CHAPTER EIGHT

Delegation and Consultation: How the Administrative State Functions and the Importance of Rules

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I. INTRODUCTION

In November 2016, Prime Minister Justin Trudeau made a series of controversial announcements. His government ordered the National Energy Board to allow Kinder Morgan's Trans Mountain pipeline project and Enbridge's Line 3 pipeline project to move ahead but at the same time rejected the Northern Gateway pipeline proposal. Trudeau claimed his government's decision was based on science and evidence, even bringing his own credibility into play by stating that if he thought the Kinder Morgan project was unsafe for the BC coast, he would reject it.

These choices about pipelines had to be made in the face of uncertainty and conflict. On one side was the threat that without the pipelines the economy would falter, not only in

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Alberta but across the country. On the other lay the risks from climate change, oil spills, and tanker traffic if the pipelines were built. Both sides marshalled evidence to support their predictions and were backed by strident voices.

So, who should decide how to balance these interests, and how should we resolve the uncertainty? In Canada, the classic story about how decisions are made, such as whether to approve a pipeline, how to determine if a substance is toxic, or whether to admit a refugee, is straightforward. The public elects representatives to the legislature. These representatives hold reasoned debates about policy and enact laws based on those debates. The laws enacted may be broad, such as the *Canadian Environmental Assessment Act, 2012*[1] establishing a process to review projects for their environmental impacts before they are approved. They may also be more closely tailored, such as the *Species at Risk Act*,[2] which addresses only certain species (those "at risk").

These elected representatives, however, seek all manner of policy solutions to issues in such varied areas as the environment, the economy, health care, and food labels. There is too much to do and too much to know for elected representatives, so they do what we all often do in such situations—they delegate to someone else—and this act of delegation and its exercise is the realm of administrative law. Legislators enact statutes to delegate decisions to some part of the executive, whether it is the governor in council (also known as Cabinet), a particular minister, a civil servant, or some board or other decision-maker.[3] The party who is given the power will use its knowledge and expertise to gather evidence, analyze the relevant issues, and make a reasoned decision based on the direction given by the legislators in the relevant statute. The courts are in a position to ensure that executive decision-makers follow fair procedures and stay within the powers given by statute. Behind all this lies the public who will hold their representatives accountable at voting time for any decisions made.

So, that's the classic story—the legislature delegates power to some part of the executive, which makes decisions, as empowered by its statute and informed by expertise, and is monitored by the courts. There is some truth in this simple story; however, as with much of administrative law, the actual story is more complicated.[4] Consider the Northern Gateway pipeline decision. Under the *National Energy Board Act*, Parliament did delegate the power to decide to the executive—but, specifically, delegated power to Cabinet, a body subject to political accountability and with members of diverse backgrounds, but not specific expertise in energy.[5] It granted Cabinet the power to decide "on the widest considerations of policy

1 SC 2012, c 19.

2 SC 2002, c 29.

3 See Chapter 1, A Historical Map for Administrative Law: There Be Dragons, for a discusson of who is included in the "executive."

4 For a discussion of the differences in the United States between the assumptions about how administrative law works and the actual day-to-day workings of the administrative state, see Daniel A Farber and Anne Joseph O'Connell, "The Lost World of Administrative Law" (2014) 92 Texas Law Review 1137. They see key assumptions in the United States as "that statutes delegate authority to particular agencies (rather than, for example, to the Executive Branch as a whole); that agency decisions through discrete actions are based on evidence rather than political perspectives and that we can identify the particular evidence before the agency (aka 'the record'); that certain kinds of reasons and only those reasons are allowed; that one agency, rather than many, makes the decision; and that the output of the administrative process consists of discrete, severable decisions."

5 *National Energy Board Act*, RSC 1985, c N-7, s 54.

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and public interest assessed on the basis of polycentric, subjective, or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest."[6] Parliament included an expert body as part of the decision-making process—the National Energy Board—which gathered information and was part of a public hearing process that resulted in a report to Cabinet recommending approval of the pipeline. The board established general rules for itself about how the hearings should take place, as well as rules (subject to Cabinet approval) about how pipelines are to be constructed.[7] Despite the statute and powers delegated to Cabinet to make decisions regarding the pipeline, environmental and Indigenous groups challenged the report and the Cabinet decision in court. Based on the extremely broad nature of the delegated power and the role played by Cabinet, the Federal Court of Appeal gave Cabinet the "widest margin of appreciation over these questions."[8] It found Cabinet's decision to be reasonable as "[t]o rule otherwise would be to second-guess the governor in council's appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside of the ken of the courts."[9] It did, however, find that the Cabinet had failed to fulfill its duty to consult Indigenous Peoples in its initial approval of the Northern Gateway pipeline.

The federal government's Northern Gateway pipeline decision thus involved a combination of one-off discretionary decisions (the Cabinet "may" direct the board to issue a certificate or dismiss the application), rules governing how the decision is to be made and how to construct pipelines, public hearings, and judicial review by a court of the administrative process and decision. While Parliament formally gave Cabinet the power to decide, different parties took part in the decision using different types of processes. Administrative law is about how such powers are and should be employed and ultimately whose decision prevails. While the classic story tells of a dominant legislature with strong though subordinate partners in the executive and the courts, in fact, power can shift between these bodies over time and across issues. At times in the past, the courts have taken a strong role in deciding policy, although they are ostensibly backing off such a role recently. At other times, the executive (or, more properly, some part of the executive) runs with the power given to it by the legislature beyond what would seem to be the natural limits of its mandate.

This chapter focuses on a particularly important, though underappreciated, aspect of how power is allocated under administrative law in Canada—the ability of an administrative decision-maker to make and apply rules or soft law (such as guidelines). Before going any further, however, it is important to be clear on terminology. **Rules** are legally binding requirements and, as such, the legislature has to expressly grant to the decision-maker in a statute the power to make rules.[10] In this chapter, all binding requirements are termed "rules," including rules and regulations as well as other forms of binding requirements such

6 *Gitxaala Nation v Canada*, 2016 FCA 187 at para 154 [*Gitxaala Nation*].

7 National Energy Board Rules of Practice and Procedure, 1995 (SOR/95-208) and National Energy Board Onshore Pipeline Regulations (SOR/99-294).

8 *Gitxaala Nation*, *supra* note 6 at para 155.

9 *Ibid* at para 157.

10 Both regulations and rules are legally binding and arise from a statutory power. The federal *Statutory Instruments Act*, RSC 1985, c S-22, includes both in the term "statutory instruments." The term "regulation" is generally used in statutes where there is a delegation of the power to fill in detailed requirements. Rules and regulations are also sometimes called "delegated legislation."

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as municipal by-laws and certain orders in council made by Cabinet. They cover such diverse issues as permissible levels of pollution, the required content of a prospectus, working conditions in mines, and record-keeping requirements for beekeepers.

Soft law, on the other hand, is also developed by administrative decision-makers but is not legally binding. However, as we will see, soft law, which includes guidelines or policies, plays an important role in how decisions are made, both procedurally and substantively.[11] Guidelines may, for example, structure how an immigration officer views whether an individual deserves humanitarian and compassionate consideration, potentially altering the course of the individual's life.[12] As we will discuss, soft law may or may not be made following a formal process where the public or others have input. Further, as they are not directly legally binding in that they do not directly impose a legal requirement, the power to make soft law does not have to be expressly provided for in a statute.

Both rules and soft law are intended to give general guidance on how to make future decisions. They are key to understanding how policy is set because they fill in gaps in statutes. Rules and soft law may relate to process, such as in the case of National Energy Board (NEB) where the Act empowers the board to hold hearings concerning pipelines, but allows the board broad discretion over how those hearings are to take place.[13] They may also deal with substance, such as regulations exempting certain industrial activities from having to comply with species-at-risk requirements.[14]

Rules and guidelines are in theory different than adjudication. Adjudication deals with one-off disputes: Did this individual commit insider trading? Or does this person satisfy the requirements to stay in the country as a refugee? However, rules and adjudication blend into each other, and the line between them can be hard to see. Both require expertise. Further, rules can be quite specific, such as a regulation that the tariff provisions of the *National Energy Board Act* apply to anyone who was operating a pipeline on November 2, 1959.[15] On the other hand, what may be categorized as adjudication may have broad implications, such as a pipeline hearing in which a board panel concludes that upstream greenhouse gas emissions are not part of its mandate. Adjudication is well covered in the rest of this book, but rules require separate consideration given their importance.

Before we discuss how rules and guidelines are made, we begin in Section II by discussing why we may want legislators to delegate power to others to make detailed policy decisions and, in particular, the need to take advantage of the expertise and experience of different decision-makers. We then turn in Section III to the risks raised by delegation, where the party

11 See e.g. Lorne Sossin & Charles Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines, and the Role of Law in Regulating Government" (2003) 40 Alta L Rev 867; France Houle & Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 Can Pub Admin 283.

12 See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. For a more recent example (discussed further below), see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

13 *National Energy Board Act*, RSC 1985, c N-7, s 8 and National Energy Board Rules of Practice and Procedure, 1995 (SOR 95/-208).

14 *Wildlands League v Ontario (Natural Resources and Forestry)*, 2016 ONCA 741 [*Wildlands League*] (upholding regulations under Ontario's *Species at Risk Act*, SC 2002 c 29, exempting certain activities from the prohibitions under the Act on harming species at risk or their habitat).

15 National Energy Board Order No MO-62-69, CRC, c 1055.

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delegating the power loses some control over how the resulting policy decisions actually turn out. In Section IV we look at delegation of the power to make rules and how these benefits and risks are dealt with in Canada—focusing on the key issues of how much power is delegated, to whom the power is given, what processes are used to make rules, and, finally, what type of oversight is necessary. The issue of delegation is common across all regulatory systems, but different countries balance the benefits and risks in different ways, both as a matter of where the emphasis lies in administrative law and because of the nature of the background institutions (such as whether it is a Parliamentary system, such as it is in Canada, or a Presidential system, as it is in the United States). To give a point of comparison, we will look at some of the ways the United States attempts to solve the problem of delegation. Finally, in Section V we will discuss the need to balance power across the different players and how the allocation of power changes over time. The executive generally plays a dominant role in shaping policy in many areas in Canada, with the legislature and the courts at times seeming to take subordinate roles.

II. WHY DO LEGISLATURES DELEGATE TO ADMINISTRATIVE DECISION-MAKERS?

When you examine the range of issues that are covered by rules or soft law, it becomes immediately apparent how important they are to our lives.[16] Yet despite their importance, legislatures do not make these detailed prescriptions about our lives but instead delegate this power to members of the executive, including ministers, boards and tribunals, and self-regulating bodies like the Law Society of Ontario.

Why do legislators give others the power to make such important policy decisions?[17] The primary reason legislators delegate power is *expertise*.[18] They cannot possibly have sufficient expertise to understand and evaluate all the various, detailed requirements in the vast range of areas that comprise the regulatory and welfare state. Such expertise requires education and training as well as experience in dealing with a particular issue. For example, developing the appropriate procedures for an immigration hearing may require the expertise of individuals who have been involved in many such hearings. Developing air pollution standards requires an understanding of science as well as of the manner in which industries use and dispose of various pollutants. Developing rules for a securities market requires knowledge of how these markets function, the role of the consumer, and the manner in which corporations make decisions. Although individual legislators may have some information on these

16 Taggart states that "[i]t is trite to observe that delegated legislation … often has more impact on the lives of ordinary citizens than do most full-blown Acts of Parliament." Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 UTLJ 575.

17 Such shifting of responsibility raised concerns about the constitutionality of delegated powers when it became increasingly common in the early part of the 20th century. See *ibid* for a discussion of the history of delegated legislation.

18 As a result, expertise is an important concept in administrative law. As Kate Glover discusses in Chapter 5, expertise underlies the tests related to procedural fairness and, as Audrey Macklin discusses in Chapter 11, it has been crucial in the determination of the standard of review courts use when reviewing the substance of administrative decisions.

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issues, the concern is that legislators cannot make optimal decisions in all these areas because of their lack of expertise. The argument, therefore, is that legislators should delegate the power to fill in the details to individuals or groups who do have the expertise.

There is, however, a related reason for delegation. Even if they had the expertise, legislators lack the *time and information* to make all the decisions necessary for the functioning of the current regulatory and welfare state. They lack the time to think through all the different ways in which specific provisions should be structured, relate to other provisions, and may apply in particular circumstances. For example, in regulating professions such as optometry, legislators may enact a broad provision that a member of the College of Optometry may be found guilty of professional misconduct if he or she contravenes a requirement specified in regulations and then delegate the power to make the regulation to the college itself. Even if it were possible to do so, legislators do not have the time to consider all the potential ways in which an optometrist might engage in professional misconduct.

The lack of time raises the related point that, even with time and expertise, legislators never have complete information about the future. They cannot possibly know all the new ways in which optometrists may think to act unprofessionally, or all the different pollutants that may be invented, or the different types of securities that may be developed. Legislation is therefore necessarily and unavoidably incomplete. Because legislation can be difficult and time-consuming to alter, legislators may delegate the power to fill in requirements in order to increase *flexibility*—to allow the requirements to be changed as new information arises. This flexibility is particularly important in rapidly changing areas such as environmental and securities regulation.

When delegating power, legislators have to decide whether to grant the power to adjudicate disputes between parties and/or to make rules about, for example, the process of decision-making or how policy decisions must be taken. As we discussed, the line between adjudication and rule making is not clearcut, and both require expertise. However, a key difference is that adjudication is more flexible and allows fine tailoring to different fact situations, while rules bring more certainty and consistency because of their more general nature.

These issues of expertise, time, and information also explain why there is soft law. While not legally binding, soft law such as policies and guidelines can have significant impacts on people's lives. For example, guidelines were central to *Baker*.[19] In that case, Ms Baker was an overstayer in Canada and had been ordered deported. She applied to the immigration minister to exercise his discretion under the *Immigration Act*[20] to grant humanitarian and compassionate exemptions. She was seeking to stay in Canada pending determination of her application for permanent residency.[21] As a practical matter, immigration officers (not the minister) exercised the power to grant humanitarian and compassionate exemptions in individual cases. However, the minister had issued guidelines setting out the bases on which immigration officers should decide whether the individual deserved humanitarian and compassionate consideration. Although these guidelines were not legally binding, the Supreme Court of Canada took them into account in deciding that the officer had not acted reasonably in failing to exercise the humanitarian and compassionate power in favour of Ms Baker. These guidelines were therefore important to the court in deciding the limits on

19 *Supra* note 12.

20 SC 1976-77, c 52.

21 For a discussion of the facts of *Baker*, see Kate Glover, Chapter 5.

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the discretion of the minister (delegated to an immigration officer) to be exercised under the *Immigration Act*.

Soft law has some advantages over rules. Both provide a greater measure of certainty to those who come before regulatory decision-makers. However, soft law is much more easily adaptable to changing circumstances, as making soft law is less likely to involve time-consuming and costly procedural steps than rule making. As we will discuss below, regulation-making involves mandatory procedures (such as pre-publication) whereas guidelines come in a variety of forms and result from a range of different types of processes, some of which are informal and non-public. As the Federal Court of Canada stated:

> Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of ad hoc discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis. … Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation.[22]

While soft law may have some advantages over rules from an efficiency perspective because they are easily altered, this ease of adjustment raises concerns about democratic legitimacy as it may stem from a lack of procedural safeguards.

Legislators therefore may want to set out broad policy decisions in legislation. They leave these decisions necessarily incomplete, either because they lack the expertise to make the decisions or because they lack the time and information needed to make the requirements at the time of enactment. Legislators delegate the power to make rules and soft law in order to allow others to fill in the gaps left in the legislation.

III. THE RISKS OF DELEGATION

While there are benefits to the legislature delegating power, delegation is not without its risks, nor is it necessarily always benign. Delegation raises the risk that those who are making the rules or soft law are not following the wishes or expectations of those who delegated the power. This risk arises because of a *principal–agent problem* inherent in such delegation.[23] The principal–agent problem arises in all sorts of settings when one party (the principal) gives another party (the agent) the power to undertake some task on the principal's behalf. For example, the principal–agent problem arises when you (as a principal) put your faith in

22 *Canada (Minister of Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at paras 55-56 [*Thamotharem*].

23 For a good discussion of the principal–agent problem and its relationship to administrative law, see Matthew D McCubbins, Roger G Noll & Barry R Weingast, "Administrative Procedures as Instruments of Political Control" (1987) 3 JL Econ & Org 243. See also Adrian Vermuele, "The Administrative State: Law, Democracy, and Knowledge" in Mark Tushnet, Mark Graber & Sanford Levinson, eds, *The Oxford Handbook of the US Constitution* (New York: Oxford University Press, 2015).

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a real estate agent to do the best possible job for you, but you cannot know if the agent is devoting as much time to your house as she should, as there may be other higher-valued houses that she would make more money from selling. In the administrative law context, this principal–agent problem arises because the administrative agent who makes the rules or soft law may not be following the wishes of the legislature (which can be termed "the principal").

We discussed above the reasons why legislatures (the principal) both need and wish to delegate powers to administrative decision-makers (agents) for reasons of expertise, information, and time. The risks arise from the same features that make principals want to have agents undertake the task for them. The principal's lack of expertise, information, or time means that he or she has difficulty ensuring that the agent is actually acting in his or her best interests in carrying out the task.

Two concerns arise when legislators delegate power to the executive to adjudicate or to make rules or soft law. First, the agent (for example, the party making the rules or soft law) may follow its own views and values rather than the legislators' views or values in exercising the power. Because legislators often enact legislation setting out only broad directions for policy, a ministry or agency making regulations under such legislation has considerable scope to determine the content of the detailed rules. The rule-maker may, however, have very different views from the legislators of what constitutes the appropriate rule or guideline in particular cases.[24] Legislators do not have the expertise, time, or information to monitor the content of each rule or guideline. The agent may in such cases be attempting to further the public interest but is doing so in the way it (as opposed to the legislature) believes is best.

Second, the administrative agent may not even be attempting to further the public interest; it may, instead, be seeking to further its own interest. For example, if regulated parties such as a particular industry group are able to offer some form of inducement to members of the Ontario Securities Commission (such as future job opportunities), these members may be influenced in how they make rules or soft law. Such influence by private actors is often termed "capture." Capture arises "where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest," such as through long-term relationships with regulators or provision of biased information.[25] Such capture can be by industry groups but also by groups favouring greater regulation, such as environmental groups or labour organizations. Alternatively, the agent may in some cases simply not want to expend the effort to regulate in a particular area or may seek to use its power to pursue projects or regulations that further its own ends (such as greater job security, power, or resources) rather than the public interest.

24 As discussed below, the impact of such a divergence in views will depend in part on the institutional structures in place. For example, in a Westminster system, the legislature and the executive are to some extent connected. Cabinet decides in large part how much detail is provided in legislation and how much is delegated to others to fill in. The minister is then responsible to Parliament for the resulting regulation. Although this system may provide a more direct connection and different dynamic between the rule-maker and the legislatures than the stricter separation of power in the United States, the lack of time, expertise, and information affect legislators' ability to monitor and control rule-makers in both systems.

25 Michael A Livermore & Richard L Revesz, "Regulatory Review, Capture and Agency Inaction" (2013) 101 Georgetown LJ 1337 at 1340.

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Similarly, legislators themselves may delegate in order to further their own interests, such as where they enact broad legislation and delegate rule-making powers to avoid blame for stringent regulations or to get credit for seeming to take strong action but not actually doing anything. The legislature could, for example, enact very broad, tough-sounding pollution control legislation and then delegate the details to Cabinet to work out. Cabinet could then exempt or "grandfather" certain parties, such as particularly powerful industry groups. The legislators seek credit for enacting strong legislation but also are able to satisfy politically powerful parties.[26]

This principal–agent problem arises in any delegation of power where it is difficult for the principal to monitor the actions of the agent. The extent of the problem will vary depending on the relationship between the principal and the agent. The close connection between ministers and their ministries at least provides some (though at times weak) accountability to legislators for those making rules in ministries. The problem may become worse as the power to make rules is delegated to parties more independent of government. As Taggart notes, one of the trends of most concern in delegated legislation is the involvement of private parties (including regulated parties) in making rules. For example, governments in recent years have contracted out public services to private actors, giving rise to questions about the accountability of, and control by, legislators over these actors.[27]

IV. ALLOCATING POWER AND CONTROLLING RISKS

The Canadian administrative state is built on the core principle of legislative supremacy. Elected legislators have the principal power to determine policy and to decide who makes particular decisions. As the Supreme Court of Canada has noted, there is a "foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers."[28]

So how then should these powers to set policy be allocated to take advantage of the strengths of delegation in terms of leveraging expertise, experience, and flexibility, while at the same time minimize the risks from delegation, for example, that an administrative decision-maker will make choices that do not align with what the legislature intended? As we have seen, legislators can delegate the power to adjudicate disputes or to make more general rules. We will focus in this section on delegation of the power to make rules and soft law. In order to get a sense of how power is allocated and the steps that can be taken to control the risks, we need to think about some key questions:

- How much power should be delegated?
- To whom should the power be given?
- How should the power be exercised?
- How should we monitor how the powers are being used?

26 See for example, Matthew C Stephenson, "Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts" (2006) 119 Harv L Rev 1035.

27 Taggart, *supra* note 16.

28 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 27 [*Dunsmuir*].

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These questions are all inter-related and cannot be cleanly separated. However, to get a sense of the issues around delegated rule-making power, it is useful to at least initially deal with them individually.

A. How Much Power Should Be Delegated?

One obvious question legislators must ask is how much power should they exercise themselves and how much should they delegate. An Act may grant broad powers to make regulations. Under the *Food and Drugs Act*, Cabinet "may make regulations for carrying the purposes and provisions of this Act into effect" including "prescribing standards of composition, strength, potency, purity, quality or other property of any article of food, drug, cosmetic or device."[29] Or even more broadly, under the *Competition Act*, "The Governor in Council may make such regulations as are necessary for carrying out this Act and for the efficient administration thereof."[30] Legislators may delegate the power to make rules about substance—such as the composition of food—or process. For example, under the *National Energy Board Act*, the board "may make rules respecting … the procedure for making applications, representations and complaints to the Board and the conduct of hearings before the Board, and generally the manner of conducting any business before the Board."[31]

While legislators may grant broad powers to make rules, they may at the same time attempt to structure how an Act is interpreted including how the regulation-making powers will be viewed. One way they may try to structure interpretation is by setting out the purposes of the Act. The *Competition Act*, for example, states:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[32]

Such purpose sections aid those making regulations—and to a certain extent the courts, as we will see, in overseeing the actions of administrative decision-makers—in understanding how broad regulatory powers should be used. However, statutes often do not have such clear statements, and, even when they do, the statements themselves may be very broad and bring in competing considerations.

In addition to purposes sections, legislators may place more particular limitations on how the power to make rules is to be exercised. The Harper government, for example, amended

29 RSC 1985, c F-27, s 30(1).

30 RSC 1985, c C-34, s 128(1).

31 RSC 1985, c N-7, s 8.

32 *Competition Act*, RSC 1985, c C-34, s 1.1. Others set out the underlying policy directly, such as the *Canada Transportation Act,* which declares a National Transportation Policy in the Act that "a competitive, economic and efficient national transportation that meets the highest practical safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas in Canada." See *Canada Transportation Act*, SC 1996, c 10, s 5.

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the *Fisheries Act* to constrain the power to make certain regulations.[33] Under s 35 of the Act, "No person may carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery," except in certain circumstances. One of those circumstances is that the work, undertaking, or activity is prescribed by regulation, and the minister is empowered to make regulations exempting works, undertakings, and activities from this prohibition on serious harm to fish. However, ss 6 and 6.1 of the Act state that

> 6 Before recommending to the Governor in Council that a regulation be made in respect of section 35 … the Minister shall consider the following factors:
>
> (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
>
> (b) fisheries management objectives;
>
> (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and
>
> (d) the public interest.
>
> 6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.

These provisions give greater guidance to the minister as to what types of regulations are consistent with the Act and to the courts, if called upon to review the decision, as to whether the minister has stayed within her powers.

Soft law, as we discussed, does not require a statutory basis, as it is not legally binding. However, in some cases, legislators do explicitly provide for guidelines within legislation. For example, the *Immigration and Refugee Protection Act* creates an Immigration and Refugee Board, which hears a range of reviews and appeals relating to such matters as individuals claiming refugee status or admissibility decisions for foreign nationals.[34] The Refugee Appeal Division alone resolved 3,000 appeals of refugee protection claims in 2016.[35] Given the large number of cases, the possibility exists for a huge variation in decisions. For example, when a non-Canadian is detained for an immigration infraction, the board may review the detention. On one report, board members in Ontario were almost three times more likely to release detained individuals than members in the rest of Canada.[36] One method to attempt to reduce such variance across decision-makers is through guidelines that aim to bring some uniformity in approach. The Act states that the chairperson of the board "may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in

33 RSC 1985, c F-14.

34 SC 2001, c 27.

35 Immigration and Refugee Board of Canada, *2017-18 Departmental Plan—Part III*, online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/DpPm1718partIII.aspx>.

36 Adrian Humphreys, "Immigration and Refugee Board in Ontario Less Likely to Release Detainees Than in Rest of Canada: Analysis" *National Post* (7 March 2017), online: <http://nationalpost.com/news/canada/refugee-board-in-ontario-much-less-likely-to-release-detainees-than-in-rest-of-canada-analysis/wcm/e2b9a860-4fd9-49fc-95cc-88c2379d16e4>. Note that this analysis does not appear to account for various factors that could account for differences across regions such as differences in types of cases that come before the board in each region.

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carrying out their duties."[37] The chair has issued nine guidelines covering issues from how to approach detention decisions to, most recently, promoting greater understanding of cases involving sexual orientation and gender identity and expression.[38]

The breadth of the power the legislature delegates to others will depend on a number of factors, such as the capacity of the legislature to make detailed statutory rules.[39] If the members of the legislatures have the time, resources, and expertise to make particular rules, they will be more likely to set out detailed requirements in legislation. The willingness of the legislature to delegate powers will also depend on its confidence in the party exercising the power and that there are controls on the exercise of discretion, such as what processes they have to follow and what oversight exists. We turn to these issues next.

B. To Whom Should the Power Be Given?

Legislators will be more likely to delegate broad powers to make rules the more they trust the agent making the rules to follow their policy preferences. This trust will vary according to such factors as the level of control the legislators have over those making the policy. For example, in Canada legislators may delegate rule-making powers in broad terms because Cabinet (whose members are generally part of both the legislature and the executive) may either be making the rules or have some control over the ministry or other body making the rules. This element of trust, however, raises a second type of principal–agent problem: trust between the public and elected officials. The ability of Cabinet to both set the scope of discretion and control the exercise of that discretion provides the party in power a significant ability to steer the details of policy at the expense of other elected members of the legislature.[40] How much power the legislature delegates may therefore depend on whether there is a majority or minority government. In a minority government situation, for example, the opposition parties have greater bargaining power and, thus, may be less likely to grant broad discretion to ministries controlled by the ruling party.[41]

As we have seen, legislatures often choose to delegate to Cabinet—the most powerful part of the executive. In fact, Cabinet holds the power to make a wide range of regulations under many different statutes at the federal level from the *Canada Business Corporations Act*[42] and the *Controlled Drugs and Substances Act*[43] to the *Youth Criminal Justice Act*[44] and the

37 SC 2001, c 27, s 159(1)(h).

38 The Chairperson's Guidelines for the Immigration and Refugee Board can be found at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/index.aspx>.

39 See, for example, John D Huber, Charles R Shipan & Madelaine Pfahler, "Legislatures and Statutory Control of Bureaucracy" (2001) 45 Am J Pol Sci 330 (discussing some of the factors influencing the degree of discretion granted by legislatures including bargaining costs, legislative capacity, and the availability of non-statutory means of control).

40 David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) and Taggart, *supra* note 16.

41 An example is the *Kyoto Protocol Implementation Act*, SC 2007, c 30, which was a federal private member's bill aimed at reducing the discretion of the executive in the area of climate change, ostensibly by requiring the government to develop and implement a plan to meet Canada's emission reduction commitments under the Kyoto Protocol. The Federal Court, however, held these requirements to be non-justiciable: *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, [2009] 3 FCR 201.

42 RSC 1985, c C-44.

43 SC 1996, c 19.

44 SC 2002, c 1.

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Yukon First Nations Land Claims Settlement Act.[45] At the other end of the spectrum, legislators may delegate the power to make rules to a relatively arm's-length body, such as the Office of the Superintendent of Financial Institutions, which regulates banks. The superintendent has protections under its enabling statute to foster independence such as holding office for a term of seven years (so longer than the election cycle).[46] The superintendent has the power to make numerous decisions that have significant impacts on the Canadian economy and has used its powers to make guidelines about important matters such as the capital requirements of banks.

However, even where legislators delegate power to a relatively independent body, they often ensure that Cabinet retains some control. In the case of the NEB making regulations about pipeline safety, for example, the board may make the regulations, but they are subject to approval by Cabinet. In other cases, the legislature mixes responsibility, such as in the case of the *Species at Risk Act*. Cabinet has discretion as to whether to order a species be added to the "List of Wildlife Species at Risk" under the *Species at Risk Act*.[47] Listing triggers various protections for the species and its habitat under the Act. An expert body (the Committee on the Status of Endangered Wildlife in Canada, or COSEWIC) makes a recommendation to place a species on the list. COSEWIC is an advisory panel of academics, consultants, and biologists who are elected by their peers. If COSEWIC recommends placing a species on the list, Cabinet has nine months to decide whether to add the species to the list or not. If it chooses not to add the species to the list, Cabinet must give reasons for not adding the species. If it takes no actions within the nine months, the minister must add the species to the list. Elgie calls this "constrained discretion," as Cabinet discretion is constrained by having to give reasons for going against the expert recommendations and must act within a specific period of time with the default being listing of the species.[48]

Legislatures may also attempt to indirectly control the exercise of discretion through the choice of body that is granted the discretion.[49] Consider the decision about whether to approve the Kinder Morgan pipeline. The outcome may be different or at least influenced depending on whether the decision is delegated to a body whose mandate mainly concerns energy regulation (such as the National Energy Board), which may frame the issue around trade, energy, and economic growth, as opposed to an agency whose key function is to regulate environmental issues (in which case the regulatory discourse may be shaped around scientific knowledge) or a body whose function is to bring about reconciliation between the Crown and Indigenous Peoples. Each of these bodies may have the expertise to make the rules or soft law, but their actual policy preferences may differ depending on their mission or composition.

Further, the legislature may attempt to steer how the powers are used by determining the composition of the body that is exercising the discretion, such as by specifying that the

45 SC 1994, c 34.

46 *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3d Supp), Part I, s 5.

47 *Species at Risk Act,* SC 2002, c 29, s 27 contains the requirements on amending the "Species at Risk List."

48 For a discussion of this "constrained discretion," see Stewart Elgie, "Statutory Structure and Species Survival: How constraints on Cabinet discretion affect Endangered Species Listing Outcomes" (2008) 19 J Envtl L & Prac 1.

49 David B Spence, "Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies" (1999) 28 J Legal Stud 413.

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decision-making body be composed of representatives of different groups. For example, the *Law Society Act* in Ontario provides that the Law Society of Ontario is to be governed by Convocation, which is composed of benchers. Convocation has the ability to make different types of rules such as by-laws to set the qualifications for those who may be licensed to practice law in Ontario and to make certain regulations (subject to approval of the provincial Cabinet) including about the appointment of a Complaints Resolution Commissioner.[50] The Act provides that 40 persons who are licensed to practise law in Ontario and five persons who are licensed to provide legal services shall be elected to Convocation.[51] In addition, the provincial Cabinet may appoint eight non-licensees to Convocation as lay-benchers.[52] The legislature thus may influence the content of the rules by diversifying (at least slightly) the composition of Convocation—on the assumption that a more representative Convocation is less likely to adopt self-interested or inefficient regulations. Similarly under the *Canada Labour Code*, the Canada Industrial Relations Board is to be composed of a chair and a number of vice chairs, all of whom "must have experience and expertise in industrial relations."[53] It is also to include an equal number of representatives of employees and employers. The board has broad powers to make regulations, such as rules of procedure, determination of collective bargaining units, criteria for determining whether an employee is a member of a trade union, and the conditions for valid strike or lockout votes.[54]

So, legislators paint the broad strokes of who is to exercise rule-making power. However, there is still significant work to be done to fill in the outline, work that is typically done by Cabinet. The *National Energy Board Act*, for example, establishes the National Energy Board and states that the board is to consist "of not more than nine members to be appointed by the Governor in Council."[55] It places some weak constraints on who can be a member, including that members must be Canadian citizens or permanent residents and cannot be engaged in the business of producing, selling, buying, or dealing in hydrocarbons or electricity.[56]

Beyond these weak constraints, however, the Cabinet has broad discretion over appointments to these bodies. It may then be able to steer the exercise of discretion by assigning people with particular beliefs or skills to the positions. A body composed of former energy industry executives may decide differently than a body of environmental scientists. As is discussed further by Laverne Jacobs in Chapter 7, The Dynamics of Independence, Impartiality, and Bias in the Canadian Administrative State, the Cabinet may also possibly remove members of different decision-making bodies, though often not easily. Legislators may set different constraints on removing members of boards or tribunals from office. In the case of the Canada Industrial Relations Board, for example, chairs and vice chairs are appointed for terms of five years and are to hold office during good behaviour though they are subject to removal at any time for cause.[57] National Energy Board members are appointed for terms of

50 *Law Society Act*, RSO 1990, c L.8, ss 62 and 63.
51 *Ibid*, ss 15 and 16.
52 *Ibid*, s 23.
53 *Canada Labour Code*, RSC 1985, c L-2, s 9 [*Canada Labour Code*].
54 *Ibid*, s 15.
55 RSC 1985, c N-7, s 3(1) [*National Energy Board*].
56 *Ibid*, s 3(4).
57 *Canada Labour Code*, s 9.

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seven years during good behaviour, though they "may be removed at any time by the Governor in Council on address of the Senate and House of Commons."[58] The Cabinet then can potentially use its power to appoint, and with more difficulty its power to remove, decision-makers who will make rules in line with its preferences.

Even more broadly, the legislature can attempt to keep other bodies from having any input into the exercise of discretion. One of the most important examples—discussed in earlier chapters—is of the legislature attempting to protect the decisions of its delegates from review by the courts. Legislators may insert privative clauses of various strengths into statutes that may, for example, state that the decision of a body is final and not reviewable by any court. Courts have been reticent to give full effect to such clauses.[59] However, they can have the effect of making courts more hesitant to intervene or raise the costs of individuals accessing the courts. Some Acts such as the *National Energy Board Act* add another wrinkle. The Act allows for appeals to the Federal Court of Appeal but makes it more difficult to get a hearing by requiring that an appeal receive leave of the court.[60] This screen on accessing judicial reviews raises the direct costs of launching an appeal (as there is an extra step in the process) and all other things being equal reduces the probability of a review being heard.[61]

The identity of the rule-maker therefore may be important to the resulting rules. The choice can influence the resulting rules both through the mandate of the rule-maker as well as its expertise (or lack thereof). Legislature and Cabinet may also take other measures to either enhance or hamper the attributes of the decision-maker and its processes, such as through the resources given to the rule-maker. Delegating rule-making power to an under-resourced body, even an expert one, can lead to fewer rules and/or a reliance by the body on information from parties who have a vested interest in the outcome (such as an environmental assessment body relying heavily on information from a proponent of a project).

C. How Should the Power Be Exercised?

Decisions can be influenced not only by who makes them, but also by how they are made. There is a wide range of processes that a body creating rules could follow. At one extreme, it could make the rules based on no external information and no consultation with any other group. At the other, the body could hold a full hearing on the rule, taking submissions from different groups and engaging in consultations over draft rules. Actual decision-making processes generally fall somewhere between these extremes. This section first discusses why process, and in particular public consultation, is important. It then looks at how rule-making processes are set by the legislature, the executive, and the courts as well as the important shift in process to encompass the duty to consult.

58 *National Energy Board*, s 3(2).

59 See the dicussion in Chapter 1 on discussing privative clauses.

60 *National Energy Board*, s 22(1).

61 See also the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on requiring leave to seek judicial review. These provisions concerning leave have resulted in a high variance in leave grants by particular judges in the context of refugee determinations: Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queens LJ 1.

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1. Why Consult?

Making rules or guidelines may involve many different processes to gather and analyze information and formulate appropriate rules. A key feature of these processes is the extent of public participation. Why might we want to have a process that includes public participation? The principal reason is that it may result in better rules or guidelines. First, process requirements may ensure that those making the rules or guidelines have all the relevant information. This information may, for example, be about the costs and the benefits of a particular rule, such as how much it would cost regulated parties to comply with the rule (for example, the cost of putting safety equipment on all machines to protect workers) or how the regulated activity affects the general public (such as the impact of noise pollution on their daily activities). It may also provide information on how the public and the regulated party value the changes proposed under the rule. Consider a rule limiting greenhouse gas emissions. Public consultation may provide the party making the rule with a better understanding of the extent to which the public cares about and is willing to bear costs of addressing climate change. This additional information may reduce the mistakes made by the party making the rule about either the extent of the problem or the values of the public regarding the issue.

Second, instead of merely gathering information, such processes may promote active deliberation where issues are debated and ideas exchanged. Such debate may lead not only to better understanding of the issues but also to the growth of shared values and goals. For example, deliberation on the rules about public schools in Alberta may lead to new shared values or goals for education for citizens of the province. Some jurisdictions, such as British Columbia, have experimented with "citizen juries" for developing policies. These juries are made up of a number of citizens who are given information on an issue (or set of issues) and time to debate. The hope is that the exchange of ideas will lead to a better, more considered decision on the policy.

More formal processes for making rules or guidelines therefore potentially lead to better decisions through increased information for the rule-makers or more thoughtful deliberation by citizens. Better information and deliberation may reduce the probability of mistakes by rule-makers. Further, the involvement of the public increases the openness of the process to scrutiny, which may reduce the probability that those making the rules or guidelines act on their own view of the public interest (as opposed to that of the legislators or the public). It may also reduce the ability of interest groups to pressure those making the rules or guidelines to decide in their favour (and against the interests of the public more generally).[62]

However, more formal processes are not without their risks. First, making proposals and holding hearings or consultations to obtain public input can be expensive and time-consuming. Perhaps more important, public consultation can considerably lengthen the time it takes to make a rule or guideline. Formal processes have been blamed, in part, for the inflexibility and slow-changing nature of the US regulatory system. An example of the time that consultations can add to rule making is the air pollution standards process in Ontario. In the 1970s, the Ontario government made standards setting out permissible levels of emissions of particular substances. The Ministry of the Environment decided to revise those standards in the late 1980s. It engaged in public consultations from 1987 to 1990, but was unable to obtain agreement and stopped the process. It began again in 2001 and went through a

62 See e.g. Richard Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv L Rev 1669.

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series of proposals and different efforts at getting public comments. This process continued over four years before new standards were in force.[63]

Second, while formal processes may provide transparency that reduces interest group power, the processes at the same time provide another avenue through which interest groups can pressure those making the rules or guidelines. It is important to consider who is using the process and the nature of that group's involvement. Is a particular group able to use its resources to dominate the process? Little research has been done on this issue in Canada. Third, and relatedly, those making the rules or guidelines may not actually attend to the public participation. They may simply go through the motions in the process and not substantively change their views.

Finally, public participation may be detrimental if the public itself makes mistakes. Many of the issues that are addressed through rules and guidelines are highly technical or based on complex science. Individual members of the public may make mistakes in understanding and expressing opinions about an issue. These mistakes can lead individuals to believe that a risk is greater than it actually is. For example, individuals tend to perceive the risk of a car accident to be greater if they have seen a car accident recently. Individuals may also perceive risks to be less than they actually are. For example, individuals tend to be overly optimistic about their own personal risks of accident. Most believe they have above-average skills and are less likely than average to have a workplace accident. Further, many of these mistakes concern the types of issues that involve regulatory choices that are difficult for individuals to understand. Individuals have difficulty, for example, understanding very small probabilities of catastrophic harm, such as a catastrophic shift in climate. They tend to ignore these very small probability risks even though they should be taken into account.[64]

A related concept is that individuals often do not invest the time or resources necessary to become informed on an issue. Instead, they may base their decisions on decisions of others. If some individuals believe, for example, that the use of a hormone in the production of meat is carcinogenic (even though there is no evidence to that effect), other people may adopt the same position, purely on the basis that the first individuals believed it. More may come to the same belief on the basis of the now greater number of people who believe that hormones are harmful. These "information cascades," where people come to believe something on the basis that others believe it, can lead to dramatic shifts in public opinion on issues.[65]

The possibility of such mistakes has led to different types of proposals for structuring decision-making. Some commentators have called for the isolation of regulatory decision-makers from the public because of these mistakes—that is, they argue that decisions should be made largely by experts as opposed to through "deliberation," which is likely to be based on mistaken understandings.[66] Others claim that any such isolation is inherently undemocratic and that the mistakes can be reduced through an appropriately deliberative process.[67]

63 Environmental Commissioner of Ontario, *Annual Report 2004-2005* at 55-58, online: <http://docs.assets.eco.on.ca/reports/environmental-protection/2004-2005/2004-05-AR.pdf>.

64 Richard Posner, *Catastrophe: Risk and Response* (Oxford: Oxford University Press, 2004).

65 Cass Sunstein, *Risk and Reason* (Cambridge: Cambridge University Press, 2002).

66 Cass Sunstein, *Law of Fear* (Cambridge: Cambridge University Press, 2005).

67 See Dan Kahan, "Fear of Democracy: A Cultural Evaluation of Sunstein on Risk" (2006) 119 Harv L Rev 1071.

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2. Legislating Process

Given these benefits and costs related to the process for making rules or guidelines, what have we done in Canada to address these issues? Legislatures may use either a general statute or a more specific, substantive statute to set the process by which the discretion is to be exercised. For example, Parliament enacted the *Statutory Instruments Act*, which provides some general process requirements for how rules are made.[68] The Act requires that any proposed regulation be sent to the Clerk of the Privy Council (a civil servant whose function is to advise Cabinet) so that the Clerk and the Deputy Minister of Justice can review the proposed regulation to ensure it is authorized by statute and does not unduly trespass on Charter rights. It also mandates that regulations be published in the *Canada Gazette*.[69] However, in terms of general process, the *Statutory Instruments Act* is quite thin. Further, the legislature sometimes exempts certain regulations from the requirements of the *Statutory Instruments Act*.[70] As we will see, Cabinet itself generates many of the requirements on regulation-making.

The United States has taken the opposite approach. The federal *Administrative Procedures Act* (APA) imposes significant requirements on the making of rules.[71] It establishes two main processes for making rules. There is a formal process under which there is a hearing requirement for some rules. The hearing involves almost court-like procedures including presentation of evidence and cross-examination. Most often, however, regulatory agencies use a more informal process—notice and comment rule making which, as its name suggests, involves the decision-maker giving relevant parties notice of the proposed rule and interested persons the opportunity to comment on the proposal. While it seemed more informal than a full hearing, the courts have over time increased the requirements on those making rules. Consequently, the notice and comment process is now very process-heavy and legalized. It has also led to considerable litigation about both the content and substance of rule making.[72] The key point, though, is that the United States has taken a different tack than Canada, as the legislature has set detailed procedural requirements for rule making.

In addition to general statutes such as the Canadian *Statutory Instruments Act* and the American APA, legislators may impose procedural requirements on rules or guidelines made under particular statutes. For example, under the Ontario *Securities Act*, the Ontario Securities Commission has the power to make rules about a variety of matters such as regulating the distribution of securities and public reporting by public companies.[73] The Act imposes detailed requirements on the commission to publish proposed rules, including

68 RSC 1985, c S-22.

69 Since the mid-1980s, the publication of proposed regulations in the *Canada Gazette* has been accompanied by a regulatory impact-analysis statement. The statement sets out the rationale for the regulation and attempts to measure the costs and benefits of the regulation. There is a more general statute in Quebec. See Hudson Janisch, "Further Developments with Respect to Rulemaking by Administrative Agencies" (1995) 9 Can J Admin L & Prac 1 for a general discussion of rule making in Canada.

70 See, for example, s 35(4) of the *Fisheries Act*, RSC 1985, c F-14, which specifies that regulations exempting parties from the prohibition on works, undertakings, or activities that cause serious harm to fish that are part of a fishery are themselves exempt from certain requirements of the *Statutory Instruments Act*.

71 5 USC S500 et seq.

72 See Daniel A Farber & Anne Joseph O'Connell, "The Lost World of Administrative Law" (2014) 92 Tex L Rev 1137 (discussing concerns about the US *Administrative Procedures Act*).

73 RSO 1990, c S.5, s 143 [*Ontario Securities Act*].

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publishing a statement of the purpose of the rule, a discussion of alternatives to the proposed rule and reasons for not adopting them and a description of the anticipated costs and benefits of the proposed rule. The commission then has to invite and give a reasonable opportunity to interested persons and companies to comment on the proposal and may only make a rule after "considering all representations made."[74] The Act further requires that the commission provide the rule to the minister along with any comments and the commission's response to any significant concerns and the minister then has the power to approve or reject the rule or return it to the commission for further consideration.[75]

Ontario has enacted similar requirements in other areas. For example, the Ontario *Environmental Bill of Rights*[76] creates procedural rights surrounding government decisions in the environmental area, including the making of rules. The Bill provides for the creation of an online registry of all proposed rules and instruments (including regulations, formal rules, policies, orders, and approvals). There are different notice and comment procedures for different types of decisions (with, for example, longer comment periods for decisions that may have a greater impact on the environment). The minister of the environment and climate change is to "take every reasonable step to ensure that all comments relevant to the proposal that are received as part of the public participation process … are considered when decisions about the proposal are made."[77] The government can be taken to court for failure to fulfill statutory procedural requirements.[78]

These procedures imbedded in either general or specific legislation are a way for the legislature to ensure there is a form of accountability in the making of rules or guidelines. It allows the public to know what the decision-maker is doing and potentially have some input into its decisions. The public then provides a check on the principal–agent problem more directly when the details of the policy are being worked out.

3. Executive Action

The executive, and in particular federal and provincial cabinets, may also attempt to control how rules and guidelines are made. The federal Cabinet has at times structured the making of rules and regulations through Cabinet directives, which are guidelines that are for all intents and purposes mandatory on other members of the executive. These Cabinet directives have been very controversial. In 2007 the Cabinet put in place the Cabinet Directive on

74 *Ibid*, s 143.2. See Janisch, "Further Developments re Rulemaking by Administrative Agencies," *supra* note 69, and Mullan, *supra* note 40, for a discussion of the history behind the procedural rules for the OSC.

75 *Ontario Securities Act*, s 143.3. The Act provides for similar processes if the commission makes a policy about the principles or criteria to be considered in its exercise of discretion or the manner in which the commission interprets the Act, the regulations or the rules (s 143.8).

76 SO 1993, c 28.

77 *Ibid*, s 35.

78 See for example, *Enbridge Gas Distribution Inc v Ontario Energy Board* (2005), 74 OR (3d) 147 (CA) (upholding the Ontario Energy Board's rule making under the Act, noting that if the legislature was concerned that the board engaged in "thoughtless rule-making, it would surely have imposed a requirement to give reasons for rule-making, if indeed it left the Board with any rule-making power at all" (at 160)). See also *Hanna v Ontario (AG)*, 2011 ONSC 609 (court reviewing wind power regulations under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, to determine whether the statutorily required process was followed).

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Streamlining Regulation, replacing the former Government of Canada Regulatory Policy. The Cabinet directive emphasized the importance of identifying interested and affected persons when making regulations and providing them with meaningful opportunities and information for participation. However, it also was criticized for non-transparency and an emphasis on economic factors.[79]

The Harper government replaced that directive with the Cabinet Directive on Regulatory Management in 2012. The 2012 directive includes the requirement that regulatory agencies undertake a regulatory impact analysis of any proposed regulation. The process is to include notification and consultation with any interested and affected parties and an assessment of the costs and benefits of any regulation. It also has a substantive element in that it mandates that in developing the option "to maximize net benefits," the decision-maker is to limit the burden imposed on Canadians and businesses, and in particular small businesses, as well as prevent or mitigate adverse impacts and enhance the positive impacts on health, safety, security, and the environment.

The United States has taken a similar approach but with a more formalized process. The structure of agencies and decision-makers is somewhat different. However, for those over which the president has control, various presidents have imposed requirements on rule making through executive orders, including mandating detailed cost-benefit analysis and extensive participation.[80] In fact, because the statutory process requirements under the APA are so onerous, rule-making agencies often attempt to avoid these processes, with the result that these executive orders may in practice be more influential than the statutory processes.[81]

The decision-makers themselves may also make rules or guidelines about the process they will follow in making decisions (either in adjudication or in making rules). For example, as we saw, the chair of the Immigration and Refugee Board makes guidelines to aid in adjudicating the large number of cases the board hears each year. The board also has a "Policy on the Use of Chairperson's Guidelines" that sets out the circumstances in which the chairperson will create guidelines.[82] Although the resulting guidelines are not binding, these circumstances show their potentially broad reach, as the policy states that the chairperson may make guidelines to, among other things, resolve an ambiguity in the law or inconsistency in decision-making, establish "legal interpretations as preferred positions" and set preferred approaches to the exercise of discretion. The policy on the use of guidelines sets out a process for creating guidelines, though the process is vague. The enabling legislation requires the chairperson to consult with deputy chairpersons before making guidelines.[83] The policy adds that "[o]ther consultation shall also take place, that is appropriate for the nature of the issue or matter being addressed in the guidelines, including consultation with

79 The Cabinet directive also sets out process requirements, such as analysis of the costs and benefits of proposed regulations. See Cabinet Directive on Streamlining Regulation (April 2007), online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/ri-qr/directive/directive00-eng.asp>.

80 Cass Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities" (2013) 126 Harv L Rev 1838 [Sunstein, "Office of Information"].

81 Daniel A Farber & Anne Joseph O'Connell, "The Lost World of Administrative Law" (2014) 92 Tex L Rev 1137.

82 Immigration and Refugee Board, "Policy on the Use of Chairperson's Guidelines," online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolGuideDir.aspx>.

83 IRPA, s 159(1)(h).

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the Executive Director" and that "[e]xternal consultation shall also take place, the extent of which shall be determined at the discretion of the Chairperson." There is therefore some process involved in making these guidelines, although fairly minimal and discretionary given the importance of the resulting guidelines.

4. Judicial Review of Process

So far, we have discussed the role of the legislature and executive in the making of rules and soft law. The third broad actor in administrative law is the courts. The courts are an obvious candidate for oversight of rules and soft law. In theory, they are an independent third party that can monitor or review the rules that are made. Such monitoring may keep the agent within the bounds of the power delegated to it by the legislature and control the agent where it makes mistakes, substitutes its own views of the public good, or acts in its own self-interest.

Courts may review either the process by which rules or soft law are made or the substance of the rules themselves. We will discuss judicial review of substance in the section on oversight. In terms of process, courts could potentially review how the rules were developed and create a common law set of procedures that must be followed when making rules under delegated powers. However, as Kate Glover explains in Chapter 5, there is no common law requirement of procedural fairness where a decision is of a "legislative and general" nature.[84] Because rules are typically general (that is, apply to many parties), they tend to fall under this exception to procedural fairness.

"Legislative" in this context does not necessarily mean "by the legislature." In *Att Gen of Can v Inuit Tapirisat*,[85] the Inuit Tapirisat challenged a rate increase for telephone services supplied by Bell Canada. The Canadian Radio-television and Telecommunications Commission (CRTC) implemented the rate increase following hearings in which the Inuit Tapirisat had participated. The CRTC approved the rate increase without attaching the conditions that the Inuit Tapirisat had requested. The Inuit Tapirisat appealed to the federal Cabinet under provisions of the *National Transportation Act* [86] to have the CRTC decision set aside. As part of this appeal, the CRTC made submissions to Cabinet through the Department of Communications. The Inuit Tapirisat was not allowed to review or respond to the CRTC submission. Cabinet rejected the appeal.

The Inuit Tapirisat sought judicial review, claiming it had been denied procedural fairness in its appeal because the CRTC had made submissions to which it did not have access. The Supreme Court of Canada, however, found that Cabinet did not owe the Inuit Tapirisat procedural fairness in this case. Among other things, Estey J found that setting rates was "legislative action in its purest form" because it affected many Bell subscribers.[87] He pointed to, among other things, the fact that the legislation created procedural rules for the CRTC but

84 *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653.

85 [1980] 2 SCR 735 [*Inuit Tapirisat*]. See also *Denby v Dairy Farmers of Ontario*, 2009 Carswell Ont 6924 (Sup Ct J (Div Ct)) (no procedural fairness due for creation of new dairy quota policy by the Dairy Farmers of Ontario because the decision was of a legislative nature).

86 SC 1996, c 10.

87 *Inuit Tapirisat*, *supra* note 85 at 754.

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not for Cabinet appeals. In the end, he found that there was no obligation on Cabinet to provide procedural fairness, such as notice, a hearing, or reasons.

Inuit Tapirisat shows that for a decision to be "legislative" in nature, the body making the decision does not have to be the legislature. The decision itself must have this "legislative and general" character. Although this legislative and general category is not self-evident, it appears to exclude rules aimed at a single party. For example, *Homex Realty v Wyoming*[88] involved a dispute between a municipality and a developer over who should pay the costs of installing services for a new subdivision. After extended and bitter negotiations, the municipality used its powers to make by-laws to designate the developer's subdivision plan not to be a "registered plan." It did so without notice to the developer. If the by-law was valid, the developer would have to obtain permission from the municipality to sell parts of the development and, before providing consent, the municipality would impose conditions (such as installing services). The developer challenged the by-law on the ground that the municipality did not act fairly in enacting the by-law. Estey J held that the by-law was not general in nature, but was aimed at resolving a dispute with one party—the developer. The municipality therefore owed a duty of fairness in such situations. Dickson J, in dissent, also agreed that there was duty on the municipality to provide procedural fairness. He stated, "[w]hat we have here is not a by-law of wide and general application which was to apply to all citizens of the municipality equally. Rather, it was a by-law aimed deliberately at limiting the rights of one individual."[89]

The Federal Court more recently considered the issue of the scope for procedural review of regulations in *Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*.[90] The court found that a decision to terminate the mandate of the existing body regulating immigration consultants and replace it with a new body was "essentially a 'legislative' action (whether it results from an Act of Parliament or from a regulation made by the Executive branch)."[91] The fact that the regulation was aimed at one particular body (the Canadian Society of Immigration Consultants) did not make it an "individual" decision so as to make it non-legislative in nature. As a result, the duty of fairness did not apply to the regulation-making process at issue. The court did open the door to the possibility of the application of the doctrine of legitimate expectations to the regulation-making process, but found that, even so, there was no breach of the Society's legitimate expectations.

5. Duty to Consult and Accommodate in Rule Making?

The courts then have taken only a limited role in establishing common law requirements for the process of making rules. There is, however, increasing recognition of a constitutional constraint on rule making that courts have become involved in defining—the duty to consult and accommodate Indigenous Peoples in decisions that affect them. As discussed in Chapter 3, this duty arises under s 35 of the Constitution. The Supreme Court has stated that

88 [1980] 2 SCR 1011.

89 *Ibid* at 1052. The majority and the dissent, therefore, agreed that the developer was owed a duty of fairness because the by-law was not "legislative" or general. They differed on whether they should, in their discretion, grant the remedy requested by the developer. The majority held that the court should not grant the remedy because of the actions of the developer during the negotiations and litigation.

90 2011 FC 1435, [2013] 3 FCR 488.

91 *Ibid* at para 113.

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it is "a procedural duty that arises from the honour of the Crown,"[92] although there is also an accommodation requirement that may arise in certain circumstances.[93]

The Supreme Court has stated that the duty to consult not only arises in individual decisions that impact Aboriginal rights, but also in "strategic, higher level decisions."[94] The Federal Court of Appeal recently decided that the duty to consult does not extend as far as legislative action. In *Canada (Governor General in Council) v Mikisew Cree First Nation*, the court dismissed an appeal of a Federal Court decision finding that the federal government had breached its duty to consult the Mikisew Cree in developing and introducing certain aspects of two omnibus bills amending the *Canadian Environmental Assessment Act*, the *Fisheries Act*, the *Species at Risk Act*, the *Canadian Environmental Protection Act* and the *Navigable Waters Protection Act*.[95] The Mikisew Cree argued that the amendments would reduce their ability to participate in decisions that affect their treaty rights and that the Crown should have consulted them in the developing the amendments. The court, however, found that legislative action itself does not fall within the scope of the duty to consult.

However, the courts have found that the duty to consult arises in general decisions that may affect Indigenous or treaty rights. These decisions include various types of plans such as for forest stewardship and municipal land use. Further, the Alberta Court of Appeal addressed the duty to consult in making a water management plan made under the *Water Act*.[96] Under s 9 of the *Water Act*, the minister of the environment had the discretion to require a director or other person to develop a water management plan. The lieutenant governor in council was empowered to approve any such plan under the Act. The Tsuu T'ina Nation claimed the Crown had failed to adequately consult and accommodate them in making the plan. The court found that the fact that the plan was adopted by an order in council (that is, by Cabinet) does not take it outside the scope of the duty to consult in appropriate circumstances. The court stated, "even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions."[97] The duty to consult on this view would then appear to apply to delegated legislation such as orders in council.[98]

The federal government has adopted the "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult,"[99] which provides step-by-step guidance for how federal departments and agencies are to interpret and fulfill

92 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 257 44, [2014] 2 SCR 257 at para 78.

93 See Chapter 3, Realizing Aboriginal Administrative Law.

94 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44.

95 *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311.

96 *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137; *Water Act*, RSA 2000, c W-3.

97 *Ibid* at para 55.

98 The Federal Court of Appeal in *Mikisew* distinguishes *Tsuu T'ina Nation* from the challenge to the omnibus bills noting that "the consultations in *Tsuu T'ina Nation* occurred outside the legislative context, as they were to be conducted well after the enactment of the legislation" (*supra* note 95 at para 50). See also *Adams Lake Indian Band v British Columbia*, 2011 BCSC 266.

99 Indigenous and Northern Affairs Canada, "Aboriginal Consultation and Accommodation—Updated Guidelines for Federal Officials to Fulfill the Duty to Consult," online: <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp1_6_1>. Provincial governments also have various guidelines on the duty to consult and accommodate.

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the duty. In terms of rule making, the guidelines note that "[g]overnment actions that may adversely impact Aboriginal and Treaty rights can include … change in regulation or policy that may restrict land use," indicating that the federal government may see rule making as encompassed by the duty.

6. Consultation and Interest Group Power

Much of the formal consultation in rule making in Canada established either by legislation or guideline consists of the provision of notice of the proposed rule and the opportunity for those affected to comment on the proposal. How do such "notice and comment" requirements fit with our discussion of the benefits and risks of process? They are beneficial in that they ensure that those affected have some information about the proposed rule and the regulators potentially receive information back about the costs and benefits of and trade-offs in making the rule. Further, the cost of these requirements is relatively low.

However, notice and comment requirements have a number of drawbacks. First, they can cause delay because those making the rules need to give notice of and time to comment on any proposed material change to a rule. Second, while notice and comment rules potentially open the rule-making process up to a greater range of parties, it is not clear who can participate. It may be that the comment process is dominated by certain parties and, in particular, the regulated parties. Certain groups may be able to make more detailed and effective comments if they have resources and are willing to invest in the process. If significant costs may be imposed on relatively few parties, they have greater incentive to invest resources to oppose the rule than if the benefits (or costs) are spread over a larger number of parties. Finally, notice and comment rules do not provide scope for deliberation. The comments of each individual are provided to the government, but there is no exchange of ideas between those making the comments.[100]

The process of making rules can therefore aid in controlling the actions of the "agent." It can potentially reduce mistakes in rule making by increasing the flow of information to rule-makers. It can also provide some transparency that may reduce the rule-makers' ability to make rules that do not follow the interests of legislators but rather their own idiosyncratic view of the public good or their own self-interest (such as where they seek to favour certain parties because of the rewards those parties can provide to them). Legislators may even be able to use the process to aid in ensuring that rules have a particular substantive content by altering procedures to favour certain parties.[101] For example, procedures that favour or encourage submissions by environmental groups may lead to rules that tend to favour their interests.

However, there is no necessary connection between these processes and results, or a reduction in interest group power. As noted above, much depends on the relative resources of the parties and the willingness of parties to become involved in the rule making. It also depends on the willingness of the rule-maker to take the comments of interested parties into account. Interestingly, there may be a connection between these process requirements

100 See Andrew Green, "Creating Environmentalists: Environmental Law, Identity and Commitment" (2006) 17 J Envtl L & Prac 1 for a discussion of administrative law, deliberation, and the formation of shared values or identities.

101 McCubbins, *supra* note 23.

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and substantive review by the courts. If a rule-maker follows expansive procedures (including public participation), courts may be more willing to defer to the resulting decisions (rules) because, for example, the use of the procedures is a signal of better-quality decisions.[102] Courts, however, may not know if as a result of the notice and comment process that the quality of decisions *actually* is improved and that the rule-makers *actually* do take public comments into account. Part of the answer may be to require the rule-maker to provide reasons in the hope that it will be held accountable, either by the public or by legislators. However, such accountability can be a weak constraint where time, expertise, and information costs hinder monitoring.

D. How Should We Monitor How the Powers Are Being Used?

We have so far looked at issues around the scope of the delegated power to make rules, the identity of the rule-maker and the process for making rules. A further, related issue is whether anyone reviews the proposed or actual rules or guidelines. We will look at two sources of such monitoring: legislative or executive oversight and judicial review.

1. Legislative and Executive Oversight

Instead of indirectly attempting to ensure that the power it delegates conforms to its views, the legislature could directly control the discretion by reviewing the resulting rules or soft law. The legislature itself, or more likely a committee, could examine the rules or soft law and decide whether to approve, disapprove, or amend them. Such legislative committees have been used at both the federal and the provincial level in Canada to examine regulations. For example, at the federal level, a joint committee of the Senate and House of Commons reviews regulations, although the intent is to review the form of the regulation and not the underlying reasons for it.[103] More generally, many boards or other bodies have to report annually on their activities, which provides an opportunity for the legislature to consider their rule making. Although legislative committees may review rules and regulations, there is generally no legislative oversight of soft law.

However, the use of legislative committees to review regulations only goes part of the way to solving the principal–agent problem. As a committee, it may have some time to examine regulations that are made but, absent a significant allocation of resources, still less time than the agency or ministry, particularly if there is a desire to review not only formal regulations but all rules and even soft law. Further, it exacerbates the problem of time in some ways because it creates a system where regulations go back and forth between the legislators and the agency or rule-making authority. This oversight causes delay in implementation. More importantly, however, legislative review does not solve the problems concerning expertise and information. Members of the legislature are unlikely to have

102 Matthew Stephenson, "The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations" (2006) 120 Harv L Rev 528.

103 *Statutory Instruments Act*, s 19. See Mullan, *supra* note 40, describing the federal and provincial committees that have been set up to review regulations. And Taggart, *supra* note 16 at 624, notes that the second half of the 20th century "was dominated by the attempt to enhance parliamentary safeguards against potential and actual 'abuses' of these delegated powers."

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enough information or expertise to adequately review the regulations. This lack of expertise and information is often one of the main reasons for delegation in the first place. Legislators are likely either to largely defer to the rule-making authority, in which case the purpose of review is lost, or to take a hard look and be willing to substitute their own views, in which case the potential for errors increases significantly. Finally, legislative review does little to aid in the principal–agent problem between the public and the legislature/executive.

Centralized oversight within the executive itself has perhaps greater implications. The starkest example is the Office of Information and Regulatory Affairs (OIRA) in the United States. Starting in the 1980s, most federal agencies had to submit proposed rules to OIRA, a strong central oversight body within the executive, for approval. This requirement is in addition to following the procedures under the APA discussed above. OIRA reviews proposals based on cost-benefit analysis undertaken by the agency.

The Canadian equivalent arises under the Cabinet Directive on Regulatory Management. In addition to the procedural steps discussed in the previous section, the Cabinet directive imposes further accountability requirements such as the obligation on decision-makers to develop regulatory plans and submit them to the Treasury Board. The Treasury Board is, in essence, a committee of Cabinet. The Treasury Board is also given an oversight role to review the proposed regulations and ensure the requirements of the directive have been met and to promote "regulatory reform."

Central oversight involving a separate check through a body such as Cabinet composed of elected officials may allow for greater democratic accountability for rules.[104] Further it may reduce capture, which as we noted above is where interest groups sway public powers for private purposes. Centralized oversight may reduce capture to the extent the oversight body's mandate is general in nature, rather than specific to one particular industry. Close relationships between a regulator and the regulated industry may give rise to concerns about the nature of the resulting rules. General centralized oversight may avoid such a close relationship. Centralized oversight may also result in better rules to the extent it allows the central body to help "collect widely dispersed information" both inside and outside government, and to coordinate across different government departments and decision-makers.[105]

The difficulty, of course, lies in the fact that the effort to check or review agency decisions to overcome capture may itself give rise to capture.[106] The central oversight body is another route for regulated parties or others to stop new regulatory measures or to steer them in their interests. As such, centralized review may stymie regulation, particularly as such review tends to focus on regulatory action rather than inaction.

104 For arguments in favour of centralized oversight, see Michael A Livermore & Richard L Revesz, "Regulatory Review, Capture and Agency Inaction" (2013) 101 Georgetown LJ 1337.

105 Sunstein, "Office of Information," *supra* note 80.

106 Livermore and Revesz, *supra* note 104 at 1340. See also Lisa Heinzerling, "Classical Administrative Law in the Era of Presidential Administration" (2014) 92 Tex L Rev 171 (arguing that central oversight by OIRA actually enlarges the group that can delay or stop rules that favour the public interest, and that the expansion of people involved and the lack of transparency favour regulated interests).

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2. *Judicial Review of Substance*

In addition to review by the legislature or the executive, courts may oversee the content of rules or soft law. One of the seminal cases in Canada is *Thorne's Hardware Ltd v The Queen*.[107] In that case, the federal governor in council (Cabinet) made an order in council under the *National Harbours Board Act* extending the boundaries of the Port of Saint John, New Brunswick. The applicant challenged the order in council on the basis that it was made in bad faith. It argued that Cabinet extended the boundaries in order to increase the revenues of the National Harbour Board and that such a purpose was not within the scope of Cabinet's powers under the Act. The Act provided that the boundaries of the Saint John harbour were those set out in a schedule "or as may be determined from time to time by order of the Governor in Council."[108]

The Supreme Court, however, held that while it was possible to strike down an order in council on "jurisdictional or other compelling grounds," "it would take an egregious case to warrant such action. This is not such a case."[109] It refused to examine the evidence of bad faith that the applicant provided, stating that "the government's reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social, or partisan considerations."[110] As a result, the court found against the applicant, stating that the harbour extension was an issue of "economic policy and politics" for which Cabinet "quite obviously believed [it] had reasonable grounds" and the court "cannot enquire into the validity of those beliefs."[111]

The court in *Thorne's Hardware* therefore took a strong position against examining the actions of Cabinet in making orders in council (a form of delegated rule making). However, as discussed in Chapters 11 and 12, the Supreme Court of Canada more recently established a broad default of reasonableness review following *Dunsmuir*.[112] One question was whether this reasonableness framework applied to rule making. At first, it appeared it would. In *Catalyst Paper Corp v North Cowichan (District)*, the Supreme Court undertook a reasonableness review of a municipality's by-laws, noting that,

> review of municipal bylaws must reflect the broad discretion provincial legislators traditionally accorded to municipalities engaged in delegated legislation. Municipal councils passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political, and other non-legal considerations.[113]

107 [1983] 1 SCR 106 [*Thorne's Hardware*].
108 *National Harbours Board Act*, RSC 1970, c N-8, s 7(2).
109 *Thorne's Hardware*, *supra* note 107 at 111.
110 *Ibid* at 112-13.
111 *Ibid* at 115. The Supreme Court applied the principle in *Thorne's Hardware* in refusing to allow an applicant to examine members of a city council to determine their motives in creating a board of inquiry: *Consortium Development (Clearwater) Ltd v Sarnia (City of)*, [1998] 3 SCR 3. But see *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 14 [*Catalyst Paper*] ("this attempt to maintain a clear distinction between policy and legality has not prevailed").
112 *Dunsmuir*, *supra* note 28.
113 *Catalyst Paper*, *supra* note 111 at para 19.

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In applying the reasonableness framework to its review of the by-laws, the court was very deferential to the municipality. The court noted that courts reviewing by-laws "must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws" and the test is "only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside."[114] Here the court found the substance must conform to the rationale of the statutory regime, and, given it is a legislative process, the municipality was not required to give reasons or formally explain the basis of the by-law, as it may consider objective factors but also "broader social, economic and political factors that are relevant to the electorate."[115] After briefly reviewing the process and content of the by-laws, the court held that the by-laws were within a reasonable range of outcomes.

However, the Supreme Court elected not to bring regulations under the standard of review framework in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*.[116] In that case, the court was faced with a challenge by Shoppers Drug Mart and other drug stores against Ontario government regulations aimed at prices of generic drugs. The drug stores argued that regulations were inconsistent with the purpose of the provincial drug statutes aimed at reducing drug prices, as there was no evidence the regulations would lead to lower prices.

Rather than folding the test for regulations in the standard of review analysis, as was done with by-laws in *Catalyst Paper*, the court adopted an approach in line with *Thorne's Hardware*. The court noted that regulations "benefit from a presumption of validity," which means that the challenger has to demonstrate the invalidity of the regulation and courts "where possible" are to construe the regulation so that it is valid.[117] The court adopted language from an Ontario Court of Appeal decision, which stated that challenges to regulations are "usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed."[118] The court noted that:

> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106, at pp 112-13). Nor does the vires of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives. … They must be "irrelevant," "extraneous" or "completely unrelated" to the statutory purpose to be found to be ultra vires on the basis of inconsistency with statutory purpose…. In effect, although it is possible to strike down regulations as ultra vires on this basis, as Dickson J observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p 111).[119]

The court found that, in this case, the regulations accord with the purpose of the relevant statutes which, was to control and reduce drug prices and "[w]hether they will ultimately prove to be successful or represent sound economic policy is not the issue."[120]

114 *Ibid* at para 24.
115 *Ibid* at para 30.
116 *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz Group*].
117 *Ibid* at para 25.
118 *Ibid* at para 27, citing *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)* (2002), 211 DLR (4th) 741 (Ont CA).
119 *Ibid* at para 28.
120 *Ibid* at para 39.

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Following *Katz Group*, then, courts are not to review the reasonableness of the substance of regulations in the *Dunsmuir* sense, but instead whether the regulations appear "completely unrelated" to the statutory purpose. A more recent case in Ontario dealt with the connection of regulations with the statutory purpose but also with the second important factor referred to by the court in *Katz Group*—that the maker of the regulation fulfills any condition precedent in the statute before making the regulation. In *Wildlands League v Ontario (Natural Resources and Forestry)*, the Ontario Court of Appeal dismissed a challenge by environmental groups to regulations made under Ontario's *Endangered Species Act* (ESA)[121] that exempt certain industrial activity from prohibitions on killing, harming, harassing, or capturing listed species at risk (SAR) or destroying or damaging their habitat.[122]

The Wildlands League argued first that the regulations were aimed at cost savings and as such were inconsistent with the purpose of the Act to protect and promote the recovery of SAR.[123] Following the *Katz Group* approach, the court held that, "[w]hile the motive for the regulation may well have been a concern for administrative efficiency and cost savings, the limitations, conditions, exceptions and scoping of the exemptions contained in the regulation are directed toward the protection of SAR. The regulation is therefore not 'irrelevant,' 'extraneous' or 'completely unrelated to' the purpose of the ESA and its scheme."[124]

The Wildlands League then argued that the minister, in making the regulations, had failed to observe a condition precedent. Under s 57(1) of the ESA, before making an exemption regulation, the minister must consult with an expert on the possible effects of the proposed regulation on a species if "the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species." The Wildlands League argued that the minister had failed to fulfill this condition as he did not assess the effect of the regulation on each species listed as at risk under the Act. They contended that the minister's determination under s 57 should be reviewed by the court under a standard of correctness or at least reasonableness. The court, however, took a very light hand on the necessity of observing conditions precedent, finding that:

> Where a statutory condition precedent itself requires an opinion to be reached or a determination to be made, it is beyond the scope of judicial review to assess whether the determination was objectively correct or reasonable. At the same time, it is not sufficient that the decision-maker purported to make the determination. The determination must have been made in good faith and based on the factors specified in the enabling statute.[125]

In this case, the court found evidence that the minister had considered how the regulation affected each species.

121 *Wildlands League v Ontario, supra* note 14, leave to appeal to Supreme Court of Canada denied May 5, 2017; *Endangered Species Act, 2007*, SO 2007, c 6.

122 ESA, ss 9 and 10.

123 ESA, s 1 states, "The purposes of this Act are: 1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge. 2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk. 3. To promote stewardship activities to assist in the protection and recovery of species that are at risk."

124 *Wildlands League, supra* note 14 at para 98.

125 *Ibid* at para 56.

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As a result of *Katz Group* and its progeny, it is hard to challenge regulations. Even though the substance of regulations could in theory be subject to the reasonableness standard of review under the *Dunsmuir* approach, the courts have taken an even lighter hand.[126] In part, such light review in the context of regulations may be due to the fact that in *Katz Group* the regulations were made by Cabinet, which is composed of elected officials. The courts may see less of a need to review (or legitimacy in reviewing) such regulations as there is more clearly an alternate source of accountability than the courts.[127]

However, while the courts may undertake only a light review of regulations made by Cabinet, they may be more likely to review under the *Dunsmuir* framework other types of rules made by other types of bodies such as boards or tribunals. For example, the Supreme Court in *Green v Law Society of Manitoba* recently considered whether the Law Society of Manitoba could impose rules that couple a mandatory continuing professional development program with a possible suspension for not complying with the program.[128] Under Manitoba's *Legal Profession Act*, the Law Society "must … establish standards for the education, professional responsibility and competence of persons practicing or seeking the right to practice law in Manitoba."[129] The Act provides that "[i]n addition to any specific power or requirement to make rules under this Act, the benchers may make rules to manage the society's affairs, pursue its purpose and carry out its duties."[130]

The majority of the court found that the *Dunsmuir* framework applied and that the applicable standard of review was reasonableness. It found that the rule will only be set aside if it "is one no reasonable body informed by [the relevant] factors could have [enacted]" (citing *Catalyst Paper*) meaning "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature" (citing *Catalyst Paper* and *Katz Group*). The court held that reasonableness was appropriate as, among other things, the legislature had given the Law Society a broad discretion to regulate the legal profession in the public interest and the power to "make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity."[131] In addition, the benchers are elected by and accountable to the members of the legal profession. The court found the

126 See Paul Daly, "The Scope and Meaning of Reasonableness Review" (2014-15) 52 Alta L Rev 799 (arguing against a fragmented approach to judicial review where regulations are reviewed under a different framework than other administrative decisions).

127 But see *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135, in which the court reviewed a decision by Cabinet to rescind a Canadian Transportation Agency decision regarding a fuel surcharge. The court adopted the *Dunsmuir* framework, noting that "[t]he precedents instruct that the *Dunsmuir* framework applies to administrative decision-makers generally and not just to administrative tribunals. The *Dunsmuir* framework thus is applicable to adjudicative decisions of the Governor in Council" (at para 54). It distinguished *Katz Group* by stating, "[u]nlike cases involving challenges to the vires of regulations, such as *Katz Group*…, the Governor in Council does not act in a legislative capacity when it exercises its authority under s 40 of the CTA to deal with a decision or order of the Agency" (at para 51).

128 *Green v Law Society of Manitoba*, 2017 SCC 20 [*Green*].

129 *The Legal Profession Act*, CCSM c L107, s 3(2).

130 *Ibid*, s 4(5). Section 4(6) provides that the rules are binding on the law society, the benchers, the members and everyone who practices or seeks the right to practise law under the Act.

131 *Green*, *supra* note 128 at para 22. In support of the standard of reasonableness, the court also pointed to the fact that the Law Society was acting pursuant to its home statute and has expertise in regulating the legal profession (paras 24 and 25). The dissent also applied a reasonableness standard of review.

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rules reasonable after construing the scope of the Law Society's statutory mandate to be to protect the public interest in the delivery of legal services and determining that the suspension for breach of the rules was reasonable in light of the Law Society's statutory mandate.

Courts therefore have been very deferential in reviewing the substance of rules, particularly when reviewing regulations as opposed to other forms of rules. They will of course review rules for other reasons. For example, courts will assess whether a rule violates the *Canadian Charter of Rights and Freedoms*.[132] Evan Fox-Decent and Alexander Pless examine substantive judicial review and the Charter in Chapter 13.

Courts have been even more reluctant to review soft law.[133] One exception to this reluctance is review for "fettering." Fettering occurs where a decision-maker does not exercise her discretion in a matter but instead follows a guideline or policy that she views as mandatory or binding because of its language or practical effect.[134] In *Kanthasamy v Canada (Citizenship and Immigration)*, the court reviewed a decision by an officer in Citizenship and Immigration Canada denying Kanthasamy, then a 17-year-old, an exemption on humanitarian and compassionate grounds to apply for permanent resident status from within Canada.[135] Under s 25(1) of the *Immigration and Refugee Protection Act*, the minister has the discretion to provide such an exemption "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected." The minister had put in place guidelines to aid in determining whether there were sufficient humanitarian and compassionate grounds. These guidelines stated that the applicant must show either "unusual or undeserved" or "disproportionate" hardship and set out a list of non-exhaustive factors that may be relevant (such as ties to Canada, the best interests of any children affected, and health considerations). According to the guidelines, an officer considering an application for relief under s 25(1) must assess all the facts and undertake a "global assessment" of the considerations. The officer relied on the language of the guidelines in denying Kanthasamy the exemption.

Abella J, writing for the majority, found that the guidelines are useful in indicating a reasonable interpretation of s 25(1) but, as they are not legally binding, officers should not "fetter" their discretion by treating them as mandatory requirements. Instead the officers should consider the guidelines as descriptive but consider and weigh all the relevant factors in the particular case. In this case, Abella J found that the officer failed to sufficiently consider a number of considerations such as Kanthasamy's age and mental health concerns and took the elements of the guidelines as distinct legal tests rather than as descriptive aids to fulfilling the provision's equitable purpose (para 45). As the officer failed to consider the

132 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. For a discussion of some of the grounds of review, see Mullan, *supra* note 40, Chapter 7 (including that the party making the rule must act in good faith, for a proper purpose, and on relevant considerations). On the Charter and regulations, see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

133 For example, for a discussion of soft law and the Charter, see e.g. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, and Lorne Sossin, "Discretion Unbound: Reconciling Soft Law and the Charter" (2002) 45 Can Pub Pol'y 465.

134 See e.g. *Thamotharem*, *supra* note 22 (finding a guideline specifying reverse-order questioning for refugee protection hearings did not constitute an unlawful fetter because it expressly directed panel members to consider the particular facts of each case to determine whether there should be an exception to this order of questioning).

135 *Kanthasamy*, *supra* note 12.

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evidence as a whole, Abella J found that the officer's "approach unduly fettered her discretion and, in my respectful view, led to its unreasonable exercise."[136]

In summary, courts have tended to take a fairly light review of rules and soft law (with the exception of fettering). Yet even if courts were willing to review rules or soft law substantively, is this something we should want them to do? There are three principal reasons why we may not. First, judicial review can be time-consuming and expensive. In some cases, there are only a few parties who bear the costs from a new rule, while the benefits are spread across many people. For example, if the Ontario Ministry of the Environment makes a rule limiting sulphur dioxide emissions, the rule may impose significant costs on a few industries or firms but provide benefits (in terms of lower levels of air pollution or acid rain) to a large number of people (both within and potentially outside the province). In such a case, the industries or firms affected may have the incentive to challenge the rule in court (and be willing and able to expend the resources to do so), while those who benefit individually receive too little benefit to take on the expense of becoming involved in the application. The government agency that created the rule would have to represent the interests of those whom the rule benefits. Conversely, if the costs are spread over a large number of people (for example, a rule imposing a tariff on an imported consumer product), there may be no one person who is sufficiently harmed to bear the costs of challenging the government decision. As a result, this check on government rules depends, in part, on such factors as how many parties benefit or bear costs and the resources of those parties.

The second concern with substantive judicial review is that, even if the "appropriate" challenges come before the courts, the courts often do not have the expertise to review the rules. There is therefore a large potential error cost from substantive judicial review—that is, courts might be less likely than the administrative decision-maker to determine the "right" answer.[137] Generalist courts that are "compulsorily ignorant" may not have the knowledge, experience, or technical expertise to review the often very detailed, technical rules.[138] For example, in *Katz Group*, how can a court determine the appropriateness of a rule concerning pricing structures for generic drugs or even the appropriate interpretation of the purposes of the legislation? The expertise of the ministry in these issues would aid in making these determinations. A court could defer to the decisions of the rule-maker, in which case there is no real check on the principal–agent concern. Alternatively, the court could take a hard look (potentially substituting its own view of the appropriate policy), in which case there is an increased risk that the wrong rule will be chosen. As with legislative review, the check on the principal–agent concern comes at the cost of loss of expertise.

Finally, even if the courts have the expertise to review administrative rules, this discussion of the courts' role in reviewing administrative rules has implicitly assumed that courts are attempting to determine the best possible interpretation of legislative power and the appropriateness of the challenged rule. However, judges also have their own policy

136 *Ibid* at para 60.

137 Stephenson, *supra* note 26.

138 See Taggart, *supra* note 16 at 589 (discussing the distaste of administrative law scholar John Willis for judicial review).

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preferences.[139] Judicial review, therefore, gives rise to a concern that judges' discretion over policy outcomes (the content of rules) creates a further principal–agent problem as judges seek to implement their own views of appropriate policy.[140]

The issue of the extent of desirable substantive review by courts of administrative decisions has long vexed courts, legislators, and legal scholars. This issue is more fully addressed in other chapters in this book. However, there is an interesting connection between judicial review and the discussion above of structural approaches to controlling delegated decision-making. In order to increase the likelihood that rules will align with their preferences, legislators may wish a particular agency, rather than courts, to interpret legislative provisions in making rules.[141] For example, legislators who are favourable to unions or workers may believe that a Ministry of Labour interpretation of a rule-making power is more likely to favour unions or workers than a court's interpretation. Thus, in such cases, they may seek to limit judicial review. In other cases, the legislators may believe that courts' interpretations are more likely to be in accordance with their preferences and seek to expand judicial review. Such limitation or expansion of judicial review could come, for example, through a privative clause or a right to appeal, or through other cues as to who the legislature wishes to set policy. However, given the lack of clarity in how the courts interpret their "expertise" relative to that of administrative decision-makers, legislators can never be sure that their choice of delegate (either administrative decision-maker or court) will prevail over time.[142]

V. THE SEARCH FOR A BALANCE

While adjudication tends to get more attention in administrative law, rules and soft law are critical to the operation of the administrative state. There are few areas of practice that are not at least touched, if not dominated, by them. If you are in private practice, rules and soft law will determine or at least influence many of your clients. To be effective, you need to understand how they are made and how they can be challenged to be in a position to aid your clients' interests. If you are working for the government, you may have to draft, apply, or follow a wide range of rules and soft law. You need to ensure they are developed and applied fairly and are safeguarded to the extent possible from judicial review.

139 See generally, Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) and Thomas J Miles & Cass R Sunstein, "Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron" (2006) 73 U Chicago L Rev 823. For an application of the attitudinal model of judicial decision-making in the Canadian context, see e.g. Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47:1 Osgoode Hall LJ 1.

140 See e.g. Stephenson, *supra* note 26 (discussing the possible differences in policy preferences between legislatures, agencies, and courts).

141 See e.g. *ibid* (arguing that legislators may wish to delegate the power to interpret legislation to agencies, if they wish to produce consistent interpretation across issues, or to the courts, if they wish to produce consistent interpretation across time—that is, even when other legislators are in power).

142 Adrian Vermeule, "The Delegation Lottery" (2006) 119 Harv L Rev 105 (arguing that the choice of who interprets legislation is as much of a "lottery" for legislators as is the ultimate rule or decision that a delegate makes on the basis of broad legislative provisions). See also Chapters 9 and 10 in this book discussing the Supreme Court's approach to determining the standard of review.

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Legislators delegate the power to make rules and soft law to widely different types of decision-makers—from Cabinet and individual ministers to independent boards and tribunals or self-regulating bodies. These rules and soft law give guidance on procedural matters as well as substantive issues, such as how to interpret a legislative provision or the factors to consider in exercising a discretionary power. In delegating the power to make rules and soft law, legislators gain the use of the expertise of these other parties. Further, they expand the reach of their regulatory powers because they would not otherwise have the time to make rules in all the areas that are encompassed by a modern welfare and regulatory state. However, at the same time, they relinquish a significant amount of power to parties they cannot fully control because of the information and time costs of monitoring them. This difficulty in monitoring creates the principal–agent problem.

Administrative law is in part about this struggle to take advantage of the benefits of delegation while minimizing the risks. Different countries have sought different means of resolving this struggle, and even in the same country the trade-offs made will change over time with different governments and altered contexts. In Canada, the executive has tended to hold considerable sway in developing rules and soft law. The centralized control by Cabinet has the potential to meld expertise with greater political accountability to the electorate. However, in practice such accountability depends on the issue, as the public tends to react sporadically, focusing on certain issues for a time before a different set of concerns catches its attention. Rule making is particularly technical and complex, and as such, the public may have difficulty sustaining attention over the vast array of rules and soft law that make up the modern regulatory state. In recent years, the courts have generally tended to take a more deferential role in reviewing government decisions. This deference is particularly evident in the review of rule making, especially in the review of the substance of regulations. The executive then often plays a central role in monitoring itself, and often does not execute the role very well.

The result is a system in which elected officials delegate broad powers to make rules and (directly or indirectly) soft law, but with varying degrees of oversight of their creation and use. The difficulty in challenging rules and soft law after they are made points to the need to consider getting involved in the process of creating them. These rules and soft law are central to the ultimate distribution of power—they shape who gets to stay in the country, which species are protected, and what health services people receive. Given their importance in the lives of Canadians, rules and soft law are woefully understudied and their significance underappreciated. The struggle over how to allocate decision-making powers continues.

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