content; both Australia and New Zealand have experimented with wiki-drafting.⁵⁸

New Zealand used a wiki to update its *Police Act*, with over 10,000 hits and hundreds of edits a day. In Australia, the city of Melbourne used a wiki to develop its 10-year strategic plan, and that wiki had over 6,500 visitors and 700 registered users. Despite the popularity of the wiki in New Zealand, it was felt by those involved that it did not live up to its collaborative potential. Instead the wiki acted as an online collection of submissions from special interest groups. Having learned from New Zealand’s experience, Melbourne set out to ensure that the process was collaborative and inclusive. As a result, the response in Melbourne was overwhelmingly positive.⁵⁹

⁵⁶ *Ibid.* at 3.

⁵⁷ *Ibid.* at 3.

⁵⁸ Will Dick, “Future Melbourne: From Consultation to Collaboration with Citizens” In *Genera Insight: Government 2.0* (November 2008). For more information about wikis see the “Wiki’s in Plain English” video available on You Tube at <http://www.youtube.com/watch?v=-dnL00TdmLY>

⁵⁹ *Ibid.* See also the Future Melbourne website at <http://www.futuremelbourne.com.au/wiki/view/FMPlan/WebHome>

While these experiments have not extended to developing policies for use in decision-making, the results of these experiments may be useful. Specifically, the experiments revealed the following:

- To use wikis to the greatest advantage, the focus of the consultation process should be changed from simply the collection of submissions to active collaboration.
- Policy makers must adjust their understanding of their role when using wikis: no longer are they simply processors of submissions, they are now facilitators of discussion and leaders of a wiki community.
- Policy makers must respond to users' submissions in a transparent and ongoing fashion. This keeps users engaged and helps improve the quality of future submissions. Absent active feedback, wikis may simply become another forum for stakeholders to express their interests and grievances.
- A staged approach may be necessary to ensure that concerns about privacy and security are being met and that policy makers are comfortable with both the technology and their new roles and responsibilities as leaders of a wiki community.⁶⁰

Questions:

- *Would an on-line model for public commentary, such as a wiki or the American eRulemaking, be a good method to develop policies?*
- *Are there any circumstances where that approach might work better?*
- *Could such a model be adapted to improve on, and avoid some of the pitfalls experienced in, other jurisdictions?*

Some Related Issues

Application of the Charter of Rights and Freedoms

A fundamental element of constitutional law is the courts' jurisdiction to review legislation to ensure the law complies with the *Canada Act* and the *Charter of Rights and Freedom*, and to declare legislation that contravenes the *Charter* to be invalid. However, the extent of the courts' review of discretionary decisions and the policies and guidelines for *Charter* compliance is less clear.

The courts have approached this by either:

- reviewing the *legislation* governing the exercise of discretionary decision-making, if the legislation (expressly or by necessary implication) confers a power to infringe a right protected by the *Charter*; or
- reviewing the *decision*, if the legislation governing the decision-making discretion does not purport to give the power to infringe a right protected by the *Charter*.⁶¹

⁶⁰ Dick *supra*, note 58 at 5-6.

⁶¹ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 3. This approach comes from the decision of Lamer J., dissenting in part but with the support of the entire Court on this issue. This test has since been cited by the S.C.C. in subsequent decisions.

The Supreme Court of Canada applied this approach when considering the B.C. Medical Services Commission's (and various hospitals') policy not to provide funding for sign language interpreters.⁶² The Court decided that the enabling legislation neither demanded nor prohibited interpretation services, and as such did not violate the *Charter*. But because the legislation gave the Commission and the hospitals the discretionary authority to determine what services would be provided, the Court considered the exercise of that discretionary authority and concluded refusing to provide funding for sign language interpretation violated the applicants' *Charter* right to equality.

While some legal commentators suggested that this case indicated a willingness by the Court to extend its review of discretionary decisions to include a review of the policies that underlie those decisions,⁶³ the Court soon after took a different approach.

When asked to consider the constitutionality of various Customs and Border Services Agency directives and policy manuals, the Court held that while it could review the enabling statute and the individual decisions made pursuant to that statute, the policies that led to the individual decisions were not subject to the Court's review. Two reasons were given:⁶⁴

- The policy manual was “nothing more than an internal administrative aid to Customs inspectors. It was not law.”
- “[i]t is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials.”

As such, while discretionary decision-makers will need to exercise caution when making decisions to ensure that the decisions do not contravene the *Charter*, (and the policies should be *Charter* complaint), the actual policies themselves may not be subject to *Charter* review.

Application of the Human Rights Code

While policies may not be subject to *Charter* review, they have been reviewed for compliance with human rights legislation. In British Columbia, decision-making policies might fall under s. 8 of the *Human Rights Code*.⁶⁵ Section 8 prohibits discrimination (without a bona fide and reasonable justification) with respect to, among other things, services that are customarily available to the public.

For example, the British Columbia Human Rights Tribunal (HRT) recently considered a policy of the Ministry of Health developed for its Choices in Support

⁶² *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.

⁶³ Pottie and Sossin *supra*, note 8 at 168.

⁶⁴ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 S.C.R. 1120 (at paragraph 85).

⁶⁵ [R.S.B.C. 1996, c.210](#)

for Independent Living program.⁶⁶ That program provides funding for persons with disabilities to self-manage the hiring of service providers to assist them with daily living needs such as bathing and dressing, but a program policy barred the hiring of family members. A client of the program wished to hire her father as her caregiver. The HRT found that the policy was discriminatory, contrary to sections 8 and 13 (which prohibits discrimination with respect to employment) of the *Human Rights Code*, and ordered the Ministry to develop a set of criteria to allow for the hiring of family members on a case-by-case basis under its policy.

Procedural policies may also be subject to review by the HRT. A recent complaint⁶⁷ alleged a Residential Tenancy Branch policy that hearings were to be conducted by telephone conference calls was discriminatory. (While the policy provided for “exceptional circumstances”, the complainant’s circumstances had not been accepted as “exceptional”.) When asked to dismiss the complaint on the basis that it lacked jurisdiction to review procedural matters, the HRT refused, and found that an allegation of a breach of the *Code* for failure to accommodate a disability in the processes used was within the Tribunal’s jurisdiction.

Automated Decision-Making

Some jurisdictions are using automated computer systems to assist in decision-making. Automated decision-making is generally “rule-based”; it incorporates the relevant legislation and policy into “rules” that are applied to the “facts” as determined by the answers to set questions. For example, if the entitlement to a benefit depends in part on age, the answer to a question about an applicant’s age would then automatically generate a decision regarding entitlement based (in part) on that answer. These systems are considered to be helpful in ensuring that decisions are more accurate and consistent and are made in a timely, cost-effective manner.⁶⁸

However, it may be important to ensure that the use of automated computer systems does not improperly fetter discretion. In a recent review of the use of automated assistance in administrative decision-making in Australia, three ways to address this concern were identified:

- Direct – in this approach, the decision-maker exercises his or her discretion and the result of that discretionary decision is incorporated into the automated decision.
- Recommendation – in this approach, the automated system is used to collect data related to the discretionary decision and then makes a

⁶⁶ *Hutchinson v. B.C. (Ministry of Health)* 2004 BCHRT 58.

⁶⁷ *Carline v. B.C. (Ministry of Forests and Range and Minister Responsible for Housing)* 2008 BCHRT 141.

⁶⁸ [Automated Assistance in Administrative Decision-Making: Better Practice Guide](#) (Government of Australia), 9.

recommendation to the decision-maker. The decision-maker may then accept or override the automated recommendation.

- Guided – in this approach, the automated system is used to determine whether or not discretion should be exercised at all. This type of automated assistance is generally used when decisions are typically fact based but the legislation allows for the consideration of “exceptional circumstances.”⁶⁹

The review suggested there may be other methods of ensuring proper exercise of discretion in an automated system, including “ejecting” those decisions that require discretion from the automated system.

Questions:

- *How can policy makers ensure that policies respect and reflect the Charter and the Human Rights Code?*
- *What information about the Charter and the Code do policy makers need to know?*
- *How can they most effectively get that information?*
- *Could integrating automated processes free up resources to focus on the more difficult aspects of discretionary decision-making?*
- *Would guidelines on the use of automated processes be helpful?*

Conclusion

The public policy considerations respecting how discretionary decision-making policies are developed and used are varied and complex, with many of them inter-related. Careful thought and analysis of these considerations will be required. Your thoughts and ideas about these, and any other issues you may identify, are important and you are invited to share those thoughts and ideas using the Feedback option on the AJO Web site at: www.gov.bc.ca/ajo.

⁶⁹ Administrative Review Council, [Automated Assistance in Administrative Decision-Making](#) (Report No. 46) at 19.