Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

independent administrative agencies

Working Paper 25

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INDEPENDENT ADMINISTRATIVE AGENCIES

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Notice

This Working Paper presents the views of the Commission at this time. It reflects the state of Canadian federal administrative law and governmental organization and practices as of the end of May, 1979. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

The expansion of state activity into virtually every aspect of social life has posed problems for established legal systems. They are constantly trying to come to grips with that interface between law and modern government administration which has become known as administrative law. In fact, no generally accepted approach to the subject of administrative law has been developed, at least in countries whose public law falls within the common law tradition.

The law and lawyers in Canada still tend to look at administrative law largely in terms of the remedies available before the courts to respond to abuses in the administrative process. We are only three generations removed from the great British constitutional authority, A. V. Dicey, who could assert that "The words 'administrative law' . . . are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation".[1] Today, it is clear that judicial review of administrative action constitutes only one segment, albeit an important one, of administrative law. Small wonder, then, that at the time of the establishment of the Law Reform Commission in 1970, the Minister of Justice declared that administrative law should, along with criminal law, be one of its priority items of study.

Despite this, the work of the Commission in administrative law had modest beginnings. Specific topics designated for examination were closely linked to other aspects of its work. Thus, the Commission's first research program announced that the law of evidence before administrative tribunals and the effectiveness of sanctions invoked to enforce federal statutes would be studied. And at the suggestion of the Minister of Justice, the Commission also undertook a study of expropria-

tion law. Nevertheless, the research program made the Commission's long-range interest in the area clear by announcing that it would also study "the broader problems associated with procedures before administrative tribunals".

Much of the work on the first set of topics has now been completed. A Working Paper and Report to Parliament on *Expropriation* have been issued,[2] and evidence before administrative tribunals has been dealt with, in part at least, in the Report on *Evidence*.[3] Working Papers on *Commissions of Inquiry*[4] and *Federal Court: Judicial Review*[5] have been published, and Reports on these subjects are currently in preparation. A Working Paper on the effectiveness of sanctions is also being prepared.

The term "administrative tribunals" was being employed in its broadest sense when the Commission's research program was adopted in 1971. This was in keeping with the definition of tribunal set forth in section 2 of the *Federal Court Act*:

> "federal board, commission or other tribunal" means any body, or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *British North America Act*, 1867.[6]

Under this definition, not only a federal administrative authority specifically called a tribunal, but also any departmental official, agency, board or commission, or even a minister or the entire Cabinet, can be characterized as a federal administrative tribunal to the extent that the person or body exercises jurisdiction or powers conferred by statute; nothing hinges on the formal name of the entity.

A study of the "broader problems associated with procedures before administrative tribunals" thus encompasses the whole of the federal administrative process insofar as it involves public officials who exercise powers pursuant to statute. It involves, in respect of a vast number of extremely varied administrative authorities, consideration of such diverse matters as the relation of these authorities to the Cabinet, to

Parliament, to the courts and to the public, as well as many specific procedural problems arising before them. The necessity for some limitations to the scope of research became evident, if we were to deal in any effective manner with the wide range of issues involved within a reasonable period of time.

Even more daunting than the scope of the subject was the lack of information in the area. Too little is known about the workings of administrative tribunals, since most Canadian writing on administrative law has tended to stress judicial review. While the relation of the courts to administrative tribunals remains an important issue, it must be recognized that there are often factors other than the prospect of judicial review which have equal or greater impact on administrative decisions. As a first priority, therefore, it was necessary to take steps to remedy the lack of information.

An early step was the decision to sponsor research that led to the publication of *A Catalogue of Discretionary Powers in the Revised Statutes of Canada*, 1970.[7] The *Catalogue* identified and classified most of the discretionary powers (no fewer than 14,885) explicitly conferred upon public authorities by federal statutes. The Commission attempted to identify discretionary powers because of their enormous importance compared to the less numerous mandatory and ministerial statutory powers exercised by public authorities in the day-to-day administration of government affairs. Of course, the *Catalogue* provided information only about powers which might be exercised. To learn anything about the powers actually exercised, their effect on government administration and their impact on private rights and interests, meant studying the actual practices and procedures of those who wield the powers.

It was decided, therefore, to study the practices and procedures of a number of tribunals. The objectives were and are to gain an appreciation of what these bodies were designed to do and how they function, to learn what powers they exercise and with what result. Only in this way, it was thought, could one identify the broad problems associated with procedures

before administrative tribunals (*i.e.*, with the manner in which tribunals exercise their powers). The studies would provide a basis for proposing reforms to remedy these problems.

At the outset there was the problem of deciding which tribunals to study. We eventually determined to apply three criteria in preparing a list of tribunals to receive our initial attention. First, tribunals formally established with some degree of independence were selected. It was easier to review their work comprehensively than to delve into departmental processes and chains of command in order to determine the extent of responsibility of an authority attached to a department of the government. Second, in order to give priority to a series of studies on tribunals whose activities and decision-making directly affect private rights, tribunals having exclusively advisory functions but with no power to make recommendations or final decisions directly affecting rights, were put aside for possible later examination. Third, an attempt was made to select tribunals carrying out a variety of tasks and using different procedures in order to provide a basis for comparison between the exercise of different types of powers and related practices. It was believed that an approach of this scope would afford the Law Reform Commission an opportunity to determine the major problems involved in tribunal administration.

Because the bulk of our work has been concentrated on those administrative authorities sometimes called "independent administrative agencies", this Working Paper is largely confined to administrative law problems relating to these bodies. However, as will become evident, some of the discussion has broader implications.

The independent agencies initially selected for study were the following: the Immigration Appeal Board,[8] the Atomic Energy Control Board,[9] the National Parole Board,[10] the Unemployment Insurance Commission,[11] the Canadian Transport Commission,[12] the National Energy Board,[13] the Canadian Radio-television and Telecommunications Commission,[14] the Pension Appeals Board,[15] and the Anti-dumping Tribunal.[16] The Commission later arranged to study the Canada Labour Relations Board[17] and the Tariff Board[18] as well.

In preparing the specific agency studies, researchers spent a considerable amount of time observing what agencies do and talking with those who make or are involved in making decisions for them, as well as with those who are affected by their decisions. Attempts were made to describe their organizational make-up, how their members perceive their roles, and how the agencies relate both to private interests they deal with and to the government. A research paper prepared for the Commission entitled *Approaches to the Study of Federal Administrative and Regulatory Agencies, Boards, Commissions and Tribunals* was published in "Canadian Public Administration".[19] It outlined a multi-disciplinary approach for agency studies, and suggested that such studies go beyond what were considered to be traditional legal issues in the narrow sense.

Other study papers attempt to deal with general problems facing independent agencies. Papers on *Access to Information*,[20] *Public Participation in Administrative Proceedings*,[21] *Political Controls over Independent Agencies*,[22] *Parliament and Administrative Agencies*,[23] and *Supervision with Independence in the Administrative Process*[24] have already been completed.

Naturally, the question of judicial review could not be ignored. Consequently, both a Study Paper on the *Federal Court Act*[25] and a Working Paper entitled *Federal Court: Judicial Review*[26] were prepared. A Report on the same subject will be forthcoming. That work provides the basis for the comments on judicial review made in Chapter Seven of this Working Paper.

Here we propose to step back from the perspective of any specific agency and to discuss more generally the operations of federal independent agencies in Canada. Many of the issues in administrative law which have surfaced in the provinces and in other countries, as well as academic literature, are discussed in the light of the knowledge we have gained from our studies of particular independent agencies. In the discussion of the broader problems associated with administrative authorities, some of the values which the Commission believes should govern their solution have become evident, and on the

basis of these values, directions for reform are set forth. On some of the issues we have developed fairly firm positions; on others only tentative suggestions can be offered. The Commission does not intend this Paper to be its last work on administrative law; reform in this area is an ongoing task and one of the principal purposes of the Paper is to indicate future directions for the Commission's research.

In preparing the General Working Paper, the Commission has benefited from the comments made by specialists in various disciplines. We thank in particular those persons who accepted the invitation to be members of the Consultative Committee who commented on various draft versions of the Paper. Among those participating were: persons with experience as members of independent agencies, including Marshall Crowe, Yves Dubé, Gordon Fairweather, Jacob Finkelman, Pierre Juneau, William Outerbridge, Marguerite Ritchie, and Jack Stabback; agency counsel, including Chris Johnston, Russell Juriansz and Fred Lamar; and the Commission's Senior Advisor from among administrative law practitioners, Brian Crane. Alan Reid assisted in the preparation of early drafts of the Paper, and Charles Marvin in later ones. Others who contributed to the final product were Pierre Issalys, Alan Leadbeater, Sandra McCallum, and Gaylord Watkins. The Commission depended, of course, throughout the Paper on information and insights provided by the authors of the other papers already prepared under the auspices of the Administrative Law Project.

INTRODUCTION

Independent Administrative Agencies — Issues and Values

This Working Paper deals with some of the major issues associated with proceedings conducted by federal independent administrative agencies. It comes at a time when there is growing tension surrounding the increased governmental regulation of social and economic life. In contemporary society few activities are not in one way or another affected by state organizations. Governmental bodies charged with traditional government concerns — municipalities, the police, schools, the public service, the courts — have all seen marked expansion. The increasing scope and degree of government involvement in societal affairs has also resulted in the proliferation of all sorts of new governmental agencies — boards, commissions and tribunals — many of which operate outside of traditional departmental structures. One needs only to think of activities such as the marketing of commodities, the conduct of labour-management relations, the regulation of transportation services, and the management of social benefits schemes, to see the importance of these agencies in our everyday lives.

Most people would probably agree that some degree of government control and regulation is essential in modern society, and it will likely continue as an important part of our

social organization for the foreseeable future. But most of us tend to be ambivalent about it. In one situation or another we are likely to see government commitment to social benefits programs or regulatory devices either as an expanding encroachment on the freedom of the individual or as an undue interference with private enterprise or with the rules of the market place. But even where there is agreement as to the desirability of government initiatives, either in general or in a particular context, it by no means follows that there will be approval of the mechanisms or procedures used or the means of carrying them out.

Indeed, we confine ourselves here to the discussion of one type of mechanism, administrative tribunals, as defined in the broad sense in the *Federal Court Act*.[27] More particularly, this Paper is based on a series of studies on that small group of independent agencies currently in place which apply and develop government policies, and the manner in which they operate from an administrative law perspective. We do not intend to speculate about any mechanisms other than administrative tribunals, or administrative authorities as we prefer to call them,[28] which the government might use to carry out particular initiatives. Nor do we wish to involve ourselves in a guessing game as to what sectors of human activity the government should or should not involve itself in. We leave that to adherents of disciplines purporting to specialize in such matters. Even the traditionalists among administrative lawyers would be prepared to admit that, aside from situations where administrative tribunals are established principally to adjudicate matters, governmental concern does not need to result in the creation or maintenance of institutional mechanisms of any particular form. For example, tax incentives, subsidy programs, grants or loans, or even deregulation or discontinuance of any governmental involvement in a given area, might prove to be viable and even desirable alternatives to social benefit schemes or regulatory agency mechanisms.

The decision to concentrate on the independent agencies arises from a number of considerations. Their very importance and pervasiveness is one. The fact that they seem to spring up everywhere without any overriding design or clear relation to

other governmental institutions is another. From the particular perspective of the Law Reform Commission, the characterization made of, and significance attributed to proceedings before these agencies by authorities from each of the traditional branches of government, as well as by persons involved in the agency proceedings, form yet a third consideration.

There is also the fact that we sense that an increasing tension is building up around these agencies. Part of the tension is reflected in the allegation that Ministerial control over government operations, and Ministerial responsibility to Parliament for those operations, is weakened through the delegation of power to make regulations and social policy to non-elected government officials assigned to run independent statutory bodies. This is not merely a doctrinal issue of interest to politicians and constitutional experts. Observers of government and public administration have noted the occasional feeling of unease in the interaction between career civil servants acting as ministerial policy advisors within departments, on the one hand, and politically appointed members of independent agencies and their staffs, on the other hand. Academics and journalists have cited chapter and verse of cases where a need apparently exists to improve the rapport between departments and independent agencies having related policy interests.

A second concern is the question whether it is appropriate for those who make rules to be permitted also to sit in judgment in the application of those rules to individual cases. The traditional commitment to the splitting of institutional responsibility for making law and applying law between distinct legislative and adjudicative bodies is breached when reliance is placed on one agency to combine both functions. But, this commitment is no less breached, of course, when the Minister is placed in a position both to approve regulations and then serve in an appellate function to review an agency's decisions based on the regulations.

Another factor serving to maintain tension concerning the administration of government stems from the differences in points of view which various persons have of the goals of

agencies, how they function, the limits of their power and how they relate to other institutions of government. Individuals who have to deal with a social service agency may perceive its operation to be overly complicated and difficult; there is uncertainty about how it operates, how policy is made and who influences it. Persons appearing before agencies which make decisions affecting freedom of movement, property rights or trade interests are naturally as concerned about procedural safeguards as they are about the consistent application of government policy.

Various persons directly affected by an agency regulating a specific industrial sector may, of course, see things differently. Some will perceive its activities as an encroachment by government on their freedom of choice or flexibility of operations. At the same time, many regulated industries welcome the stability and support which regulation provides and accept the inevitability of government standards, especially where public health and safety are at stake. Even so, agency processes are sometimes regarded as slow and cumbersome, and run by people who do not have a sufficient appreciation of the problems of those who are subject to its rulings. For example, industrial and commercial interests occasionally complain of a policy vacuum in a regulatory agency making it virtually impossible for them to engage in adequate planning. It deprives them of lead time in organizing their operations and this in turn fuels demands for government deregulation.

To the government of the day, even the agencies with clear and specific statutory mandates may at times seem highly unresponsive. Far from being tools of the government, some agencies may be perceived as obstacles to the achievement of government policies. The government of the day may sense the prospect of an eventual confrontation between itself and an agency, especially one having a broad policy mandate and staffed largely by unsympathetic appointees. It may seek ways of exercising more direct control over the functions presently exercised by administrative agencies — for example, by transferring responsibilities into departments more closely aligned with it.

For many lawyers and judges, the point of focus is the fact that the agencies are engaged in making decisions which directly affect individual and property rights. They look at the agencies as potentially arbitrary and in need of careful scrutiny to prevent excesses and abuses. For many, the integrity of agency processes is conditional on an agency functioning more or less like a court. Concomitantly, they tend to stress the importance of judicial review of administrative decisions. This is often diametrically opposed to the views of administrators who strive for efficiency. Moreover, the judicial model does not fit well in the case of agency operations more concerned with planning and policy making than with adjudication and the application of the letter of the law. Consequently, the stress on judicial procedures and review may de-emphasize the need for more broadly based internal reform of procedures, for broader representation of relevant interests, and for a more defined system of accountability to Parliament and the government.

Those who administer the agencies often tend to stress the importance of adopting efficient means of fulfilling statutory mandates. Most are concerned with implementation, costs and efficiency, and some may be willing to compromise what others would regard as basic rights. There are differing perceptions among administrators about how decisions ought to be made. An administrator's concept of the "public interest" may be narrowed by a restricted view of his role, influenced significantly by the interests most frequently and strenuously advanced before him. Administrators are influenced by their own perceptions of what government policy is, regardless of whether such policy is clear or even exists, or of the accuracy of their perceptions with respect to policy. Some may interpret their statutory mandates narrowly. Others may perceive that Parliament has conferred on them a greater degree of independence than is actually the case.

Finally, the appropriate place for independent agencies in the constitutional framework, both under political theory and in their practical relationship to Parliament, remains unresolved. To the extent that there is no Minister actually responsible and accountable before Parliament for the operations

of a government agency, one can say that there has been an investiture of power in the agency by the legislature, rather than a mere delegation of authority. It is at least partially in response to the reality of this situation that the general public has demanded that a degree of participatory democracy be introduced into agency proceedings. Where their elected representatives do not govern, interested members of the public themselves seek to become involved.

Parliament, of course, currently exercises a degree of scrutiny over agency operations in various ways, for example, in the handling of accounts, and through the examination of statutory instruments by the Standing Joint Committee on Regulations and Other Statutory Instruments. Nevertheless, there is rising sentiment in favour of increasing Parliamentary scrutiny over both expenditures and the substance of operations of various governmental bodies, including the independent agencies.

It is obvious, therefore, that different perceptions give rise to differing and sometimes competing concerns. The fact that agencies are indiscriminately described as tribunals, boards, commissions, and agencies, and are invested with a wide variety of powers and duties, does little to rationalize these differing perceptions. Moreover, the practices, procedures and control mechanisms of independent agencies cannot respect, in equal degree, all the values which are seen as important by different groups and individuals. However, many individuals and organizations are favourably disposed towards the work done by administrative agencies, and the generalized concerns we have expressed should not be taken as indicative of widespread dissatisfaction. Nevertheless, the tension spoken of does exist and does contribute to many of the difficulties to be discussed in this paper.

The Commission shares many of the concerns already mentioned. We are concerned, for example, about the degree of delegation of discretionary authority and the controls to be placed over the authority, and also about the need to ensure that agency authority as exercised involves careful consideration of the interests affected by each decision. We are

interested in exploring the policy-making role of independent administrative agencies and the interplay between them, departments and the government of the day. We are concerned about the procedures agencies use in reaching decisions and the impact of those procedures on their ability to make decisions which are informed and fair. At the same time, we are mindful of the dangers of arbitrarily imposed legal structures causing institutional dysfunctions, and of too stringent procedural safeguards bringing decision-making to a grinding halt. We are concerned that agencies act with dispatch in a reasonably efficient manner. Finally, we are interested generally in the problems involved in placing the administrative process within a comprehensible legal framework, and in assessing the use of governmental and judicial controls to keep the power exercised by administrative agencies within reasonable limits. Agencies must be accountable to Parliament, the government, the courts and the public.

This cataloguing of some of our principal concerns tends to reveal the values to which we think administrative structures and procedures should conform, but we think it will lead to clarity to set forth these values or principles explicitly:

(1) *Accountability* — Accountability to Parliament and government for the exercise of governmental authority; accountability to the courts for excess or abuse of power; responsiveness to the public, in the sense of making decisions based on the inclusive representation of relevant interests and an appropriate consideration and weighing of those interests.

(2) *Effectiveness, economy and efficiency* — The activities carried on by administrative authorities should achieve their goals or intended effects. Operations should be organized economically with an appropriate mix of human and material resources. They should be run efficiently with a maximum production of administrative services in relation to resources employed.[29]

(3) *Fairness* — If an administrative authority does not operate fairly pursuant to proper procedures, it becomes incapable of performing its functions and attaining its

objectives in a society which depends as much as ours on the voluntary cooperation of citizens. This value should be reflected in internal agency processes, and supported by the traditional supervisory role of the courts. Fairness can produce by-products such as trust and credibility which, in turn, increase social cohesiveness, belief in the legitimacy of governmental institutions, and cooperation with them.

(4) *Integrity* — The integrity of administrative processes must be respected. If an enabling Act grants a power to an agency, it should really exercise the power; the government of the day should not be pulling hidden strings. The morale of decision-makers must not be sapped by manipulating them. Those charged by law with making decisions in accordance with certain norms and procedures must make those decisions without unduly bowing to external pressures or improperly using information not on the record.

(5) *Authoritativeness* — Citizens have a right to authoritative decision-making from governmental bodies designated as having particular powers. Subject to specific appeal or other review procedures, agency decisions should have the quality of *finality*.

(6) *Principled decision-making* — Administrative authorities should base their rules and individual decisions on principles which are identified and articulated. To the extent that it is possible for any field of activity under consideration, authorities should take into account appropriate facts and arguments in order to achieve *correctness* and *accuracy* in decision-making.

(7) *Comprehensibility* — Government institutions and procedures should be so structured and inter-related as to make them as understandable as possible; mechanisms should also be developed to make them known and understood. Interested persons must know to whom to present their cases and in what manner.

(8) *Openness* — This includes *accessibility* to government institutions. This value also supports all the other values:

> an open process is more comprehensible and more accountable than a closed one; it supports its integrity; it encourages fairness; it is likely to promote effectiveness by producing more accurate decisions; it should conduce to more preformulated standards and thereby certainty.

The importance of the eight values mentioned lies in their providing some standards against which to measure administrative practices and procedures. They occasionally conflict with one another in given situations depending on priorities involved and interests at stake. However, this should not be overemphasized.

Generally, our purpose in this Paper will be to examine the functioning of the independent agencies and their relationships to other government institutions in light of these values so as to identify relevant major problems, to make such recommendations as seem possible on the basis of our present knowledge, and to identify areas for future research. To summarize, therefore, this Working Paper attempts the following:

(1) to identify some of the broader problems associated with procedures before administrative tribunals;

(2) to set forth the values at issue in the resolution of these problems;

(3) to make recommendations and suggestions for the reform of the law and its administration so as to deal effectively with these problems; and,

(4) to define areas requiring additional research in order to identify other problems and the further steps which must be taken for their resolution.

CHAPTER ONE

The Historical Perspective

The emergence of a complex federal administrative structure in Canada, including independent agencies which refine and apply the law under the aegis of special statutory powers, is not the product of a well-defined approach or design. The growth of this structure is best described as an aspect of the evolution of government rather than as a planned constitutional development. It takes its shape from pragmatic responses to emerging problems over the years. In some situations, especially in the early years, the choice of certain types of governmental bodies to perform particular functions may have been the product of a reasoned general approach. But the choice in many cases seems to have been *ad hoc*. The selection of a non-departmental rather than a departmental body to regulate, or an administrative tribunal rather than the courts to adjudicate, appears to have been influenced, more often than not, by the exigencies of the case and existing institutional precedents than by an overall plan or any particular attitudes respecting one type of governmental body rather than another.

Being a product of history, the present composition of the federal administrative structure cannot be fully understood without some knowledge of its growth. A detailed history of

that growth has yet to be written. But to explain the present place of independent administrative agencies in the modern state apparatus at the federal level in Canada, this first chapter delineates the legal context within which the Canadian government has traditionally operated, and gives a thumbnail chronological sketch of the parallel growth of government activities and independent agencies.[30]

A. The Traditional Legal Context

Government in a general sense includes two functions — law-making and administration. Under our system, Parliament makes the laws which are carried forward by the executive and the public service. Both functions, legislative and executive, are actively directed by the governing party through the Cabinet. Ours is a system of responsible government which is based on the concept that the government collectively, and Ministers of the Crown individually, must account to Parliament for governmental action under their control.

The courts function independently as arbiters of the law in accordance with fundamental constitutional relationships which have evolved over the centuries and were inherited from Great Britain. Some of these constitutional relationships are reflected in the *British North America Act*, 1867[31]; others — such as the independence of the courts — are firmly established by custom or tradition. Fundamental too is the "rule of law", that society shall be governed through principled decision-making rather than by the arbitrary fiat of an individual or group. While Parliament, in its role as legislator within the limits of federal jurisdiction, is supreme in the sense that it can easily repeal or amend any ordinary law, in practice it normally feels compelled to respect the basic laws or constitutional conventions about such matters as the relationships between the legislature, the executive and the courts. These well-accepted propositions (which, while trite, can stand repetition from time to time) take us towards a less well

defined area between law and politics — the field of public administration.

Although historically the conduct of public business was the prerogative of the King and His Council and as such largely beyond judicial control, it can now be said that Ministers and public servants must act in compliance with the general laws of the land. A system of public departments established by statute was introduced in the United Canadas in 1841, and this model was adopted by the federal government in 1867. Only the Privy Council remained a prerogative department as opposed to a statutory authority. There are still some privileges and immunities favouring the government in litigation, but they are becoming less and less important, and in the 1975 Report on *Evidence* this Commission recommended that those privileges and immunities be further restricted.[32]

The involvement of government, and its employees, with the judicial process takes many forms: a citizen may be injured by the negligence of a public servant, a government contract may be broken, the government as tax collector may sue for customs duties or income tax, or lands may be expropriated by a public authority. Again, a constitutional or jurisdictional problem may have to be decided: a question of federal or provincial competence under the *British North America Act*,[33] the invalid exercise of power by a minister or civil servant, or a failure to comply with statutory standards such as those set out in the *Canadian Bill of Rights*,[34] the *Canadian Human Rights Act*[35] or the *Official Languages Act*.[36] Many of these claims come before the courts for resolution.

Having said this, it must be conceded that there is a considerable field of activity which in the normal course is not subject to judicial review: for example, the internal management of government departments and agencies, how they deal with the public and how they exercise their discretion within the limits of statutory authority. Doctrines such as Parliamentary supremacy and Crown privilege have served to inhibit the courts from intervening in such matters. These doctrines are based on the premise that law-making is the sole responsibility

of elected representatives and that government must have the authority and independence to see that the law is brought into force and administered.

While the constitutional arrangement outlined above was adequate for a small nation with limited governmental activity, new considerations have emerged in the context of the modern welfare state. Today, it is impossible for elected representatives effectively to supervise all aspects of the public business. Substantial areas of government are managed by officials who are only remotely responsible to Ministers or to Parliament and who have little direct contact with the public. Industries are controlled and regulated, taxes are levied, welfare grants are dispensed, and land is expropriated by bureaucracies which are never required to stand for election. This expansion of government has conferred on government appointees and public servants great legislative, administrative and sometimes judicial power. The courts have attempted to adapt the principles of administrative law, first developed through judicial review of lower tribunals at a time when Justices of the Peace were still the main administrators in the English countryside, to contemporary conditions where comprehensive standards are needed to limit or structure the powers of public officials who enjoy wide authority under delegated legislation. Given the scope of current governmental operations and the degree of discretionary power exercised by administrative authorities, it is clear that sources of law additional to judicial ones will have to be depended upon if administrative law is to be bolstered to meet existing needs and to ensure that governmental action is carried out fairly, effectively and responsibly.

B. The Expansion of Government

At Confederation and for quite a few years thereafter, the federal government and its administrators were preoccupied

with the extension and protection of the frontier and the development of a national economy. Thus the opening of the West, relations with native peoples, building the great transcontinental railways, and the protection of the border were the great public questions. There was a handful of government offices in Ottawa as well as a number of officials scattered throughout the country to collect customs duties, administer land grants, carry out surveys, look after post and telegraphs and preserve order in the emerging nation.

The need for novel administrative structures reflecting the character of government functions in a young and developing country first became apparent in Canada in connection with the nascent railway industry. Even before Confederation the Province of Canada had resorted to a type of non-departmental regulatory body when it enacted a *Railway Act* in 1851 under which regulatory functions, principally the approval of rates, were assigned to a Board of Railway Commissioners, although in fact the functions were assumed by four Cabinet Ministers. This device, known after Confederation as the Railway Committee of the Privy Council, persisted until 1903.[37]

However, a debate over whether Cabinet Ministers should be replaced by full-time semi-independent officials began as early as the 1880's. The idea of establishing a railway regulatory commission to take over the function of rate-making from the Cabinet committee was considered but rejected in the Galt Royal Commission Report of 1888.[38] That Commission was reluctant to recommend the model of the recently established United States Interstate Commerce Commission,[39] which it regarded as untried, and ventured the view that a commission format was inconsistent with the Canadian system of responsible government, ignoring the fact that the British Parliament was also then experimenting with a commission model.[40] But the problems associated with the employment of Cabinet Ministers as regulators did not go unnoticed by the Galt Commission. The fact that Railway Committee members served only part-time and were based in Ottawa, their lack of expertise and their vulnerability to political pressure were sensed as limitations on their effectiveness.

It is hardly surprising that the Galt Commission should have opted for keeping railway regulation within the confines of a government department. The system of public departments was well established when the Commission reported. Railways had been included in the responsibilities of the Department of Public Works after Confederation, and in 1879 had been placed under a newly constituted Department of Railways and Canals. Furthermore, the increased workload and complexity of the tasks entrusted to the Cabinet Committee seemed to call for the full-time employment of knowledgeable people. The necessary expertise might conceivably have been built up within the department. However, there were certain drawbacks to this course.

Generally, there was less inclination at that time to involve the federal public service in complex programs. To a large extent the public service performed ministerial functions and gave support to more direct public service programs offered in the provinces. More specifically, the tradition of patronage in the public service of the day gave rise to fears that designated departmental personnel might have inappropriate backgrounds or lack the technical capacity to deal with the kinds of issues being raised in the context of railway regulation. Also, adjudicative functions were largely foreign to departments, and the considerations which supported the removal of these duties from the Cabinet Committee probably precluded as well their being vested in a department. In retrospect, it is interesting to speculate on the question whether the present *pot-pourri* of independent agencies would exist today if a professional and non-partisan Canadian federal public service had been available at the turn of the century to take up the slack from Cabinet ministers.

The move towards a non-elected full-time body outside any departmental structure to regulate railways matured with the reports of Professor S. J. McLean to the Minister of Railways and Canals on *Railway Commissions, Railway Rate Grievances and Regulative Legislation* between 1899 and 1902.[41] These reports suggested the appointment of an independent commission to take the place of the Railway Committee and drew the following conclusions:

1. There must be great care in the definition of the powers conferred upon the commission.

2. The matters to be dealt with are concerned with administration and policy, rather than formal judicial procedure.

3. Subject to an appeal to the Governor in Council the decision of the commission should be final.

4. There should be requirements in regard to technical qualifications for office; one commissioner should be skilled in law, and one in railway business.

5. The commissioners should hold office on the same tenure as judges.

The *Railway Act* of 1903,[42] which reflected in large part the recommendations of the McLean Reports, opted for a new administrative agency, the Board of Railway Commissioners, which appears to have served as a model for later legislative initiatives vesting all kinds of governmental functions in independent agencies. It is noteworthy, however, that the Act provided for an important measure of judicial and political control. There was an appeal to the courts on questions of law or jurisdiction, and the Governor in Council was authorized, either on petition or of its own motion, to vary or rescind any order, decision or rule of the Board. Thorny issues about the appropriate institutional relationships to establish between Cabinet, independent agencies, and individual ministers in charge of related departments still remain to be adequately dealt with today.

Within six years Canada again used a regulatory commission model to establish by treaty, jointly with the United States, the International Joint Commission[43] to replace the International Waterways Commission,[44] which had been a purely investigatory body. It marked a further important step in establishing a framework for government regulation in Canada similar in many respects to the type concurrently being set up in the United States. The practice of appointing

experts to decide rather than merely to advise was becoming firmly established. There was much faith displayed at the time in the recruitment by government of specialists, especially those with backgrounds in business affairs, to bring their knowledge to bear on certain economic and political issues. The approach was again followed in 1912, when the *Canada Grain Act*[45] established a Board of Grain Commissioners charged with the administration of terminal warehouses and generally all matters related to the inspection, weighing, trading and storage of grain.

This was a period during our history when marked changes were taking place in the economy and in society at large. By 1900 the major economic and political problems which had precipitated Confederation had been resolved — the frontiers had been established and guaranteed, transportation and communication links had been forged and our national political and legal institutions had been established. During the first part of this century there was intense economic development, stimulated by waves of immigration, integration with the American economy, the assumption of responsibility in international affairs and the forced expansion of World War I. Immigration, which had been a mere 49,000 in 1901, rose to a phenomenal 402,000 in 1913. At the same time people were moving to the cities, especially Montreal, Toronto, Vancouver and Winnipeg.

C. World War I — Growth of Government Controls

With the advent of World War I and the commitment of Canada to the war effort, there was marked intervention in the economy by the federal government, including rent and price control, the prevention of hoarding, and the control of the marketing of Canada's principal products. This led to the creation of many administrative agencies such as the Board of Grain Supervisors (succeeded in 1919 by the Canadian Wheat

Board), the Food Control Board (later the Canada Food Board), the Wage Trade Board, and municipal Fair Price Committees.

The government also took major initiatives in the health and welfare fields for the first time, although certain measures tangential to Agriculture, Immigration and Indian Affairs operations had been previously adopted. A Board of Pension Commissioners was established in 1916, to be replaced by the existing Canadian Pension Commission in 1933. The Department of Soldiers Civil Re-establishment was created in 1918, and the Department of Health in 1919. They were consolidated in 1928, only to be split again into Veterans Affairs and National Health and Welfare in 1944.

To finance the expansion of the public sector, direct taxation was introduced, first under the rubric of an excess business profits tax in 1916, and then in the much more significant form of an income tax on individuals and corporations in 1917. The income tax has greatly increased since then, and has provided guaranteed means for bureaucratic growth.

It was also during the War, fifteen years after the installation of the first major regulatory agency, that the Union Government under Robert Borden placed the federal civil service on a truly professional footing by the *Civil Service Act*, 1918.[46] The Civil Service Commission, which had been given statutory powers over personnel in 1908, saw these powers expanded under the new legislation. At this point, the Commission assumed responsibility to pass upon the qualifications of candidates for admission to and classification, transfer and promotion in, the civil service. For the first time, it was explicitly provided that, save in exceptional cases provided for under the statute, neither the Governor in Council nor any minister, officer of the Crown, board or commission would have the power to appoint or promote anyone to a position in the civil service. It should be noted, however, that most independent agencies created in the years after the War were exempted from the provisions of the Act.

A final significant step taken by the Union Government was the passage of the *Public Service Rearrangement and*

Transfer of Duties Act in 1918.[47] As expanded in 1925,[48] the Act provides that the Governor in Council may transfer any powers, duties or functions or the control or supervision of any part of the public service from one Minister to any other Minister, or from one department or portion of the public service to another. The Governor in Council may also amalgamate any two or more departments under one Minister of the Crown and under one deputy minister. Although a final section of the Act provided that all orders made under the authority of the Act must be tabled in the House of Commons, since the *Regulations Act*[49] was passed in 1950 no such orders are required to be tabled in the House. In recent years the executive has carried out numerous administrative reorganizations with minimal consultation. However, the practice has remained that any new departments or agencies have to be established by statute and, at least as a matter of courtesy, major reorganizations of existing departments and agencies have been ratified through legislation.

D. The Inter-War Period

At the end of the War the unusual economic controls were discontinued, with some temporary exceptions. Because of continuing high prices, many of the powers the government had exercised during war-time were conferred on a Board of Commerce, and the *Combines and Fair Prices Act*[50] gave the Board extensive powers to conduct investigations and to make determinations of fair prices and profits. But its activity was short-lived, and price-fixing had come to an end before the empowering statute was declared unconstitutional in 1922, although prohibitions against combines were revived in another form. As well, several schemes were developed to assist men who had served in the war in readjusting to life as civilians in a peacetime economy which gave birth to such structures as the Soldier Settlement Board and the Dominion Employment Services.

Nevertheless, the period following the War until the depression of the "30's" was one in which the federal govern-

ment generally refrained from extensive new activities. A contributing factor to this quiescence was that the government was burdened with war debts and the obligations resulting from its absorption of the railways which became the Canadian National Railways (CNR). This latter step was to serve as a model for other public sector enterprises to become at least partially integrated with Canadian governmental structures. By 1939, fifteen Crown-owned companies had been created to operate in the fields of rail, ship and air transportation, banking and credit, harbour administration and commodity marketing.

The rapid dismantling of war-time controls should not obscure their long-term effects. Professional civil servants had acquired expertise in performing complex tasks which far outstripped the involvement of their predecessors who, only a few years before, had been primarily involved in merely ministerial functions. The stage was set for departments to assume, in the long run, functions which up to that time might have been assigned only to specialist boards or commissions. As the Rowell-Sirois Report put it:

> People saw how governments could mould their lives and civil servants learned how to do it . . . The belief grew that governments could and should use their powers to improve social conditions. The war-time experience with the regulation and direction of enterprise was an important factor in bringing on the wide extension of government control which economic and social chaos seemed to make desirable.[51]

Economic and social pressures, this time in the form of the Great Depression, comprised the motivating factor behind renewed federal legislative efforts in the "30's". The flurry of Canadian "New Deal" legislation in 1935 saw the creation of a number of regulatory and adjudicatory agencies, but several of these became entangled in constitutional difficulties. One such casualty was federal legislation to provide unemployment insurance, but the federal government later re-enacted legislation in this field, following a constitutional amendment in 1940, to create a commission with tripartite labour, business and government representation to oversee the functioning of a special Unemployment Insurance Account contributed to by employers and employees. Other casualties included several measures governing labour relations. Constitutional difficulties

also frustrated several joint federal-provincial attempts to regulate marketing. Ultimately, various techniques, such as administrative delegation, were devised to overcome these difficulties, but these had certainly not been extensively developed when World War II again pushed constitutional distinctions into the background.

By no means were all the Crown entities created at this time unconstitutional, however. For example, the Canadian Broadcasting Corporation (CBC), created in 1932, regulated private radio and television broadcasting along with carrying on its own activities in the field until 1958. At that time an independent government agency, the Board of Broadcast Governors, later to give way in turn to the Canadian Radio-Television Commission, was created to regulate the broadcasting industry. Administrative reforms also continued in areas of activity where the federal government had been active previously. In 1931, the Tariff Board was created as an independent agency to carry out advisory and quasi-judicial functions: first, it was to conduct inquiries into matters relating to tariffs and trade; second, it was to assume appellate functions previously handled by a departmental committee under the Minister of Finance which had been called the Board of Customs. In 1935, the Canadian Wheat Board was given the responsibility for marketing wheat in interprovincial and export trade. In 1936 the National Harbours Board was created, and the Departments of Railway and Canals and the Marine were merged with the Civil Aviation Branch of the Department of National Defence in a new Department of Transport. Trans-Canada Airlines, the precursor of Air Canada, was created in 1938. Also in 1938, the Board of Railway Commissioners, which had survived the vicissitudes of time and political criticism, was reconstituted as the Board of Transport Commissioners.

E. World War II and Its Aftermath

World War II again saw the federal government adopting close and detailed control over the economy. In many cases

the chosen instrument of control was a Crown Corporation which itself "went into business" — for example, Eldorado Mining and Refining, the Polymer Corporation, the Industrial Development Bank, and Defence Construction Ltd., to name a few. The technique of control through public ownership rather than regulation was, of course, not new, and has continued to be used. One has only to mention the CNR, the CBC and Air Canada to appreciate the importance of this type of entity. The distinction between government economic controls through the activities of Crown corporations, as opposed to controls through the use of regulatory mechanisms, is not always so clear-cut as these instances would seem to suggest, however. Thus such hybrid entities as the Bank of Canada and the Canadian Wheat Board combine both public ownership and regulatory functions.

What was said by the Rowell-Sirois Commission about the long term effects of governmental intervention during World War I applies with even greater force to the experience following World War II. Those who created Canada's war-time economic machine remained at the helm during the period of reconstruction. And though most of the war-time state enterprises engaging in activities traditionally carried on by the private sector were discontinued after the War, many of the agencies created during World War II continued to operate afterwards.

Governmental organizations continued to proliferate in the post-war period. Further specialized bodies such as the Atomic Energy Control Board (1946) were set up. Canadian involvement in the setting up of NATO, the maintenance of a Department of Defence Production and the commitment of about one-third of the federal budget to defence matters, led to a substantial expansion of the federal public service during the early years of the Cold War.

During the economic booms of 1946-49 and the Korean War period, a network of marketing boards spread across the country. When, in 1952, the Supreme Court of Canada decided in the case of *P.E.I. Potato Marketing Board v. Willis* [1952] 2 S.C.R. 392, 4 D.L.R. (2d) 146, that regulatory

power within the jurisdiction of the federal government could validly be delegated to boards created and operated by a provincial government, and vice versa, by implication this encouraged the creation of yet more independent administrative agencies, in the interests of cooperative federalism.

Welfare state activities blossomed. At the federal level, the Family Allowances Plan (1944), the Old Age Security Pension (1952) and the Canada Pension Plan (1965) joined the earlier established veterans' allowance and unemployment insurance benefits programs. Government intervention was also marked in respect of disposition and use of manpower, perhaps encouraged by large waves of immigrants. More recently, a rising tide of regulations, service and subsidization endeavours has added to the growth of government to the point where at least forty per cent of gross national income is expended on state-related activities. The number of civil servants has at least doubled since the end of World War II. In the words of John H. Deutsch writing in 1968:

> The life of the public service is closely bound up with the role of the state in society. One of the most striking features of the history of our time has been the large and persistent increase in the activities of government. Over the hundred-year span of Canada's history, the changes have been truly remarkable. During this period, Canada's working population has increased about seven and a half times, but the number of employees in the public service of the federal government has risen by approximately one hundred times. In 1867, less than one out of every hundred of the working population was employed by all governments — federal, provincial, and municipal. Today at least one in every eight is on a government payroll. At the time of Confederation, total government expenditures were in the order of 5 per cent of the total gross national production. Today, they are in the order of 32 per cent.[52]

All the agencies forming the subject of specific studies by the Commission — the Anti-dumping Tribunal (ADT), the Atomic Energy Control Board (AECB), the Canada Labour Relations Board (CLRB), the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC — created as an umbrella commission in 1967, under which the Board of Transport Commissioners, the Air Transport Board, and the Canadian Maritime Commission were merged), the Immigration Appeal Board (IAB), the National Energy Board (NEB), the National Parole

Board (NPB), the Pensions Appeals Board (PAB), the Tariff Board and the Unemployment Insurance Commission (recently merged with the new Employment and Immigration Commission) — were either created or reconstituted in the post-war years.

However, these agencies are not the only kinds of non-departmental governmental organization that have developed in Canada over the years, and particularly since World War II. There are many others serving variegated functions, for example, purely advisory bodies such as the Law Reform Commission itself. There are as well quasi-departmental structures administering programs established to handle the overload of regular departments and which report through the same Minister. Crown corporations also continue to grow in numbers and prosper as an institutional form.

As of 1979, the government continues to experiment with various ways of organizing public administration. It is interesting to note that one of the agencies studied, the Unemployment Insurance Commission, was integrated with the Department of Manpower and Immigration in 1976. The new entity, Canada Employment and Immigration, is both a department and a commission, retaining labour and management representatives who serve as Assistant Deputy Ministers as well as Commissioners. Such a creation does not bode well for students of government who like to learn about accountability and administration through the use of organizational charts, but it might facilitate cooperative federalism by allowing inter-delegation of powers between the federal and provincial governments to such hybrid bodies in their capacity as independent agencies.

Regardless of the proliferation of various governmental bodies, departments continue to play a central role in public administration. Deputy ministers and their senior policy advisers can have significant influence on the operations of related agencies sharing the same responsible minister with them, depending on arrangements between the Minister, the deputy minister and the chairman of the agency. It should not be forgotten either that the departments sometimes engage in

functions similar to those performed by agencies. For example, several are engaged in licence granting and revocation. And income tax and immigration appeals were formerly dealt with by appeal procedures internal to departments, a way of proceeding still employed in connection with applications for patents, and food and drug regulations.

Although the structures and functions of the machinery of administrative government are not delineated or allocated in the most rational manner at the present time, one institution which presently provides common guidelines for various federal administrators dealing with similar problems is the recently constituted Federal Court, which replaced the old Exchequer Court. Under the *Federal Court Act*,[53] which came into force in June, 1971, all federal statutory administrative authorities were brought under the exclusive jurisdiction of a federal court for the first time. Previously, the general power of judicial review over them resided in the superior courts of the provinces. Other mechanisms which might serve to improve the machinery of federal administration, the administrative process or the review of administrative action will be mentioned later.

CHAPTER TWO

Independent Agencies and the Administrative Process

The use of an assortment of administrative authorities with differing mixes of powers and procedures, to achieve diverse mandates, has long been a source of concern to critics of Canadian government organization. Speaking specifically of the independent agencies, the Glassco Commission on Government Organization made the following comments in its 1963 report:

> Generally, your Commissioners were struck by the lack of any consistency in the status, form and procedures of the tribunals examined. It is noted that, during the past three decades, in both the United Kingdom and the United States these matters have been the subject of official inquiries and extensive public discussion, resulting in a variety of general legislative efforts to establish greater consistency of principle and regularity of form and practice. Nothing comparable has occurred in Canada and the limited findings of your Commissioners suggest the need for a comprehensive study of this important field.[54]

Although the Glassco Commission had a considerable impact on government structures, the type of comprehensive review it suggested has never been undertaken. In contrast, the Law Reform Commission has engaged in a research project of modest dimensions involving the empirical study of independent agencies. They are defined as legal entities or branches of the government, aside from departments or Crown Corporations, most of which are directly assigned their mandates and powers by Parliament, and which report to or

through a minister of the Crown. Specifically, the Administrative Law Project has studied a limited number of independent collegial bodies operated by government appointees who make rules or decisions which affect the rights of private parties either as individuals or as a group.

A. The Role of Independent Agencies in Government

As an organizational phenomenon, independent agencies are by definition set up as specialized bodies separate from departments or other ministerial services, and have considerable autonomy from the executive branch of government. But since, unlike the judiciary, they are not separated from Cabinet influence by constitutional convention, it is unclear how the political norms of parliamentary democracy and ministerial responsibility apply to them.

The wisdom of allocating government decision-making functions to entities other than departments and the judiciary has been a subject of serious debate in common law countries. Some even raise serious questions about the legitimacy of doing so. Thus the then Home Secretary of the United Kingdom, Mr. Reginald Maudling, had this to say in the British House of Commons a few years ago:

> I can assure honourable Members I have never seen the sense of administrative law in our country because it merely means someone else taking the Government's decisions for them.[55]

Such criticisms merit attention, if only to qualify or reject them. Certainly, the solution of any policy issue which demands the brokerage of contending interests calls for heavy involvement by elected officials. No one can reasonably expect such an issue to become non-partisan by channelling it through a particular form of bureaucratic organization, such as an independent agency.

Furthermore, a number of the reasons traditionally given in favour of setting up independent agencies may well be suspect. Two qualities which were once said to be pre-eminent in independent agencies — impartiality and collegial policy-making and decision-making — may be at least as prevalent within departments. A professional public service following regularized procedures with predetermined standards for decision-making, can act impartially. Effective collegial operations can be developed using committees or appropriate supervisory and consultative techniques. Two other qualities, expertise and continuity, have been provided in the recent past to a greater degree by independent agencies than by departments because of too frequent changes in top level personnel in the latter. But here again there is no reason why executive personnel practices could not be changed to improve the performance of departments.

On the other hand, the needs of government or the nature of the private interests concerned may call for the creation of an independent agency. This point may be most easily brought home by looking at reasons usually cited for the creation of independent agencies:

(1) where there was a perceived need for a specialized body not too closely identified with the government to deal with repeating or continuing economic or business problems of a particular kind, such as regulating and rate-making in the railway and then in the telecommunications field;

(2) where it was thought desirable to hive off an issue from traditional politics and to relieve Ministers of the burden of having to account for sensitive decisions, such as the allocation and issuance of licences regarding radio and television broadcasting;

(3) where adjudication of a substantial number of individual cases of a similar kind was involved, and it was undesirable to add to the caseload of the regular courts, examples being matters handled by the Immigration Appeal Board or by the Tax Review Board, or where the subject matter was so

specialized that the regular courts could not ordinarily be expected to spend their time on it, an example being the appellate duties of the Tariff Board;

(4) where there was a need for the government to create a body and give it a mandate to act in response to a particular set of issues, but no existing body seemed quite suited for the task and the establishment of a new department to handle the matter would not have been justifiable at the time, an example being the creation of the National Energy Board to be responsible for the energy sector prior to the creation of the Department of Energy, Mines and Resources; and

(5) where it was desired to give special visibility to a relatively autonomous administrative program, and where a collegial body could best represent interests responded to in that program, an example being the Unemployment Insurance Commission (although that body has now been merged in Employment and Immigration Canada, which is both a department and a commission).[56]

Two other factors have played an important role in the creation of independent agencies. They are: first, the need to use non-departmental entities as the mechanisms to exercise powers cross-delegated between the federal and provincial governments, given the present state of Canadian constitutional law; and second, the fact that the Canadian and United States economies are largely integrated, and that the United States, which is the more populated country and the centre of much North American business decision-making, has numerous independent agencies at both the federal and state levels that perform tasks analogous to those which Canadian governmental entities are expected to perform.

There is no indication that the network of independent agencies will disappear in the near future. However, the institutional context within which they interact with the three traditional branches of government provides them only an uneasy existence at the present time. As between Parliament and the government of the day, it is difficult to say whose

agents they are. Agency enabling legislation often has limited content and Parliamentary review of agency operations is minimal. On the other hand, intervention by the Cabinet or the responsible Minister has sometimes appeared to be arbitrary and proved to be worrisome to applicants or other participants in proceedings before regulatory agencies. The role of the Federal Court through judicial review of administrative action has also been brought into question, owing in part to how its administrative law jurisdiction is delimited under sections 18 and 28 of the *Federal Court Act*.[57]

Problems arising out of the relationships between independent agencies, Parliament, the government of the day and the courts, as well as particular problems resulting from haphazard drafting of legislation relating to structures and powers of statutory agencies, are treated further in subsequent chapters. However, responses to these types of problems may be no more central to the development of a contemporary administrative law for agencies than the evolving rules respecting administrative proceedings carried on by the agencies themselves, a subject treated in Chapters Five and Six.

Before making recommendations responsive to particular problems relating to independent agencies, however, it is desirable to give an overview of the categories of agencies and what they do, and to describe basic elements of the administrative process. This chapter indicates the orientation the Commission has taken toward classifying agencies in terms of areas of societal activity in which they are involved, as well as in terms of modes of governmental involvement. It also delineates some of the highlights of the administrative process which, after all, is the object of most administrative law.

B. Classification of Agencies

Varying motives have provided the impetus behind the establishment of the diverse independent agencies, and the

differences in provisions from one enabling statute to another might justify a critic to say that almost every agency was *sui generis* and could be placed only in a category of its own. However, at a certain level of abstraction, all agencies studied in the context of this Project, indeed, administrative authorities in general, carry out activities relating to economic or social matters, broadly defined.

Another category of activity engaged in by other administrative authorities, which was by definition excluded from this project, is work of internal interest to government where decisions on private sector interests are not made as such, although private services might be used. Agencies engaged solely in research and advisory work for the government fall into this category. Of course, an agency or other authority can be designated to carry out more than one type of activity, and sometimes conflicting functions are assigned to one body.

In this section we classify social and economic agencies into sub-categories according to the principal purposes they serve. The classification of agencies is not merely an academic exercise. Each type of administrative authority has its own peculiar characteristics which may call for special legal treatment. Therefore, before making prescriptions for administrative law reform respecting independent agencies, it is important to survey the spectrum of existing agencies.

1. *Economic Agencies*

The government may choose to regulate private firms in a given sector of the economy by means of licensing, setting standards and enforcing them through inspections, investigations and the invoking of sanctions, rate-making and the like. The National Energy Board, the Canadian Transport Commission, or the Canadian Radio-television and Telecommunications Commission are three major regulatory agencies.

On another level, the government can focus on promoting commercial and industrial endeavours. This can be accomplished not only through governmental agencies, but also

by setting up Crown enterprises or nationalizing private sector ones. Canadian National Railways, the Canadian Broadcasting Corporation, Air Canada, and Eldorado Nuclear Limited come to mind. Of course, most regulatory agencies have promotional aspects to their activities. But some agencies have promotion as their major interest; the Canadian Egg Marketing Agency and other farm products marketing boards are examples. The Canadian Wheat Board and the Atomic Energy Control Board as presently constituted are also very interested in promoting undertakings in their sectors of jurisdiction.

Agencies may be established, of course, to further the interests of the state in regulating commercial or industrial undertakings in general as opposed to regulating a particular economic sector. These may be labelled regulative agencies to distinguish them from the regulatory ones mentioned above. Various examples may be cited. The Restrictive Trade Practices Commission holds formal hearings to reach conclusions regarding anti-competitive practices prohibited by the *Combines Investigation Act*,[58] and makes recommendations about appropriate remedies in reports to the Minister of Consumer and Corporate Affairs. The Tariff Board inquires into and reports upon any matter in relation to goods which are subject to, or exempt from customs duties or excise taxes about which the Minister of Finance desires information. The Anti-dumping Tribunal, if so authorized by Order-in-Council, may inquire into any matter involving serious prejudice to Canadian production caused by foreign imports.

Another type of agency, the jurisdiction of which relates to economic activities, is the labour relations board. At the federal level, there are two such independent boards. The Canada Labour Relations Board works to contribute to effective industrial relations in any work, undertaking or business operating within federal jurisdiction. This includes the certification of bargaining agents, disposition of complaints relating to unfair labour practices and declarations of unlawful strikes or lockouts. The Public Service Staff Relations Board administers the *Public Service Staff Relations Act*,[59] which established a system of collective bargaining, a grievance process and an adjudication procedure for the federal public service. It has

been remarked that labour relations boards are unique among administrative agencies regarding their manner of functioning and the issues their operations pose with respect to traditional administrative law. It is, thus, not surprising that labour law practitioners are often most vociferous in attacking the current state of affairs in administrative law, especially regarding judicial review of administrative action.

Some independent agencies act as administrative tribunals to adjudicate questions regarding commercial or industrial matters, either at first instance or on appeal from decisions of other administrative authorities. The Anti-dumping Tribunal holds formal hearings of an adjudicatory nature to determine whether the dumping of goods has caused, is causing, or is likely to cause material injury to the production in Canada of like goods. The Tariff Board, under provisions of the *Customs Act*,[60] the *Excise Tax Act*[61] and the *Anti-dumping Act*,[62] hears appeals from rulings of the Department of National Revenue (Customs and Excise) on such matters as excise taxes, tariff classification, value for duty, drawback of customs duties, and determination of dumping.

One agency functioning solely as an appellate tribunal is the Tax Review Board, which exercises appellate powers with respect to the Minister's assessments of tax under the *Income Tax Act*.[63] Proceedings before this Board involve strictly the application of statutory provisions and regulations to the case in question. The taxing power is, of course, so central to the very existence of the machinery of government and public sector programs that authorities administering it can be viewed as performing both economic and social activities.

2. *Social Agencies*

Switching now to social agencies, we might turn first to agencies carrying out benefactory functions, that is, those concerned with distributing welfare benefits. Two examples are the Employment and Immigration Commission and the Canadian Pension Commission. The branch of the Employment and Immigration Commission which carries on the func-

tions of the old Unemployment Insurance Commission pools contributions by employees and employers to the Unemployment Insurance Account and determines the benefits payable to unemployed workers under the *Unemployment Insurance Act*.[64] The Canadian Pension Commission deals principally with questions related to pensions claimed for armed forces veterans or their families under the *Pension Act*,[65] or claims under the *Civilian War Pensions and Allowances Act*[66] made by individuals from civilian groups who were specially engaged during World War II.

In connection with federal benefits programs, there are several bodies which hear appeals from initial decisions by administrative authorities. Three independent benefits appeal tribunals deserve mention: the Pension Appeals Board hears appeals in general under the *Canada Pension Plan*[67] and the *Unemployment Insurance Act*,[68] as well as appeals from contributors under the Quebec Pension Plan;[69] the Pension Review Board hears appeals from final decisions of the Canadian Pension Commission; and the War Veterans Allowance Board hears appeals from decisions made by District Authorities administering the *War Veterans Allowance Act*.[70]

There are other social agencies dealing with questions of personal status. The National Parole Board is one example. It is required to decide whether a person should be released from imprisonment and the conditions of release. The issue is usually perceived to be more of an individualized one than pensions or other benefits cases, probably because the major value at stake, liberty, is one which has always been closely guarded by judges. But unlike decisions to deprive people of liberty, which are conditioned on legal standards established by courts, the decision to restore liberty has been left to the absolute discretion of the Board. Parliament has reposed in the Board much of the responsibility for developing policies governing parole.

The Canadian Human Rights Commission is concerned with both individual and group status. Established in 1977, it deals with complaints regarding discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex,

marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap.

An example of a social agency which acts as an appellate tribunal on matters of status is the Immigration Appeal Board. Its major duty is to review decisions to deport persons made by immigration authorities and, in so doing, to determine whether a decision was based on an error of law or of mixed law and fact.

Another type of social agency is the granting agency or cultural promotional one. Prime examples here are: the Canada Council, designed to foster and promote the study and enjoyment of, and the production of works in the arts; and the Social Sciences and Humanities Research Council, designed to promote and assist research and scholarship in the social sciences and humanities.

In summary, independent agencies falling under the terms defined by this project come within two categories, either economic or social agencies. Economic agencies are primarily either regulatory, regulative or promotional, or are tribunals acting to adjudicate issues at first instance or on appeal. Social agencies are primarily oriented toward distributing benefits, treating issues of status or promoting cultural activities, or are tribunals. As was stated earlier, this Working Paper does not examine research bodies such as the National Research Council, or advisory bodies such as the Science Council, the Economic Council or the Law Reform Commission.

The independent agencies' legal relations with the three traditional branches of government, and the manner in which they carry out administrative proceedings with regard to the clientele or relevant publics they regulate or serve, should be a reflection of how they are structured by statute and within the organizational framework of government. Agencies designed to distribute large volumes of welfare benefits presumably involve different interests from agencies dealing with the liberty or freedom of movement of individuals. Accordingly, they might need to establish different procedural routines and safeguards. A regulatory agency dealing directly with a limited

industrial constituency but having to take into account various other interests and to weigh alternative lines of policy might perform differently, especially respecting the right of interested persons to participate in administrative proceedings, from a regulative agency implementing specific legal rules which touch upon variegated and sometimes not immediately identifiable interests.

Classifying governmental bodies from an administrative law perspective should assist in ascertaining what the present machinery of government is doing and how administrative activities should be organized or carried out differently in the future. Tribunals assigned court-like functions should, for example, be examined to see whether the activities on which they make decisions should be dealt with in a judicial fashion at all; and, if so, whether the functions of certain tribunals should be transferred into the judicial branch of government.

C. The Administrative Process

Having surveyed the various types of independent agencies, we now look at the administrative process. The administrative process comprises activities undertaken by administrative authorities, including independent agencies, which lead to administrative decisions and acts from which direct effects on the legal interests of persons are derived. Administrative activities cover a broad spectrum, as was indicated by what the surveyed agencies do, and no single authority engages in all the activities along the spectrum.

At the broadest level of abstraction, all the independent agencies studied by the Commission engage in two basic types of administrative action, law-elaboration and law-application. Law-elaboration consists of the development of relatively specific legal criteria to guide and structure administrative action. Rules, standards or policy guidelines are usually derived from more general criteria provided by official sources

of law such as legislation, case law, and ministerial or Cabinet regulations or directives. However, criteria sometimes originate from commercial usage, custom and established administrative practice. Law-application consists of the application through agency decision-making of legal criteria generated from agency or other official sources to specific cases, plans or programs.

In order to carry out administrative action effectively, it is important that administrative authorities utilize the technical resources and expertise at their disposal. Agency decision-making may depend heavily on the collection and analysis of relevant information or on the informed opinion of agency members, staff or outside specialists who possess expertise in a given field. Various methods are used to acquire information. Some agencies conduct and fund research; some conduct inspections or investigations or engage in other formal or informal fact-finding procedures, including hearings and meetings and consultations with people who have an interest in their decisions.

Using the information and expertise at their disposal, agencies are also involved in policy formulation, interpreting and shaping the roles they are to play. This may be accomplished by making broad general rules, by deciding individual cases or even by issuing informal staff directives and guidelines. As an extension of their policy roles, agencies may be involved in giving advice to the government and to other agencies, thereby participating directly in government policy formulation.

To a large extent, information gathering and policy formulation are preliminary to deciding specific issues. Such decisions usually create or alter legal relationships, for example, deciding whether someone is entitled to a licence to operate within a regulated area of activity. This may involve allowing or rejecting applications for licences, or placing conditions on those which are issued. Often this will lead to decisions about enforcement, decisions to investigate people and to sanction through measures like licence suspension or revocation. Decisions are also made in the course of administering schemes

that confer statutory benefits and privileges, particularly social welfare benefits like pensions and unemployment insurance. Decisions are made to grant, refuse, suspend and terminate these benefits and to enforce statutory rules laid down to govern their administration.

Agencies make decisions having various orientations. Some are inherently managerial and affect mainly the people within the agency. Here the effect on people who deal with the agency and the general public will usually be of a very general nature, although the allocation of research, inspection or enforcement personnel, not to mention agency members, can have specific effects. A few decisions arise from questions the government refers to an agency such as the Anti-dumping Tribunal or the Tariff Board, and may have only tangential effects on private parties. Most official decisions, however, principally those involving the dispensing of economic privileges or social benefits, or the invoking of sanctions, will be felt more directly by people outside the agency.

Many decisions will be directed at particular individuals or will deal principally with an isolated situation or set of circumstances. These might be referred to as "individualized" decisions. Others, however, especially where major commercial or cultural undertakings are at stake, will affect a large number of interests and may reflect the possibility of a multiplicity of potential solutions which are dependent upon many variables. These might be referred to as "polycentric" decisions.[71]

The distinction between "individualized" and "polycentric" issues becomes particularly important in considering how an agency should proceed in resolving them. Accordingly, it is relevant to consider any function an agency performs in the light of a number of questions. To what extent does the decision involve broad economic or social issues? Does the decision primarily involve the determination of a given issue within a narrow factual context, or does it have broad ramifications in terms of long range policy? Even if only one individual's case is before the agency, does the decision have to take into account a general government program or policy, for

example, unemployment benefits? The choice of a focal point for the decision-maker's attention can be a key factor in the way discretionary power is exercised. Is the decision-maker confined to well-defined guidelines or does he have the responsibility to settle the policy which is to guide his decision? These considerations were stressed in the *Catalogue of Discretionary Powers*[72] and their importance becomes more evident as we develop issues throughout the course of this Working Paper.

Another aspect of the administrative process must be borne in mind. While we tend to focus predominantly on the formal functions and discretionary decision-making powers of agencies, Cabinet Ministers and departmental officials which are stated specifically in statutes or regulations, it is obvious that the process cannot be defined solely in terms of these functions and powers. There is a wide range of agency activity which has not been catalogued, and can be referred to as "informal agency action". Agencies, especially those engaged in the administration of social security schemes like unemployment insurance, are involved daily in giving informal advice and in interpreting statutes and regulations to provide policy guidelines for that advice. On the basis of this advice people may be dissuaded from exercising lawful rights or denied access to certain benefits, all in a casual and informal way falling outside the strict decision-making functions described by the statutory or regulatory mandate of the agency. Yet this is the level at which many people interact with many agencies, ignorant of the policies and practices serving, sometimes legitimately and sometimes illegitimately, as guidelines for disposing of their requests. For many people this represents a more real form of administrative action than functions like issuing licences and approving rates and tariffs.

To control the exercise of their discretionary powers, agencies make further decisions about the procedures they will follow in performing administrative acts. Rules, guidelines or practices then are established which help to structure the law relating to administrative procedures. This law embraces informal as well as formal administrative activities and is not

limited to rules regarding formal public hearings, important as these may be.

Finally, for the independent agencies, the administrative process is maintained and developed by agency members, counsel and staff officers. The virtues and capacities of these persons, especially the professional standards of the members themselves, are of critical importance in meeting agency objectives and in serving the goal of administrative justice.

D. Conclusion

Our intention here has been simply to give an impressionistic overview of the varying duties and fields of activity of agencies and to state briefly certain matters which agencies must take into account in dealing with the three traditional branches of government and in carrying out the administrative process. Further information is available in our agency studies. Having looked in this general way at agencies and the context within which they operate, our focus now shifts towards assessing problems they face or pose and what might be done about them.

In the following pages, we discuss objectives for the administrative process as well as the legal and political structuring of administrative action, leading to ultimate suggestions about how reform should be approached. Principally, we seek a legal framework within which administrative powers can be exercised, a framework allowing limits to be set on the exercise of these powers without eclipsing the governmental purposes they are designed to serve.

CHAPTER THREE

The Legislative Framework and the Role of Parliament

The independent administrative agencies studied by the Law Reform Commission to date are all creatures of statute. The specific terms of the enabling legislation of each particular agency act as a prism through which the principles of administrative law, as interpreted by the agency, review bodies or the courts, are refracted.

Common law countries, however, have never been quite sure what role legislation should play in the law of public administration. The alliance of convenience between Parliament and the common law judiciary carried the day against the Crown's claim to extensive absolute royal prerogatives at the time of the English Revolution of 1688. However, this set the stage for questions yet to be resolved regarding the relative importance in various situations of legislation, case law and the prerogative as sources of public law, and how best to deploy them in structuring and controlling administrative authorities in countries following the British model of parliamentary democracy.

A. Necessary Reforms Concerning Legislation

1. *Legislative Planning*

At the federal level in Canada, governments have frequently set up new statutory authorities without making sure that their structures, functions, powers and procedures fit rationally within the existing administrative framework. It frustrates the value of comprehensibility in the law to have unnecessary variations in the organization and practices of governmental bodies. The Law Reform Commission recommends that:

> 3.1 *where agencies have analogous purposes, they should be designed along similar lines. In relation to similar types of functions carried out by various agencies, there should be similar sets of powers relating to those functions, drafted in uniform terminology. Agencies with similar types of powers and procedures should also have the same statutory label.*

For example, those exercising primarily a judicial type of function might be labeled tribunals. Taking these steps would encourage the development of some degree of rationalization in agency activities.

Recently, the planning and drafting of legislation and regulations which touch upon government organization have been heavily dependent not only on lawyers who work in the Legislative Drafting Section of the Department of Justice but also on officials in the small secretariat in the Privy Council Office who deal with the Machinery of Government, Cabinet Ministers and their key advisers, and lawyers in the various departmental or agency legal services.

Many administrative authorities, even within the same category of governmental bodies, end up being unique in structure because of the particular political tradeoffs involved in getting them approved by the Cabinet and Parliament. Sometimes further variations are unintentionally put into the

terms of enabling Acts of such authorities. This happens either because of the pressures on legislative drafters to produce draft bills as soon as possible after Cabinet approval is obtained, or because officials involved in preparing specific details on proposals do not take sufficiently into account the matter of how to fit them into the existing framework of governmental organization with the maximum appropriate consistency of statutory provisions.

We recommend that:

3.2 *the Government consistently follow the practice of preparing in advance a list of legislation to be introduced according to priority in each session of Parliament, and legislative drafters be engaged in the preliminary preparation of legislation early in the planning process.*

Better drafted and more consistent legislation and regulations relating to the structure, powers and procedures of statutory authorities will require more time in developing a conceptual framework between the time legislative planners and drafters begin their work and the time the draft legislation is tabled for first reading in Parliament.

2. *Legislative Drafting*

Enabling legislation for statutory authorities should, as much as possible, be comprehensible to the lay person as well as to specialists. Their impact on all of us is too great to be left solely to the understanding of experts. Accordingly, we recommend that:

3.3 *legislation should be drafted in plain language and arranged in a logical and intelligible manner instead of using antiquated conventions and archaic terminology.*

For example, the agency study on Unemployment Insurance Benefits criticized the relevant legislation for failing to use sufficiently simple language, and to structure the pertinent procedural provisions logically enough, for those affected by it to be able to understand it.[73] The *Income Tax Act*[74] is another example of legislation which affects most of us but is so

complex as to be virtually incomprehensible except to specialists. To be fair to legislative drafters, a major reason for their using complicated phraseology stems from the fear of courts misinterpreting statutes and departing from their intended effect if their drafting style were changed and language simplified. But surely modes of statutory interpretation as well as drafting can stand improvement.

Since its creation, the Law Reform Commission has been interested in making improvements in legislation. Recently, we have prepared two checklists which legislative drafters could use as a means of correcting common oversights committed unintentionally in the drafting process. We recommend that:

> 3.4 *legislative drafters should use model checklists to ensure conformance of draft legislation with basic requirements of form, phraseology, and substantive law.*

The Law Reform Commission also has prepared what we believe to be an appropriate format for drafting legislation focussed principally on the establishment of independent administrative agencies, as opposed to legislation such as the *Immigration Act*,[75] the *Canada Labour Code*,[76] or the *Anti-dumping Act*,[77] in which such agencies are treated as mechanisms in a larger administrative process, most or all of which is referred to within the context of a single statute. It has used that format in preparing a model Act using the Canadian Dairy Commission as the subject agency. We recommend that:

> 3.5 *for the sake of consistency and comprehensibility in administrative legislation and organization, the same basic format should be followed when possible in all cases where the same type of legislation is involved.*

3. *Improving Federal Statute Books*

It has long been recognized that Canadian federal statute books need improvement if they are to be of effective use to lay persons or general practitioners of law as well as to legal specialists. The government has already established a mechanism through which legislative provisions might be kept

current in a publishable form. The Statute Revision Commission, consisting of three Department of Justice legal officers appointed by the Minister, was established under the *Statute Revision Act*, 1974,[78] and was given the power to "arrange, revise and consolidate the public general statutes of Canada" and to "prepare, maintain and keep up to date a consolidation of the regulations of Canada". The Commission was given a priority task of producing an up to date set of volumes of Consolidated Regulations, and this project has almost wholly occupied its time for the past several years. However, once this task is done, there are several improvements to the statute books themselves it should consider for implementation.

One element now missing from the federal statute books is an effective system of indexing. As was pointed out in a Commission Report on *Evidence*,[79] a more sophisticated indexing system, phrased in lay persons' vocabulary, is needed to provide more subject access to statutes. The "Act analyses" in the Index to the 1970 Revised Statutes of Canada are often little more than glorified tables of contents rather than true subject entries. We recommend that:

> 3.6 *comprehensive subject indexing, with references appropriate for lay readers as well as specialists, should be prepared for the Revised Statutes of Canada and for each new volume of statutes as it appears. Indexing of individual Acts should be continued as part of the general index.*

As a complementary measure, we also recommend that:

> 3.7 *a summary of legislative provisions should be placed at the beginning of statutes, especially those which are long or complicated.*

Even if summaries of legislative provisions and detailed indices of statutory terminology are provided in the statute books, persons who are not specialists in a particular field of law might have trouble in ascertaining what a given statutory rule means. Consequently, we recommend further that:

> 3.8 *the Government should sponsor the publication of the Statutes of Canada Annotated, statutory rules being*

annotated with explanatory notes to promote comprehension of the law.

4. *Problems Inherent in Broad Statutory Mandates*

A problem common to a number of agencies, particularly those having the duty to regulate economic activities, is that they are asked to function as subordinate legislative bodies with broad mandates, vague goals and priorities which are not necessarily consistent with one another. This type of problem should be weighed by responsible authorities when legislation is at an initial planning stage. Conflicting priorities can appear on the face of a statutory purpose section. This occurs, for example, in section 3 of the *National Transportation Act*,[80] which states:

> 3. It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of users of transportation and to maintain the economic well-being and growth of Canada . . .

In the case of the Canadian Radio-television and Telecommunications Commission, no initial purpose section was inserted in its enabling Act. However, section 14 states that the objects and powers of the new CRTC in relation to broadcasting are those laid down in the *Broadcasting Act*,[81] and that the powers, duties and functions in relation to telecommunications which had been vested by the *Railway Act*,[82] the *National Transportation Act*[83] or any other act of Parliament in the Canadian Transport Commission, were henceforth vested in the CRTC.[84] The problem of reconciling different goals seems to be built into the structure of such agencies, and it is a question of policy as to which goal receives the greatest attention at any given time. Naturally, it is important that the government be given some opportunity to respond to, or to direct, agency programs in areas with heavy policy content or political overtones where there are vague or conflicting goals in an agency mandate. This is discussed further under the heading of "Directive Power" in Chapter Four.

When conflicts between agency goals are particularly severe, the pursuit of different goals should be assigned to

different authorities. Acute problems can be raised regarding agencies with both regulatory and promotional goals when a regulated industry is one which has been largely developed by the government, or where there are intimate government-industry working relationships. An example has been the relationship between the Atomic Energy Control Board and the nuclear industry, much of which industry in Canada, outside the mining sector, has been government owned. Steps have recently been taken to meet this problem. A draft Nuclear Control and Administration Act, introduced before Parliament in November, 1977,[85] would have given regulatory responsibilities to a reconstituted Board while giving the responsible Minister commercial and promotional powers in the field.

Conflict of goals can also arise where an agency is given both regulatory and advisory powers. The National Energy Board, for instance, has the responsibility of issuing licences for pipeline construction and energy exportation, and controls pipeline tariffs, while taking into account values like "public convenience and necessity". But quite apart from this duty, it must also continuously monitor developments in the energy field, and can be required to prepare studies and reports on energy matters and make policy recommendations to the responsible Minister. This can lead to tensions among the members and staff, and can raise questions in the minds of concerned individuals. For example, the past experience a member of a regulatory agency has had with projects in a given industrial sector might, in the event that the member sits on a panel hearing an application for a similar type of project, lead to an apprehension or fear of bias on the part of members of the public.

The government has in the past acted to hive off from institutions certain tasks which were incompatible with some of their other tasks. Thus, in 1952, the investigatory and adjudicative aspects of combines law enforcement were separated; the Restrictive Trade Practices Commission now appraises and reports to the Minister of Consumer and Corporate Affairs on situations which might warrant prosecution under the *Combines Investigation Act*,[86] but the investigation is carried out by a separate official, the Director of Investiga-

tion and Research. Similarly, the CBC was divested of its regulatory jurisdiction over private broadcasters in 1958; the CRTC now exercises regulatory control over both the CBC and private organizations.

In other cases, agencies have been able to perform diverse functions successfully. The Canadian Wheat Board, for example, apparently combines adjudicative and marketing functions quite successfully. Given its operation of a worldwide wheat marketing scheme, many of its decisions are highly influenced by world market conditions and international trade agreements. Others, however, are more concerned with inequities among the participants in a mandatory statutory marketing scheme. The Board must make decisions on matters like delivery quotas, which involve the imposition of controls on grain producers and elevator operators who are involved in grain production, storage and distribution and whose livelihood is directly affected by quotas imposed by the Board.

5. *Agency Status as a Court of Record*

The perceived status of an agency is quite important, and can impress a particular character on its operations and influence its relations with interested persons and with other governmental institutions. The language used in an enabling Act to label a statutory authority can thus assume considerable importance. For example, the term "court of record", as applied to statutory authorities, has been a source of great misunderstanding. Its interpretation in cases before the courts has resulted in some confusion, as was revealed by a Commission research paper.[87] The demand placed by the courts on agencies is possibly influenced by whether they are designated by statute as courts of record and given "all such powers, rights and privileges as are vested in a superior court of record".[88] Thus, the Federal Court of Appeal has placed heavy demands on the Anti-dumping Tribunal, a court of record, to keep proper records, follow judicial procedures and make decisions based only on information placed on the record during official proceedings.[89] Perceptions can stray the other way, however. The Immigration Appeal Board, also a

court of record, initially interpreted its status and powers to be closer to those of a traditional court than the Federal Court of Appeal was willing to allow.[90]

Further confusion resulting from the use of the term occurred when the first Chairman of the Canadian Transport Commission did not permit the CTC to engage actively in policy-making initiatives which it was encouraged to take under the terms of the *National Transportation Act*. From that time on, critics have accused the CTC of following what has been called "the court of record syndrome", waiting to act until concrete cases demand immediate resolution, when a matter has become a problem, rather than actively dealing with situations before difficulties arise.[91] The first CTC Chairman also refused to answer questions posed to him in Parliamentary Committee on proceedings which had been held before that body regarding the discontinuance of railway passenger service in Newfoundland, on the ground that the CTC was a court of record and thus a judicial body. Since there remained the possibility of continued judicial proceedings on the matter, the Chairman said, he could not make any pertinent comments or responses.[92]

On the basis of the individual agency studies conducted to date, and the Commission research paper on the use of the term "court of record" in the case law, we recommend that:

> 3.9 *the practice of according powers to an agency by declaring it a "court of record" should be abandoned. More specific drafting terminology should be developed to deal with the various issues of status, powers and procedure, such as problems of contempt, which the present term has been used, in different ways at different times, to cover.*

6. *Appropriate Blends of Functions, Powers and Procedures*

In the legislative planning that goes into the structuring of an independent administrative agency, undoubtedly the most

difficult task is to create an agency with the appropriate blend of functions, powers and procedures so that values such as effectiveness, fairness and openness can be implemented to a high degree. Public law in Canada is not yet at a stage where there is general agreement on what procedures, powers and functions blend well together. A unifying perspective as to how problems regarding the creation of such appropriate blends might be approached could perhaps best be achieved following experimentation by various agencies using hybrid combinations of powers and procedures, which would be monitored so that successful experimentation could be carried forward into permanent practices.

7. *Investigative Powers, Enforcement and Sanctions*

Adequate and appropriate investigative powers are essential to the work of many administrative authorities. But the federal government has tended to give authorities the general powers of a commissioner appointed under Part I of the *Inquiries Act*[93] without reflecting on what powers were actually necessary. An example is the granting of such powers to an adjudicator under the *Immigration Act* 1976.[94]

Not enough is yet known in comparative terms about the use of investigative powers to enable us to make useful general suggestions for reform. However, if the *Inquiries Act*[95] were amended along the lines suggested in our Working Paper on the subject, then provisions in the enabling legislation of other authorities giving their investigators the powers of a commissioner under the *Inquiries Act*[96] would have to be reconsidered. In any event, although this technique of incorporation of powers by reference provides a short-cut in legislative drafting, we believe that only those investigative powers which are relevant to duties assigned to officials should be granted to them.[97] We recommend that:

> 3.10 *the practice of granting blanket administrative powers by, for example, adopting by reference the investigative powers given to a commissioner under Part I of the Inquiries Act should be abandoned.*

Our studies of individual agencies have confirmed that certain agencies have problems relating to the enforcement powers at their disposal. For example, the compliance programs of the National Energy Board[98] and the Atomic Energy Control Board[99] do not appear to be particularly effective. This is largely owing to a lack of personnel assigned to such functions. Fortunately, the draft Nuclear Control and Administration Act goes into some detail in setting up an inspection system for nuclear facilities and vehicles, and in delineating the powers and duties of inspectors.[100]

Another fairly common problem is the all-or-nothing approach in giving agencies the powers to impose sanctions. Thus, licensing bodies are often given only the power to withdraw a regulated party's licence, instead of being given various sanctioning powers that would include the capacity to inflict minor or major monetary fines as well. We recommend that:

> 3.11 *more attention should be paid to giving administrative authorities sanctioning powers appropriate to their mandates.*

The Commission has long been interested in sanctions relating to proceedings before administrative agencies, and we are currently in the course of preparing a separate Working Paper on the subject.

8. *Need for a Monitoring Body*

The machinery of federal government is of such importance and is of sufficiently large scale that it would be worthwhile to designate a monitoring body with responsibility to check for consistency in the structure, powers and procedures of statutory authorities as well as the mix of their powers and procedures, for the proper performance of their work. For example, a cross-checking of the tasks and powers of the Canada Labour Relations Board and the Public Service Staff Relations Board could have led to the conclusion that, if the recent amendment to the *Canada Labour Code* limiting the jurisdiction of the Federal Court over the CLRB[101] was

warranted, similar limitations should also have been imposed respecting the PSSRB. A monitoring body probably would have been cognizant of this.

As will be seen with more particularity later, we think a specialist administrative law body should be created to advise federal statutory authorities on the designing of administrative procedures and practices, and also advise the government on draft legislation and statutory instruments relating to such authorities. Such bodies have been created in countries with common law backgrounds similar to our own, for example, the United Kingdom, the United States, and Australia. This body should be given the power to advise legislative drafters during the initial preparation of enabling legislation for independent statutory authorities. Details on this proposal are discussed in Chapter Nine.

9. *Statutory Interpretation: A Public Law Perspective*

The major legal values underlying organized public sector activity should not only be articulated in a rationally structured manner through legislation but also be implemented effectively through appropriate statutory interpretation. Unfortunately, the lack of development of methods of statutory interpretation oriented towards the needs of public administration, to which the courts or other review bodies might refer in choosing approaches to interpreting enabling Acts of administrative authorities, has to date undermined the effectiveness of legislation as a dominant source of administrative law.

Fortunately, in practice, the Federal Court has exercised its virtually exclusive jurisdiction to judicially review the actions of federal administrative authorities in such a manner as to take into account the unique aspects of each statutory authority's enabling legislation. However, in order to provide individualized justice in each specific case, the courts apply the common law principles of natural justice in tandem with the statute law to the particular fact situation in which an agency has acted. Recently, the Supreme Court has adopted

the even more flexible common law duty to act fairly in reviewing administrative action.[102] If legislation is to be paramount in structuring the machinery of government, it is essential that government, the bench, the bar and faculties of law encourage the doctrinal development of methods of statutory interpretation appropriate to the underlying principles of public administration, while taking into account broader values of legality and due process. According to the particular circumstances concerned and the interests and values at stake, legal decision-making authorities could assign differing weights to various sources of law in play.

B. Retaining Parliamentary Supremacy over Agency Legislation

Once statutory administrative law has been approved by Parliament and implemented, it must be properly channelled in its application and kept up-to-date to remain appropriate and effective. Major administrative policies are developed by independent agencies, their responsible Ministers or the Governor in Council. If the pre-eminence of the enabling Act is to be maintained, Parliament should be apprised of such developments and retain an effective review function concerning agency law and activities.

1. *Parliament's Role Generally*

Parliament should take an active interest in delineating appropriate statutory mandates for independent agencies, and in reviewing administrative activities and delegated legislation, to ensure that those agencies are performing effectively and within the terms of their mandates. Although Cabinet has the power and duty to manage the government, as was said in the Report of the (Lambert) Royal Commission on Financial Management and Accountability:

> . . .Parliament's responsibility, which is of no less importance, is the continuous scrutiny that it is empowered to maintain over the Government's implementation of the measures to which Parliament has given assent.[103]

Government priorities and plans may be debated and challenged. The machinery of government as designed and operated may be scrutinized to see whether it is pursuing appropriate goals, how successful it has been in doing so, and at what cost. Needless to emphasize, however, Parliamentary review ought not to cause administrative authorities to be expending and diverting their energies too much in justifying their performance. A balance is needed. Constant review could defeat getting on with the job.

The degree of Parliamentary control over independent agencies depends, of course, on prevalent attitudes regarding their place in the machinery of government and the degree of independence particular agencies should have. If an agency is conceived as simply another administrative authority accountable through its responsible minister to Parliament and controlled by the government of the day, then the effective allocation of legislative power is different from that of an agency which is perceived as operating under a fourth head of government power with an original mandate given by statute, whose policy directions are limited for the most part only by its own professional norms or by the threat of judicial review.

For truly independent agencies, it is imperative to the maintenance of a system of Parliamentary sovereignty that legislative controls be placed over their mandates. Therefore, we recommend that:

> 3.12 *when an independent agency is established, its policy mandate or guidelines should, in principle, be stated clearly in its enabling Act.*

If for some reason a vague mandate is initially given, then as delegated legislation or policy is elaborated by an agency, interested citizens or their elected officials, in our democratic tradition, should have the opportunity to be involved in or to comment on such developments. We also recommend that:

3.13 *when an agency has appropriately articulated a once vague mandate, it should be inserted into the enabling Act.*

This requires, of course, Parliamentary action.

Parliament can play the important role of scrutinizing how the legislative mandates of statutory administrative authorities have been rendered operational, and of providing a forum or a foil for recommendations about how the mandates or operations of existing authorities might be improved or government organization altered. The keys to strengthening this role are the augmenting of requirements to report or refer matters to Parliament, and the strengthening of the Parliamentary committee system. The latter point has been dealt with in some detail in the recommendations of the Lambert Commission. Another reform that both we and the Lambert Commission recommend is that:

3.14 *if the Governor in Council, pursuant to the Public Service Rearrangement and Transfer of Duties Act, transfers administrative powers or duties from a statutory agency to a department or other agency of government, Parliamentary approval should be required.*

Because independent statutory agencies are given their mandates directly by Parliament and not through responsible ministers as intermediaries, it is recommended that:

3.15 *independent agencies prepare detailed annual reports which should be automatically and permanently referred to the appropriate standing committees of the House of Commons and subjected to close scrutiny there.*

Unfortunately, the lack of adequate staffing for, and the frequently shifting membership of Parliamentary committees to date, have combined with other factors to undermine the potential effectiveness of the process of scrutinizing reports of administrative bodies.

Annual reports should contain detailed statements of short and long term goals, and an indication of the criteria to be used by the agency to assess its success in attaining those

goals. Annual Reports should also spell out how the general legislative mandate has been "operationalized" and express what the legislative mandate has come to mean in practice. This would include an assessment of agency decisions, orders, regulations, guidelines, policy statements, directives, staff training manuals, and so forth in terms of their contribution to the elaboration of the formal statutory mandate. Where general legislative terms have been made specific through agency decisions or regulations, the report should make a recommendation concerning whether or not the legislation should be amended to reflect such development. As well, each annual report should include an appendix listing all delegated legislation passed pertaining to its activities and indicating the policies relating to them.

To ensure that annual reports are adequately scrutinized, the Commission recommends that:

> 3.16 *Parliamentary Standing Committees to which annual reports of independent agencies are referred should be strengthened. Each Committee should be allowed its own operational budget, part of which should be used to pay for permanent research staff adequate in size for the committee to scrutinize administration effectively, and in appropriate cases, conduct additional research on administrative operations.*

The relationship between independent agencies and Parliament is the subject of a separate Law Reform Commission study paper,[104] from which we hope to develop more precise recommendations concerning Parliamentary scrutiny.

2. *Scrutiny of Delegated Legislation*

One very important step was taken by Parliament in the 1970's with respect to scrutinizing statutory administrative law. The Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments was created to scrutinize delegated legislation pursuant to the *Statutory Instruments Act*.[105] Only a small part of

delegated legislation relates, of course, to independent agencies; the bulk of it covers the activities of departmental authorities.

The Act requires regulation-making authorities to forward three copies of any proposed regulation to the Clerk of the Privy Council, who, in consultation with the Deputy Minister of Justice, is to scrutinize the regulation to ensure that:

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.[106]

In fact, whenever government authorities are not sure whether a draft instrument is a regulation or not, they immediately send the instrument to the Director of Privy Council Services at the Department of Justice for legal scrutiny. There it is determined whether the proposed instrument would constitute a regulation if it were issued, made or published, and whether it falls within the criteria noted. If these criteria are not met, the regulation-making authority is informed of the drafting changes required to make the instruments conform to them.

In the course of scrutinizing these instruments, the lawyers of Privy Council Services frequently communicate with the officials who prepared them. Since regulations are to an increasing degree being drafted by non-lawyers, the great majority of them initially have drafting or legal defects. Privy Council Services consistently offers advice to regulation-making authorities. Officials who have prepared draft regulations are also apprised of potential problems they might face with regard to criteria used by the Standing Joint Committee

of the Senate and House of Commons on Regulations and other Statutory Instruments in reviewing such instruments.

The average time taken by Privy Council Services to scrutinize a proposed regulation and get it in shape for registration with the Clerk of the Privy Council is twenty-one days. The Privy Council Services lawyers are often put under considerable pressure to expedite this process. Consequently, they do not have much opportunity to encourage the drafting of uniform provisions to be used by statutory authorities performing similar functions, such as independent administrative agencies conducting similar types of proceedings.

Most regulations are cleared through Privy Council Services, and are then sent within seven days to the Assistant Clerk of the Privy Council for registration. They are then published in the *Canada Gazette*[107] within twenty-three days following registration. Most regulations go into effect as of the date of registration, but except in special circumstances, no person is to be convicted of an offence of contravening a regulation unless at the time of the contravention it was published in the *Canada Gazette* in both official languages.

Under section 27 of the *Statutory Instruments Act*,[108] the Governor in Council may make regulations exempting certain regulations or classes of regulations from examination by the Deputy Minister of Justice, registration with the Clerk of the Privy Council, or publication. Among the regulations exempted are the following:

(1) regulations of a class that is so large in volume that it would be impractical to register them all;

(2) regulations affecting or likely to affect only a limited number of persons (in which case reasonable steps are to be taken for the purpose of bringing them to the notice of those persons); and

(3) regulations which in the interest of international relations, national defence or security, or federal-provincial relations should not be published.

In practice, the lawyers of Privy Council Services scrutinize certain regulations which may be registered but not published, but none which are exempted from registration.

Under section 26 of the Act, every statutory instrument made after the coming into force of the Act, other than regulations exempted under paragraph 27(*d*), stands permanently referred to the Standing Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments. Paragraph 27(*d*) exempts from Parliamentary scrutiny such regulations or other statutory instruments about which "the Governor in Council is satisfied that in the interest of international relations, national defence or security or federal-provincial relations the inspecting thereof and the obtaining of copies thereof should be precluded", or statutory instruments which, if not precluded from inspection, would "result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs".

To the extent that not even an exempting order has to be tabled before Parliament by the Governor in Council to prevent Parliamentary scrutiny of regulations falling under the terms of paragraph 27(*d*), the *Statutory Instruments Act*[109] represents a retrograde step from its predecessor, the *Regulations Act*.[110] However, the old Act covered only regulations of a clearly legislative nature, and there was then no Parliamentary Committee to scrutinize delegated legislation.

In practice, the scope of Parliamentary scrutiny of statutory instruments by the Joint Committee is limited. The term "statutory instrument" is specially defined under paragraph 2(1)(*d*) of the *Statutory Instruments Act*,[111] and is honeycombed with exceptions. Furthermore, the Department of Justice lawyers in Privy Council Services have given a narrow interpretation to the term. In their view, only those writings made as a result of an express statutory provision calling for a particular kind of written instrument are statutory instruments. Thus, if a section in a statute reads — "The Minister may by licence authorize (some activity)" — the licence is a statutory

instrument; but if the section says — "The Minister may authorize or permit" — then any written document used to implement the authorization, even if it takes the form of a licence, is not a statutory instrument.

In 1977 the Joint Committee tabled its Second Report in the Second Session of the 30th Parliament, in which it contested this narrow definition in these words:

> 1. It [the Committee] considers that subparagraph 2(1)(*d*)(i) of the *Statutory Instruments Act* is not as narrowly confined in its application to documents issued pursuant to statutory authority as the opinion of the Department of Justice would have it. In particular, it considers that subparagraph 2(1)(*d*)(i) does not exclude instruments made under statutory grants of subordinate law making power which do not contain a magic formula such as 'by tariff', etc. That is to say, it does include instruments made under statutory powers which authorize their issuing, making or establishment whether by proper title or in general terms by conferring subordinate law making power without specifying the name of the document in which that exercise of subordinate law making power is to be embodied . . . What is important is what is issued, made or established and whether it is issued, made or established pursuant to statutory authority, not whether it is by specific title ordered or authorized to be issued, etc.[112]

The Law Reform Commission agrees in principle with the Joint Committee that, from a substantive point of view, the nature of an instrument rather than its label should determine whether it is a statutory instrument or not. Subparagraph 2(1)(*d*)(i) of the *Statutory Instruments Act* presumably would be given a broader interpretation if instead of saying

> "(*d*) 'statutory instrument' means any . . . instrument issued, made or established
>
> (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instru-

ment *is expressly authorized to be* issued, made or established . . ."

the italicized words "is expressly authorized to be" were replaced by the words "may be".[113] However, the greater volume of work which such a revised definition of statutory instrument would impose upon Privy Council Services and the Registry in the Privy Council Office, not to speak of the increased burden on the Joint Committee to scrutinize the larger number of instruments referred to it, might cause enormous practical problems. The whole matter is one which deserves further consultation between the Joint Committee, the Privy Council Office and the Department of Justice.

However, there exists at present a practical problem that could be immediately solved without much difficulty. Although the *Statutory Instruments Act* directs that all statutory instruments shall stand permanently referred to the Joint Committee,[114] no mechanism is provided for their transmission to it. Consequently, apart from learning informally about certain statutory instruments through the good offices of a handful of sympathetic departments or agencies, committee counsel seeking to examine statutory instruments before bringing ones of questionable quality to the attention of committee members, have to focus mainly on instruments published in the *Canada Gazette*.

But the Act directs only that registered regulations must be published. Other statutory instruments are not published except where the Governor in Council by regulation so directs, or where the Act authorizes the Clerk of the Privy Council to direct such publication as the Clerk deems to be in the public interest. Under the present circumstances, it is not surprising that the Joint Committee does not scrutinize many statutory instruments other than published regulations. At a minimum, we recommend that:

3.17 *the Statutory Instruments Act should be amended to require the Clerk of the Privy Council to make available on a regular basis to the Joint Committee the lists and summaries of all statutory instruments to be registered with the Privy Council which are placed on the weekly*

agenda of the Cabinet committee responsible for statutory instruments. Such listed instruments as the Joint Committee expressed an interest in examining should then be made available to it, but Committee members should undertake not to make public the contents of instruments exempted from inspection under section 27 of the Act.

A study could also be conducted by the Government into whether it would be practical to require regulation-making authorities to send certain classes of statutory instruments directly to the Joint Committee upon their coming into effect.

The two legal counsel for the Joint Committee constantly monitor the *Canada Gazette* and scrutinize the statutory instruments there published or otherwise brought to their attention by government officials. They give special attention to statutory instruments having a high social policy content as opposed to those which are mainly technical or scientific. The problem of *vires* or legality frequently arises in the context of instruments which subdelegate a power or give a power of dispensation.

Counsel often contact departmental or agency officials for clarification or explanation of terms of statutory instruments. Only instruments to which counsel eventually takes objection are seen by the Joint Committee. When an instrument is put on the agenda for consideration, committee members receive copies of the instrument, comments of committee counsel, and copies of any relevant correspondence. The Committee usually directs counsel to engage in any further correspondence necessary to proffer the Committee's formal objections to the relevant authority.

Most departments and agencies have been cooperative and willing to comply with changes suggested by the Joint Committee. Some, however, have been characterized by committee counsel as intransigent. Where it is felt that an inadequate response has been made by an authority, the matter may be taken up informally by one of the Joint Chairmen, or another member of the Joint Committee, with the appropriate Minister. If no satisfactory action is taken, the Commit-

tee's only recourse is to report to the two chambers of Parliament. However, such a report is rare. Where the Committee has reported, the reports have been adopted by each chamber — but that is as far as the chambers can go. The House of Commons has no standing orders, nor the Senate any rules providing for the disallowance of statutory instruments. Thus, when Parliament delegates a power, it cannot police its exercise except by means of new legislation.

Very few statutes provide for statutory instruments to be subject to either affirmative or negative resolution procedures, thereby allowing either or both of the Houses of Parliament to control the coming into force of an instrument or to disallow it. Section 28.1 of the *Interpretation Act*,[115] added by subsection 1(3) of the *Statutory Instruments Consequential Amendments Act*,[116] gives standard definitions to the terms "subject to affirmative resolution" and "subject to negative resolution" of Parliament or of the House of Commons, but does not detail the necessary procedural steps.

The Joint Committee regards the extension of such procedures as desirable, and considers that they might be more widely adopted in the drafting of Bills if there were a statutory codification of the requisites for affirmative and negative resolutions so that there would be a clear understanding of the procedures to be followed, and so forth. It has recommended either that the *Interpretation Act*[117] be amended to embody a complete code of procedure, or the House of Commons and the Senate, building on section 28.1 could adopt Standing Orders and Rules (preferably identical), respectively, setting forth detailed procedures.[118]

A decade ago the Special Committee of the House of Commons on Statutory Instruments (the MacGuigan Committee), in its Third Report, gave a considered opinion on appropriate Parliamentary action respecting regulations. After referring to the comparative practices respecting Parliamentary supervision of delegated legislation in various jurisdictions of the Commonwealth, and quoting the critical views of the McRuer Report in Ontario concerning the use of affirmative or negative resolutions by the Legislature to control regulation-

making powers, the Special Committee recommended that normally Parliament should exercise its power of review by a resolution that a questionable statutory instrument be referred to the government for reconsideration.[119]

The Special Committee recognized, however, that in particular cases where more stringent controls were called for, such as where regulations put "meat" on a statutory skeleton in new areas of governmental activity affecting matters of consequence to the public, provision for affirmative or negative resolutions might be desirable.[120] It also said that further consideration should be given to providing in the Standing Orders for any group of at least ten members to have the right to require a short debate on a particular regulation provided that this did not interfere with the progress of government business.[121] Taking into account the Report of the Committee and the Law Reform Commission's own research, we recommend that:

> 3.18 *provision should be made in the Standing Orders of the House and the Rules of the Senate for debate on questionable statutory instruments at the request of at least ten members of the particular Chamber within a limited delay period, and for the making of resolutions to refer statutory instruments to the responsible Minister for reconsideration;* and
>
> 3.19 *detailed provisions should be set out regarding the procedures to be followed in the House and Senate to carry out affirmative or negative resolutions regarding statutory instruments.*

CHAPTER FOUR

Executive Controls over Agencies

The delegation of broad discretion to independent administrative agencies raises interesting questions about the relation they have with the government. Our political traditions stress that power and responsibility should be placed in elected officials. In the absence of clear justification, governmental authority should not be exercised by non-elected officials unless some basis for responsiveness and accountability to the Cabinet and Parliament is retained. The need for some means of increasing accountability to Parliament having been treated already, we discuss here various Ministerial controls exercised over independent agencies.

The controls which the government puts in place to help guide the actions of an agency should depend on the following factors: first, the overall governmental scheme in which the agency operates, including the nature and range of powers conferred on it and the nature of the rights its action affects; second, the stages in the administrative process at which the interaction between Ministers and agencies concerning the use of discretionary policy-oriented powers by agencies should be taken into account, including the stage of elaboration and application of policy, and enforcement and review of policy decisions; and third, the degree of Ministerial control considered desirable at any or all of these stages.

By conscious planning, inconsistent or conflicting allocations of government policy-making authority can be minimized. We recommend that:

> 4.1 *to avoid unnecessary confusion regarding the sources of policy direction for an agency, its enabling Act should contain provisions chosen with a conscious view to the degree to which the agency should be provided with political insulation or Ministerial control at different stages of the administrative process.*

A. Ministerial Control Versus Independence

Because our constitutional traditions stress the importance of retaining administrators under the supervision of responsible Ministers, we recommend that:

> 4.2 *the presumption should operate, in structuring the machinery of government, that administrative authorities be established within departmental confines unless there are very good reasons for constituting them as independent agencies.*

This approach should be all the more favoured since the public service has become professionalized.

However, a strong reason to retain a wide range of independent agencies, at least for the near future, is that departmental units still operate for the most part as closed forums where confidentiality reigns and little opportunity is given interested persons to submit their views on programs or policies to compete in an open forum on a merit basis. Particularly in those sectors where there are strong vested interests employing professional lobbyists, whose activities can have an immense effect on variegated lesser interests, it is important to give the latter some opportunity for representation in the policy-making process. The matter of public participation in policy-making is dealt with in some detail in the next chapter.

The classic example of the valid placing of governmental responsibility in non-elected persons is found in our judicial system. Judges are, in a sense, part of the governmental process, yet they are appointed. They apply the law in individual cases and, by convention as well as the many checks and balances which control judicial institutions, generally play only a limited role in shaping policy. Most people would agree that there is a need for decision makers who are capable of giving impartial thought to individual cases and, if necessary, of putting a check on abuse of power by those more directly involved in the exercise of political power. They should not be influenced by, or serve the perceived partisan political needs of, the government of the day but should provide an element of stability to the body politic and its legal processes. By analogy, it is believed that a considerable degree of independence from governmental control is needed where an agency is performing a court-like function. Indeed, we recommend that:

> 4.3 *agencies performing solely a court-like function should be kept free from governmental interference.*

To make them controllable by directions from the government would detract considerably from the integrity of their operations.

Between the cases where administrative authorities should clearly fall within departmental structures or be entirely insulated from Ministerial controls, however, there remains a large spectrum of agencies about which, as the McLean Commission pointed out at the turn of the century, great care must be taken in determining their powers and the means of supervision, direction or control of them to retain in Ministerial hands. A Commission study paper on *Political Controls over Independent Agencies* classifies model types of relationships between Ministers and agencies along this spectrum according to the nature of Ministerial control over policy elaboration and application by agencies, and Ministerial review of agency activities.[122]

Policy elaboration involves the translation of general policy criteria as set forth by statute into regulations and other

rules and guidelines. A Minister or the Governor in Council may be formally involved at this level where he has the power to make or approve regulations or to issue directives. Less formal intervention may occur through consultations between departmental and agency officials, the issuance of governmental policy statements for an agency to take into account, Ministerial representations relating to particular proceedings before an agency, and so forth.

Policy application consists of adjudication or other decision-making requiring the interpretation and application of policy within the framework of the statute. The role of elected officials here might entail considering and approving tentative agency decisions or reaching decisions in individual cases based on findings by an agency whose role it is to make recommendations.

Modes of Ministerial review include appeals or petitions for review to a Minister or the Governor in Council, or review by a Minister or the Governor in Council of recommendations on the basis of which he comes to a final determination. Executive review does not, of course, necessarily constitute the final administrative step; there are statutes under which the executive can refer a matter back to an agency for reconsideration.

B. Classification of Agencies by Ministerial Control Mechanisms

The agencies most closely controlled by the government are those explicitly designated as agencies of the Crown or put under the direction and control of a Minister or the Governor in Council. The Atomic Energy Control Board is an example. The next most controlled are those operated effectively as agencies of the Crown because, even if they appear to act more independently, not only must their regulations be

approved by elected officials, but their important decisions are subject to such approval as well. The National Energy Board is an example.

Types of agencies falling in the middle of the spectrum are: those which make independent public decisions or recommendations that the government has to take into account, but that are not binding on it; agencies whose regulations must be made or approved by elected officials and whose decisions may be reviewed by or appealed to the executive but whose decisions are independently arrived at; and agencies having limited mandates in an overall legislative scheme where initial decision-making takes place within a department and the agencies get involved at a later stage as advisory or appellate bodies (those independent court-like agencies treating cases arising from departmental decision-making would thus be listed again here).

Agencies of the most independent type are those before which decision-making on particular issues originates and which make their own regulations and decisions without being subjected to government approval. Two of these are the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission. The CRTC makes all, and the CTC makes part of its regulations without Ministerial approval. Both agencies arrive at their own independent decisions, although these are subject to review by the Cabinet and the Federal Court.

There has been little demand for law reform concerning Ministerial controls over certain agencies. Agencies with a high volume of detailed work with no one decision being of great significance to the government of the day, such as welfare benefits agencies, and agencies with narrow mandates or operating only at a particular level of the administrative process as one of a sequence of authorities dealing with an issue, such as the Anti-dumping Tribunal, have not generally been subjects of concern in terms of political control.

Considerable debate has taken place, however, about the governmental role of agencies given the combined functions of

elaborating and applying policy, and about the scope and degree of Ministerial controls to be exercised over them. When Parliament asks the National Energy Board to decide whether an application to build a pipeline is consistent with "present and future public convenience and necessity" it is asking the Board to develop policy related to that question. The Air Transport Committee of the Canadian Transport Commission cannot approve an application for a new service route without making policy decisions about transportation networks already in existence. While regulators are sometimes reluctant to acknowledge this policy role, it unquestionably exists.

This situation did not develop accidentally. As was mentioned earlier, agencies have sometimes been created where it was felt desirable to "de-politicize" an issue. The concept of Ministerial responsibility allows for a high level of visibility for the work of the government, and one of the major reasons for creating the so-called independent agencies was the need to relieve Ministers from the burden of accounting publicly for policy choices in administrative decision-making, especially in sensitive areas such as issuing licences to enterprises wishing to operate in regulated sectors of the economy. Another reason was to make sure that Parliament generally focussed its attention on matters of policy and general principle rather than expending a great deal of time on criticizing agency decisions in individual cases.

C. Extending Controls over Regulatory Agencies

But recently, more and more politicians and political theorists have been encouraging the government to assert more control over important policy issues. We are now seeing evidence of a growing desire on the part of the Cabinet and individual Ministers to exercise more influence, especially over agencies with regulatory functions. Some government departments have expanded their interest in policy-making

related to matters closely aligned with the responsibilities exercised by agencies. This has been a source of increasing tension between departments and regulatory agencies having similar policy interests and sharing the same responsible Minister.

Although the National Energy Board, for example, was originally established to fill a void in government policy-making, since the creation of the Department of Energy, Mines and Resources in 1966 with advisory functions substantially overlapping those of the Board, questions have been raised concerning what should be the working relationship between the two bodies. The Board has also been forced to contend with other departmental influences such as those of the Department of Indian and Northern Affairs and the Department of the Environment, both with policy-making roles which may focus on objectives different from those of the Board.

The Canadian Transport Commission provides another example. When it was established in 1967 it was envisaged as the focal point for a complex scheme of regulation of several modes of transportation formerly regulated by three separate bodies. Difficult problems have ensued in the fulfilment of this scheme, and over the past several years the Ministry of Transport has assumed more and more control over policy planning. In a speech to Parliament in June, 1975, the Minister stated that the Act would be amended to ensure that the principal source of transportation policy advice for the government would be the Minister, not the CTC.[123] Although several draft bills have since been tabled before Parliament, none has been enacted and debates continue about how increased Ministerial involvement should be implemented. Similar problems pervade the relationship between the Canadian Radio-television and Telecommunications Commission and the Department of Communications, and here too draft legislation has been tabled.

While some departments are making strong efforts to assert their dominance in primary policy-making in certain areas of high sensitivity, this does not mean that agencies will be

relieved of all policy-making functions. Even if, for example, the main policy-making thrust on issues currently enjoying a high profile passes from the CTC to the Ministry of Transport, or from the CRTC to the Ministry of Communications, both regulatory agencies will continue to develop policies governing applications made before them. The fact that the National Energy Board must compete with other bodies in the development of an increasingly complex energy policy does not detract from the fact that it must continue to decide applications in a way which is consistent with its perceptions of energy problems in Canada and worldwide. It does mean, however, that agency policy will have to be coordinated with government policy and that there will be considerable interest in the controls to be made available to government to ensure that broad lines of agency decision-making do not fly in the face of Cabinet policy.

D. Methods of Political Control

In saying this we do not mean to convey the impression that this is a new problem, or that government has heretofore been uninterested in, and incapable of controlling, agency performance. There are presently several formal and informal methods which can be, and are, used to influence agency policies. Some of these are Parliamentary controls, while others are clearly Cabinet or Ministerial controls. But because of the high degree of influence exerted by Cabinet over Parliament, the distinction between parliamentary control and government control is not always meaningful. Parliament, of course, always retains the power to repeal a delegation of authority or to superimpose legislative guidelines defining its scope, and this avenue is generally open to the government to control what agencies do. It is, however, a cumbersome and time-consuming way to react. More effective action could be taken by Parliament respecting the scrutiny of, debate on, and making of affirmative or negative resolutions concerning statutory instruments, however, as was pointed out in Chapter Three. The fuller use of reports to Parliament to allow for

periodic reconsideration of agency mandates and operations was also mentioned there.

Attempts at Ministerial control external to the administrative process can also be made. Influence of a sort can be exerted through appointments to agencies, but new appointees usually absorb the professional norms of an agency rather quickly. Control of another sort can be more easily exercised through budgetary planning, under which programs are scrutinized and approved; in effect, conditions may be placed on agency funding, although Treasury Board officials generally agree that policy direction over particular governmental bodies or programs should not be seen to be a function of financial management officials. We do not think that either budgetary planning or the way of making appointments should be distorted to achieve ends better met through issuance of clear government directions or policy statements.

In connection with the administrative process itself, Ministerial intervention can occur at the stages of policy elaboration, policy application, or governmental review of administrative action. The framework for an agency's policies is often elaborated through regulations, and most agency legislation also allows a particular Minister or, more usually, the Governor in Council to pass regulations expanding on the framework of a legislative scheme. Where agencies themselves are given this authority, the regulations of most of them become effective only on approval by a Minister or the Governor in Council, the two major exceptions being the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission.

In some cases, Ministers or the Cabinet are given authority to issue directions to an agency. Section 27 of the *Broadcasting Act*,[124] for example, authorizes the Governor in Council to issue directions to the Canadian Radio-television and Telecommunications Commission on limited matters, including the maximum number of channels to be licensed within a geographical area, the reservation of channels for Canadian Broadcasting Corporation use, and the classes of applicants to whom licences may not be issued. Similarly, section 7 of the

Atomic Energy Control Act[125] requires that the AECB must comply with any general or specific direction of the Minister.

Controls over delegated legislation or powers to issue directions are designed primarily to exercise broad supervisory authority over an agency. However, other powers are given to permit governments to intercede in particular cases and influence the application of policy there. Ministers, departments or other agencies might intervene in proceedings before an agency to make representations. Decisions of the National Energy Board to issue certificates of public convenience and necessity for major projects like pipelines require Cabinet approval. The expropriation of a particular piece of land, for example, requires ministerial approval.

At the stage of political review of agency decision-making, Cabinet or an individual Minister may act to control policy application and, indirectly, policy elaboration. Modes of political review include appeals or petitions for review to a Minister or the Governor in Council. Political review decisions may result in the accepting, varying or the setting aside of agency decisions in their being referred back to the agencies.

Apart from these formal methods of Ministerial control, there are informal ones as well. *Ex parte* communications may be made from Ministers to agencies concerning matters of general policy or individual cases. Government departments, or Ministers, will sometimes issue policy statements or make speeches which may have an impact on agencies even though they have no formal status. Less formal, but equally or more important, are the personal contacts through agency participation in meetings and conferences or on task forces, in which clearly expressed and generally agreed upon policy preferences may become highly influential on future agency decisions.

We recognize that government control over many administrative agencies, notably those with major policy functions, may be necessary under our governmental system and that there are many considerations which have to be weighted in selecting a particular mechanism for controlling a particular

agency function. These are largely political questions which must be weighed by the government when agency legislation is in the planning stages and, ultimately, by Parliament as legislator. It is our role, however, to study the impact of the exercise of these controls on the administrative process and how they affect the integrity of the process, as well as to make general observations about the nature of some of the controls to which we have referred.

E. Control over Delegated Legislation

At the level of policy elaboration linked more or less directly to an agency's statutory mandate, delegated legislation can be extremely important, as was mentioned in Chapter Three. The regulations for most agencies are either made or approved by the responsible Minister or the Governor in Council. However, the Canadian Radio-television and Telecommunications Commission, and to a large extent, the Canadian Transport Commission, make their own regulations without ministerial control. The Lambert Commission has recommended that in cases where independent agencies are authorized to make regulations, these be subject to Governor in Council approval before being promulgated.[126] In support of their position they cite the Third Report of the Special (MacGuigan) Committee on Statutory Instruments, 1968-69:

> 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 structure or elsewhere.[127]

Nevertheless, even recent draft legislation amending the enabling legislation of the CTC and the CRTC, does not propose any changes on this score. A degree of competition over subject-matter jurisdiction can be a healthy thing. For example, the CRTC has set high standards for any other body to meet in the field of broadcasting policy. However, we recommend that:

4.4 *there should be some direct line of accountability to elected officials for all delegated legislation; where an agency is given the power to make its own regulations without government direction or approval, those regulations should be made subject to affirmative or negative resolution by Parliament.*

Delegated legislation and agency policy can, of course, always be scrutinized in the context of review by Parliamentary standing committees of annual reports from statutory authorities.

F. Directive Power

There are occasions when it is important for the government of the day to give some direction to general policy mandates of administrative authorities. Although the step of legislative amendment is the only appropriate one when a statutory authority's basic mandate is being changed, Parliamentary resources should be used judiciously. Often enough, government officials can reorient administrative activity by making glosses on existing legislation. The device of the ministerial directive power based on a particular statutory mandate has been developed to meet the need for changes in policy direction in such circumstances. As mentioned previously, limited directive powers over the CRTC and the Atomic Energy Control Board have already been granted to the responsible Ministers.

We favour a more open enunciation of government policy than has sometimes been the case in the past and recommend that:

4.5 *if there is to be Ministerial control over agency decision-making, it should in principle be done on a general policy level in advance of specific cases.*

Directions serve as devices for policy control which can be subjected to scrutiny at the time a particular issue is up for determination before an agency. We recommend that:

4.6 *the power to issue directions should be used, but sparingly and not as a general political control device, in giving policy direction over well-defined areas of activity to agencies having relatively broad mandates to elaborate and apply policy.*

Thus, the directive power is particularly suitable for guiding the policies of independent regulatory agencies.

However, the way in which directions are presently made lacks the degree of openness provided by the legislative process, which gives public exposure to government policy and an opportunity to interested persons to make representations. Ideally, a policy-making process should offer some means by which policy positions can be aired prior to becoming effective, so that interested persons may have an opportunity to participate in policy making.

From a governmental standpoint, directions offer the advantage of being less formal modes of policy communication than regulations; but the greater the freedom from parliamentary constraints, the greater is the risk of executive policies not reflecting values based in the representative process found in our parliamentary system of government. There is no requirement, for example, that the directions made under the *Atomic Energy Control Act*[128] even be tabled in Parliament, although they can obviously be brought to Parliament's attention by other means. We think that to be fair to the agencies, Parliament and the general public, there need to be improvements made in the process of issuing directions. We endorse the recommendation of the Lambert Commission that:

4.7 *prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such directions should be published in the Canada Gazette and tabled in the House of Commons.*

Research done both for the Law Reform Commission and the Lambert Commission supports this recommendation. We further recommend that:

4.8 *in order to provide for the possibility of Parliamentary control over directions, Parliament should retain a power to pass a negative resolution within seven days after a direction is issued.*

To further the public interest as perceived by the government of the day, where the Cabinet is first apprised of the political importance of agency proceedings after they have commenced, we recommend that:

4.9 *the Governor in Council should have the power to issue a "stop order", effectively halting agency proceedings for a period of up to ninety days, in order that an appropriate general direction might be issued for the agency to consider in arriving at a final decision.*

We also recommend that:

4.10 *in order that agencies to which directions have been issued might benefit from further clarification of the meaning of directions, they should have the power to refer them back to the issuing authority for interpretation. Such interpretation should then be issued within thirty days.*

G. Ministerial Approval

At the level of policy application through agency decision-making, the general requirement of Ministerial approval for many types of agency action may have its place. There are sufficient numbers of ministries and high-level departmental advisory support officials in existence that this political control device could be used even more than at present before stretching to their limits the capacity of ministries to cope with them. However, demands for approval by the Cabinet on a widespread basis would place a great burden on the Privy Council Office and on the Cabinet itself. The Law Reform Commission recommends that:

4.11 *an arrangement such as that made under the National Energy Board Act regarding the issuance of certificates in respect of a pipeline or international power line, requiring the Governor in Council to consider for approval every decision of a regulatory agency pertaining to a particular field of endeavour, should not be adopted as a model political control device.*

H. Political Review of Administrative Action

While there is no evidence to suggest there has been excessive resort to the political review mechanism by the government itself, there has been a substantial increase in the number of petitions to review to the Governor in Council (Cabinet appeals) launched in the past few years pursuant to subsection 64(1) of the *National Transportation Act*[129] by parties to transport hearings before the CTC and telecommunications hearings before the CRTC.[130] The very existence of such a mechanism creates doubt in the minds of persons involved in administrative proceedings as to the choice of the appropriate body to which to direct applications and arguments for final decision, and as to what procedures or tactics to follow.

Although appeals to courts are grounded on accepted standards and restricted to matters of record or, occasionally, clearly enunciated new material, Cabinet "appeals" are quite different. They are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well documented and the reasons obscure.

Policy appeals can also be used to change policy retroactively. An agency may have decided a case on the basis of existing policy, only to have the decision reversed on a policy newly enunciated by the Cabinet. The fact that Cabinet review proceedings are both confidential and flexible means that decisions are reversed without providing a full opportunity to participate in the decision, and without full knowledge of the basis of the decision. This can lead to public apprehension that the Cabinet has not really limited its terms of reference in policy review to the scope and intent of the statute in question, and that there has been an abuse of executive power through the taking of action contrary to the intent of Parliament. This undermines belief in the legitimacy of the government of the day. Litigation has gone up before the Supreme Court of Canada concerning whether the Cabinet acted fairly in its handling of participants in political review proceedings.[131] Rather than risk further pressures on the agencies or on the Cabinet, we recommend that:

> 4.12 *provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished.*

While we acknowledge that governments may feel it essential to have the power to review policy in individual cases in some situations, such power should be available only in exceptional circumstances and, when it is, there should be clearly enunciated procedures, particularly for appeals. As well, where such a power of review is reserved, it would be preferable to exert it mainly to check an agency's compliance with government policies which were communicated in advance of the agency decision. It is important that both an agency and the parties appearing before it clearly understand what policies will ultimately govern the disposition of a case, whether by the agency or the government.

If any political review power of the Cabinet is to be maintained, the Governor in Council should be given authority only to set aside initial agency decisions and refer policy factors the agency might not have adequately taken into

account to the agency for reconsideration and final disposition. This device could be used to review agency functions in various statutory contexts or as a means of scrutinizing how an agency has responded to a direction by the Cabinet. It would allow for the Cabinet, when referring matters back to an agency, to indicate what aspects of its statutory mandate the government thought the agency should weigh in reconsidering its decision, while maintaining the integrity of the administrative process by allowing the agency to be the final administrative decision-maker in its own proceedings.

I. Informal Political Controls

A few observations can be made, as well, about informal methods of influencing policy. In many ways these can create even more difficult problems. Governments may be more inclined to rely on informal methods than formal ones so that some degree of control can be exercised without having to accept responsibility. Even where more formal methods are used by governments, informal influences are inevitable. Agencies are in frequent contact with departmental officials and with officials from other agencies, both on a federal and provincial level. In many ways this is highly desirable. It is important that agencies be aware of what is going on in other branches of government and have information about, and the point of view of, other agencies which may be facing a different aspect of a common problem.

Nor would it be realistic to attempt to prevent agencies with regulatory responsibility from participating in conferences and meetings dealing with the problems they encounter on a day to day basis. These interrelationships do cause difficulties, however, when they amount to a form of control through the clandestine influencing of agency decisions. Where supposedly independent agency decisions are perceived as having been manipulated by closed arrangements, the integrity of the process suffers. While the independence of agencies does not, in

our view, imply absolute freedom from political control, it does imply that the control will be exercised in an open way. This is especially important where agencies are involved in the regulation of other governmental enterprises, such as Crown corporations.

One way to combat the untoward effects of informal influence is to insist, and we so recommend, that:

> 4.13 *departments and agencies should have not only the right but the responsibility to intervene in proceedings of special interest to them before other departments or agencies and, conversely, the responsibility to hear the views of those others which seek to make representations before them. This should occur as much as possible in public proceedings.*

We further recommend that:

> 4.14 *ex parte communications to an agency from any governmental authority or other sources making representations pertaining to particular proceedings should be put on the record in the course of those proceedings.*

This is especially important in proceedings where individual claims are determined, where the parties may wish to protect their interests by addressing themselves to policies advanced by government intervenors. For example, any message such as that contained in the letter dated December 14, 1976 and marked "confidential" from the Minister of Communications, Jeanne Sauvé, to the Chairman of the CRTC, Harry Boyle, in which it was communicated that the government had "agreed that the Association of Telesat Canada with the Trans-Canada Telephone System as a member of TCTS was acceptable",[132] subject to some conditions, should be put on the record at agency proceedings or not transmitted at all.

The need is less urgent in policy-making proceedings, although even here an agency should at a minimum make clear the "information" on which it would base its decision so that alternative views to the policy biases encouraged by "off the record" deliberations with other government officials and bodies might be duly considered. Awkward situations can

easily arise, however, where a privileged Crown enterprise has filed an application competing with private enterprises, for example, in the fields of oil and gas or nuclear energy.

J. Occasional Need for Unimpeded Political Initiatives

In some situations, government decision-making through administrative agencies may be wholly inappropriate, particularly where the government is committed to a preconceived result. One example might be the application by Interprovincial Pipeline Ltd. to the National Energy Board in 1974 to extend the existing oil pipeline system from Sarnia to Montreal. This application proceeded while a task force of Board, government and industry representatives worked to expedite the building of the pipeline, which was felt by the government to be very much in the public interest. The outcome of the application could hardly have been in doubt, despite the fact that cogent objections were raised by intervenors.[133]

Another example of the same sort of difficulty can be seen in the Telesat Canada application to join the Trans-Canada Telephone System pursuant to a Proposed Agreement they had entered into in December 1976. As mentioned above, the government of the day indicated in advance that it favoured the arrangement but, following public hearings held in the Spring of 1977, the CRTC decided that the Agreement would not be in the public interest. Following a petition to review filed before the Governor in Council, the Cabinet varied the CRTC decision so as to approve the Agreement.[134] Whatever the actual merits of the Telesat case, it was a prime example of Ministerial intervention in the administrative process, from the stage prior to an application to an agency for a licence, ruling or other decision up to the stage of the Cabinet appeal itself.

Another situation in which agency decision-making faces difficulties is where matters become subjects for negotiation between the federal and provincial governments. In such situations, the federal government may feel constrained to put pressure on the regulatory agency to reach a decision which accommodates an understanding achieved between the two levels of government. In the Manitoba Cable case in 1976, cable licences which had been issued by the CRTC were set aside by the Cabinet after a federal-provincial agreement on cable matters had been reached.[135]

We do not doubt that there are instances when the government should have its way on specific issues that would otherwise be dealt with by administrative authorities in a routine manner. It would be better to allow the government to take these issues right out of the regular administrative process rather than to distort the process either through informal pressure or by overruling the agency after the process has run its course. While an agency, in these cases, could provide needed advice on technical aspects of implementing the government decision, its integrity as a decision-maker would not be compromised by its participation in a mere ritual.

Undoubtedly, a variety of techniques other than the directive power could be devised to allow the government to take the initiative. Perhaps the least controversial device for the government to use in carrying out an initiative is to introduce special legislation. For example, under the *Northern Pipeline Act*,[136] a special agency was formed to facilitate the planning and construction of a pipeline for the transmission of natural gas from Alaska and northern Canada. We recommend that:

> 4.15 *where the Government decides to establish structures or initiate programs the arrangements for which might fly in the face of existing economic or social legislation, there should be means for the Government to deal with such matters itself. One obvious device to use would be special legislation.*

In short, existing political controls over agencies, while usually restricted to functions which have a significant policy content, are not, in our view, so clear and direct as they might

be, are not particularly open, and do not appear to be exercised in full awareness of the pressures they place upon the agencies and upon the integrity of their processes. The fact that many different forms of control seem to be used indiscriminately is itself a matter of concern. We recognize that uniform controls may be neither possible nor desirable, but some attempt should be made to rationalize the procedures adopted in particular statutes.

While we have tended to stress the negative impact on agencies arising out of the exercise of political controls, we must emphasize that appropriate controls, properly employed, can contribute in positive ways to the effective use of agencies by governments. The importance of coordinating governmental policy through a central organ like the Cabinet cannot be overstressed.

CHAPTER FIVE

Public Interest Representation and Rule-making

The general mandate of an agency may be structured by an Act of Parliament or subordinate legislation and given further precision by the government of the day or the responsible Minister. The courts too have a role, for theirs, of course, is the duty to determine whether the actions of the agency fall within the terms of its mandate. But the particulars of a mandate are often decisively shaped in administrative proceedings where an agency may benefit from representations made by interested constituent publics, political authorities, or agency officials themselves.

This chapter underlines the importance of consultation between an agency and its constituent publics. Although an agency can be so constituted that particular members are originally appointed to represent certain interests in agency deliberations, unless the whole body is weighted towards one interest, available evidence indicates that over time any particular agency member will come to identify much more with uniform positions taken by the agency than with the interest supposedly represented by that member. The preferred mode of representation, therefore, is to encourage the advocacy of constituent interests in the context of particular proceedings.

A. Public Interest Representation

Public interest representation in administrative proceedings can be quite useful to agencies, especially in situations where it is not yet clear to agency members themselves what information or expertise is important in performing statutory functions. This can arise when the agency is new, has recently expanded its jurisdiction or operations, or has had new criteria for decision-making imposed upon it. An example of the last variety is the addition in the 1970's of environmental factors to the matters to be considered by the National Energy Board before issuing certificates of public convenience and necessity for the construction and laying of pipelines.[137]

1. *Agency Proceedings as a Political Process*

At present the desire for public participation in administrative proceedings is particularly acute in matters affecting consumer costs (rate regulation) and the environment (e.g. the National Energy Board hearings and the Berger Commission hearings on the Mackenzie Valley Pipeline project). It appears, however, that participation is addressed to various ends.[138] Often it is aimed at influencing the agency in its approach to a matter before it, but some intervenors appear to be more interested in provoking wide public discussion through media reporting, and in stimulating discussion within a political arena, for example in Parliament. Intervenors will sometimes use agency proceedings as a forum for airing political or partisan views on matters outside the scope of the agency's mandate.

To some extent, this illustrates a significant problem; participation before administrative agencies is seen by many people as a way to participate in the political process. Indeed, an agency proceeding may provide the first opportunity for participation. At the legislative stage issues may not be sufficiently focussed to allow full and effective participation. Between the legislative stage and that at which an agency is

required to make a concrete decision on a specific application, policy decisions made by government are often low in profile and invulnerable to criticism by interests that might have something useful to say.

A broad base for public participation in agency proceedings will be supported, then, by those who place a high value on citizen participation in government, a value which is hardly inconsistent with our democratic traditions. It will be criticized, however, by those who take a more functional approach to agency decision-making and who prefer to restrict participation to those who can provide insight which will assist an agency in fulfilling its statutory role. In unduly deferring to the former, we run the risk of inhibiting the decision-making capabilities of an administrative agency when the underlying problem may be the failure of our political process to respond in other ways to the needs of people to participate in their government. To illustrate, an expropriation hearing sometimes becomes a forum in which policy planning decisions are attacked by those objecting to a project for which land must be expropriated. While people should not be denied an opportunity to voice objections to such projects, to raise them at the expropriation stage will usually be too late, and will be of no assistance to those deciding the narrow issue of whether the land in question is necessary for the project. The timing of participation is vitally important if it is to have value as part of our political process, and often it must precede agency involvement in a specific issue.

The manner in which the decisional process is carried out can bring new information or different perceptions to bear on an issue, and can influence the choice, by each participant, of the frames of reference to use and the principles to apply. For example, as our agency study on the National Energy Board points out, even where public advocacy has little immediate impact on agency policy or proceedings, in the long run such advocacy often fosters internal debate and subtle modifications in points of view among agency members.[139]

2. *Ascertaining Relevant Interests*

Administrative authorities do not yet fully appreciate the procedural and substantive implications of being attuned to the interests of the public in a highly pluralistic society. Yet, it is especially important for authorities that have a substantial policy-making role, such as regulatory agencies, to make the necessary adjustments. Most recognize that it is their mandate to administer a particular substantive area in the "public interest", but few have successfully discovered an effective, yet efficient manner of discovering just what that is. Perhaps the most useful first step in resolving this dilemma is to emphasize that the term "public interest" does not represent a monolithic interest to be taken into account by the government. It is the natural consequence of pluralism that there may be no such thing as a single public interest; rather, in any given context, there may only be a myriad of diverse and sometimes conflicting group and individual interests. And these interests may be formalized in legal criteria which themselves are not always accorded the same priority or weight. An agency cannot expect any one constituent group, or a single set of criteria of predetermined value, to represent the public interest that may be potentially affected by its action.

One of the first tasks an agency should undertake in developing its policies is that of ascertaining the panoply of various interests within the agency's actual or potential sphere of authority. The relevant constituency for an agency will depend largely on the nature of the agency's substantive functions.

For example, regulatory agencies involved with the administration and planning of business conduct, including monopolistic industrial activity, might define their relevant constituency as composed of the following categories of interests:

I. The government interests —
   — agency's own interest
   — interests of other agencies
   — interests of departments

— interests of Cabinet
— interests of Parliament
— interests of provincial government institutions
— interests of the international community

II. The regulatee's interests
— profits
— stable business environment
— minimal demands on it from government and other interests

III. The interests of clients of regulatee —
— rural
— urban
— commercial
— non-commercial
— low income
— middle income
— high income
— potential

IV. The competitor's interest (actual or potential)

V. The interests of employees of the regulatee

VI. Special interests —
— environmental
— other

Similar lists of constituent interests could be prepared for other types of independent agencies. The range of interests may, of course, be much more circumscribed where the agency has a small policy-making role and proceeds like a court. Nevertheless, any agency involved in the regulation, management or planning of an activity could develop a descriptive listing of the interests it ought to consider, much like the one outlined above.

Once an agency has identified its constituent interests, a task which must be reassessed in the light of each category of matter before an agency, the difficult task of ensuring that interest positions are represented effectively and efficiently

must be tackled. The facilitation of a wider range of interest representation might lengthen the time it takes the agency to make a decision, and increase the cost of the agency's activities. On the other hand, there are benefits from increased interest representations to agencies with a large policy making role. These include: first, an improvement in the quality of decision-making through allowing an agency to expand its information base and gain a sense of community values; second, the bringing into the open and thereby adding to the legitimation of the policy-making process by satisfying the desires of constituent interests to involve themselves in important public issues; third, the reduction of any general tendency towards unthinking administrative conservatism; and fourth, in the case of regulatory agencies, the reduction of the possibility of agency members being "captured" by regulatees.

The benefits are worth a certain price in delay and expense, but they are not benefits to be encouraged at any price. As with many dilemmas, the best answer is likely to result from the best balance in the format of agency proceedings, and it is this balance for which each agency must strive in each of its own substantive areas of decision-making. Needless to say, the need for, and encouragement of public interest representation before an agency varies according to the nature of the agency and the function in question.

But if public participation in the administrative process is to be significant, certain difficulties must be overcome. The experience of many federal agencies in both Canada and the United States, suggests that the major problems of ensuring effective representation of all the interests within an agency's constituent public at an acceptable cost, in terms of delay and complexity of proceedings as well as financial costs, fall within four categories: ensuring access to agency proceedings through appropriate service of notice and liberal rules of standing, while screening out unproductive or repetitious interventions; permitting meaningful participation by making relevant information available to participants in proceedings and allowing them a reasonable time period to assimilate the information and prepare their representations; providing for spokesmen for various interests if representation would not

otherwise be forthcoming, or financing public participation in appropriate cases; and properly designing procedures for effective and efficient participation.

3. *Notice*

A crucial step in ensuring the involvement of relevant interests in agency decision-making is the provision of adequate notice of agency proceedings. Our jurisprudence with respect to notice has primarily developed in relation to adjudications in connection with the issue of the "right to be heard". Thus, where a decision directly affecting a person's rights is taken, certain minimum procedural standards are required. But notice is also important to broad policy-making functions, and is of relevance to persons who might not traditionally have been considered as being directly affected by agency policies. The degree to which an agency should have a duty to consult affected interests before reaching broad policy decisions, including the making of statutory regulations for an agency as well as policy or rules of procedure not considered binding in a statutory sense, has become an increasingly important issue.

When an agency wishes to consult a broad range of interests, the means of giving notice can pose problems. Sometimes an agency may simply wish to extend an opportunity to appear. Here one might, on the grounds of efficiency, justify a notice model that puts each potential intervenor to the task of obtaining information concerning the existence and nature of the proceedings. The concept of constructive notice through an official publication like the *Canada Gazette* is a common legal circumvention of the difficult problems involved in notifying a wide, unidentified constituency. This will be insufficient, however, where an agency genuinely wishes to obtain a full range of views. It is recommended that:

> 5.1 *independent agencies should experiment with innovative notice techniques in connection with those types of proceedings where it is important to ensure that an agency will obtain a balanced picture of the issues at*

stake because there is a wide range of constituent interests affected by decisions flowing from the proceedings.

One approach might be for an agency to compile a list of persons and groups known to be interested in matters it deals with, and to provide them with comprehensive abstracts of issues coming before the agency. While the agency might be criticized as hand-picking potential intervenors, one must assume a reasonable amount of good faith on the part of the agency. As well, this is suggested as a way of augmenting more universal communication through the mass media, such as newspapers, radio and television.

One progressive approach to notice, adopted by the CRTC among other agencies, entails maintaining an extensive mailing list to which anyone can have his name added. The list includes libraries which can serve to extend notice even further. Notice is sent to everyone on the mailing list, advising of the application, where it can be inspected in Ottawa and elsewhere, and how interventions can be made. This complements another useful procedure which the CRTC requires by regulation: applicants for licence renewals are required to broadcast information regarding their applications, allowing for direct contact with the consumers of their product. New draft rules of procedure for the CRTC Telecommunications Proceedings also provide a mechanism whereby any interested subscribers may register with the CRTC and indicate specific areas of interest, for example specific carrier rates or conditions of service. They will then automatically receive copies of any applications relating thereto. The new rules would also create a subscription list of those interested in receiving copies of tariffs on a regular basis.[140]

Obviously, different approaches will be found useful by different agencies, and in the context of different kinds of proceedings. The problem is much more important for example, to agencies like the NEB, the CRTC and the CTC, whose hearings raise issues of a broad socio-economic nature, than to agencies like the Immigration Appeal Board, the Pensions Appeal Board or the National Parole Board, whose decisions

directly affect a narrow range of participants who can normally be easily identified and notified.

Time is another vital consideration. Notice is useless if reasonable time is not given to prepare for a proceeding. An example of inadequate notification can be found in the federal environmental impact assessment procedures associated with an application to build a nuclear energy plant at Lepreau, New Brunswick.[141] While Environment Canada had made reports of environmental consultants available in libraries prior to a scheduled public meeting, interested parties were given a mere three weeks to comment on complex technical reports which had taken the consultants eighteen months to prepare.

For the most part, notice requirements in many federal statutes and regulations do not recognize the concerns about comprehensiveness and timeliness we are adverting to in this discussion. While generally adequate in terms of giving minimum notice to easily identified parties, these provisions are perfunctory and virtually useless for leading other interested persons to participate effectively in proceedings and to add to the information base of an agency.

4. *Standing*

Participatory democracy recently has received an increasingly favourable response in Canada, through the introduction by most agencies of less strict criteria of standing for interested persons wishing to participate in agency proceedings. Devising techniques to reduce excessive and unproductive intervention is, of course, also important. An agency can require that an intervenor's position be stated in writing before proceedings begin, screen participants at pre-hearing conferences, and consolidate interventions which would otherwise be repetitious or overlap.

5. *Access to Agency Law and Information*

If the representations of constituent interests are to be effective in the context of particular administrative proceed-

ings, then they must have access to agency law and the relevant information available to the agency. Such access is essential to the preparation by those interests of representations which will actually assist agencies in the task of improving the quality of their decisions.

People should be able to learn more about an agency from their first contact with it. We recommend that:

> 5.2 *each agency should have a designated information officer or staff equipped to answer in simple language standard questions posed about the jurisdiction, procedures and policies of the agency. There should also be prompt and adequate responses to inquiries from the public.*

We also recommend that:

> 5.3 *agencies should produce for the public written materials explaining in simple lay terms their organization and jurisdiction, their general rules of procedure, and how the public may obtain information and make submissions or requests.*

We further recommend that:

> 5.4 *agencies should consolidate and make available for public inspection and copying: their decisions and reasons for judgment, including concurring or dissenting opinions; general rules adopted by the agency; and administrative manuals, instructions or guidelines on the basis of which advice is given or action is taken, except those which must be kept confidential for reasons of effective enforcement policy and the like.*

Existing agency legislation does not recognize the principle of public access to information in an agency's files; but the draft Nuclear Control and Administration Act incorporates it with respect to the proposed Nuclear Control Board, and freedom of information legislation presumably would make it apply generally. The Law Reform Commission endorses the principle of public access to government information. A recommendation that federal freedom of information legislation be passed to improve the quality of public participation in

administrative proceedings, among other objectives, is put forward and discussed in Chapter Nine.

The subject of disclosure of information and confidentiality in the context of agency proceedings is of interest also, and is the subject of this Commission's study paper on *Access to Information*.[142] That paper should be referred to for a more detailed discussion of this issue. Its importance to procedural justice in the context of a particular proceeding is treated to some degree in Chapter Six.

6. *Ensuring Support for Constituent Interests*

In order to represent an interest before many federal agencies, whether in an adjudication or a less formal policy-making process, a substantial financial outlay is required. Often it is desirable to have an experienced advocate, one with specialized experience before the agency involved. Due to the nature of the function and makeup of most federal agencies, expertise in the substantive matter being considered by the agency is also required.

In regulatory matters, economic expertise is almost always essential. The advocacy and other professional skills required are expensive. In most regulatory matters, the commercial or industrial entities being regulated can, without difficulty, obtain the required expertise. But many other relevant interests cannot.

Thus, in order for an agency to have the benefit of adequate representation of the broadest possible range of differing interests, the problem of redressing the imbalance of resources among the various constituent parts of the agency's public has to be resolved. At the risk of belabouring the point, it should be emphasized that techniques for accomplishing this task cannot be determined without the benefit of experience which only imaginative experimentation can provide.

Underrepresented relevant interests might be given access to the administrative process in an indirect way through

private "public interest" organizations. These could be encouraged and supported at a sufficient level to permit high calibre representation. The Consumers Association of Canada, which seeks to ensure that a certain broad ingredient of the "public interest" is developed and advocated, has received financial assistance from the Department of Consumer and Corporate Affairs for public interest interventions under the Regulated Industries Program.[143] We recommend that:

> 5.5 *government funding should continue to be made available for worthwhile public interest intervention activities.*

Adequate funding to such organizations affords one technique for improving the range of interests advocated before administrative agencies.

The number of interest group organizations proportional to population in Canada is not nearly so great as in the United States. In 1976 it was estimated that there were in excess of 3,800 public interest organizations in that country representing a great variety of interest perspectives. The lack of organization in Canada is a further impediment to be overcome if agencies are to ensure representation of all relevant interests.

Relevant interests which could go unrepresented because of lack of resources might be included in agency proceedings through some mechanism whereby the individual or group is reimbursed for the expenses incurred in making representations. But there are many problems associated with the mechanics of compensation which would have to be worked out in individual cases. For example, some types of proceedings might necessitate the payment of monies before, rather than after the proceedings; at least some compromise involving advances would very likely be required. The problem of establishing the quantum or ceiling to be placed on a compensation-fund would have to be considered. This might involve allocating a global amount for all intervenors in any one proceeding, which would then be divided. In some situations it might be more prudent to place an upper limit on the amount any individual or group could receive in a year, and so forth.

Various mechanisms could be utilized for the distribution of funds. One particular governmental organism could be designated as distributor of public interest advocacy funds, or individual agencies could themselves provide funding. However, when the Canadian Transport Commission held a hearing in 1975 on the issue of whether it could provide costs to intervenors, it decided that it could not on its own initiative.[144] As for the notion of establishing a special advocacy agency to administer funding for public interest representation, it has not yet met with success even in the United States, where there has been much lobbying and legislative debate on the subject.

In addition to the problems associated with the mechanics of compensation, there are substantive dilemmas to be resolved in deciding what groups or individuals should be eligible. A number of preliminary inquiries would have to be made by the funding authority. First, the authority would want to ask itself whether the interests or viewpoint of the candidate intervenor are already being adequately represented in the particular proceeding. Second, the authority would have to make a preliminary assessment of the proposed intervenor's ability to represent competently the interests it is seeking to represent.

This assessment could have unfortunate consequences. One would be the tendency to accord low priority to groups with little sophistication — a factor which may not be relevant to the overall quality of their advocacy. The natural tendency to prefer experience — a tendency which is partly good sense and partly the result of feeling more comfortable with the "known quantity" — can interfere with the task of granting access to new and different approaches and perspectives. Closely associated with this tendency of preferring established groups is that of preferring moderate groups. The assumption that moderate and experienced groups are more helpful to an agency than radical or inexperienced groups involves less logic than many administrators might like to believe, and so should be employed with caution.

The subsidizing of economically disadvantaged interests does not need to come entirely out of the public purse.

Techniques of "fee-shifting" have been suggested. One form of fee-shifting — which has been termed the "deep pocket" approach — is merely to award costs against the parties best able to pay them. There might be some merit in this, if the party forced to pay costs were in a position subsequently to spread them among the class of persons who benefited from the subsidized interventions.

A great many administrative proceedings involve situations where a party seeks a government privilege (i.e. a licence, a rate increase, a modification in the terms of a licence, etc.). In such cases, it could be judged as one of the costs of doing business that the party should have to support the participation of relevant interests who could not otherwise afford to participate. This option seems especially sensible in proceedings before agencies which regulate a monopoly service. This is not, of course, a magic formula because the costs can be shifted to a degree back to consumers through increases in sales or service charges. However, the added charge per consumer is minimal.

Indeed, in the recent Bell rate hearing before the CRTC, this approach was taken; costs were awarded against Bell to compensate public interest intervenors. The principles underlying the awarding of costs were carried forward in a draft of new rules of procedure on telecommunications. Those draft rules require carriers applying for rate increases to pay the costs of certain intervenors. The criteria that intervenors must meet, in order to qualify, reflect many of the considerations referred to above. The press release announcing the decision described the criteria as follows:

> Interveners will qualify for costs in cases where they meet four criteria. First, where they represent the interests of a substantial group or class of subscribers. Second, where they participate in a responsible way. Third, where they contribute to a better understanding of the issues by the Commission. And fourth, where the Commission considers they require the assistance provided by costs to make an adequate presentation.[145]

Underrepresented interests also might be given access to the administrative process through provision of economic support to legal service groups who specialize in litigation on

behalf of indigent interest groups. The Public Interest Advocacy Centre,[146] is an example of such groups. This kind of financial support might encourage the establishment of what are referred to in the United States as "public interest law firms". In that country, these firms have been funded, to a great extent, through donations from private foundations. The number of public interest law firms in Canada might increase if, as is suggested in the study paper on *Public Participation in the Administrative Process*, such firms were given the status of charitable organizations and the revision to Canadian tax laws proposed by the National Voluntary Organization were adopted to allow all individuals to deduct 50% of the value of charitable gifts they made from their income tax payable (a form of tax credit).[147]

The use of public interest law firms would encourage positions to be taken not merely on behalf of some nebulous public good, but on behalf of specific "clients". The development of law firms specializing in the representation of interests which were formerly underrepresented, would at least put those interests on somewhat the same footing in terms of legal services as the traditional interests which, after all, have always had their own special interest law firms. The problem with reliance on the "private litigation" techniques, is that they may tend to force agencies into increasing adoption of the adversary method — a move which, if overemphasized, can be counterproductive to the rational resolution of complex social, economic and technological problems.

Legal aid plans could be broadened to include administrative proceedings, and the eligibility requirements could be reshaped so as to facilitate the representation of indigent, yet relevant interests in administrative proceedings. But legal aid seems most appropriately designed not to represent interest groups, but to support the interests of indigent individuals appearing before courts or social agencies. However, the criticism voiced in respect of funding to public interest law firms also applies here; increasing the involvement of lawyers may bring the worst of procedural technicality without affording fuller consideration of all relevant interests.

7. *Encouraging Articulation of All Relevant Interests*

The making available of financial support and relevant information to constituent groups, and even the provision of public interest advocates, does not ensure the articulation of *all* relevant interests. Where individuals or groups feel they have a stake in a matter before an agency, but lack the money, expertise and information required for meaningful participation, they certainly will have problems in dealing with agencies but at least they can make their presence known. However, the interests of many individuals or groups may be potentially affected without their ever being aware of the fact. This will occur when groups or individuals with important interests do not perceive that they have a stake in a matter before an agency.

It is a phenomenon of planning generally that many issues are dealt with at a stage when it is unrealistic to suppose that many relevant interests will have perceived that the matter is one that is likely to affect them. For example, in discussions of the adoption of new technology or the control of hazardous procedures or substances, those who would gain from a change in the status quo may well be in no position to express their interests. Workers who would be employed if new technology or procedures were adopted are as yet unhired. Entrepreneurs who might be involved in a new or expanded activity are unlikely to have a strong position to advocate on matters in which they are not currently involved. Potential customers of a new or expanded service are as yet unaware of what they might be offered, and so are unlikely to push for representation.

Yet these interests — potential producers or consumers, potential employers or employees — should certainly be included in a list of any agency's relevant public. In situations such as these, where an important interest may go unrepresented because the relevant groups or individuals do not perceive that they have a stake in the matter, the agency should take steps to carry out public information campaigns and animate those interest groups, so that their position can be developed and advocated before the agency. Agencies should

take a similar course where relevant individuals perceive that they have an interest but are simply not sufficiently organized or sophisticated to participate effectively in agency proceedings.

The possible techniques for apprising relevant groups and individuals of their interests in issues of concern to an agency are as varied as human imagination can devise. The literature on techniques for communicating a subject to segments of the public and involving them in that area is voluminous. Community animation, public information initiatives, and public education programs have recently become areas of specialization for those interested in stimulating public participation in government. We recommend that:

> 5.6 *agencies discharging a substantial policy planning function should utilize such techniques whenever appropriate to induce effective public participation in such planning.*

8. *Governmental Representation of Interests*

In many cases there might be no private party participation in administrative proceedings to represent an important interest, yet the decision-making authority should take the interest into account. In these circumstances it may be important to have an advocate designated by the government to represent the interest.

One technique of ensuring that interests are not left out of account is the designation by agencies of public advocacy officers. The task of such officers would be to determine and select for representation relevant interests which would otherwise be unrepresented in agency action. This technique has both positive and negative implications. On the positive side, it would seem to be a useful addition to agency proceedings to have staff specifically charged with considering what interests, apart from those regularly represented before the agency, might be affected by a decision or program. This institutionalized requirement to broaden the agency's perspec-

tive could well improve communication on a two-way basis — from unrepresented interests to the agency, and from the agency to unrepresented interests. In fact, public advocacy officers could combine a useful mix of public relations and advocacy functions. The traditional adversary role might be compromised to some extent, but that model is not necessarily the best approach to interest representation.

Aside from an agency itself providing public advocacy officers, the Department of Justice might be asked to provide lawyers to assist in the representation of those interests. This technique has been incorporated in section 54 of the *National Transportation Act*,[148] which permits the Canadian Transport Commission to apply to the Minister of Justice requesting that a lawyer from the Department of Justice represent a public interest before the Commission, but the CTC has never availed itself of this provision.

Another government agency could also be designated to represent a particular interest in administrative proceedings. One version of this can be seen in the office of the Director of Investigations for the Bureau of Competition Policy. Since 1976, section 27.1 of the *Combines Investigation Act* authorizes the Director to intervene in the proceedings of any "federal board, commission, tribunal, or person who is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product . . .".[149] The Director may make representations and call evidence in such proceedings in respect of the maintenance of competition. Implicit in this arrangement is the notion that the public's interest in proper commercial practices — as defined in the Act — may be advocated before administrative agencies by the Director. This implicit purpose is made explicit in new draft combines legislation.[150] The proposed legislation would create the office of Competition Policy Advocate who would have the powers of intervention in agency proceedings currently possessed by the Director. Section 27.1 would be amended further to clarify that the purposes of any such intervention would be to make ". . . representation in respect of any aspect of the central

purpose of Canadian public policy expressed in the preamble to this Act . . .".

From time to time it has been proposed that a special agency should be created to represent broad public interests. Such an agency could develop consistent policies over time, since it would not have to act only in response to complaints from the public. This function of making policy and setting priorities would enable the agency to build internal expertise on substantive issues as well as in relation to administrative procedures. The most comprehensive example of a government attempt to ensure improved interest representation is the Department of the Public Advocate (DPA) in the state of New Jersey. The DPA is a cabinet level agency, and the Public Advocate sits as a member of the Governor's cabinet. This department has divisions responsible for the public defender service, inmate legal services, mental health advocacy, consumer complaints and a division of Public Interest Advocacy.[151]

9. *The Need for Procedural Innovation*

The principal concern, when choosing procedural models, must be in designing a process which allows administrative agencies to function in such a way as to fulfil the ends for which they were created. It is essential, we believe, to retain a governmental perspective, recognizing the need for a process which produces decisions having a high degree of "accuracy" (relating the decision to the information bearing upon the issues), "efficiency" (effectiveness at a minimum of effort and expense) and "acceptability" (measured in terms of our political and cultural expectations about how decisions should be made).

We recommend that:

5.7 *in order to strike the best balance in interest representation in the format of agency proceedings, agencies should engage in experimentation with different proce-*

dures, forms and techniques allowing such representation. Innovation should be encouraged.

It would be counterproductive to set rules of general application concerning procedures governing broadened interest representation in agency proceedings. We therefore recommend that:

5.8 *each agency should eventually develop for itself an appropriate set of rules of procedure taking into account public interest representation.*

Who participates in the process of decision making, then, is not answered by simply asking who may be affected by the decision (i.e., the issue of fairness). The question must also be asked: who has useful information and insight to contribute to the decision and can the participation of the person be justified in the light of the capacity of the process to fulfil its governmental goals? Different situations will require different choices about who should participate and what the scope and modes of participation should be. Much will depend on the kind of issues involved. Cases involving diverse interests and varying goals such as the choice of a site for a nuclear reactor most likely require different procedural models from cases decided on a more narrow information base and dealing predominantly with individual interests, for example deportation or revocation of parole.

B. Agency Rule-making

There is one part of the administrative process in which all interested persons should have the opportunity to participate, and that is rule-making. In many cases, agencies perform a legislative function through the making of rules (official policy) subordinate to statute. These rules include regulations and other statutory instruments, directives from the executive branch of government, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC,

and so forth. Being non-elected legislative bodies operating with a degree of independence from Cabinet, there is some onus on agencies to take into account the views of their constituent publics, those institutions, groups and individuals whose interests may be affected by their decisions.

The arrangements for, and the timing of, rule-making should be such that the values of principled decision-making and participatory democracy are supported. A forum should be provided for public participation in rule-making which precedes, or at least operates externally to, agency action on specific cases. Despite the fact that some policies will continue to emerge first in the context of individual decisions or adjudicative proceedings, there should be greater efforts to separate policy considerations underlying a broad range of applications from special considerations relating to particular applications. Common policy problems should be dealt with as much as possible, within the context of a general rule. We recommend that:

> 5.9 *statutory authorities should move towards rule-making which, as much as possible, should take place in special proceedings designed for the purpose. Rules made pursuant to such proceedings would include regulations and other statutory instruments, directions from the executive branch, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC, and so forth.*

Rule-making proceedings need not involve a public hearing. We recommend, however, that:

> 5.10 *procedures for rule-making should include, at a minimum, a legal requirement that an authority provide public notice identifying draft rules being considered for adoption, allow time for interested persons to comment on them, and take into account any comments made.*

By servicing the needs associated with rule-making, we believe the administrative process can become certain and more open, and to a large extent the responsibilities of agencies can be better fulfilled. Agencies should be encouraged to

formulate their policies before applying them and to develop procedures to ensure that they are made known. It is especially important for an agency dealing with a mass of routine applications to indicate the types of requirements which must be met for applications to be acceptable to the agency.

There are, of course, problems with this suggestion. Courts have been known to strike down agency decisions based on preconceived policies, taking the view that this precludes an agency from having an open mind on specific applications. On the other hand, if the agency has been open in the development and promulgation of policy, and has given due consideration to varying its general policy in specific cases, there would seem to be no inherent defect in this approach.

By setting up independent agencies Parliament inevitably authorizes them to make policy even where no authority is granted. Parliament should recognize this and ensure that agency policy-making as much as possible duplicates the more open parliamentary process. Public accountability is an important value at stake here. We therefore recommend that:

> 5.11 *enabling legislation should, as much as possible, expressly authorize rule-making by most agencies, so that the grounds for the exercise of discretionary power will receive maximum exposure.*

It is to be hoped that the making of explicit policies by agencies will stimulate Parliament to change, or to render more detailed, the basic policy criteria in legislation. Although Parliament often gives an agency vague powers initially so as to allow it leeway to develop its operations in an effective manner, the accumulated wisdom of an agency should be translated over time into legislative principles recognized and adopted by Parliament.

As to policies it is not bound by statute to follow, an agency should be able to make such occasional adjustments as it believes warranted. The only caveat here is that changes in policy should serve, and not erode, the value of coherence resulting from reasoned decision-making. Consistency in administrative rulings is highly desirable, for the adoption of

different standards for similar situations is perceived as arbitrary. Agencies should strive to apply their own precedents as much as possible; and when an agency changes political course, it should give reasons for doing so.

Increased rule-making would likely enhance the effectiveness of the administrative process. First, it is likely to provide for more efficiency in terms of time and expense. Rule-making is an effective way of communicating agency preferences, thereby promoting compliance with agency standards. The more issues are reduced to specific rules, the fewer will need to be debated in the context of a specific application. This can narrow the scope of adjudication. An agency might justify a fairly stringent standing requirement in a licence application, for example, excluding representations on issues which have been amply considered in prior policy-making proceedings.

Second, the more policy is reduced to general rules, the more informed an applicant is of the considerations which bear upon his application. If he wishes to challenge the policy, he is at least aware of what it is beforehand. Along the same lines, the agency has been forced to take a position and is not likely to approach an application in a state of confusion about the policy governing the case.

On a broader front, administrative rule-making and public participation therein indicate a new direction which the law has taken with the growth of the modern state. It should now not only deal with vested rights before the courts, or make statements of principle or set limits to the exercise of power through parliamentary action, but focus on planned and principled action for the common good. Administrative law should ensure that those who wield public power focus on, and accommodate, public concerns.