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# Legitimizing Public Policy

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## **PREFACE**

The energy sector has been a dominant factor in Alberta's development and growth over the last half-century. The large capital investments and operating expenditures associated with finding and producing oil and gas have directly provided a major stimulus to the economy. But the indirect and induced impacts have been equally important. The development of many other industries supplying inputs to the energy sector, the generation of substantial export and government revenues, and the stimulus for large inflows of people have resulted in large 'multiplier' effects. In combination, these have also played a major role in shaping Alberta's 'character' which is generally distinguished by its highly educated, adjustable and entrepreneurial labour force, low unemployment and high labour force participation rates, strong work ethic and sense of self reliance, and its optimistic outlook.

In recent years the energy sector has become even more dominant and has increasingly made Alberta a key driver of the national economy. In a world with a rapidly growing demand for energy, having one of the largest concentrations of energy resources in the world might seem to translate into an assured, prosperous future. There is clearly huge potential associated with unconventional oil and gas, coal, remaining conventional resources and with alternative and renewable energy. However, translating this potential into reality will be daunting. Increasing constraints related to resource access, environmental impacts, infrastructure requirements, and availability of highly qualified people need to be addressed. Other challenges include the massive long-term investments in developing and implementing new technologies and making the right changes in the policy and regulatory framework. Indeed, the fact that relatively few nations have managed to convert resource wealth into high standards of societal welfare is a useful reminder of the magnitude of the challenges.

Alberta is in many respects at a crossroads. On the one hand complacency will almost certainly mean a dimming of the province's long-term prosperity. Declines in the conventional oil and gas sector will significantly dampen growth and prosperity. There are no other sectors of the province's economic base that could realistically expand sufficiently to offset significant declines in the dominant energy sector. On the other hand, visionary, strategic investments today can unlock non-conventional and other energy resources critical to securing a strong and prosperous long-term, sustainable future for the province.

It is in this context that ISEEE has undertaken a series of papers focused on Alberta's energy futures. The intent is to take a longer term look at the challenges, opportunities and choices and what they mean for Alberta's future.

# Legitimizing Public Policy<sup>1</sup>

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## I. Introduction

State action affecting the lives of individuals can arise without the benefit of either legislative or judicial process. Through the design and application of ministerial and administrative policy, the state makes decisions which impact significantly on the interests, concerns and rights of its citizens. It is through policy, for example, that Canadian administrators determine the conduct of immigration matters and refugee claims, the strategy for implementation of national security programs, and much of the direction and substance of economic programs such as electricity deregulation and environmental protection.<sup>2</sup> These decisions are generally made pursuant to legislation; however, they involve more than the implementation of legislative direction. They instead can, and often do, involve substantial consideration, evaluation and weighing of the interests of the citizenry. Administrative and ministerial policy-making is not simply “normatively neutral, technically competent implementation of statutes within the framework of normatively unambiguous responsibilities.”<sup>3</sup>

This paper does not suggest that the exercise of state power through ministerial or administrative policy-making is *eo ipso* legally or politically problematic. Indeed, the exercise of such power in the modern administrative state is fundamental to ensuring that the broad goals identified in legislation and adjudicated in individual cases can be translated into, and/or applied through, coherent and sensible public policy.<sup>4</sup> Rather, the concern of this paper is with the failure of the Canadian parliamentary and judicial systems to appropriately respond to the significance of executive policy-making by ensuring that policy-making follows from appropriate public process.

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<sup>1</sup> I would like to thank Richard Panton and Robert Froelich for their invaluable research assistance, the students and faculty of the University of Michigan governance seminar and participants in the Institute for Sustainable Energy, Environment and Economy (“ISEEE”) Futures Conference for their insightful comments and criticisms, and the University of Calgary and ISEEE for providing financial assistance. Any remaining errors are, of course, the sole responsibility of the author.

<sup>2</sup> For discussion of the nature of policy-making in Canada see section II, *infra* and France Houle and Lorne Sossin, “Tribunals and Policy Making” *Canadian Public Administration* (forthcoming, 2006) (hereinafter “Houle and Sossin”); Robert Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals*, (Toronto: Carswell, 1988), Vol 1, Ch. 6 (hereinafter “Macaulay and Sprague”).

<sup>3</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* transl. William Rehg (Cambridge: MIT Press, 1996), p. 440 (hereinafter *Facts and Norms*.) It is of course questionable whether administrative decision-making has ever been normatively neutral, although it certainly used to be less extensive.

<sup>4</sup> For a general consideration of the legitimacy of policy-making by administrative agencies in Canada see Houle and Sossin and Macaulay and Sprague, *supra* note 2.

Unless administrative or ministerial policy takes the form of a federal regulation, there is no general legislative requirement that policy decisions follow from any form of procedure.<sup>5</sup> Further, Canadian administrative law jurisprudence has distinguished between quasi-judicial decisions, which will be reviewed by the court to ensure procedural fairness, and decisions of ministerial policy, which will not:

A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.<sup>6</sup>

While this statement may originate in reasonable judicial deference to ministerial decision-making, its result, along with the legislative failure to subject policy-making below the level of regulations to procedural rigour, is to permit governments to make substantive decisions affecting the interests, concerns and rights of citizens without adequate process.

Using theories of deliberative democracy, this paper will argue that the failure of legislators and the courts to ensure ministerial and administrative policy-making follows from appropriate process renders the legitimacy of those policies questionable. It also makes the resulting policies less likely to be factually and normatively sound. Many administrative agencies and government ministries currently follow procedures when designing policy;<sup>7</sup> however, the sufficiency of those procedures is at best difficult to determine and at worst doubtful. And, in any event, reliance on the goodwill and good faith of individual decision-makers to establish the process of policy-making is insufficient to ensure that the resulting policies are both democratically legitimate and well-informed. Public policy-making should, and should be required to, follow from an appropriate process which ensures its legitimacy and soundness.

Part II of this paper will discuss the substance and process of policy-making in Canada. Part III will provide an overview of theories of deliberative democracy and a justification for their application to this problem. Part IV will indicate how,

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<sup>5</sup> See Part II.C, *infra*.

<sup>6</sup> *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602 at 628. Genevieve Carter describes the court's attitude as a "persistent refusal on the part of the courts to impose procedural obligations on administrative decision-makers exercising powers of a 'legislative nature' absent statutory indication to that effect" (Genevieve Carter, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence" (2003) 53 U.T.L.J. 217 at 218) (hereinafter "Carter"). Professor Carter argues that the reasoning behind this "persistent refusal" is fundamentally flawed.

<sup>7</sup> J.M. Evans, "Controlling Administrative Discretion: A Role for Rules?" *Cambridge Lectures 1991* 209 at 222.

based on the application of deliberative democracy, the process of policy-making in Canada can and should be reformed.

## II. Policy and Procedure in Canada

### A. Introduction

This section will first identify the two different types of policy-making in Canada – formal rules or regulations and informal guidelines, policies or directives – and the relative significance of each. It will then consider the processes underlying adoption of these two types of policy-making as required by legislation or judicial review, and/or as used in practice by administrative decision-makers.

### B. Policy-Making

At its most significant, Canadian policy-making takes the form of a legally binding rule or regulation.<sup>8</sup> In contrast to the United States, however, this formal policy-making is relatively less common here; it can only occur where it is legislatively permitted, and it is so permitted for few administrative agencies. Further, even agencies which have the authority to rule-make have been somewhat reluctant to exercise it.<sup>9</sup>

Having noted their relative infrequency, however, it is the case that there are legally binding policies in Canada which significantly affect the nature and extent of state action. There are rules and regulations instigated by administrative decision-makers which, *inter alia*: establish the procedure to be used when making administrative and adjudicative decisions; govern the adjudication of human rights claims; determine the nature and extent of economic regulation of activities such as telecommunications, public utilities and securities trading; and govern development and environmental regulation of industrial activity.<sup>10</sup>

<sup>8</sup> Both rules and regulations are legally binding, however, rules do not comply with the formal procedural requirements of the enactment of regulations. They gain legal force through legislative authorization but are only required to comply with any process set out in the legislation.

<sup>9</sup> Macaulay and Sprague, *supra* note 2 at 6-4.

<sup>10</sup> Houle and Sossin, *supra* note 2. See, e.g., with respect to the procedure used in making adjudicative decisions, *Alberta Energy and Utilities Board Rules of Practice*, Alta. Reg. 101/2001; with respect to the adjudication of human rights claims, *Bell Canada v Canadian Telephone Employees Association* 2003 SCC 36 and the *Canadian Human Rights Act*, R.S. 1985 c. H-6 s. 27(2) (as cited in Houle and Sossin, *ibid.*), s. 48.9(2) and the *Canadian Human Rights Tribunal Rules of Procedure (03-05-04)* available at [www.chrt-tcdp.gc.ca/pdf/rules-regles-04.pdf](http://www.chrt-tcdp.gc.ca/pdf/rules-regles-04.pdf); with respect to the extent of economic regulation, the *Ontario Securities Act* R.S.O. 1990 c. S-5 s. 143 and *General Regulations*, R.R.O. 1990, Reg. 1015; with respect to the development of industrial activity *National Energy Board Pipeline Crossing Regulations Part II* SOR/88-529 at [http://www.neb-one.gc.ca/ActsRegulations/index\\_e.htm](http://www.neb-one.gc.ca/ActsRegulations/index_e.htm); with respect to the regulation of public utilities *Transmission Regulation* AR 174/2004 available at [http://www.eub.ca/docs/requirements/actsregs/eu\\_reg\\_174\\_2004\\_transmission.pdf](http://www.eub.ca/docs/requirements/actsregs/eu_reg_174_2004_transmission.pdf); and with respect to environmental regulation, the *Environmental Assessment and Review Guidelines*

In addition to these formal rules and regulations, policy-making also can, and most commonly does, take the form of informal guidelines, directives or policy statements issued by administrative agencies or government ministries. Every administrative agency has the authority to policy-make in this way.<sup>11</sup> Such policies cannot formally bind the decision-maker – the courts have been clear that it is improper for informal policies to “fetter the discretion” of a decision-maker – however, such policies *do* have legal effect. They are treated as binding by administrative decision-makers,<sup>12</sup> and a failure to follow guidelines can subject an administrative decision to unfavourable judicial review on substantive grounds.<sup>13</sup> Further, Canadian courts have been willing to treat even non-binding policies as “prescribed by law” and thus subject to review and consideration under the *Canadian Charter of Rights and Freedoms*.<sup>14</sup> As summarized by Houle and Sossin:

[T]ribunal policies are approached with ambivalence by the courts. Policy guidelines are held not to be ‘law’ but nonetheless to be capable of imposing procedural and substantive constraints on tribunal discretion. These policies cannot purport to be treated as binding (unless legislatively mandated to bind decision-makers) and yet cannot be ignored. Guidelines shape the exercise of discretion but are also themselves discretionary decisions. The judicial treatment of tribunal policy-making is a product of the separation of powers doctrine and yet also a challenge to the logic and sustainability of those boundaries.<sup>15</sup>

Informal policy-making influences a vast range of state action in Canada. It shapes how law is interpreted and how discretion pursuant to law is exercised.<sup>16</sup> So, for example, regulators of economic activity such as the Alberta Energy and Utilities Board and the National Energy Board determine much of what is, and is not, permitted economic activity through promulgating guidelines and directives.<sup>17</sup> Further, administrative agencies making decisions about individuals

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*Order* established under s.6 of the *Department of the Environment Act* R.S., 1985, c. E-10 (as cited in Houle and Sossin, *ibid.*), and Michael M. Wenig, “The Democracy Deficit in Canadian Environmental Policy Making” (2004) *LawNow Online* (hereinafter “Wenig”).

<sup>11</sup> Macaulay and Sprague, *supra* note 2 at 6-4. Although I have not found authority for this proposition it is likely that every government ministry implementing programs under legislation also has policy-making authority.

<sup>12</sup> Houle and Sossin, *supra* note 2.

<sup>13</sup> *Ibid.* discussing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> The Alberta Energy and Utilities Board has some 71 Directives on its website which cover a wide range of activities by the energy sector. See: <http://www.eub.gov.ab.ca/bbs/default.htm>. See also the National Energy Board’s website: <http://www.neb.gc.ca>.

do so through policy-making and application. The Immigration and Refugee Board, for example, has numerous policies, including those related to how “refugee” should be defined in certain cases, and how information from informants as to the credibility of a particular refugee claim should be taken into account (or not) in adjudicating refugee claims.<sup>18</sup>

There are thus constraints on the extent to which informal policies impact state action. Those constraints are, however, more apparent than real in the majority of cases. Government decision-makers have the power to enact policies and also to follow them, subject only to what is in practice the fairly narrow prohibition against the fettering of discretion. The relative insignificance of this constraint arises particularly from the fact that, in reviewing whether a guideline is an improper fettering of discretion, the courts focus on whether the policy expressly fetters the decision-maker’s discretion; they do not consider the practical constraints on administrative decision-making which a technically non-binding policy creates.<sup>19</sup>

In sum, then, it is clear that administrative policy in Canada affects the nature and extent of state action in a wide variety of areas. It does so both formally and informally, with the former being more clearly authoritative but less common, and the latter being less clearly authoritative but both more common and practically of significant influence and importance.

### C. Process of Policy-Making

The question of how these differing types of policies are brought into being – the identification of the process of policy-making – needs to be considered in three ways. First, are there any legislative constraints on the process used in setting policy? Second, are there any judicial constraints on the process used in setting policy? Third, how, in practice, do administrative agencies set policy?

#### 1. Legislation

Most instances of policy-making in Canada are not legislatively required to comply with procedural requirements.<sup>20</sup> Where policy-making is informal, or even where it is formal but does not take place pursuant to the actual enactment of a regulation, there is no general legislative requirement in any Canadian jurisdiction that the policy in question follow from a particular process. None of the Ontario *Statutory Power Procedures Act*,<sup>21</sup> the Alberta *Administrative*

<sup>18</sup> See Houle and Sossin, *supra* note 2. See also [http://www.irb-cjsr.gc.ca/en/references/policy/policies/unsolicit\\_e.htm](http://www.irb-cjsr.gc.ca/en/references/policy/policies/unsolicit_e.htm)

<sup>19</sup> Houle and Sossin, *supra* note 2.

<sup>20</sup> Houle and Sossin, *supra* note 2: “the idea that some procedural rights to participate in the primary creation of a guidelines is not often recognized by a statute.”

<sup>21</sup> R.S.O. 1990 c. S-22 s. 3(1). The Act applies only to statutory powers which, as part of the statutory authorization, “otherwise by law” must be exercised following a hearing.

*Procedures Act*<sup>22</sup> or the *Quebec Act Respecting Administrative Justice*<sup>23</sup> requires that the enactment of administrative rules or policies follow from procedure, and no other Canadian province, nor the federal government, has enacted similar general legislation governing administrative procedure. Further, the specific statutes of at least two of the administrative agencies with significant rule-making power – the Canadian Radio-Television and Telecommunications Commission and the National Energy Board – do not speak to the process of policy-making except where it occurs through the enactment of a regulation. The governing legislation simply provides that those bodies have the power to hold public hearings on any matter where it is in the public interest to do so. That is, they are permissive with respect to the process used to enact legally binding guidelines, not directive.<sup>24</sup> It is only relatively rarely that formal rule-making is legislatively required to follow from procedure.<sup>25</sup>

Policy-making in Canada is most clearly subject to legislatively required procedure where the policy takes the form of a regulation. Where a policy is formalized through a regulation it must satisfy the general legal requirements which precede the enactment of regulations.

At the federal level the process for enacting regulations is established by the *Regulatory Policy 1999*<sup>26</sup> and under the *Statutory Instruments Act*<sup>27</sup>, and is potentially quite rigorous. The department or agency writing the regulation must have a consultative process with “stakeholders” at the drafting stage. The draft regulation which follows from this process is submitted to the Department of Justice for review for legality and is submitted to the sponsoring Minister for sign-off. The draft regulation is then received and reviewed at the Privy Council Office, and will be pre-published in the *Canada Gazette*, Part I, following which it is subject to public scrutiny and comment for a minimum 30 day period. The responsible department or agency must advise the Department of Justice as to whether any changes follow from the notice and comment period. The revised draft regulation is sent back to the Privy Council Office and to the Treasury Board Ministers for final approval.

<sup>22</sup> R.S.A. 2000 c. A-30 s. 1(c). The Act applies only to administrative action directed towards individuals.

<sup>23</sup> R.S.Q. c. J-3. The Act only applies to “individual decisions made in respect of a citizen.”

<sup>24</sup> See, *Broadcasting Act*, S.C. 1991, c. 11 s. 18(3); *National Energy Board Act* RSC 1985 c. N-7 s. 24(3).

<sup>25</sup> See, e.g., amendments to the Ontario Securities Commission legislation, the *Securities Amendment Act, 1995*. The process involves a notice and comment period and is inapplicable in circumstances of “urgency” (s. 143.2(5)): [http://www.osc.gov.on.ca/Regulation/Rulemaking/rnn\\_backgroundr.jsp](http://www.osc.gov.on.ca/Regulation/Rulemaking/rnn_backgroundr.jsp).

<sup>26</sup> Ironically, this policy is a good example of the significant impact which policy-making can have. It fundamentally alters the process for the enactment of legally binding regulations but was not itself subject to any legally required process prior to enactment. See: <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&page=publications&sub=governmentofcanadaregula>

<sup>27</sup> R.S.C. 1985, c. S-22.

It should be noted, however, that these more rigorous requirements are in significant part *not* legislative. Only the review by the Privy Council and the pre-publication in the *Canada Gazette* are required under the *Statutory Instruments Act*. The other requirements are imposed by the Regulatory Policy only.<sup>28</sup> Further, it is not clear precisely what processes would result from application of the Regulatory Policy. Stakeholder consultation can take place without having a meaningful public consultation process. Moreover, it appears that few Canadian provinces have followed the federal lead in imposing additional procedural requirements around regulation-making.<sup>29</sup> In Alberta, for example, “the cabinet (and individual ministers) may adopt regulations without first obtaining public comment on draft versions.”<sup>30</sup>

In sum, then, only a small amount of Canadian policy-making is subject to legislatively required procedure, and that procedure is, on its own terms, relatively minimal. While agencies may follow procedures prior to enacting policies they do not do so because of legislative necessity.

## 2. Judicial

The constraints imposed by the Canadian judiciary on the enactment of administrative policy without process can be summarized simply: there are none.<sup>31</sup> It is government action which the courts have treated as occurring in “a space devoid of legal principles.”<sup>32</sup> Following from the leading decision of the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat of Canada*<sup>33</sup> the courts have consistently refused to review the process by which any “legislative” decision – i.e., a decision which is general, rather than directed at the individual, and which reflects considerations of public policy and the public interest, rather than “facts pertaining to individuals or their conduct”<sup>34</sup> – is made.<sup>35</sup> The approach has been one of absolute deference: the courts do not

<sup>28</sup> Theoretically a failure to comply with this informal policy could result in a successful application for judicial review. But since such review would only be for compliance with the Policy (see footnote 37, *infra* and accompanying text), and since the Policy is so general, such a review would be unlikely to have substantive effect on the process used.

<sup>29</sup> Quebec has a similar regime to the federal government’s enacted in 1986 under the *Regulations Act*, L.R.Q. c.R-18.1. It would appear that no other province has imposed additional procedural requirements: an excellent summary of the current situation is available at <http://www.eco.on.ca/english/publicat/reform.pdf> at pp. 32-33.

<sup>30</sup> Wenig, note 10.

<sup>31</sup> The courts will impose procedure where it is required by legislation, but at that point the requirement flows from the legislation, not the courts. The doctrine of “fettering discretion,” discussed *supra*, applies to the implementation of policy in individual cases but not to the enactment of it.

<sup>32</sup> Carter, *supra* note **Error! Bookmark not defined.** at 222 and 225.

<sup>33</sup> [1980] 2 S.C.R. 735.

<sup>34</sup> Donald Brown and John Evans, *Judicial Review of Administrative Action* (Toronto: Canvasback, 2004) at 7-23 – 7-24.

<sup>35</sup> See, for example: *Canadian Association of Regulated Importers v. Canada (Attorney General)* *Regulated Importers v. Canada* (1994), 17 Admin. L.R. (2d) 121; *Thorne’s Hardware Ltd. v. Canada* [1983] 1 S.C.R. 106; *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létorneau Commission)* [1997] F.C.J. No. 985; *MacMillan Bloedel*

require procedure for a legislative or quasi-legislative decision except where it is mandated by statute,<sup>36</sup> and where it is statutorily mandated they do not review the procedure for adequacy beyond compliance with the statutory requirements.<sup>37</sup>

### 3. Administrative Practice

Despite the lack of legislative necessity or judicial oversight, Canadian administrative decision-makers do, in at least some cases, follow procedures prior to enacting policies. Determining the nature and extent of the procedures used is difficult, however. Because the procedures are designed on an *ad hoc* basis (and arguably are not even designed at all) they vary between different decision-makers and between different types of decisions. Thus, while it is possible to indicate the different types of procedures which administrative agencies use in some instances of policy-making, it is impossible to say how prevalent these procedures are, how agencies decide which procedures to use in which cases, and whether such procedures are always, or even normally, available. Further, even when we can identify the type of procedure used in a particular case – for example, the frequently relied upon “stakeholder consultation” – it is often next to impossible for an outsider to describe the process with precision. That is, someone reviewing the process after the fact may know stakeholders were “consulted,” and may even know which stakeholders were consulted, but he will not know the form that consultation took, nor “whether an administrative tribunal took into consideration the suggestions of a particular interest group or not and why.”<sup>38</sup>

The main forms of process used in policy-making by administrative decision-makers are: internal consultation in the form of full Board meetings and/or use of the expertise of agency staff; allowing challenges to the application of a policy to an individual in a particular case; broad public participation and deliberation through a public hearing on the policy issue; and consultation with stakeholders either informally or more formally through a notice and comment procedure.<sup>39</sup>

At the Alberta Energy and Utilities Board, for example, policy generally follows either from a public hearing<sup>40</sup> or from stakeholder consultation. In designing

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*Ltd. v. British Columbia (Minister of Forests)* (1984) 8 D.L.R. (4<sup>th</sup>) 33.; *Piche v. Canada (Solicitor General)* [1989] F.C.J. No. 204.

<sup>36</sup> And as discussed in the prior section, it is so mandated relatively rarely.

<sup>37</sup> Carter, *supra* note **Error! Bookmark not defined.** at 218.

<sup>38</sup> Houle and Sossin, *supra* note 2. This lack of information about the process of administrative policy-making is exacerbated by the lack of judicial scrutiny because judicial review provides, if nothing else, an opportunity to witness the nature of administrative decision-making in practice.

<sup>39</sup> *Ibid.*

<sup>40</sup> The Board tends to use a public hearing where the impact of the policy is immediate and the interests of stakeholders are in direct conflict. It has, for example, held hearings in developing the policy for resolving the competing interests of bitumen and natural gas producers in Alberta’s oil sands (see, *inter alia* AEUB General Bulletin 2003-028) and for resolving the problem of congestion in regulated electricity transmission given deregulated generation (AEUB Decision 2002-099). Both documents are available at the AEUB’s website, [www.eub.gov.ab.ca](http://www.eub.gov.ab.ca). Ironically,

Directive 036, which addresses “Drilling Blowout Prevention Requirements and Procedures,”<sup>41</sup> the Board received “input” from stakeholders, and in particular from industry representatives and “other government regulators in Canada.”<sup>42</sup> It is, however, impossible to gauge further the true extent or impact of this consultative process.<sup>43</sup> What the stakeholders said, which stakeholders took which position, what opportunity the stakeholders had to respond to each other, and the reasons for the Board’s adoption of a particular approach are not available for review.

It is, therefore, fair to say that in practice the process of administrative policy-making is by no means as procedurally empty as it could be given the absence of either legislative direction or judicial scrutiny. It is also, however, impossible to assess the breadth and depth of these procedures: how often they are used, how they are chosen, and their rigour and adequacy.

Further, despite the difficulties noted, it is possible to find examples of public decision-makers making policy without properly or meaningfully consulting with those who will be affected by it. In Alberta, for example while some aspects of energy regulation and deregulation have followed from relatively comprehensive processes, others have been so incomplete as to fail to raise serious issues of concern to affected parties and the public at large.<sup>44</sup>

#### *D. Summary of Process and Policy*

Administrative policy-making in Canada thus clearly affects the nature and extent of state action in numerous areas, ranging from general regulatory jurisdiction over economic activity to more individualized concerns such as immigration and human rights. Such policy-making may result from processes intended to facilitate administrative decision-makers’ pursuit of the public interest. However, it is impossible to state with certainty the significance or extent of such processes. They are for the most part not required by law, not subject to judicial review and are in practice difficult to assess. In addition, despite the difficulties of

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the policy which followed from the Board’s full public hearing on the transmission issue was overridden (and rejected) by the Department of Energy’s transmission policy, supported only by a non-public stakeholder consultation process (and the formalities of translation into a regulation). It was these two competing approaches to policy-making, and my concern with the procedural and substantive inadequacy of the Department of Energy’s approach, which initiated the research and analysis contained in this paper.

<sup>41</sup> This is a policy related to the conduct of drilling operations and contains numerous constraints and guidelines on industry practice.

<sup>42</sup> General Bulletin 2004-18.

<sup>43</sup> One of the most remarkable facts about the EUB’s reporting of its procedure is its statement, in Bulletin 2004-18, that one of its purposes in organizing its directives is “to better serve our customers”. The idea that an independent adjudicative and regulatory body would view industry as its “customers” indicates the democratic deficit which can arise in a regulatory regime.

<sup>44</sup> See, in this respect, the dissent of Dr. Prince in AEUB Decision U990113: Board Review of the Independent Assessment Team’s Report of Power Purchase Arrangements and Other Determinations, Phase 2, footnote 40, *supra* and Wenig, footnote 10, *supra*.

assessment, it is quite possible to find examples of procedural inadequacy in administrative policy-making.

This happenstance and undisciplined approach to the process of policy making is, as discussed further in the following sections, insufficient to ensure the democratic legitimacy and instrumental soundness of the policies which result.

### III. Deliberative Democracy

#### A. Introduction

This section will begin with a brief overview of the two primary models of deliberation theory – the theoretical model (which has its origins in Kantian metaphysics) and the instrumental model (which views deliberation as important to ensure substantively sound policy decisions). It will then discuss what deliberation consists of and how theoretical models of deliberation can be translated into practice. Finally, it will discuss some challenges to deliberation theory and defend its relevance to Canadian public policy making and administrative law.

#### B. Theoretical Model

Theories of deliberative democracy arise from a central problem of metaphysical philosophy: how does the state legitimately coerce the individual given the individual's innate right of "independence from being constrained by another's choice... insofar as [that right] can coexist with the freedom of every other in accordance with universal law?"<sup>45</sup> How can individual rights and collective action co-exist?

Drawing from the Kantian insight that legitimate laws are those which reflect the "general united will of the people,"<sup>46</sup> deliberative democracy asserts that laws can be understood as reflective of that will when those laws arise from a democratic process of public reasoning – i.e., from deliberation.<sup>47</sup> When the

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<sup>45</sup> Immanuel Kant, *Metaphysics of Morals* transl. Mary Gregor (Cambridge: Cambridge University Press, 1991) p. 63.

<sup>46</sup> *Ibid.* p. 125 – See: Jürgen Habermas, "Habermas on Law and Democracy: Critical Exchanges: Habermas's Proceduralist Paradigm of Law: Paradigms of Law" (1996) 17 *Cardozo L. Rev.* 771 at 777 (hereinafter Habermas (1996a)); Jürgen Habermas, *Between Facts and Norms: An Author's Reflections* (1999) 76 *Denv. U.L. Rev.* 937 at 940; Joshua Cohen, "Deliberation and Democratic Legitimacy" in *Deliberative Democracy: Essays on Reason and Politics* James Brohman and William Rehg Ed. (Cambridge: MIT Press, 1997) p. 72 (hereinafter "*Deliberative Democracy*"); Joshua Cohen and Joel Rogers *On Democracy* (New York: Penguin Books, 1983) p. 149; Frank Michaelman, "How Can the People Ever Make the Laws? A Critique of Deliberative Democracy" in *Deliberative Democracy* p. 162.

<sup>47</sup> Jürgen Habermas, "Popular Sovereignty as Procedure" in *Deliberative Democracy* p. 48 (hereinafter "Popular Sovereignty").

individuals who are to be subject to laws have a discussion in which participants provide reasons as to what laws can (or cannot) legitimately bind them, and after those discussions achieve consensus as to the laws which should be binding on all, then those accepted laws are legitimate.

What is required for a proper deliberative process, both in theory and under the practical constraints of the non-theoretical world, is discussed in more detail below; however, some immediate points need to be emphasized. Most importantly, deliberation is *not* pluralism. To determine the public will discussants need to do more than identify their competing interests and aggregate the preferences of the majority.<sup>48</sup> Rather, they need to reach a collective consensus as to what are proper reasons for consideration in identifying legitimate laws, and with respect to what those laws should be. This means, in turn, that each participant is assumed to be capable of more than instrumental rationality.<sup>49</sup> Participants are instead understood as able to identify and articulate reasons which take into account the perspectives of others.<sup>50</sup>

Further, deliberative democracy asserts that participants in the process do not have an exogenous set of perspectives which are incapable of being affected by the process of discussion and reason giving.<sup>51</sup> Rather, participants can and will change their position in response to reasons given by others, and in particular based on the perspectives articulated by others.<sup>52</sup>

In sum, then, theoretical models of deliberative democracy assert the necessity for, and importance of, determining the public will through a discussion in which participants identify a consensus view on legitimate reasons and on the state action which follows from those reasons. This requires participants' ability to explain, to justify, to listen and to take into account the perspectives of others. And through this "proceduralist paradigm of law"<sup>53</sup> those laws which can legitimately bind citizens, given each citizen's innate right to be independent of

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<sup>48</sup> Cass Sunstein, "The Republican Civic Tradition: Beyond the Republican Revival" (1988) 97 *Yale Law Journal* 1539 at 1554-1555 (hereinafter Sunstein (1988)).

<sup>49</sup> Joshua Cohen, "Procedure and Substance in Deliberative Democracy" in *Deliberative Democracy* p. 416.

<sup>50</sup> *Ibid.*

<sup>51</sup> Sunstein (1988) at 1554.

<sup>52</sup> *Ibid.* Some theoretical models of deliberation theory also ground deliberation's merits in its ability to "transform" and "enlighten" participants, to inculcate civic virtue (Mark Seidenfeld, "A Civic Republican Justification for the Administrative State" (1992) 105 *Harvard Law Review* 1512 at 1529 and 1534). Whether this position is or is not correct, and whether or not it can even properly be ascribed to deliberative democracy theorists in general, it is not a concept which is used in this paper. The normative and instrumental value of deliberation for legitimating state decision-making does not depend on whether the process of decision-making creates in general a more virtuous or other-centered citizenry. See also: Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking" (1997) 92 *Northwestern University Law Review* 173.

<sup>53</sup> "Popular Sovereignty" in *Deliberative Democracy*

constraints arising from the choices of others, can be distinguished from those which simply represent an arbitrary and illegitimate exercise of state power.

### *C. Instrumental Model*

Grounding of deliberative democracy also rests in the usefulness of deliberation to the formation of good public policy. Deliberation is asserted to be the best way to correct for the informational and other failures of reason which arise when groups of people try to make a decision about their collective good.

Due to a variety of causes largely related to failures to share or obtain the best information when making a decision, groups of people often make poor decisions: that is, they make decisions that they would not rationally have made if they had had the benefit of the best and most comprehensive information. For example, studies have been done<sup>54</sup> in which different groups of individuals are given a personnel decision to make. Each person in a group is given some, but not all, of the information about different candidates who can be hired. One potential candidate is clearly the best qualified; however, almost none of the groups in the experiment in fact choose that candidate. The posited reason for the failure to do so is that the participants did not share information accurately with each other. They tended to share only positive information about the candidate they liked, and to share negative information about the candidate they did not like.

Similarly, psychologists have done studies<sup>55</sup> in which participants are given a question to answer. In some cases the question is easy and in other cases it is difficult. When the participants are placed in a group in which other members of the group (who are “plants” and not participants) strongly assert erroneous conclusions, participants in the group will assert erroneous answers to the questions posed even when the questions are straightforward. These erroneous conclusions appear to arise either from the fact that people will rely on the information apparently held by others in deriving their own conclusions, or from conformity effects. More troublingly, subsequent experiments have found that the errors and conformity effect apparent from these fact-based studies can also occur where the issue is one of morality or politics.<sup>56</sup>

Cass Sunstein, a strong proponent of the instrumental significance of process, notes and discusses these and many other decision errors arising from the use of heuristics, from informational and reputational “cascades” (in which conformity effects determine conclusions rather than independent judgment) and from the tendency towards group polarization (in which groups of like-minded people become more extreme in their views). Sunstein argues that deliberation, and in

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<sup>54</sup> This example is discussed in Cass Sunstein, *Why Societies Need Dissent* (Cambridge: Harvard University Press, 2003) p. 119 (hereinafter “*Dissent*”).

<sup>55</sup> *Ibid.* pp 18-23.

<sup>56</sup> *Dissent* at 21-22.

particular deliberation designed to generate information sharing, decreases peer pressure and encourages heterogeneity of views, and is the best way to decrease the likelihood of these errors. Sunstein does not believe that deliberation is the only way to achieve these ends, and his more recent work in fact questions whether traditional deliberative models will do so.<sup>57</sup> Nevertheless, he argues strongly that it is for accomplishment of these goals – the encouragement of effective and accurate decision-making – that a thoughtfully-designed deliberation process is both good and necessary.

For the instrumentalists, deliberation may be a source of democratic legitimacy in law-making. But it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure and enhance information sharing<sup>58</sup> and lead to better decisions:

we regard public deliberation as primarily of instrumental value. It is an instrument for the making of high quality decisions. If public deliberation does not serve that purpose, it does not have value.<sup>59</sup>

#### *D. What is deliberation?*

Deliberation theory thus asserts that deliberation is necessary to ensure legitimate and well-made decisions. This leads to the obvious question: what is deliberation?

Different deliberation theorists provide somewhat different answers to the question of what constitutes true deliberation, with differences particularly evident where the basis for deliberation shifts from theoretical to instrumental grounds. There are, however, four consistently articulated criteria for a discussion to be considered fully deliberative, described here as the ‘four pillars of deliberation.’

The first pillar of deliberation is consensus. Unless the participants reach a consensus in favour of a particular outcome it cannot be said that that outcome reflects the will of all of the participants. Theorists do not agree as to whether that consensus must, in a theoretical sense, also be unanimous, but they do agree that it must reflect more than an aggregation of pre-existing preferences.<sup>60</sup>

The second pillar of deliberation is reason; deliberation requires that discussion be reason-based. What “reason” requires is not consistently articulated by

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<sup>57</sup> Cass R. Sunstein, “Group Judgments: Statistical Means, Deliberation, and Information Markets” (2005) 80 N.Y.U.L. Rev. 962 and 982.

<sup>58</sup> *Ibid.* at 1012-1021.

<sup>59</sup> Thomas Christiano, “The Significance of Public Deliberation” in *Deliberative Democracy* p. 255.

<sup>60</sup> Cohen in *Deliberative Democracy* p. 75; John Rawls, *Political Liberalism* excerpted in *Deliberative Democracy* p. 137; Gerald F. Gaus, *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London: Sage Publications Ltd., 2003) pp. 131-141 (hereinafter Gaus, 2003); but see contra: Habermas 1996b at 1484.

different theorists. It is clear, though, that it is *not* merely instrumental rationality. Reason is instead an “orientation to the common good,”<sup>61</sup> the ability to take into account in a fundamental way the perspective of others – to be compelling to discussants other than the person offering the reason;<sup>62</sup> and to articulate reasons which have some claim to universality.<sup>63</sup>

The third pillar of deliberation is rational discussion; ideal deliberation requires not just that the discussion be based on reason, but also places constraints on the manner in which the reasons provided can be discussed. Participants cannot terminate the conversation because of concerns unrelated to the reasons given – for example, a personal distaste for the person offering the reason. Further, participants must be sincere in offering reasons. Finally, the only true basis for discussion is in the reasons provided by participants – it is only the attempt to identify and develop the better argument which can govern the discussions. Within the constraints of reason and of rational discussion, however, participants have complete freedom of expression – they may question or assert any proposition.<sup>64</sup>

The fourth and final pillar of deliberation is equality; in ideal deliberation participants will be formally and substantively equal with each other. Participation is not constrained by the pre-existing distribution of resources in a society, and individuals are not treated differently based on status. Each participant is treated as equally competent to provide and respond to reasons through the deliberative process.<sup>65</sup>

Ideal deliberation, then, is rational and reason-based discussion among formally and substantively equal participants who achieve consensus on the outcome of those discussions. The question this raises, is, how do deliberation theorists think these criteria are translated into a real world setting?

Deliberation theory does not have a clear or unambiguous answer to this question, although it is generally recognized as a problem. Most theorists

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<sup>61</sup> Habermas 1996b at 1481.

<sup>62</sup> Joshua Cohen, “Procedure and Substance in Deliberative Democracy” in *Deliberative Democracy* p. 413 (hereinafter “Procedure and Substance”).

<sup>63</sup> This last requirement follows naturally from the Kantian origins of deliberation. Gaus describes this requirement (from Habermas’ original articulation of deliberative democracy) in the following terms: “Everyone who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant aspects” Gaus, 2003 p. 121.

<sup>64</sup> These details are most obviously stated by Habermas 1996b at 1519. See also Gaus 2003 121-122. I would suggest, however, that they apply also to the deliberative models adopted by others. For example, Cohen asserts the importance of reason for all aspects of deliberative discussion: “Deliberation and Democratic Legitimacy” p. 74.

<sup>65</sup> “Deliberation and Democratic Legitimacy” p. 74; Habermas 1996b at 1519; Jack Knight and James Johnson, “What Sort of Political Equality does Deliberative Democracy Require” in *Deliberative Democracy* p. 288. Sunstein also notes the distorting effects of status and inequality in creating poor decisions – in the real world some speakers will have a more powerful impact than others based not on what they say, but on who they are: *Dissent* pp. 67-8.

suggest, for example, that in practice voting or some other decision mechanism is required to allow deliberation to reach a decision even without the accomplishment of consensus.<sup>66</sup> Further, most recognize that deliberation must be representative rather than involve actual participation by all citizens, with Joshua Cohen going so far as to suggest:

Perhaps an ideal deliberative procedure is best institutionalized by ensuring well-conducted political debate among elites, thus enabling people to make informed choices among them and the views they represent.<sup>67</sup>

Furthermore, deliberative theorists in general, and certainly Habermas in particular, suggest that the project of translating deliberation into practice is ongoing; it cannot be definitely structured for all times and for all problems. It requires the ongoing “interplay of institutional imagination and cautious experimentation.”<sup>68</sup>

The form and style of deliberation is inevitably context dependent; it depends on the “empirical, technical, prudential, ethical, moral or legal” circumstances in which it takes place.<sup>69</sup> Habermas recognizes, for example, that bargaining can, in the real world, be a legitimate form of deliberation. The ability to compromise to reach solutions is at the heart of political decision-making.<sup>70</sup>

The four pillars of deliberation – consensus, reason, rationality in discussion and equality – thus do not have any definite form in practice. They are standards against which a decision-making process can be measured to determine that process’s legitimacy, but they are also standards which need to be used carefully, taking into account the practical circumstances in which the decision is being made.

To this point discussion of the content of deliberation has been focused on the normative theory of deliberation. As discussed, *supra*, however, deliberation also has an instrumental basis. And satisfaction of the instrumental requirement of deliberation requires taking into account factors beyond the four pillars of normative deliberation.<sup>71</sup> Sunstein argues that to be effective, deliberation must also be designed to encourage participants to share information with each other. He makes some practical suggestions in this regard, including: encouraging critical thinking, rewarding group success, appointing devil’s advocates for the group, enlisting high-status contrarians and effective discussion leaders, and where necessary using anonymity for participants.<sup>72</sup>

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<sup>66</sup> Habermas 1996b at 1494-5.

<sup>67</sup> “Procedure and Substance” p. 422.

<sup>68</sup> *Between Facts and Norms* p. 441.

<sup>69</sup> Habermas 1999 at 941.

<sup>70</sup> *Ibid.*

<sup>71</sup> Sunstein 2005 at 990.

<sup>72</sup> *Ibid.* at 1012-1020.

These instrumental suggestions would, as Sunstein acknowledges, also present the challenge of appropriate translation into practice;<sup>73</sup> however, they provide an additional measure against which to consider the adequacy of procedures used in developing public policy. They may not affect the assessment of the democratic legitimacy of the resulting public policy, but they certainly provide a basis for assessing whether the process used was conducive to ensuring that policy was well-informed.

*E. Challenges for deliberation theory and its relevance to Canadian public policy and administrative law.*

Deliberation theory thus posits four pillars of deliberation, and suggests that these pillars can be translated into practice, taking into account the particular circumstances and nature of a democratic decision. There are, however, major issues with deliberation theory, and in particular with its four pillars and how they can be translated into practice.

The first major issue is with respect to the requirement for consensus. As even deliberation theorists recognize, consensus is enormously difficult, and may be impossible, to achieve.<sup>74</sup> Gerald Gaus makes this point most strongly:

We do not simply live in a society with plural understandings of the good life, but with diverse and conflicting ideologies that insist their competitors are *deeply* misguided. None of this is to say that political life in an ideologically fractured society is impossible. It does, however, strain beyond plausibility the claim that politics ought – even ideally – to aim at actual consensus.<sup>75</sup>

And if consensus is impossible – “even ideally” – then how can it be a grounding criterion for political discussion?

Further, as has also been noted by writers within deliberation theory, accomplishment of equality is something which has not yet been achieved in most of the world, and certainly was not in existence at the time countries whose political systems are claimed to be based on deliberation originated. Given that that is the case, it seems problematic to either find democratic legitimacy in societies based on deliberation where the conditions of equality have never been

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<sup>73</sup> *Ibid.* at 1020.

<sup>74</sup> Most theorists accept that there have to be decision mechanisms to resolve conflict. Some, such as Habermas, see these mechanisms simply as an interruption in the deliberative process pending a return to attempting to achieve actual consensus (Habermas 1996b at 1494-5). Others, such as Rawls, seem to accept that a plurality of views is the reality of the modern world, and that a “political rule of action” is always required: *Political Liberalism* in *Deliberative Democracy* p. 137. See also footnote 60, *supra*.

<sup>75</sup> Gaus 2003 p. 140.

met, or to suggest that such societies can ever achieve legitimacy through deliberative processes.<sup>76</sup>

Perhaps most fundamentally, however, as the discussion above makes clear, deliberation is based strongly on a metaphysical conception of reason. Whether or not this conception is empirically or philosophically supportable, it cannot be disputed that it is one roundly rejected by economists, post-modernists and many feminists. It does not take into account the situational nature of most decisions, and the enormous and perhaps impossible challenge posed for individuals seeking to separate themselves from their own circumstances and experiences in analyzing the appropriate response to a problem.<sup>77</sup> And if reasoning is always situational, how can a society require a universalized reasoning process as a precursor to legitimate political decision-making?

Finally, even if the four pillars of deliberation can be defended from these challenges, the translation of deliberation into practice is, as discussed above, not a matter on which deliberation theory itself gives much guidance. It may be reasonable to suggest that deliberation must be translated into practice by taking into account the “empirical, technical, prudential, ethical, moral or legal” circumstances in which the decision is to take place, but this observation is more obvious than it is helpful. Once the four pillars of deliberation are recognized as incapable of perfect translation into practice, then some other concept or concepts will be required in order to determine an appropriate process for state decision-making in particular circumstances. Deliberative democracy itself, at least in its non-instrumental form, does not provide much indication as to what those concepts may be.

Given these fundamental objections, what justification can this paper present in support of its use of deliberative democracy?

While there are, in the author’s view, no indisputable responses to these objections, there are nonetheless good reasons for using the analysis of deliberative democracy to illuminate the problem of process in policy-making. The most important of these is that, except for those philosophers who are doctrinaire supporters of a particular approach, there are no theories which

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<sup>76</sup> See: Jon Elster, “The Market and the Forum: Three Varieties of Political Theory” in *Deliberative Democracy*. Elster makes the point (at page 18) that if deliberation requires a society free of “political and economic domination,” this creates problems for deliberation in any society which does not satisfy this criterion: “If, as suggested by Habermas, free and rational discussion will only be possible in a society that has abolished political and economic domination, it is by no means obvious that abolition can be brought about by rational argumentation”.

<sup>77</sup> Note that the feminist and economist objections to “reason” might have different bases. For the economist the problem is the impossibility of the non-self-interested perspective. For (some) feminists the problem is that the emphasis on reason privileges a particular way of ordering and thinking about the world, which has a much less obvious claim to validity than these theories suggest: Carol Gilligan *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge: Harvard University Press, 1982). Gilligan is discussing Kohlberg’s stages of moral reasoning and not metaphysical reason *per se*, but I think the central argument is the same.

cannot be subject to the same sort of fundamental criticism. Take, for example, political economy, which can also be used effectively to critique the process of public policy-making. Political economy rests on the idea that all humans are instrumentally rational – they will act in the way most likely to maximize their own self-interest. Again, however empirically or philosophically supportable that conception of human action is, it is clearly as hotly disputed as the metaphysical conception of reason, and can no more provide an uncontroversial basis for analysis than deliberative democracy can. Similarly, the feminist “ethics of care” can be criticized as empirically non-demonstrable and as in fact indistinguishable from a properly understood metaphysical conception of reason.<sup>78</sup> Further, and of particular importance given the subject-matter of this paper, careful analysis of administrative procedures in practice does not support the empirical validity of any single theory of government regulation.<sup>79</sup>

This position suggests two alternatives: either the use of theory should be abandoned except by those for whom it is incontrovertibly compelling, or theory should be used where, after acknowledging its arguable weaknesses, its strengths can nonetheless provide insight into, or clarification of, a particular problem. This paper asserts the latter basis for using deliberative democracy – deliberative democracy does have weaknesses, and those weaknesses can only be refuted by, in the author’s view, taking a doctrinaire approach to the theory. But that it has such weaknesses should not render its strengths invisible. It is its strengths which make it compelling for analysis of policy and procedure.<sup>80</sup>

What are the strengths of the deliberative model? First, deliberation theory’s primary focus is on the question of procedure – on what procedures are fair, effective and respectful of equality. Even if its answer to the question of what constitutes fair and effective procedure can be criticized, there are few other theories which engage so thoroughly with that issue.<sup>81</sup> That engagement makes deliberation theory helpful in considering what, in the context of policy-making, constitutes fair and effective procedure. And since it is that question which this paper is considering, deliberation theory is a justifiable part of the consideration of the question’s answer.

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<sup>78</sup> Steven Hartwell, “Promoting Moral Development Through Experiential Teaching” (1994-95), 1 *Clinical L. Rev.* 505 at 519-522.

<sup>79</sup> Steven P. Croley, “Theories of Regulation: Incorporating the Administrative Process” (1998) 98 *Columbia Law Review* 1 at 167.

<sup>80</sup> This weak defence of the theory will no doubt be unsatisfactory to some. I would suggest, however, that a weak defence is better than an implausible one. Further, I would note that this weak defence properly allows other theories to be taken into account in analyzing administrative procedure. In my view development of administrative procedures should take into account a multiplicity of theoretical perspectives. The perspectives are to a great extent theoretically incompatible but they are not practically incompatible, and it is their practical significance which is important here.

<sup>81</sup> Pluralism addresses this question directly and, arguably, political economy addresses it indirectly.

It is noted in this respect that one of the challenges which has traditionally faced the courts in reviewing “legislative” type decisions for procedural adequacy is the recognition by the court that the procedural norms of judicial decision-making apply only awkwardly, if at all, to legislative type decisions.<sup>82</sup> This recognition is appropriate, and means that if courts are to undertake consideration of the appropriate process for legislative decisions, different procedural norms need to be articulated. Deliberative democracy, with its focus on how legislative decisions are properly made, assists in this task.

Second, while the four pillars of deliberation can be criticized, and will be simply unconvincing to some, they do provide directional orientation to the design of procedure. If my friend lives to the north of me, and I am walking to her house through city streets, I may never be able to walk due north; however, having a compass with “north” on it will at least help me know in general which streets are the best ones to take. The four pillars of deliberation are the “north” of political decision-making. Consideration of the interests of others, ensuring that rules can be fairly applied in different circumstances, allowing for equal participation, and attempting to achieve consensus about state action may all be impossible to achieve and may not be the only relevant factors for consideration. But the avenues of procedure which head in the general direction of those outcomes are better to take than ones which do not.

This use of the pillars of deliberation as directional orientation for procedural design also responds to the objection that deliberative democracy does not provide sufficient guidance as to how to deliberate in practical circumstances. It suggests that procedures which are orientated towards accomplishing the goals of reason, rational discussion, consensus and equality of discussants are better than those which are not orientated towards these objectives. Thus, for example, a consultative process for the design of ministerial or administrative policy which only hears from parties with an interest in the outcome, hears only from those parties certain to promote self-interest rather than consideration of others or the public good, does not acknowledge or promote equality of participation, and which in no way aims for consensus, is unlikely to withstand the scrutiny of deliberative democracy, even taking into account the practical circumstances in which it was made.<sup>83</sup>

Third, this directional orientation of deliberative democracy coincides with the self-concept of Canadian administrative law. Canadian administrative law and practice does not conceive of itself as simply an attempt to aggregate the preferences of the majority, or as driven by the self-interest of the participants in the process. Rather, it has an internal morality orientated towards fairness,

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<sup>82</sup> Carter, *supra* note **Error! Bookmark not defined.** at 244.

<sup>83</sup> See, e.g., footnote 44, *supra* and accompanying text.

reasonableness and the protection of human dignity.<sup>84</sup> While no doubt those most critical of deliberative democracy would also criticize this self-concept, there is merit in using a theory which respects the basic tenets of Canadian administrative law to elucidate flaws in Canadian administrative practice.<sup>85</sup>

Finally, the instrumental branch of deliberative democracy – which looks at empirical research on decision-making and considers how, based on that research, political decisions can be more accurate – does not suffer from the conceptual weaknesses of the theoretical branch. The philosophy and approach of instrumental deliberation is empirical and pragmatic, and in that way it can be used to consider whether process is desirable and how an effective process can be structured. It can be used in conjunction with an analysis of how a procedure orientates towards the pillars of deliberation to assess the legitimacy and effectiveness of a particular process.

#### **IV. Deliberative Democracy and Administrative Procedure**

##### *A. Introduction*

This section of the paper will first consider the extent to which the current approach to administrative policy-making in Canada satisfies, in the qualified way just articulated, the tenets of deliberative democracy. After arguing that it does not, it will then outline how the process of policy-making can and should be changed so that it does.

##### *B. The Current Approach*

Does the process of public policy-making in Canada satisfy the criteria of deliberative democracy? There are two potential routes for answering “yes” to this question. The first is through claiming that policy obtains democratic legitimacy indirectly through the legislative process. The second is through arguing that the procedure currently used for policy-making is, given the “empirical, technical, prudential, ethical, moral or legal” circumstances in which it takes place, adequate to ensure that the resulting policy is both democratically legitimate and well-informed. It is submitted that neither of these answers is satisfactory.

The difficulty with the first response is indicated by the discussion in Part II: policy-making in Canada is normative and not merely technocratic. Canadian public policy has a significant and independent impact on the nature and extent

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<sup>84</sup> Evan Fox-Decent, “The Internal Morality of Administration: The Form and Structure of Reasonableness” in *The Unity of Public Law* David Dyzenhaus ed. (Oxford: Hart Publishing, 2004) p. 143.

<sup>85</sup> See Ernest J. Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 *Yale Law Journal* 949.

of state action and, as a consequence, cannot meaningfully claim to derive legitimacy from the process through which its authorizing legislation was enacted.<sup>86</sup>

The only way policy-making could obtain procedural legitimacy through the parliamentary process is when it is discussed during question period. Such discussion is possible, and when policy-making was relatively less common question period was probably a real source of procedural legitimacy. However, in a modern parliamentary democracy, where public policy-making is substantive, frequent, and technically complex, it is highly doubtful whether 45 minutes a day of questioning (and even then, only when Parliament is in session) is sufficient to allow for any meaningful discussion of emerging public policy issues. It is also highly doubtful whether question period could qualify as deliberative in either a theoretical or instrumental sense. It might initiate deliberative processes elsewhere, but it is itself highly partisan, and experience shows that it is unlikely to be orientated towards the pillars of deliberation.

With respect to the second response, while it is obvious that, when assessed against the four pillars of deliberation in their theoretical form, the procedure used to make policy in Canada is inadequate, it is less obvious that it is inadequate when taking into account the need to translate those pillars into practical circumstances. As has been discussed, policy takes a wide variety of forms. In circumstances where the impact of the policy is narrow, its legal force constrained, and some form of procedure has been used, it is not evident that, at least in that particular case, there is a democratic deficit, or that insufficient information to ensure instrumentally sound decisions has been generated.

It is indeed quite likely that there are numerous instances in Canadian administrative practice where the procedure used to develop policy *is* sufficient to ensure both democratic legitimacy and instrumental soundness. It is also the case, however, that there is no assurance in the current circumstances that policy will follow from a sound and appropriate procedure and, as noted, there are certainly examples which suggest that it may not. Under the current approach to policy-making there is every opportunity for administrative decision-makers to avoid procedure altogether, or to implement it inadequately or improperly. Having democratic legitimacy and instrumental soundness rest on the goodwill, creativity and budget of particular administrative decision-makers is an insufficient protection of democratic values, and of the legitimate instrumental concern that public policy reflect a well-informed identification of what will satisfy the public interest articulated by legislation. Democratic legitimacy and sound decision-making must not depend on happenstance.

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<sup>86</sup> See, *Between Facts and Norms* at 440.

### C. Deliberative Policy-Making

It is impossible to determine for all time and all purposes the appropriate process for the design of administrative policy. As is the case for administrative procedure more generally, the precise form and type of procedure used for designing administrative policy is a matter best left largely for determination by the administrative decision-maker drafting the policy.<sup>87</sup> With that qualification noted, however, this section will attempt to identify the general principles which should inform the process through which administrative policy is designed, and provide some suggestions for how those principles can be implemented in practice. It will then consider the legislative and judicial parameters which should be placed around administrative procedure to ensure that administrative policy is both democratically legitimate and well-informed.

The first general principle which should inform the process of policy-making is that the extent of the procedure used should be directly related to the significance of the policy being designed, and the significance of the policy should be assessed based on whether and to what degree it affects the nature and extent of state action. If a policy will *in fact* (whatever its theoretical legal force) change the way individuals are treated by the state, then that policy should not be designed without some process to ensure that policy's legitimacy and soundness. The nature of the decision-maker (whether a government department or an administrative agency) and the form of the policy (whether a rule, regulation or guideline) should be less significant to the determination of the process which is required than the impact of the decision being made.<sup>88</sup>

Second, procedures should attempt to ensure that participation is, to the extent possible, based on reasoned engagement with the policy rather than lobbying to further the interests of participants. So, for example, if a stakeholder consultation process is used, participants should be required to submit comments in writing, or in a public forum, rather than through private conversations or phone calls with government officials.<sup>89</sup> Further, the documentation or records arising from the consultative process should be readily available to the public on the relevant department or agency's website. Otherwise it is difficult for anyone outside the inner circle of stakeholders to determine whether participation, and the process itself, involved reasoned engagement with the issues, or whether it was simply

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<sup>87</sup> The Supreme Court of Canada has said that each administrative decision-maker is "master of its own procedure" (*Knight v. Indian Head School Division* [1990] 1 S.C.R. 653 at [49]). This principle should apply no less in the legislative or quasi-legislative context.

<sup>88</sup> Genevieve Carter makes a similar point: Carter, *supra* note **Error! Bookmark not defined.** at 45.

<sup>89</sup> It is recognized that some private discussions may be necessary to ensure candour from participants and to further effective bargaining. However, public record discussions are equally important to ensure breadth of participation, orientation of discussion towards the public interest and the ability for public scrutiny and accountability. No public policy process should take place solely in private, and the public portion should come well before the policy has reached the stage of a proposed rule or regulation.

positioning by parties who had much to gain or lose considered quite apart from the public interest.

Obviously those most interested in the outcome of the policy are those most likely to participate in administrative process regarding its drafting, and it may be simply impossible to expect those participants to engage with the issues in a disinterested fashion. However, the public and formal nature of the communications is likely to increase the amount of reasoned consideration of an issue. Even if the reasoning is not wholly sincere, and is certainly not disinterested, it will stand on its merits as reason, and can be weighed in those terms by the decision-maker.<sup>90</sup>

Third, participants in the process should have some opportunity to respond to positions put forward by others, or at minimum to be aware of those positions. This will allow for a more deliberative process and encourage parties to engage with each other's reasons and not simply with extraneous concerns related to competitive advantage.

Fourth, decision-makers should seek to obtain breadth of participation in the process, both in terms of making multiple parties aware of the policy point to be decided, and also through taking practical steps to encourage participation by those who otherwise might not do so. Funding of participants is one of the most obvious ways in which to accomplish this; however, inviting other levels or departments of government to participate and contacting representatives of groups known to have an interest but not the financial wherewithal to participate, may serve the same purpose.

Creative use of the tools of the modern electronic media can also reduce the cost and increase the breadth of participation; oral hearings are no longer the only means by which a broader public can participate in policy-making. Further, participation and information sharing may be enhanced in contexts where policy development and implementation is common (e.g., the energy sector) by decreasing the frequency of processes and increasing their intensity. A hearing on, for example, the proper approach to addressing the cumulative effects of development of Alberta's oilsands is likely to be more effective at ensuring breadth of participation than are separate stakeholder consultation processes for multiple smaller issues related to the cumulative effects of that development.<sup>91</sup>

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<sup>90</sup> This effect of formal participation soon becomes apparent in a regulatory proceeding. So, for example, in the Alberta Energy and Utility Board's generic hearing into the policy which should govern transmission expansion (see footnote 40, *supra*), identifying the relationship between parties' positions and their economic interest was straightforward. However, the positions were stated in reasoned terms, defended with evidence, and were available for assessment (and were so assessed) on their merits. Further, it is always possible for the decision-maker to take into account the qualification which may arise from the relationship between the position and the self interest of the party who makes it. The end result is, in any event, a number of reasoned arguments which the decision-maker can take into account.

<sup>91</sup> The ideas in this paragraph were suggested by participants in the ISEEE Futures Conference.

Fifth, care should be taken to ensure the qualifications and open-mindedness of those making decisions. It is unclear that true impartiality is required for policy decisions in the same manner it is required for adjudicative decisions. This is because policy does not involve win/lose determinations in the same way adjudicative decisions do, and because the general and public orientation of policy decisions may make it unreasonable to require that decision-makers not have some preconceived ideas about the best policy to adopt. Policy design is different than, for example, a situation where a decision-maker is assessing an otherwise unfamiliar fact situation.

Having the expertise and experience necessary to make the policy decision in a thoughtful way, however, and the ability to be open to the reasons presented by others, *is* an important part of the decision-making process, and one which has arguably been relatively neglected here.<sup>92</sup> Ensuring that type of open-mindedness and competence is one of the most straightforward ways to improve democratic legitimacy and instrumental effectiveness. It is also one of particular importance where the policy-maker is not a regulatory agency (the appointments to which often face public scrutiny) but is rather a governmental department whose employees are largely shielded from public review.

In terms of deliberative democracy, the necessity for competence and open-mindedness arises from both the need for rational discussion and for consensus. The open-mindedness and competence of the decision-maker will allow the policy-making process to focus on the reasons why the policy should or should not be adopted (and not on extraneous political concerns), and will also allow that decision-maker's decision to provide a justifiable substitute for the achievement of consensus.

Finally, and in accordance with the instrumental conception of deliberative democracy, the process of policy-making should be designed to encourage the generation of information about the policy in question and its likely outcomes. This can be done through encouraging participation as discussed above, but also through ensuring that information is shared between the decision-maker and between participants and through using agency staff in creative ways, as "devil's advocates" or contrarians. An agency staff member could play this role in a public hearing by, for example, asking interrogatories, cross-examining witnesses, or submitting arguments which address strengths and weaknesses in the positions presented.<sup>93</sup> Ideally, agency or government staff could be used to

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<sup>92</sup> See, e.g., Peter Aucoin and Elizabeth Goodyear-Grant, "Designing a merit-based process for appointing boards of ABCs: Lessons from the Nova Scotia reform experience" 2002 45(3) *Canadian Public Administration* 301 at 303; Abigail Friendly, "Process and Criteria in Public Broadcasting Governance: Appointments to CBC and CRTC", prepared for the Friends of Canadian Broadcasting at <http://www.friends.ca/Resource/Publications>. Note in particular that Canada has no requirement, as does the United States, that members of administrative bodies represent the spectrum of political beliefs.

<sup>93</sup> This is a familiar strategy to many agencies.

support different possible outcomes, thereby helping to ensure better development of information on those outcomes to assist the decision-maker.<sup>94</sup>

Application of these deliberative principles does not preclude the use of a wide variety of administrative procedures in administrative policy-making.<sup>95</sup> A notice and comment process can be as consistent in its own way with these principles as can be a full public hearing. The significance of the principles is that they indicate what quasi-legislative process, which is orientated at different things than a quasi-judicial process, should be trying to accomplish. Determination of a dispute between parties, or administrative implementation of state programs at the individual level, simply does not involve the same kind of decision-making or involve the same concerns of legitimacy<sup>96</sup> as a legislative, or quasi-legislative, decision. The purpose of the principles identified here is to suggest what good quasi-legislative process will be directed towards, in the same way norms of fairness, impartiality and openness suggest what good adjudicative process will be directed towards.<sup>97</sup>

How should these principles be implemented? While it is important, as noted earlier, that administrative decision-makers be given latitude to design the procedure appropriate to the policies they are making, it is also crucial that the *ad hoc* approach to policy which currently exists, where everything depends on the goodwill and competence of particular decision-makers, be replaced with some more formal requirement that appropriate processes be used for policy-making.

Balancing these competing concerns – respecting administrative discretion and ensuring appropriate procedure – can be accomplished both through legislative direction and judicial oversight. Where administrative decision-makers are enacting policy that will be legally binding, whether through regulations or otherwise, those decision-makers should be legislatively required to follow a consultative process. The specific form of that process need not be stipulated, but the general necessity for process should be indicated.

Further, wherever administrative decision-makers develop policies which potentially affect the nature and extent of state action, whether formally or informally, courts should be willing to assess the propriety of the process used to develop those policies. While the court has, to this point, refused to undertake

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<sup>94</sup> This would obviously have the disadvantage of making the government seem less well directed. To address this issue it might be necessary to use different government departments to address different perspectives, and/or to use a public or consumer advocate.

<sup>95</sup> This insight is important. Process is expensive and without design flexibility will inappropriately draw resources away from important substantive programs.

<sup>96</sup> Although legitimacy is as much of a concern, it is not a concern in the same way.

<sup>97</sup> In her article, Genevieve Carter (*supra* note 7) suggests that these procedural norms (articulated by the Supreme Court in *Baker*) should also influence how the process of policy-making is designed. While I think Carter and I are quite consistent in our recommendations, I would argue (as I have attempted to do here) that the way to get to the recommendations should not follow from an application of principles which are developed in the adjudicative context.

this responsibility, critics<sup>98</sup> have demonstrated that there is no particular logic to that refusal, and that undertaking some scrutiny of the process of policy-making is in fact quite consistent with the more recent decisions of the Supreme Court. In undertaking this role, courts should give administrative decision-makers respect and should not require quasi-legislative decision-making to comply with the norms of judicial decision-making. However, they should assess if, given the nature and effect of the policy in question, the process which was designed is sufficient to ensure the resulting policy's legitimacy and soundness.

## V. Conclusion

It may be that implementing the proposals of this paper would make little difference to the practice of administrative policy-making. The purpose of this paper has been, however, to demonstrate the extent to which there is no guarantee that adequate procedure prior to policy-making exists in Canada at this time. As matters stand, administrative decision-makers can make policy decisions which will have a significant impact on individuals, which are only authorized in general terms by the legislation pursuant to which they are made, and which have not been subject to procedural rigour. As a result Canada has a democratic gap – a space “devoid of legal principles” – in which there is no assurance that government policy will reflect the public will.

However, through some modest legislative changes and a more open-minded judiciary, it is possible to close that gap – to allow the modern administrative state to discharge its important responsibilities without losing its democratic justification for doing so.

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<sup>98</sup> In particular Professor Carter, *supra* note **Error! Bookmark not defined.**