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

# parliament and administrative agencies

ADMINISTRATIVE LAW SERIES

STUDY PAPER

Canada

# PARLIAMENT AND ADMINISTRATIVE AGENCIES

Administrative Law Series

# PARLIAMENT AND ADMINISTRATIVE AGENCIES

Administrative Law Series

A Study Paper prepared for the

Law Reform Commission of Canada

by

Frans F. Slatter

Une édition française de ce document
d'étude est disponible.
Son titre est:

LE PARLEMENT
ET LES ORGANISMES ADMINISTRATIFS



Available by mail free of charge from

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Ontario
K1A 0L6

or

Suite 2180
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J32-3/34E
ISBN 0-662-11625-9

# Table of Contents

# Preface

This study was undertaken on behalf of the Law Reform Commission as part of its research into "the broader problems associated with procedures before administrative tribunals".

The research was done between March and July of 1979. The beginning of the federal election campaign on March 27 and the subsequent change of government following the election of May 22 meant that access to Members of Parliament was limited. As a result greater reliance was placed on secondary sources than might otherwise have been the case. Although efforts have been made to include newer material where possible, the study should be considered to be up to date as of the summer of 1979.

A number of people were of great assistance in preparing this study. I would like to thank the heads of administrative agencies, the public servants, and the Members of Parliament who willingly gave of their time to answer my many questions. Special thanks are due to Philip Girard who was my research assistant during the latter part of the work, and to Rose-Marie Haché who, in the modern parlance, processed the words.

This paper excludes much of the detail respecting the various case studies made in Chapter Four. The full study can be examined in the offices of the Law Reform Commission.

F. F. Slatter

# Abbreviations

| | |
|---|---|
| AECB | Atomic Energy Control Board |
| AIB | Anti-Inflation Board |
| CBC | Canadian Broadcasting Corporation |
| CHRC | Canadian Human Rights Commission |
| CLRB | Canada Labour Relations Board |
| CPC | Canadian Pension Commission |
| CRTC | Canadian Radio-television and Telecommunications Commission |
| CTC | Canadian Transport Commission |
| ECC | Economic Council of Canada |
| EIC | Employment and Immigration Commission |
| FIRA | Foreign Investment Review Agency |
| IAB | Immigration Appeal Board |
| LRCC | Law Reform Commission of Canada |
| NCC | National Capital Commission |
| NEB | National Energy Board |
| NPA | Northern Pipeline Agency |
| NPB | National Parole Board |
| PAB | Pension Appeals Board |
| PSSRB | Public Service Staff Relations Board |
| RTPC | Restrictive Trade Practices Commission |
| TRB | Tax Review Board |
| UIC | Unemployment Insurance Commission |
| WVAB | War Veterans Allowance Board |

"Lambert Commission" refers to the Royal Commission on Financial Management and Accountability, which was chaired by A. T. Lambert.

# CHAPTER ONE

# Introduction

Canada has inherited "a Constitution similar in principle to that of the United Kingdom". Since 1867, however, the Westminster-type of parliamentary democracy as applied in Canada has not remained static: it has evolved to adapt both to the Canadian federal system and to the twentieth century.

The last few decades have seen rapid growth in the public sector and an increasing complexity in the matters dealt with by government. Accompanying these changes, and instigated by them, has been the rise of a large number of semi-independent boards, commissions, agencies, tribunals and Crown corporations. These administrative agencies (as they will collectively be called here) have pervaded the structure of government and become such a permanent and prominent part of the public sector, that they can fairly claim a place in the unwritten part of our constitution. Yet, while their existence and importance is obvious, the relationships they do and should have with the more traditional branches of government are not always clear. An understanding of these relationships is important to the determination and evaluation of the work of administrative agencies, and it is also vital in determining whether the proper balance between their independence and their accountability to elected officials has been struck.

This paper examines the relationship between administrative agencies and Parliament, and more particularly, the House of Commons. It is intended to complement other studies commissioned by the LRCC on the internal functioning of agencies and on their relationships with the courts, the executive, and the public.

The paper takes as a "given" the parliamentary system of government, and administrative agencies are seen as a development within, and not an abandonment of, that system. Constitutional reform is beyond our scope. This means that agencies are evaluated in light of the values traditionally associated with parliamentary democracies.

The paper is divided into four parts. In Chapter Two, the role of the administrative agency in the parliamentary system is evaluated. By identifying the various roles that administrative agencies can play, do play,

should play, or are intended to play, one can better examine what their relationship to Parliament is and should be. In order to really get at the problem one has to see why administrative agencies were set up in the first place — what are their characteristics and advantages?

Chapter Three reverses the coin and examines the roles that Parliament plays in the administrative system. The functions of the House of Commons are already fairly well defined, and the purpose here is to state them in relation to administrative agencies.

Chapter Four is concerned with the empirical. The discussion here turns to the "points of contact", or the actual ways in which Parliament and administrative agencies interact. Since agencies are many and diverse in their relationships with Parliament, the chapter is organized from the point of view of the House with various agencies brought into the discussion as examples where appropriate. This chapter discusses points of contact with the House, the committees of the House, contacts through the Minister and other miscellaneous contacts.

The final chapter, which is somewhat self-contained, builds on the earlier ones and attempts to draw some conclusions about Parliament and administrative agencies. Having identified the respective roles of agencies and Parliament, and having examined where and how they interact, it is possible at this stage to identify certain key issues arising within the overall system. These issues are discussed in turn and recommendations made where appropriate. A summary of the author's recommendations follows, with references to the relevant discussion in the text.

# CHAPTER TWO

# The Role of Administrative Agencies in the Parliamentary System

## A. Introduction

As was noted earlier, this century has been characterized by an exponential increase in the size and complexity of government. This growth has put strains on the traditional institutions of parliamentary government, and one response to these strains has been the creation of numerous administrative agencies.

Administrative agencies play a number of roles in the modern public sector. A clear identification and awareness of these roles is vital to an assessment of the performance of agencies, and is a prerequisite to the determination of the relationships, controls, and interactions that should exist between the agencies on the one hand, and the legislature, the executive and the courts on the other. Without having a clear idea of what a particular agency is supposed to be doing, it is impossible to evaluate its effectiveness, or to see whether an administrative agency is the appropriate tool for the job in the first place. Without a clear idea of the role of the agency in the overall structure of public administration, it is not possible to say whether a particular type of executive control, a particular instance of judicial review, or a particular form of legislative scrutiny is appropriate.

As will be seen below, one can identify about a dozen roles which administrative agencies play. This is not to say that any agency performs them all, nor that each agency performs only one. Indeed, the unlimited permutations and combinations afforded by this list of roles points out another reason why the various possible roles should be clearly identified: it is arguable that there is no such thing as a "typical" administrative agency or a "system" of administrative agencies. No thought was ever given to setting up a "system" of agencies to help run the government; rather, each agency was created *ad hoc* in response to a particular perceived need. Nor was much thought given to how each new agency would fit in with those already existing, or to whether a new agency was

the proper structure at all. Furthermore, new agencies seldom seem to have been cast from the same mould as those already existing.[1]

Treating the various agencies as being part of an integrated system, or as being fundamentally similar can give rise to several problems. First of all, there is a tendency to think that to any common problem there will exist one solution that can be applied to all agencies. For example, regarding all agencies as being "typical" might lead to the conclusion that, whatever the relationship between the House of Commons and administrative agencies should be, it should be the same for all agencies. In fact, it may be that a "custom-tailored" solution is required for each one, or at least for each agency performing a particular task or combination of tasks.

Alternatively, the failure to recognize that agencies perform many different roles, and that any one agency can play several roles, can lead to a tendency to force all agencies into one particular structural, procedural or functional model. This in turn can distort the analysis of the work of the agency and its relationship to other players on the administrative stage. To illustrate, an over-emphasis on the adjudicative functions of some agencies can lead to the conclusion that adversarial techniques and court-like procedures are appropriate in all circumstances, that the key issue in administrative law is fairness and natural justice, and that the relationship between an agency and Parliament should be similar to the relationship between Parliament and the courts. When one role is over-emphasized in this way, the focus is usually put on the large regulatory commissions with high political profiles, considerable power and wide impact. Conclusions arrived at in this context are often not useful when applied to other agencies.

The dangers of treating the numerous administrative agencies as part of a "system" or integrated whole, or as following the same structural pattern must be kept in mind. But it is a necessary hypothesis of a paper such as this that there are nevertheless some general observations that can usefully be made about them as a group. A sensitivity to the problem and an allowance for differences is the solution.

## B. The Roles of the Administrative Agency

With these opening comments in mind, the following roles, which are to some extent overlapping, can be identified as those played by administrative agencies.

## 1. Assistant

As was noted above, the rise of administrative agencies has paralleled a substantial increase in the overall size of government. One of the most obvious reasons, then, for the creation of agencies has been to take some of the work-load off the more traditional branches of government. This is the agency as assistant.

As government expanded and entered new fields, the tendency has naturally been to give new, rather than existing functions, to administrative agencies. There are, however, instances where the latter has taken place. The exercise by the NPB of certain aspects of the ancient royal prerogative of mercy is perhaps the best example.

A number of factors indicated the desirability of splitting off the added work burden, rather than just expanding the existing departments of the public service, giving more work to the courts, or increasing the powers of the executive. In many cases, the new activities would have been "awkward or burdensome bedfellows" if added to already existing duties.[2] This is one reason why new undertakings of government, such as regulation of economic activity, arbitration of labour disputes and exercise of statutory discretions have ended up in the hands of administrative agencies.

There is also a limit on how much one can cram into an existing department and still maintain efficient operation. One Minister or Deputy Minister can only keep track of so much, and at some point diseconomies of scale arise. In these cases, recurring or time-consuming chores that are functionally distinct can be split off from the department and given to an administrative agency. It is often thought that these functions will be better administered if they are the sole or primary interest of the organization, and not just a peripheral matter dealt with by someone whose attentions are primarily directed elsewhere. A division of labour in this way also helps develop a degree of specialization and expertise.

While the need for efficiency has militated against the growth of existing departments, certain conventions about the size and structure of Cabinet have prevented the creation of new departments.[3] Some more sceptical observers of the system have also suggested that the creation of agencies to deal with new tasks is a way of concealing the overall growth of government.[4]

The creation of new agencies to help bear the burdens of government is an ongoing activity, as can be seen by recent proposals that a new agency be set up to deal with unemployment insurance benefits appeals, thereby relieving some of the pressure on the Federal Court. Indeed it can

even be argued that we have now reached the stage where new administrative agencies are being set up to take some of the work-load off the existing ones. An example of this may be the new NPA, set up to perform some functions that might have been made the responsibility of the NEB.[5]

## 2. Substantive Expert

The second characteristic of the growth of government noted above was its increase in complexity. This has come about because of greater government involvement with the economy and new forms of technology, which are themselves growing increasingly complex. This development has led to the use of administrative agencies as experts in substantive matters (as opposed to their role as procedural experts which will be discussed next). A number of examples of this quickly come to mind: the setting of safety standards by the AECB, the determination of energy reserves by the NEB, and the overall regulation of the transportation industry by the CTC.

In some cases the required expertise could be developed inside existing departments or courts by appointing or retaining the appropriate personnel. However, the need for expertise is sometimes found in combination with a rule-making, decision-making or adjudicative function that would be inappropriate for a department of government or a court. While a department may not be able to provide the independence from government needed in some of these applications of expertise, it would also be very difficult to develop all the different kinds of expertise needed in the courts without increasing their number and size beyond what is reasonable. Furthermore, if new courts are needed, or if the existing courts will have to function in divisions based on expertise, a new administrative agency might as well be used. The work of the Anti-dumping Tribunal is a good example of a situation where the need for speedy adjudications in highly technical matters makes the task inappropriate for either the courts or a government department.

## 3. Procedural Expert

Administrative agencies are nothing more than an alternative way of organizing and executing the functions of government. Not surprisingly, one reason for the use of alternate structures and procedures is the fact

that they are more appropriate to the task at hand. It is in this sense that agencies can be seen as procedural or structural experts.

The advantages over traditional courts which agencies are said to have are numerous. Economy, speed in decision making, ability to change quickly to meet changing conditions, and freedom from technicality in procedures are the most commonly cited. Agencies have also been able to relax the formal rules of evidence when it seemed appropriate, and should be able to avoid an over-reliance on adversarial techniques. Administrative agencies have been largely responsible for the nurturing of one of the most important new tools of government, the public hearing. An example of less encompassing reforms is the NEB practice of examining expert witnesses in panels rather than individually.[6] Furthermore, administrative agencies are not restricted to formulating policy on a case-by-case basis as are the courts.

Many of these techniques also represent an advantage that agencies have over the traditional government department. For example, the opportunity for public input provided by a public hearing is denied to departments because of the conventions under which they operate. An agency structure therefore enables interested members of the public to participate in the making of the decision, rather than being restricted to reacting to the decision once it is made. The ability to use a modified adversarial system to decide between competing parties is another advantage the agencies have over departments. Agencies are also a way of avoiding administrative controls that exist in departments.

One structural advantage of the agencies already noted is their ability to pull together bits and pieces of a function in order to make a coherent whole that is a central concern of one organization, and not just a peripheral concern of many. Their separateness from government makes them an ideal mechanism for giving various interest groups a place in government policy making through the appointments process. This is common, for example, with labour relations boards. Groups that are co-opted into the system in this way are more likely to support government activity in the field. Being one step removed from the vagaries of Cabinet shuffles and changes in government, this may also enable an agency to provide for greater continuity and stability in policy making and implementation.

Administrative agencies are also ideally suited to collegial decision making. This facilitates the bringing together of many and diverse ideas, and can be used to encourage openness in decision making. This in turn may lead to a greater acceptance, and a greater perception of the legitimacy of the decisions taken. It is also sometimes seen as undesirable to have a significant power, such as a power to make rules, in the hands of one individual, or hidden in the depths of a department.[7]

Despite these general advantages, though, one can list instances where administrative agencies have not put their procedural and structural characteristics to good use. For example, they have often been accused of over-reliance on the court model of decision making. Public hearings can be painfully time consuming if not properly run. Allocating seats on an agency to various interest groups can shut out those who are less well organized. Finally, the use of agencies to reconcile the views of various interest groups through constituency appointments may result in compromises that are not in the public interest. It has been argued that such compromises should be made in the open by elected officials, rather than in agency boardrooms.[8] Yet despite these deficiencies the administrative agency remains a useful social tool.

## 4. Manager

Agencies are often set up for no other reason than to manage a particular programme, facility or enterprise. Crown corporations are most frequently used for this purpose, but pension and insurance commissions, marketing boards, and workmen's compensation boards also play large managerial roles. Many regulatory programmes, for example, anti-inflation controls, require considerable managerial skills.

Most managerial agencies are involved with activities that are unlike normal government functions. In some cases the programmes are intended to be wholly or partly self-funding, involving the collection of premiums and the payment of benefits much as a private insurer operates. In other cases it is thought that accountability for the particular activity should be to the market-place rather than through the more traditional government channels. This occurs most frequently with nationalized industries.

If different standards of performance are to be applied to the activity, or if the organization is to compete with private industry, there is much to be said for the use of an administrative agency or corporation. Such entities are better able to adopt methods and procedures, and to make decisions that will enable them to reach their goals if they operate at arm's length from the rest of the public sector.

## 5. Adviser and Investigator

Many agencies play a largely advisory role. As advisers, they are usually required to make inquiries about, to research, or monitor some activity or event and then advise the Cabinet or Parliament.

Advisory agencies can be broken down into two categories: those which advise on general terms, and those which advise on individual cases. Examples of the former kind are the LRCC and the ECC, whose mandates consist in giving advice to government on various policy issues. Besides its role as an industry regulator, the NEB advises the government on general energy policy. The second group includes agencies such as the FIRA, which technically only advises the Cabinet on whether a particular investment should be allowed. The latter group is probably better regarded as performing a decision-making or adjudicative function, rather than being advisory in nature. This depends, of course, on the extent to which their advice on individual cases is "rubber-stamped" by the formal repository of decision-making powers.

Obviously a great deal of advice is generated from within departments. An administrative agency will be used for this purpose where public hearings may be needed, or where it is desirable to have representatives of various interest groups involved. The ECC, for example, has traditionally included labour and management representatives, and its constituting act requires that appointments be made "after consultation with appropriate representative organizations."[9] Advice from an administrative agency may also be seen as more objective or reliable because it is independent. It has the added advantage that the Minister will not be seen as responsible for the conclusions reached in the same way as if the advice were generated from within the ministry. In this way ideas and issues can be discussed in public without the Cabinet having to take a firm, and perhaps premature, stand on the matter.

## 6. Adjudicator

Several agencies perform adjudicative functions. This can occur when conflicts arise between private parties, but the existing courts are not seen as a suitable forum for their resolution. The problem is often a lack of expertise, a need for the creation of policy before the issue is resolved, or simply the large numbers of adjudications needed. One prime example is the Anti-dumping Tribunal, which must make speedy decisions on highly technical disputes between importers and local industries, and another is the CLRB, which hears disputes between employers and employees.

Some agencies, such as the two just mentioned, adjudicate at first instance. Many others are appellate adjudicators. This occurs most frequently when the parties to a dispute are the government on one hand and a private citizen on the other, or when a governmental decision gives rise to a right of appeal. If recourse is not had to the courts to resolve the

dispute, an agency may be used because it would be inappropriate for a part of a department to decide on the department's rights. The work of the IAB[10] fits this model, as does the work of the PAB, the PSSRB and the Tariff Board.

Administrative agencies provide several advantages as adjudicators. They can relax the rules of evidence, and may not feel bound to rely on the litigants to bring all the relevant evidence before them.[11] They need not be bound by their previous decisions. They provide a middle ground between government departments and the courts where the expenditure of the prestige and time of highly paid judges is not felt justified. It is this function of agencies which the courts most readily classify as "quasi-judicial", and so it is the administrative agency as adjudicator which has been most often subject to judicial review. This may have resulted in a tendency on the part of lawyers to over-emphasize the adjudicative role of agencies to the exclusion of other equally important roles.

## 7. Arbitrator

Administrative agencies are sometimes used as arbitrators. The CLRB is an example of an agency where this occurs, perhaps because direct governmental involvement would be resisted, and therefore be counter-productive. Ombudsmen, in those jurisdictions which have them, make an important contribution by smoothing out disputes that arise between the bureaucracy and the citizen. The ombudsman's semi-independent status gives him an air of independence that encourages aggrieved individuals to seek his assistance, and a measure of prestige in the public service that enables him to get answers and promote changes.[12] One of the most recently created agencies, the CHRC, also has a duty to arbitrate certain disputes. Under the *Canadian Human Rights Act* the Commission may appoint a conciliator to attempt to settle a complaint, and that conciliator is neither competent nor compellable to appear later before a Human Rights Tribunal.[13]

## 8. Determination Maker

The increased number of social welfare plans and other programmes of government that confer rights, privileges or entitlements on individuals have resulted in the need for a great number of decisions on a great number of individual cases. Where it is felt appropriate that these decisions

be taken in an independent atmosphere, or after an inquiry of some kind, an administrative agency may be appointed the determination maker. Again the sheer volume of decisions may call for a separate structure.

The determination-making function can be distinguished from the adjudicative function in that the former does not involve the resolution of a dispute and is not primarily adversarial. It often involves a finding of the facts that exist and then a decision as to whether these facts fit criteria that may be well or poorly defined. The decision as to whether a person is entitled to a pension or compensation from a fund is a common example. Others would be a decision by the NPB to grant or deny parole, a determination by the EIC as to whether unemployment benefits should be paid, or a decision by a marketing board on the allocation of quotas.

Determinations often involve the exercise of administrative discretions. Granting bodies such as the Canada Council fit in this category. As government expands into unfamiliar territory it is often hard to set fixed criteria that will adequately anticipate all the marginal cases. Sometimes it is simply not possible to foresee what circumstances will arise.[14] In these cases a greater or lesser degree of discretionary power must be left to the administrator. Grants of benefits by the WVAB and a decision by the NPB to grant a pardon are examples of important discretionary powers, and also illustrate the diverse nature of such powers.

## 9. Rule Maker

One of the most important and significant powers given to administrative agencies is the power to fix procedures, criteria or policies in the form of rules. Rules, unlike the individual decisions just discussed, involve a pre-determination of some matter in a way that is binding on a number of cases. Many agencies have the power to make rules governing their own procedures, but a significant number have rule-making powers in important areas of social policy. The rules made by some of these agencies are subject to approval or veto by the Minister or the Governor General in Council, but others (such as those made by the CRTC, and some made by the CTC) can be made by the agencies in their own names.

A rule-making power is often found where regulation of a highly complex or technical nature is required, an example being the safety regulations made by the AECB. Delegation of rule-making powers may also be needed where constant fine tuning of the rules and quick changes to meet new circumstances are required. Often the Cabinet cannot justify devoting the time needed to these matters, or else it is felt that it simply cannot act quickly enough. It would of course be totally impractical to take the numerous amendments needed through Parliament.

The ability to formulate regulations that apply to numerous cases has many advantages for both the agencies and those who deal with them. Regulations provide a degree of predictability so that the regulatee knows where he stands. A regulation can preclude the need to decide on the same issue over and over for each applicant. This can be illustrated by the North Coast Air Services cases. When a CTC regulation on route protection was declared *ultra vires* by the courts, the Commission was forced to respond by amending each of the 450 licences involved to achieve the desired result.[15] Finally, a regulation can help ensure consistency and therefore greater fairness in the application of standards to various individuals. The chief disadvantage of regulations is that they reduce the opportunity of each applicant to argue the issue before the policy is applied to his particular case.

## 10. Policy Maker

One of the most controversial roles which agencies play within a parliamentary system is that of policy maker. The power to make or expand on social policy manifests itself in the power to issue licences, to make regulations, to exercise discretions, or to interpret the mandate given to the agency by statute. The ability to make policy sometimes comes to administrative agencies more by default than by design. It can arise when the mandate of the agency is expressed in terms of "the public interest", "convenience and necessity" or other criteria so vague that they must be given content by the agency before it can proceed with its work.[16] A related situation arises where the policy laid out in the relevant Act requires that compromises be made by the agency, an example being the *National Transportation Act*, which declares the need for a transportation system that is not only efficient and economic but "adequate".[17] It sometimes arises when applications are made to the agency which raise issues that have not yet been the subject of public discussion or official government policy. Since the agency must decide either to grant or reject the individual application before it, it must formulate a policy on the issue. Policy making of this sort raises important issues of accountability in a responsible system of government.

The existence of important policy-making powers in Canadian administrative agencies is easy to document. The decisions of the CRTC on Canadian content in broadcasting fit the definition. So does a decision by the NEB stating that there is a surplus of natural gas in Canada which should be exported, or alternatively that new markets in Canada should be developed for that gas. Decisions by the CTC which affect the relative competitiveness of transport by sea, air, rail, and road also have a high

policy content. Rate-setting decisions rely on important policy decisions about acceptable rates of profit in a natural monopoly.

The exercise of a policy-making function by an administrative agency is said to provide flexibility both in the policy formulation itself and in its application to particular circumstances. Agencies are said to be able to react to new circumstances more quickly than the executive branch, and are able to be more flexible in the application of standards than the judicial branch. Somewhat paradoxically they are also said to provide greater continuity and stability in policy.[18] This is because the administrative agency, as mentioned earlier, is one step removed from Cabinet shuffles and changes in government. The advantages of this in the context of billion-dollar energy projects or ventures providing employment to thousands are obvious.[19] The disadvantages are that in our system of government, policy is supposed to be in the hands of responsible elected officials, and to some extent is supposed to be sensitive to changes in the government or the Minister.

## 11. Intermediary

In 1950 the Supreme Court of Canada held that the provinces and the federal government could not delegate their legislative power to each other. The blow of this decision was somewhat softened two years later when the Court held that Parliament could delegate authority to provincial administrative agencies.[20] This decision guaranteed the agencies an important role as an intermediary in those areas where the division of legislative power makes co-operation between provinces and the central government essential. Transportation and marketing of agricultural products are the two areas where this role is of primary importance. This is another situation where the structural separateness of an administrative agency enables it to bring together various interests in a form of partnership.

The role of the agency as intermediary arises in other contexts as well. For example, the motor transport boards of the four western provinces have started holding joint hearings to hear applicants who wish to operate across all four provinces. This eliminates the need for the applicant to make four separate applications, and provides for co-ordination of transportation policy in the West. The NCC plays such a role in the relations between the federal government and the municipalities in the Ottawa area. The administrative agency also plays a role as intermediary on the international scene. The International Boundary Commission and the International Joint Commission are two examples.

## 12. Insulator

During the discussion to this point, one characteristic of administrative agencies has repeatedly come up: their independence from, or arm's-length relationship with, the rest of government. In many cases this is the only reason why an agency is used rather than a more conventional department. Departments could generate advice, build expertise, develop new procedures, or manage programmes and projects. But it is only an administrative agency that can provide this added remoteness. In other cases the very function itself calls for independence. Adjudications, arbitrations, and the exercise of some statutory discretions are examples of this need. It is here that agencies play an important role as insulators between government and the public.

There are several facets to the agencies' role as insulators. The first, and perhaps least legitimate is that it is used to dealing with a "hot potato". Probably no agency has ever been set up without some more suspicious Member of the Opposition suggesting that it was being created only to give the appearance that the government was doing something about some sensitive matter. No doubt agencies have on occasion been used when "public feeling was intense but its drift was obscure".[21] The agency can then serve to deflect criticism and give the government time to examine the alternative solutions available.[22]

An agency may also be used where the administration of a particular policy is viewed as being politically dangerous. The use of an agency means that the Minister is not directly responsible for decisions taken, and so the government is protected.

Where valuable benefits such as various licences or rate increases are at stake, an agency may be used to deflect lobbying and attempts at invoking political favours. It is much easier for a government to say "no" when it can honestly say that the real power is outside its control. It was this type of consideration that resulted in the present system of allocating broadcast licences.[23] The hope here is not that pressure groups will have no influence on government, but rather that their arguments will be evaluated on their merits.

An impartial determination maker is useful whenever government administration should be free of partisan politics and political influence. Any adjudication or arbitration fits this bill, as does the granting of funds for research or cultural purposes. Where economic regulation interferes with vested private rights, the business community will usually be happier with government intervention if it is not a matter of party politics.[24] In these cases our political traditions require that the decisions be taken in an atmosphere of independence; decisions so taken will be more readily accepted by the public.

As was noted above, a degree of independence may be the price that must be paid if various interest groups are to participate in government decision making. An illustration of this occurred when most of the labour representatives on the ECC resigned in 1977 over wage and price controls and a perception that the Council was no longer independent of the government.

Finally, as has already been noted, in cases where consistency and predictability of policy are needed despite the disruptions inherent in public life, an administrative agency can play an important role.

Their independence is the central characteristic of administrative agencies. In this case the medium through which the government function is performed can be said in a very real sense to be itself a part of the message.

### 13. Conclusion

These then are the major roles performed by administrative agencies in the Canadian parliamentary democracy. It is worth repeating at this point that while a few of these functions could not be performed within more conventional government structures, agencies usually bring something to the particular role which departments and courts cannot. It is also worth repeating that no agency is likely to perform only one of these roles. Some of the large regulatory commissions such as the CTC and the CRTC are at times expert, manager, adviser, adjudicator, determination maker, rule maker, policy maker and insulator. All these functions are rolled up into the shorthand term "regulator of the industry". And while it is important to identify the many roles played by these agencies in order to better appreciate what they actually do and how diverse their activities are, it is equally important to realize that the list of roles is not a method of classifying the agencies.[25] This can only be done on the basis of which roles a particular agency blends together and in what proportion, for the real advantage of administrative agencies is their ability to combine roles in a way that the traditional machinery of government cannot.

## C. Administrative Agencies and the Branches of Government

The functions of government have traditionally been divided into three branches: the legislative branch which makes the law, the executive branch which administers the law, and the judicial branch which interprets the law

and settles disputes. Although there has never been a clear demarcation between the three branches, the threefold division has proved useful for analytical purposes. For one thing, the parties involved — Parliament, the Cabinet and the public service, and the courts respectively — are easily identified. For another, the relationships between the three, and their respective roles in a parliamentary system are reasonably well defined and understood. And while there has never been a clear "separation of powers" in the Westminster-type of parliamentary democracy, there are still some types of overlap between the branches which are felt to be inappropriate given our parliamentary traditions. Examples would be an open legislative power in the judiciary, or any kind of executive control over cases before the courts.

As government has expanded, the lines between the three branches have become increasingly unclear, and the need has arisen on occasion to place aspects of all three powers in one decision maker. Administrative agencies have been used as compromise solutions in these circumstances. A good illustration is the modern type of industry-wide economic regulation by licence issuing, rule making and rate setting, which seems to involve legislative, executive and judicial acts.

The emergence of the administrative agency with quasi-legislative and quasi-executive, as well as the more familiar quasi-judicial functions has been increasingly accepted as a proper way to structure government. But while there has been widespread acceptance of their existence, the vital question about the administrative agencies has yet to be answered: What should their relationship be to the traditional branches of government, given the roles that they play? The courts have perhaps struggled more with this question than the other two branches, but any examination of concepts such as "quasi-judicial", "jurisdictional error" and "natural justice" will reveal that no simple answers have been forthcoming. The purpose of this paper is, of course, to identify and examine the agencies' proper relationship with the legislative branch, Parliament. The courts have long recognized that their relationship with agencies should vary depending on what particular role they are playing,[26] and it can be argued that the same should apply to Parliament. It can further be argued that where it is clear that the agency is primarily operating within one of the traditional spheres of governmental activity, the starting point in forming its relationship with Parliament should be the traditional relationship that exists between that branch and Parliament. Alterations to this relationship must then be made to take account of differences that exist, as the definition of the agency's connection to the House of Commons must be sensitive to the various roles it plays. Where the work of the agency bears no relation to any of the traditional branches of government, new approaches are needed to the interaction between the agency and Parliament.

# CHAPTER THREE

# The Role of Parliament in the Administrative System

Chapter Two of this paper proceeded on the assumption that administrative agencies are a part of parliamentary government, and examined the roles that agencies play therein. This chapter will look at the other side of the coin and examine the roles that Parliament plays in the administrative "system". Parliament has a more or less well-defined relationship with the executive and judicial branches of government. Its relationship with administrative agencies is less clear, but it is possible to identify certain roles that Parliament plays and to discuss them from the particular perspective of the agencies.

## A. The Constitutional Context

It is perhaps not too surprising that Canada and the United Kingdom have managed to exist for so long with largely unwritten constitutions. What is more surprising is that the way their systems of government are supposed to work in theory is sometimes in marked conflict with what happens in practice. For example, the theoretical absolute power of the Queen exercised through the Governor General is largely non-existent. Focussing attention on what Maitland called "the showy parts of the constitution"[27] can give a rather distorted view of the true operation of government.

This gap between constitutional law or convention, and actual government practice touches the role of Parliament as well, giving rise to differing views of its proper function. Under what may be called the classical theory of parliamentary democracy, Parliament is the omnipotent centre of government. The supremacy of Parliament gives it complete control over the policy followed by the public sector. Parliament selects and replaces at will

the Prime Minister and the other members of the executive. No taxes can be collected nor money spent without its approval. Since the power of government is in Parliament, and since Parliament is responsible to the electorate, the system of government is representative of the wishes of the people.

At the other end of the scale is the view that Parliament has become a powerless pawn of the executive. Cabinet control of the agenda of Parliament ensures that there is discussion only on those topics which the executive wants discussed. Party discipline and the knowledge that defeat of the government will result in an election, and possibly the loss of their own seats, is enough to keep back-benchers in line. The executive can therefore push any measure it wants through the House, and by doing so has managed over the years to place most of the policy-making power in its own hands. The real limit on spending, according to this view, is not Parliament, but the amount of revenue that the economy generates. On this view Parliament is only a nuisance factor to the government of the day, and has relevance as an institution only to the Members in Opposition.

The true state of things probably falls between these two extreme views, but the important thing to realize is that there are two possible explanations for the discrepancy between theory and fact. The one is that the proper role of Parliament in the system has been misunderstood. If Parliament was never intended to run the day to day affairs of government, then the fact that it does not do so is not cause for alarm. It is only if the discrepancy has come about through an actual usurpation of Parliament's power by the executive that there is real cause for alarm. The issue then is one for which there is no clear solution and on which opinions will differ: the proper role of Parliament.[28]

There is no doubt that the executive has a great amount of power over the legislative branch. This is not to suggest, though, that such power is somehow sinister, for the government of the day has earned the right to exercise these not inconsiderable powers by winning the largest number of seats in the House of Commons. In at least this one fundamental way the executive power is responsible to the electorate. It must also be remembered that Cabinet Members themselves are almost invariably elected members of the House. In a general election it is the Ministers of the government who are most closely identified with government policy, and they are frequently the ones to experience the wrath of an unhappy public on voting day. Since members of the Cabinet are by convention usually selected from the Members of Parliament, the defeat of a Minister in an election forces the choice of a different executive, and ensures that political parties keep the electorate in mind when selecting their leaders. It would be impossible for a body as large as the House of Commons to run the government on a day to day basis, and some delegation to a smaller

group is inevitable.[29] And where the delegation of management responsibilities is made, the principal must by and large be content to accept the advice and actions of the agent. The practicalities of the situation therefore assign to Parliament a largely supervisory role in government.

To a great extent it follows that the evaluation of the performance of Parliament must centre on an evaluation of its ability to perform its supervisory role. It is only if the power of the House to oversee the work of the executive has been seriously curtailed that one should become concerned. While it is true that the ultimate weapon, the defeat of the government, is seldom used, there are other controls which are available to the House.[30] Not the least of these is the ability of Opposition Members, now assisted by the television camera, to constantly attack and propose alternatives to government policy. Neither can the government afford to ignore the opinions of the Members of its own caucus if it wishes to hold on to power in the long run. Institutions such as the Office of the Auditor General[31] and the mass media are also important allies of the House.

One must therefore examine Parliament with a realistic eye. While Parliament is constitutionally supreme, in fact a great deal of its power has been delegated to the Cabinet which exercises it under the supervision of the House. With these introductory observations in mind it is possible to elaborate on some of the roles Parliament plays, with particular attention to the context of administrative agencies.

## B. The Roles of Parliament

From the perspective of this Study Paper one can identify five basic roles of Parliament.

### 1. Creator

Since most administrative agencies have a statutory base, Parliament plays a fundamental role as their creator. Parliament does not, however, have a monopoly on the formation of new structures of government, as there does exist what has been referred to as the executive's "unquestioned prerogative to initiate organizational changes."[32] There also exist a number of statutes which enable the Cabinet to set up new administrative agencies.

To illustrate this, in the United Kingdom the Criminal Injuries Compensation Board was set up in 1964 under the prerogative power and continues to exist in that form.[33] There would seem to be no reason why this could not be done in Canada. Closer to home there are two agencies, the International Joint Commission and the International Boundary Commission, which were created by treaty between the United Kingdom and the United States. The existence of both was subsequently confirmed by statute.[34] The Food Prices Review Board was created under the *Inquiries Act* by Order in Council.[35] The day after the Anti-Inflation Controls Programme was announced the Interim Anti-Inflation Board was set up in a similar way to run the programme until the *Anti-Inflation Act* was passed.[36] Other bodies such as the Advisory Council on the Status of Women exist without a direct statutory mandate.[37] The Patent Appeal Board was set up entirely on the initiative of the Commissioner of Patents to assist him in his work.

Despite these instances, the general rule has been to create new administrative agencies by statute. In any event it is necessary to go to Parliament if the agency is to be given rule-making powers or the right to impose sanctions, or if the agency must rely on the public purse. And once an agency is set up under statute any changes in its mandate or jurisdiction must be approved by Parliament. The *Public Service Rearrangement and Transfer of Duties Act*[38] gives the Governor in Council the authority to transfer duties between departments and Ministers, but it does not extend to independent agencies. The first draft of *An Act to Amend the National Transportation Act*,[39] introduced in 1977, contained a provision that would have allowed the Cabinet to transfer responsibility from the CTC to the Minister, but this provision was removed from later versions of the Bill.

The creation stage is a very important one for the administrative structure. It is at this point that the choice of the appropriate governmental tool is made. Social policies can be pursued by many methods other than an administrative agency, such as by a penal statute prohibiting certain conduct, by tax policy, by grants, subsidies and loans, by nationalization, or by the creation of civil rights to be enforced by private individuals. If an administrative agency is chosen as the proper tool, it is then necessary to decide between an existing or a new agency. These decisions have important implications for the integrity and rationality of the system as a whole.

It is at the formative stage that the mandate of the agency is set out. The policies to be pursued by the agency should be clearly stated, and if those policies involve any conflicts requiring compromise, the basis upon which the compromises are to be made should be outlined.[40] At this point the powers of the agency to compel witnesses, gather information, impose

sanctions and make rules will be set. Any right of appeal that is to exist will probably be in the statute as well. Finally, it is at this stage that the relationship of the agency with the Cabinet and with Parliament will be specified.

To call Parliament the creator of administrative agencies is of course to overstate the case.

> The decision is ultimately made by Parliament, and it is conventional to attribute it to Parliament, since no other attribution is constitutionally possible. Clearly, however, the question . . . is a matter which is recommended to Parliament as a result of departmental advice and ministerial decision.[41]

In most cases the outline of a new agency will be presented to Parliament as a matter of government policy. It would be a rare case where Parliament made major changes to this outline and an even rarer case where Parliament substituted for the agency some other device, such as a penal statute, to implement the desired policy. Indeed, Parliament is ill-equipped to make such changes or to redraft statutes on a wholesale basis. This, along with the fact that the organization of government falls to some extent under the executive prerogative, means that Cabinet must provide the leadership and take the major responsibility for the structure of administrative agencies. Parliament's role in the creation process is to criticize the policy mandate given to the agency, to scrutinize the coercive powers it has, and generally to polish the rough outline proposed to it by the Cabinet.

## 2. Financier

It is a fundamental principle of our system of government that only Parliament can raise money by taxes and authorize its expenditure, and that the money so raised can only be spent in the manner authorized.[42] While money may in unusual circumstances be authorized by Governor General's warrant, this procedure is restricted by convention and statute, and any funds so authorized are submitted to Parliament for approval after the fact. Since most administrative agencies are dependent on the public purse for the financing of their operations and programmes,[43] Parliament plays an important role as the financier of agencies.

Parliamentary control of finances occurs in two stages: supply and scrutiny of the public accounts. The Supply process is not limited to a mere examination of the quanta of the various parts of the budget. The long-standing tradition of "grievances before Supply" has meant that the budget debate involves a scrutiny of the government's entire programme and all its policies. The change in procedures of the House whereby much of the Supply debate now takes place in the standing committees, and

whereby the Opposition Parties in turn are allowed to debate any topic they choose on the "Opposition Days" in the House,[44] has altered this procedure somewhat, but not the scope of the debate. Supply is therefore an important opportunity for the House of Commons to convey its point of view to administrative agencies and the rest of government.[45]

The scrutiny of public accounts, the second stage of the financial process, is one of the few places where the House of Commons has a professional and institutionalized mechanism for helping it with its work. The Auditor General does much of the leg work in comparing actual expenditures with authorizations, and in identifying waste and mismanagement. But the debate on his report to Parliament provides another important opportunity for the Members to direct their attention to administrative agencies.

The Lambert Royal Commission on Financial Management and Accountability has recently completed an extensive inquiry into the financial procedures of the government. In its *Final Report* the Commission emphasized that control by Parliament is an essential part of the financial system of the government. Their various recommendations for increasing the accountability of the system to Parliament will be noted where appropriate.

The granting of Supply continues the process of defining the mandate of the administrative agency that begins with its creation. It is not always possible to define with any precision in the founding statute the policies that the agency is to follow. The Supply process enables the further definition and elaboration of the statutory mandate on an annual basis. The examination of the public accounts is in turn one way of checking for compliance with the policies set out by Parliament through allocation of money for certain purposes, and withholding of it for others. The financial process should naturally enough be primarily concerned with things financial, and is therefore not always the most efficient way of providing policy input to the public service.[46] One cannot, however, ignore the fact that the budget in many ways reflects the government's priorities through the allocation of resources, and that spending is often as important as legislating. Control of the purse strings therefore gives Parliament an important degree of control over the direction of administrative agencies.

## 3. Legitimizer

As was noted above, under our constitution Parliament is supreme. The House of Commons is the institution that provides the link between the public sector and the electorate, which makes for a responsible system of government. The executive has extensive powers, but these are viewed

as legitimate because they are exercised through the legislature. And while the Cabinet has extensive control over the House, still it is necessary for all legislation to actually receive the stamp of approval of elected Members. The electorate will submit to taxation initiated by the executive only because the raising of revenue has been approved by their elected representatives. Public acceptance of the system rests largely on the legitimacy that Parliament brings to it.

Administrative agencies wield considerable power over the private sector. In many cases they are authorized to interfere with private economic rights. They can set standards of behaviour and coerce compliance through sanctions. They are allowed to choose between competing interests in society. It is clear that agencies can only do these things, or do them effectively, if they are perceived as being entitled to exercise the powers they have. Their legitimacy in doing so in large measure is a result of the fact that the foundation of their power is a grant of authority from Parliament.[17]

No agency can be effective if it becomes cut off from the real centres of political power. An agency can only survive in the long term if Parliament agrees with the policies it pursues and the way it interprets its mandate. Where the agency and elected officials are at odds, in the long run it is the agency that will bend under the weight of parliamentary legislative change or financial control. An agency under sustained attack from elected representatives will not receive the public acceptance and cooperation that is essential to its efficient and effective operation.[18]

The role of Parliament as the legitimizer of the system is an important one.

> Without direct political support and involvement . . . the regulatory process will never be effective. In practice agencies have not found strength through independence but merely weakness in isolation.[19]

This means that the question of strong and appropriate relations between Parliament and administrative agencies is not a concern only of Parliament. It is in the agencies' best interest to develop and support strong links to the elected part of government, just as it is in Parliament's interest to keep in close touch with the work of the agencies.

## 4. Policy Maker

It has already been noted that party discipline, Cabinet's access to the advice of the expert public service, and control of Parliament's agenda places a great deal of the real power of government in the executive

branch.[50] This has prompted the frank comment that "members of parliament are not a particularly vital part" of the policy process in Canada.[51] Parliament as an institution is unsuited to the formulation of policy, and so policy has tended to be made by other political centres. By the time legislation is presented in the House it is too late to provide policy input, so rather than forming policy,

> . . . through work in committees, and through the debates in the House of Commons, the members of parliament criticize and comment on the legislation, pointing out its weaknesses, legal loopholes, and potentially contentious provisions. The effect of this multi-partisan participation in criticizing all government policies is to improve the quality of the ultimate legislative output without altering its substance.[52]

While much of the policy-making power has ended up in the Cabinet, as was pointed out in the last chapter some administrative agencies also play a policy-making role.[53] For practical reasons Parliament will have to continue to be content with having policy formation centred elsewhere than in the House of Commons. This is not inconsistent with Canadian political tradition. The central concern in this area must not, therefore, be an attempt to shift policy making to Parliament, but rather to ensure that Parliament is able to properly perform its task of refining and polishing policy initiated elsewhere.

## 5. Scrutineer: Seven Elements of Accountability

The fifth role of Parliament identified here, to a certain extent overlaps the first four. To this point in the discussion it has been emphasized that Parliament's main role is as scrutineer, auditor or critic of the public sector, and this is also its main role in relation to administrative agencies. As creator and financier Parliament must largely rely on measures proposed by the Cabinet, and much of the policy making of government takes place elsewhere than in the House of Commons. Parliament reacts to initiatives from without. Since supervision is its primary function, an outline of some of the aspects of administrative agencies to which Parliament's attention should be directed is appropriate. These "elements of accountability" should provide for an integrated and coherent approach by Parliament to its constitutional role in relation to administrative agencies. They should also result in more effective agencies that comply with the norms and conventions traditionally associated with parliamentary government.

Firstly, attention should be given to the overall structure and integrity of the system. The organization of existing agencies, the place of new

ones, and the relationships between agencies and other parts of government are worthy of attention.

Secondly, the mandate given to the agency should be examined for clarity, inherent contradictions and compliance with the wishes of Parliament.

Thirdly, policy developed by the agency should be closely monitored, as should any policy directive given to the agency by the executive. Of particular importance is the interpretation by the agency of its mandate and jurisdiction.

Fourthly, where an agency is given the power to make rules, the scope and use of that power should be closely watched. Regulation making is a legislative process, and should be of particular interest to the legislative branch.

Fifthly, discretionary powers should be monitored. Parliament should take steps to ensure that these discretions are being exercised as was intended when they were granted.

Sixthly, financial controls to ensure economy, efficiency and effectiveness should be in place.

Seventhly, and of somewhat greater difficulty, is the question of review of decisions and adjudications in individual cases. In the case of decisions by the courts there is a strong tradition according to which judges should not be accountable to the executive or the legislature for individual cases. Parliament of course retains the right to alter the law in response to a particular case. But attempts to influence the outcome of a case, or an overruling by legislation of a particular result, while constitutionally possible, is regarded as being undesirable. Many of the reasons that have led to this constitutional convention apply to adjudications by administrative agencies. Review of the decisions of agencies by Parliament must therefore be directed towards "knowing what is going on", perhaps with a view to future action, rather than being directed towards the decision *per se*.

## 6. Conclusion

Identification of these five roles that Parliament plays in relation to administrative agencies provides a basis upon which to evaluate structures and relations between the two. Such an examination must be sensitive not

only to the proper roles of Parliament, but also to the roles played by the particular administrative agency. From this base, recommendations for improvement can be made.

# CHAPTER FOUR

# Points of Contact between Parliament and Administrative Agencies

The second chapter of this Study Paper examined the role played by administrative agencies in a parliamentary democracy. In the third chapter the role of Parliament itself in such a system of government was examined, especially from the perspective of administrative agencies. This chapter turns to the empirical. The purpose here is to examine the various ways in which Parliament and agencies actually interact. There are a number of "points of contact" between the two. Since agencies are many and diverse, but there is only one Parliament, the chapter is organized from the outlook of Parliament. The contacts between agencies and Parliament can therefore be grouped into the following categories: contacts with the House, contacts with the committees of the House, contacts through the Minister, and miscellaneous contacts.

## A. Contacts with the House of Commons

The House of Commons is so much the centre of Parliament that "Parliament" and "the House" are often treated as being synonymous. Contacts between agencies and the House itself are primarily through the legislative process, but can also arise during other scheduled business such as Question Period, allotted "Opposition Days", and various types of motions. Each of these points of contact are examined in this section.

It has been mentioned in passing that one significant power of the executive is its right to set the agenda of the House.[54] Since the time of the House is limited, the right to determine what business will have priority is of considerable importance. Private Members and Opposition Parties have certain limited times set aside for them, primarily Question Period and "Opposition Days",[55] but the rules are such that bills and resolutions other

than those put forward by the government seldom come to a vote. Agencies can therefore come under the scrutiny of the House whenever the Members in Opposition are willing to devote time to that end, but the most significant debates are those started on the initiative of the government. This is true for the passage of legislation.

## 1. Private Members' Bills

Members can and do introduce Private Members' bills relating to administrative agencies, but as little House time is allocated to them they are invariably "talked out". Occasionally the proposals in them will be accepted by the government and will appear later in government bills. In all cases one can expect that the content of the bills would be noted by agencies, the Cabinet, and policy advisers in the public service. Private Members' bills may therefore serve the useful purpose of identifying areas that are in need of reform, injecting new ideas into the system, and stimulating the government to bring forward proposals of its own, although these bills seldom result in substantive change.

In order to assess the nature of contacts between Parliament and agencies through Private Members' bills, a survey was done of such bills introduced during the 30th Parliament.[56] Over nine hundred of these were introduced during this time, but this number is misleading as many bills are re-introduced in one session after another. Of this number there were less than two dozen which dealt with matters of "administrative law".[57]

Some of these bills would have affected existing agencies; others were designed to create new ones.[58] A number of attempts were made to establish the office of Ombudsman.[59] One member introduced a "sunset" bill which would have seen all federal agencies and programmes cease to exist after five years if not renewed by Parliament.[60] A number of bills dealt with reports to Parliament;[61] others, with jurisdiction and procedures of administrative agencies.[62] Appointments also received considerable attention.[63]

In the final analysis Private Members' bills cannot be said to have had a significant impact on federal administrative agencies. Indeed only five of them were ever debated in the House, and none of them was given second reading. They are however interesting, as they demonstrate not only that Members are aware of the existence and importance of agencies, but also give some indication of which aspects of the agencies are of most concern to them. In this regard the interest in appointments and in reports and other communications with the House are of note. Private Members' bills

also provide the individual Member with a way of focussing attention on a particular problem perceived to exist with an agency, especially when the problem only manifests itself locally. As such they are a potentially valuable means of informing agencies of public attitudes towards them and of the concerns of their political masters.

## 2. Government Bills

Debate of government bills accounts for a good part of the time of the House. These bills are dealt with through the familiar process of three readings. First reading of the bill is the first parliamentary step in the process. (This is not to say that first reading is the first step in the legislative process, for bills presented to the House of Commons have by that time been the subject of considerable attention elsewhere.) First reading is a formal step not involving substantive debate, which brings the bill before the House and places it on the *Order Paper*. In due course second reading of the bill takes place. Debate during second reading is limited to the principles of the bill. No amendments are permitted at this stage. After second reading the bill is automatically referred to a committee of the House where clause by clause consideration of it takes place. Extensive debate and proposals for amendment are to occur at this stage. Following debate in committee the bill is reported back to the House of Commons with any amendments made, and debate then takes place in the House on both the principle and detail of the bill. The final step in the House is third reading which follows some time after debate at the reporting stage, and usually occurs without any further debate. The bill is then sent to the Senate where it is again considered in committee and by the whole Senate. Royal assent is the final step in the process.

## 3. Debates on Proposed Legislation

To better appreciate the nature of the contacts between the House and administrative agencies during the legislative process, three specific debates were examined in detail.[64] The anti-inflation programme, the first example chosen, is representative of a large scale effort to regulate important areas of the economy through the use of administrative agencies. Since the programme only existed during a relatively compact period of time it is a convenient one to study, even though it involved an impressive collection of agencies.[65] Because the debate is a recent one, it has the added advantage of reflecting current practices and procedures. The study

of this example centred on the debate on the *Anti-Inflation Act*,[66] but also included the events leading up to, and following, the passage of the Act to give a better overall picture of the administrative agency before the House.

The other two examples are narrower ones. The second is the passage of the *Northern Pipeline Act*[67] which created the NPA. This is another recent example of the creation of an agency, but one which differs from the anti-inflation example in its scope, importance, purpose, and relations with other parts of government. This agency is one of the most recently created, and is interesting because of the significant control over its operation given to the executive. Also of note is that while there was already in existence a regulatory agency (the NEB), a government department (Energy, Mines and Resources), and a House committee (the Standing Committee on National Resources and Public Works) which could have dealt with the pipeline, an entirely new structure was created. The new agency was set up and it was to report to the Deputy Prime Minister, not to the Minister of Energy, Mines and Resources, and the House set up a Special Committee on Northern Pipelines. The creation of this entirely new structure was later to be criticized in the House.[68]

The third illustration of contact between the House of Commons and administrative agencies through the legislative process is the debate on the *Canadian Radio-television and Telecommunications Commission Act*.[69] While in form the Act created a new commission, the substance of the measure was to transfer regulation of telecommunications from the CTC to what was formerly the Canadian Radio-Television Commission. This example therefore differs from the two preceding ones in that it involves the interaction between Parliament and two existing agencies, which would presumably have certain vested interests and would make representations on their own behalf. The Act, which represented a major re-organization of regulatory jurisdiction, was not the type of measure that was likely to arouse strong feelings in the Members' constituencies. It was therefore of interest to see the focus of the debate and compare it to that on more contentious matters such as the creation of the AIB.

The debate on any bill, naturally enough, is focussed primarily on the substance of the proposed measures. This Study Paper on the other hand is not particularly concerned with, for example, the merits of having a system of controls on prices and wages or of building a particular pipeline. The concern here is primarily with those parts of the debate that raise issues in what may be called "administrative law" in its widest sense. These issues include the choice of an agency over other methods of implementing the programme, the discretions in, and jurisdiction of, the agency, the right to appeal, the overall fairness of the procedures proposed, the relations of the agency to Parliament and the Cabinet, and the coercive powers of the agency. The case studies therefore did not examine the debates as a whole but highlighted the resulting contacts between

Parliament and administrative agencies, as agencies. The methodology used was a detailed examination of the printed debates of the House and its committees, supplemented by interviews with agency members and parliamentarians.

An analysis based on these three examples of the contact between administrative agencies and the House through the legislative process cannot be definitive. It depends to a large extent on how representative the examples chosen are. The exercise is also not suited to forming recommendations for the improvement of the system. It is not particularly meaningful to say that Members of Parliament should discuss this or that issue further, or should be more aware of the consequences of a particular provision. Each bill is different and raises its own issues. More importantly, in any debate Members must be able to concentrate on those points which they feel raise the most important issues of the day. What can be done here is to point out those issues which do receive attention during the debate on public bills and those which do not. This will point out areas that do not receive special scrutiny, and so may be in need of scrutiny in other forums.[70]

There are certain topics which always seem to catch the attention of Members during debates. One of these is the degree of executive power granted by the legislation being discussed. This point was noticed both in relation to the anti-inflation and pipeline measures.[71] The telecommunications bill did not grant any significant new powers to the Cabinet and so did not arouse the same concerns. Related to this issue is the extent of the regulation-making power in a bill. The use of regulations to set out the real substance of a programme is becoming more common, and Members are particularly sensitive to the loss of parliamentary control that results from this.[72] As yet no really effective procedure for the scrutiny of the substance of delegated legislation by the House has been put in place.[73]

Of what significance is it that the Opposition is quick to recognize new executive and regulation-making powers? It did not stop the government from introducing the anti-inflation and pipeline bills with their extensive delegation of authority to the executive and administrative agencies. Neither did it prevent their passage with these provisions substantially intact. This situation is perhaps an inevitable consequence of the government controlling the majority of the seats in the House. This is not to say that criticism of such measures has no effect on legislative draftsmen. The government will always want to avoid unnecessary criticism in the House and ensure quick passage of its legislative programme, and this will act as a brake on delegation of jurisdiction to the executive. As was pointed out earlier this process of criticism and scrutiny of government policy by the Opposition, combined with a recognition of the government's right to govern, is the essence of parliamentary democracy.

Another matter consistently discussed during debates on legislation concerning administrative agencies is the relationship these agencies will have with the House. That Members of Parliament should be concerned with the aspects of the legislation with which they themselves will be dealing is not surprising. Accordingly one finds frequent references to the extent to which the agency must report to the House, the relationship it will have with House committees, and the requirements for tabling in the House of documents produced by the agency.[74] These are all traditional links between the House and administrative agencies. The concern with communications and information perhaps reflects an awareness on the part of Members that without basic data on the work of the agency they will be unable to subject it to the type of scrutiny that will keep it accountable to Parliament.[75]

Also of interest to Members of the House are the provisions for appeals and for the protection of the rights of individuals subject to the jurisdiction of the administrative agency. One aspect of this is a concern that free access to the courts be maintained as one method of protecting the citizen and keeping the agency accountable. Questions of standing, scope of appeals, delay, standardization of procedures, the right to a hearing and other similar matters were raised in connection with all three bills examined.[76] In the case of the anti-inflation programme, amendments to the appeal structure were brought in following repeated criticism by the Opposition.[77] Of course this may have resulted as much from administrative necessity as from the Opposition's actions, but it is interesting that Members of Parliament took such an interest in what might seem to be rather technical and mundane matters. In the case of the pipeline legislation the pressure of the Opposition seems to have been largely responsible for the introduction in committee of government amendments that expanded access to the courts.[78] The attempt to obtain standardized procedures for appeals in telecommunications matters was less successful.[79]

Finally and not surprisingly, one issue which receives a great deal of attention during debate is the substance of the policy being implemented. For example, during the discussion of the anti-inflation legislation, a great deal of time was spent on the desirability of a system of controls on wages and prices. This is mentioned here to point out that to a large extent the amount of debate on a measure dealing with an administrative agency depends on the controversy surrounding the underlying policy. The anti-inflation programme was highly visible and provoked long debate. As a result, agencies set up to administer the programme received prolonged examination. On the other hand the transfer of telecommunications regulation was not politically important and so the policy and agencies involved received little attention. This phenomenon is an inevitable characteristic of the political process, and it means that the House cannot be counted on as a consistent polisher of legislation dealing with administrative agencies.

Certain agencies, such as the NPA, which may be of considerable significance in the future, will not receive the necessary scrutiny at their creation simply because at that time the issues they deal with are not highly political.

One or two issues seemed to be consistently overlooked during House of Commons debates. One of these was whether it was appropriate to use an administrative agency in the first place, and if so how the agency would fit in with the rest of the government structure. An exception to this general observation arose with the pipeline legislation, for the entirely new structures created by that Act were the subject of comment.[80] But in relation to the telecommunications bill, where a rationalization of the system was the very substance of the measure, there was almost no debate on this point. This could of course reflect the general agreement with government proposals. A brief comment was made on whether the government or the Food Prices Review Board should have the power to take action over prices,[81] but aside from this instance no attention was paid to the suitability of the use of administrative agencies to fight inflation. This occurred in the face of a seemingly endless series of boards, tribunals and commissions.

It was noted earlier that the prime responsibility for the orderly structuring of the public sector must rest with the Cabinet.[82] Not only is this partly a matter of executive prerogative; the creation of new agencies often occurs beyond the control of the House of Commons. This was particularly true in the anti-inflation example, for many of these agencies were simply set up by Order in Council.[83] This means that the House's control on the overall system is incomplete at best, which in turn means that planning for, and supervision of, the structuring of the public sector must take place in other centres of responsibility.

In marked contrast to the concern shown over the grant of power to the executive, and the relationship of the House to the administrative agency being set up, is the lack of discussion about the relationship between the new agency and the Cabinet. This is an important matter for it decides both the degree of independence the agency will have, and also the extent to which the Minister will be accountable in the House for the actions of the agency. There was the occasional comment about Cabinet appeals, about the need for independence of an agency, or about the undesirability of setting up bodies that are not accountable to elected officials. What was lacking was any systematic debate or awareness of the dilemma of independence versus accountability. In this regard there was no sensitivity to the role to be played by the new agency. Was it to be engaged in quasi-judicial adjudications requiring a degree of independence, as was the Anti-Inflation Appeal Tribunal? Or was it to be so concerned with the formation of policy that effective control should be retained by the Cabinet, as could be argued for the AIB or the CRTC? This gap in the

debates reflects a basic absence of any coming to grips with the nature of the administrative agency and its place in a parliamentary democracy.

A final matter which did not receive a great deal of attention in the House was the scope of discretionary powers granted to agencies. Related to this is the existence and detail of any criteria or guidelines given for the exercise of that discretion. Under the *Anti-Inflation Act* both the Administrator and the AIB were given significant discretionary powers. For example, the AIB could deal with price changes, which, "in its opinion", violated the guidelines "in fact or in spirit". The Administrator had, *inter alia*, the power to decide whether excess revenues should be returned to the market-place or whether it was sufficient that their generation in the future be prohibited.[84] These discretionary powers were to be exercised without any criteria being set down in the statute, and without any provision being made for their scrutiny in the House. Similar, though less sweeping examples, could be drawn from the pipeline legislation. While the debate ranged over the extent of the powers being given to the executive, little mention was made of the extensive discretionary powers being given to these administrative agencies.

As mentioned earlier, the second reading stage of a bill is supposed to be directed at the principle of the legislation.[85] In committee detailed attention is to be paid to the bill on a clause-by-clause basis. This might lead one to believe that greater attention would be paid to details such as appeal procedures, regulations and relations to the other branches of government in committee than in the House itself. In fact this was not so in the three cases studied. A surprising amount of time was spent on second reading discussing matters of "administrative law" such as those just mentioned. A good part of this debate arose from a handful of Members of Parliament who seemed to take a special interest in this subject. On the other hand proceedings in committee were much less concerned with such matters than one would expect. What mention was made of these issues in committee largely repeated the arguments that had been made in the House. There was nothing approaching a true, detailed "clause by clause" examination of the bills with a concerted attempt to improve the legislation. This may reflect a lack of expertise on the part of the members of the particular committees involved, but it could also result from a lack of interest on the part of Members in any proceedings that were unlikely to catch the attention of the press, and therefore the attention of the electorate. Whatever the reason, committee time could have been used more effectively to iron out the problems in the bills, to save time in the House, and to better define the discretionary powers, procedures and relations of the agencies.

In summary, the legislative process as reflected in the three examples discussed seemed to be fairly effective at examining the broader policies set down in a statute for the agency to apply, the power granted to the

executive, the delegation of regulation-making power and the general procedural aspects of the legislation. Not as effective was examination of the place of the new agency in the public sector, the relationship of the agency to the executive, and the granting of discretionary powers in the bill. During the legislative process the debates on second reading contribute more to this process than might be expected, while proceedings in committee have the potential of being more useful than they are at present.

Researchers for the Lambert Commission also examined the debates on selected bills dealing with administrative agencies in order to identify the issues raised in the House.[86] Chosen for this purpose were the bills that created the CRTC, the CTC and the NEB. On the creation of the CRTC it was found that Members were particularly interested in the generality of the objectives the agency was to pursue, and the resulting scope for interpretation which would fall on the regulator.[87] The new directive and appeal powers in the Cabinet were noticed, especially in the context of how they would infringe on the powers of the CRTC and affect the accountability of the agency and the Cabinet to the House. Members were also concerned about the CRTC's effect on parliamentary supervision of the CBC.

When the CTC was created, the Lambert study found, there was little detailed debate on the accountability or independence of the new agency. In committee there was a successful attempt to change the overall policy goals from providing an "economic and efficient" transportation system to providing an "economic, efficient and adequate" system. But Members did not address either the vagueness or generality of this mandate, nor did they attempt to provide guidelines or standards to resolve the conflict that now existed between the three stated objectives.[88] Discussion was also missing on a related matter: How the CTC was to "harmonize and coordinate" the various modes of transport under its jurisdiction. As to the relationship that would exist between the CTC and Parliament, there was only one extended speech (by Mr. Ged Baldwin), which dealt fully with the problem and proposed changes to improve accountability.

The NEB differs to some extent from the CTC and the CRTC in that its role is split between being an adviser to the government on energy policy and a regulator of the industry. While this meant that the Minister was largely responsible for the work of the agency so that problems of accountability to Parliament did not loom as large, this just caused Members to argue that the Board was not independent enough and that the government had conferred too much power on itself. Also along these lines were complaints about the power of the Cabinet to proclaim the Act in force and to control the release of Board studies. No debate, however, was directed at possible conflicts between the Board's advisory and regulatory roles.

From their analysis of these three debates the Lambert researchers came to some general conclusions, most of which coincide with the results of research done for this Study Paper. First of all it was found that there was little cogent discussion of the accountability relationship between the new agencies and either the Cabinet or Parliament. The present study observed the failure to come to grips with the relationship of agencies with the Cabinet, and especially the absence of any meaningful discussion on the independence of the agency from the government. The present study did observe however, contrary to the Lambert study, considerable interest among Members in the relationship that would exist between agencies and the House. This was expressed in terms of reports to Parliament, the relationship with House committees, and the tabling of agency documents. It could be argued that these are not sufficient means of ensuring accountability, but they are the ones that have traditionally been used in Canada, and they were discussed with some regularity.

The second and related conclusion drawn in the Lambert study was that Members were more interested in the substance or output of measures than in the processes involved. Process only became of interest when "improper" decisions were made, in which case processes would be followed back to determine the causes. The present study also concluded that the amount of discussion a bill received was directly related to the height of its political profile, and that most debate centred on the substance of the matter. It did, however, find a surprising amount of interest in process issues such as appeal procedures.

A common observation of the Lambert study and of this paper was the concern voiced by Members about the vesting of power in the executive branch of government. Just as this paper noted a lack of interest in the discretionary powers granted to agencies, so the Lambert study concluded that while Members objected to more power going to the Cabinet they did not mind it being given to an independent agency. Related to this was a general comment that while there was much complaining about executive power and parliamentary accountability, there were few concrete alternatives forthcoming from Members.

Undoubtedly each debate in the House of Commons will have its own character. Issues raised one day may be forgotten the next, and similar issues in different bills will receive different degrees of attention because of the relative political heat generated by the proposed measures. These factors must make one cautious about drawing general conclusions concerning what is or is not discussed in the House. While certain issues do seem to be perennial favourites, the general inconsistency of debates, especially on matters of process and procedure, must make one wary of reliance on the House to consistently iron out problems of "administrative law" in new bills. This leads to the conclusion that other mechanisms must be in place to ensure that this is done on a regular basis. Strengthening

this view is the observation that debate on these more technical issues, while common, is always at the initiative of two or three specific Members, and is not a matter of general interest in the House. In the end, though, one must not underestimate the ability and willingness of Members to discuss these issues, and press for and obtain amendments, when they are raised on the floor of the House.

## 4. Oral and Written Questions

One of the best known and most highly visible parts of the agenda of the House is the daily Question Period. During these forty-five minutes back-benchers have the opportunity to ask Ministers of the Crown questions on any matter within their administrative responsibility. By convention the Speaker gives some priority to the questions of Opposition Members, although government back-benchers can and do ask questions of the Ministers. Less well known than the oral Question Period is the process whereby written questions are put on the *Order Paper* and are later answered in writing by the appropriate Cabinet Member.[89]

Related to the right to ask questions and worthy of brief mention here is the provision for Notices of Motion for the Production of Papers under Standing Order 48. This is another method whereby the individual Member can acquire information about the government. Rather than asking for an answer to a particular problem, these Notices of Motion require the production of an entire document. It would then be up to the Members to interpret the contents of the documents themselves. Papers requested through such a motion may relate to an administrative agency.[90] The government need not produce them and frequently does not on the basis of cost or confidentiality.

Under the rules of the House oral questions are to be asked only on matters of urgency — all others should be put on the *Order Paper*. Questions must be short, without a long preamble, and should be designed to elicit a response and not to provoke debate. There are many restrictions on what may and may not be the subject matter of a question, although the rules are rather loosely applied.[91] Of relevance to this Study Paper are the restrictions on questions dealing with matters for which the Minister is not responsible, or dealing with matters that are *sub judice*. The former is of importance because the Minister is generally not responsible for the decisions or actions of an administrative agency that has been accorded a degree of independence by Parliament. The latter raises the issue of whether it is proper to ask questions about matters before administrative agencies that have been given the powers of "courts of record".[92] If both

these rules apply in the way suggested, they would represent a significant restriction on the usefulness of the Question Period as a means of obtaining information about administrative agencies.

Most statutes setting up an administrative agency designate a Minister through whom the agency reports to the House. These Ministers are sometimes referred to as "speaking for" the agency. This does not, however, mean that the Minister is responsible for the inner workings or decisions of the agency in the way that the Minister is responsible for a department.[93] The designation is primarily for purposes of communication, and there is no ministerial responsibility unless the Minister has a real degree of control over the agency. Furthermore, the Minister can only realistically be expected to have a very general knowledge of the work of the agency. This makes the oral Question Period an imperfect tool for obtaining information about the intentions, policies and workings of administrative agencies, although written questions have more potential. As was pointed out in Chapter Two, one reason for the creation of administrative agencies was to put the function performed at arm's length from the political process. An inevitable consequence of granting them a degree of independence is that they become less accountable through traditional procedures such as Question Period.

The application of the *sub judice* convention (which covers all debate and not just questions) to administrative agencies is unclear. Certainly there are occasions when the Minister will refuse to answer a question on the grounds that the agency is a quasi-judicial independent body and should not be the subject of political comment, pressure or control.[94] On the other hand Ministers are not reluctant to discuss decisions or cases before an agency where they feel they have the necessary information, and that it would be to the government's advantage to do so.[95] In 1977 the Special Committee on Rights and Immunities of Members looked into the scope of the *sub judice* convention. The Committee took the approach that this convention tended to limit the right to free speech of Members, and accordingly should be restricted as much as possible. It found that the convention had been consistently applied in criminal matters, but perhaps less so in civil ones, and that in any event the convention ceased when judgment was rendered. In the end the Committee recommended that Members exercise restraint in asking such questions, with final resolution of any dispute being at the discretion of the Speaker.

As to the application of the convention to administrative agencies, the Committee concluded that this only occurred if the agency was a court of record. In 1947 the Speaker invoked the rule when a question was asked about a rate application before the Board of Transport Commissioners, and a similar situation arose again four years later.[96] On occasion heads of administrative agencies have invoked the convention in refusing to answer questions put to them in House committees.[97] Overall its application has

been inconsistent, with the answering or non-answering of questions being more dependent on political considerations than on the *sub judice* rule.

The right of a Member to ask questions of the Cabinet is not complemented by a duty of the Minister to reply. Furthermore, the Minister need give no reason for his refusal to answer. In fact a fair number of oral and written questions are not answered on grounds of public interest, because of the need for secrecy in order to preserve security or to promote relations with other governments, and because of the great expense that would be incurred in gathering the information requested.[98] The check on abuse of the right to refuse to answer is the criticism that the overly secretive Minister would receive in the House and from the press.

The right to ask questions, especially oral questions, is an important opportunity for Opposition Members to set the topic that will take up the time of the House and to criticize government policy. Since the time allowed is rather limited the matters discussed are those perceived by Members to be the most urgent and the most important issues of the day. In order to assess the extent to which administrative agencies are the subject of questions in the House an examination was made of the questions asked concerning three of them: the CRTC, the IAB and the WVAB.[99] The CRTC is taken as being representative of a large industry regulator in a fairly high profile policy area. The IAB is a tribunal of a more judicial nature, with a lesser impact on overall immigration policy than the CRTC has on broadcasting policy. The WVAB is less visible than the other two, but is representative of a granting agency that can have a significant effect on the individuals who come before it.

About one hundred and fifty questions were asked on the broad policy areas of concern to the CRTC, such as children's advertising and programming, television service in a particular community, multicultural and bicultural service, pay television, federal-provincial relations, and deletion of commercials to name but a few. In most cases questions were directed at the substantive aspects of the policy in question, particularly the government's policy on the matter. While the CRTC was involved as the regulator in the area, questions were directed more at the government than at the Commission itself. As a result the answers provided more information about the government's policy on the subject matter of the question than about the work of the CRTC.

The Minister of Communications often expressed a willingness to convey information and questions to the CRTC.[100] Unfortunately this seems to be a one-way street, as there is no mechanism to convey responses from the Commission back to the House. Members frequently asked what was the government's position on a particular decision of the CRTC. The response of the Minister to such questions was not always consistent. Generally the Minister was reluctant to discuss cases presently

before the Commission, but more willing to discuss the resulting decision when it had been made.[101] This was particularly so when the decision was subject to review by the Governor in Council. The Minister did, however, on occasion attempt to explain or undertake to look into a decision of the CRTC.[102] Also, Members of the House on occasion attempted to stimulate the government to use the CRTC to perform a particular task.[103]

Oral questions relating to the IAB are of a different type than those concerning the CRTC. Because the IAB is primarily involved with processing individual appeals there are few questions directed to broader questions of immigration policy. Of the approximately fifty questions asked, a number were inquiries about the appeals, deportation or the status of individual immigrants. Some of these questions arose because the matter had received some attention in the press, but many seemed to result from a call for assistance from a constituent. The Minister would generally answer these questions if a final decision had been made, but would limit himself to an explanation of the background and current status of the case if it was before the IAB or the courts. While there would therefore appear to have been loose compliance with the *sub judice* convention, the convention was not referred to by name and does not appear to have unduly restricted the questioning. This may only reflect restraint on the part of the questioners.

For some time the IAB experienced a serious backlog of cases. Several questions were directed at this problem.[104] However, besides this series of questions little interest was shown in the structure, procedures or work of the Board.

While questions on the IAB were infrequent, questions on the WVAB were virtually non-existent. This undoubtedly reflects the uncontroversial nature of their work. However, questions were not even asked on the status of individual cases as was the case with immigration appeals. What attention was addressed to this general topic related primarily to the level and generosity of the veterans' allowances, and little interest was shown in the structure and procedures of the Board.

Written questions, as has been noted, are primarily directed at less urgent matters that require detailed, technical or statistical answers.[105] Since the Minister cannot be expected to have this type of information at his fingertips, and since it is not suited to oral replies, the questions are put on the *Order Paper* for later reply. Responses are tabled in the House after questions have been researched by the Minister's staff. Written questions are therefore a potentially useful source of information on administrative agencies, even though as with oral questions there is no obligation to reply, and replies often take some time.

Questions placed on the *Order Paper* for written replies which touched the jurisdiction of the CRTC fell into several distinct categories. A number

of questions dealt with the provision of broadcasting service to particular locations.[106] Some, in effect, inquired after the existing state of the law.[107] This is information that would presumably be available in the regulations but which Members might not be able to extract themselves due to a lack of resources. Thirdly, there were questions on the consequence or status of particular rulings by the CRTC.[108] Finally, several questions about the staffing and expenditures of the Commission were put on the *Order Paper*.

As with oral questions, the written questions relating to the CRTC were often not directed at the Commission itself. The real targets in these cases were the government or the CBC, with the CRTC being involved only peripherally. Several questions, however, were asked relating to the policy of the CRTC on various issues.[109] Generally no questions were asked which anticipated a decision by the CRTC on a particular application. It is likely that answers to such questions would have been refused. However, on one occasion an attempt was made in an answer to explain a previous decision of the CRTC.[110] Also asked were questions on the ability of the CRTC to deal with certain types of applications.[111] Related to these questions were ones asking for information on the disposition of particular applications and the status of particular licences.[112]

Written questions on the IAB were occasionally directed at the status of particular individuals. In addition some statistical data were sought on the number of appeals heard, the type of immigrant that generated the appeals, the disposition of appeals, and the number of certificates issued to the Board declaring an immigrant to be a risk to national security. A great deal of interest was also shown in staffing, including the appointment of new Board members, their qualifications and pay, as well as the number and remuneration of support staff working for the Board. No questions were asked as to the general policies followed by the Board, although the Board would probably reply that the reasons issued for its decisions must speak for themselves. No statistical data were requested on the way the Board exercised the discretionary powers granted it under the Act.

As might be expected very few written questions were directed at the WVAB. Again some interest was shown in the membership of the Board and the members' remuneration; there were also questions about certain expenditures of the Board, its staffing, and about the total value of allowances paid in each province. The financial questions were accompanied by requests for statistical data on allowances paid and backlog of cases before the Board. In another category were questions as to eligibility for allowances of persons in certain hypothetical situations.[113] War veterans allowances are largely discretionary in nature, but no questions were asked about how this discretion was exercised or about the criteria applied by the Board.

The provisions in the Standing Orders for asking questions and for requiring the production of papers have the potential of fulfilling four

functions. First of all, if properly used they could be important sources of information on administrative agencies. This is especially true of written questions which indirectly allow the individual Member to use the resources of the government to sift through and analyse raw data. Secondly, these procedures can be used to criticize the government and its policy towards a particular agency and its decisions. Thirdly, they can serve to keep agencies informed of the concerns of Members of Parliament. Most of the agency chairmen interviewed indicated that they had some regular process of scanning Hansard for questions and debate on their agency. This assists them in keeping in touch with the public they serve and with the range of policies being advocated by various groups in the country. Finally, questions and the production of papers are important tools in maintaining the accountability of administrative agencies. This is particularly true of the oral Question Period, whose value for this purpose has now been increased by the televising of House business.

Overall the procedures under discussion have not lived up to their potential vis-à-vis administrative agencies, and there are several reasons for this. One is that any contact with the agencies through these procedures must be second-hand, for the agencies themselves cannot be queried in the House. All communications must be through the Minister. Furthermore, the interest of Opposition Parties in replacing the government means that any questions, even if they relate to an administrative agency, are primarily directed at the government. Any involvement of the agency itself is peripheral. Discussion therefore tends to centre on the attitude of the government towards the policy being applied by the agency, rather than on the agency policy *per se*. In the end the whole process tells one more about the House-government relationship than about the House-agency relationship. All these factors tend to make the question procedure a rather imperfect point of contact between the House and administrative agencies.

But despite these shortcomings, the right to ask questions is a valuable one. Unfortunately it has not always been fully exploited. The emphasis on criticizing the government has meant that questions are often directed towards revealing potentially embarrassing information rather than information of a more substantive nature. This accounts for the seemingly endless questions about minute expenditures, reasons for particular trips, number of employees, levels of pay of commissioners, names of consultants and lawyers employed by a particular agency in a particular constituency, and motives of Cabinet Members. In none of the examples studied was a consistent and organized attempt made by a Member through a series of questions to obtain information about the policies applied by an agency. Also lacking was any inquiry into the criteria used to exercise a discretionary power given by statute, for example, the discretion granted to the IAB under section 15 of the *Immigration Act*. Most questions seemed to arise from a concern about a particular decision of an agency or

an aspect of its operations that had somehow come to the attention of the Member. Research done for the Lambert Commission confirms that the questions asked lean heavily towards individual cases and operational matters, rather than towards accountability or policy issues.[11] There was therefore scant attention paid to the broader aspects of the work of administrative agencies. The right to ask questions, especially oral questions, has significant undeveloped potential as a means of obtaining information about administrative agencies.

The requirements of the Standing Orders relating to matters *sub judice* and to matters not under the administrative jurisdiction of the Minister were not a significant limitation on the value of the question process. Members did seem to exercise some restraint in bringing up matters actually before an agency. Where such questions were asked the Minister was generally willing to provide some background to the case and its present status, while avoiding anticipation of the decision to be made. Ministers also were generally willing to answer questions about matters concerning agencies for which they were not strictly responsible. When they did not have the information readily available there was no reluctance to take the question to the agency itself. It is of importance that there be no interference with the decision making of quasi-judicial tribunals. In the questions studied this requirement seemed to be met without unduly restricting the right of Members to inquire about the workings of the government.

## 5. Miscellaneous Debates

In addition to debates on legislation and questions asked in the House there are a number of other types of business which have scheduled time in the House of Commons. Some of these, such as the debate on the Speech from the Throne and the Budget Speech, are directed so much towards the policy of the government that administrative agencies are seldom mentioned at all, and then only in passing. Some others such as allotted days, motions on matters of urgent and pressing necessity under Standing Order 43, motions to adjourn under Standing Order 26, and daily adjournment debates can be used to raise and discuss matters relating to agencies.

Allotted days, also known as Supply Days or Opposition Days, are a fairly recent procedure in the House. Prior to 1968 the government Estimates were debated in the Committee of Supply which was a Committee of the Whole. In that year changes were made which resulted in the Estimates being referred to the various standing committees. In order to

preserve the right of "grievance before supply" the Opposition Parties were given twenty-five days a year on which they could decide the topic to be debated. No more than six of these debates can be on motions of "no-confidence". The allotted days therefore represent an important opportunity for the Opposition to raise a topic of concern to them, and such a topic could of course concern the procedures, jurisdiction or work of an administrative agency.

During the 30th Parliament there were about one hundred such motions debated. Few, however, concerned administrative agencies, for the Opposition naturally regards these days as a prime opportunity to attack the government, and topics chosen reflect the government policies that are receiving the most attention at the time. A number were also used to debate matters of Supply. There were two debates on the anti-inflation programme, one of which supported the creation of a Fair Prices Commission, but in both cases the debate centred on the programme itself and not on the machinery that had been set up to administer it.[115] One of the motions raised the topic of the creation of new Crown corporations and administrative agencies in such a way that their creation was not subject to the scrutiny of the House.[116] This was allegedly being done through the use of One Dollar Votes in the Estimates which would provide for the setting up of the agency or corporation in question. Finally, one motion was debated which raised the problem of increased use of statutory instruments and regulations, as opposed to putting more detail in statutes.[117] Because certain administrative agencies have regulation-making powers this debate could be said to apply to them.

Debate on allotted days cannot be said to have had any significant impact on administrative agencies. Their significance is more in their potential as a point of contact between the House and agencies. The nature of the process is such that only the most serious and highly visible issues of the day will be the subject of these motions. They cannot therefore be seen as a method of keeping agencies informed on a routine basis of the concerns of the House; rather, they are a type of "safety-valve" to be used only when the activities of an agency stray so far from the expected that a large portion of the public becomes concerned with it. This in itself is valuable, but it does not present a solution to the problem of proper contacts between the House and agencies on a day-to-day basis.

Standing Order 43 provides that a Member may present a motion on a matter of urgent and pressing necessity with the unanimous consent of the House.[118] If there is unanimous consent then the motion may be debated, but if the consent is forthcoming it usually means that the House is in favour of the motion so that it passes with little or no debate. Motions under this Standing Order are presented at the beginning of each day's business, and the Speaker immediately asks if there is the required consent. Since there almost never is, the rule has come to be used by

Opposition Members as a means of mentioning matters in the House that are potentially embarrassing to the government.

Standing Order 26 provides for a motion to adjourn the House to discuss a "specific and important matter requiring urgent consideration".[119] The rules give the Speaker considerable discretion in deciding whether to allow debate to take place on such a motion. In deciding whether the motion is in order the Speaker considers whether the matter is truly urgent, whether the public interest calls for debate and whether there is any other opportunity for debate on the issue. If the motion is ruled in order the mover requires the consent of the House to proceed. Motions under Standing Order 26 are not unheard of, but they are not common.

The use of Standing Orders 43 and 26 as they relate to administrative agencies can be illustrated by the following example. On Friday, March 30, 1973 the CTC handed down a decision that granted Bell Canada certain rate increases. This caught the attention of some Members, and the following Monday they raised the matter in the House. The first attempt to do so was at the beginning of the sitting through Standing Order 43.[120] This attempt having failed, the House moved on to receive answers to questions on the *Order Paper*. At the conclusion of this item of business the Opposition tried again, this time by invoking Standing Order 26.[121] The Speaker deferred making a ruling on the motion until later in the day, and the oral Question Period began when several questions were put on this issue.[122] After the discussion of some government business the Speaker gave a favourable ruling on the motion under Standing Order 26.[123] As a result of this ruling the House spent three hours that evening debating the decision of the CTC.[124] This debate considered not only the rate increase itself, but the ability of the CTC to protect the public interest, and the power of the Cabinet to reverse the decision. During this discussion Members turned their attention to the problem of protecting the independence of administrative agencies while keeping them accountable to the House, and noted the lack of any effective mechanism in Parliament to review the work of agencies on a continuous basis. Overall the debate provided a good opportunity to reflect on the workings of the CTC.

The debate under Standing Order 26 did not end the matter. In the days that followed there were more motions under Standing Order 43, and more oral questions. On April 6, the Minister of Communications announced during the time set aside for that purpose that the government had decided to suspend the decision pending further investigation. As provided by the rules each Opposition Party was given an opportunity to react to this statement.[125] The matter ended when the government subsequently announced it would reverse the decision of the CTC.[126]

This example demonstrates how the two Standing Orders can be used by Members to debate and draw attention to federal administrative agencies. While the rules do not enable the House to take votes that would

compel the agency in question to act in a particular way, they can prod the executive to do so. As well the debates inform the agency of the views of Members and help it keep in touch with public opinion. They are therefore one more part of the overall mechanism by which agencies retain an element of contact with, and a degree of accountability to Parliament.

The final type of parliamentary business to be noted here is the thrice weekly adjournment debate.[127] On Monday, Tuesday and Thursday at 10:00 p.m. there is a thirty-minute period during which a Member can bring up any matter for debate. Three topics are considered each night at what has come to be known as the "late show". Any Member who gives the Speaker proper notice is given seven minutes to make his point, after which the government has three minutes to reply. No votes are taken on the issues discussed. This procedure could of course be used to raise an issue related to administrative agencies. For example, if the Opposition had been unsuccessful in its motion under Standing Order 26 on the Bell Canada rate increase it could have given notice to the Speaker of its intention to raise the matter "on the adjournment of the House".

### 6. Conclusion

In conclusion, the varied procedures just noted all provide Members, and especially those in Opposition, with the opportunity to debate or raise matters relating to administrative agencies. They all suffer from the same defect, which is that votes on binding resolutions of the House do not result from them. This is consistent with the government's prerogative to control the business of the House. Yet despite this shortcoming, which is shared by Question Period and the allotted days procedure, these parliamentary devices are all important ways through which the House exercises its supervisory function over the public sector. Because of their extraordinary nature, though, they cannot be seen as a viable method of providing continuous scrutiny of administrative agencies by the House of Commons.

## B. Contacts with the Committees of the House

### 1. The Committee System

The House of Commons has always made use of committees. However, since the procedural reforms of the late 1960's, which substantially reduced the use of the Committee of the Whole, the role played by the

standing committees has increased in importance.[128] This shift of work from the House to committees has been opposed by some Members who are of the view that it detracts from the role of the House as the centre of debate of the nation's business.[129] The increased delegation of work to committees, it is argued, will result in a less responsible form of government and consensus politics. This support of debate on the floor of the House is balanced by the opinion that ". . . a strong attachment to the sacred notion that parliamentary business should be conducted as much as possible on the floor of the House . . . can only contribute to the 'decline of Parliament' so often bemoaned by members."[130]

At present the committees do primarily three types of work. First of all most government bills are referred to a committee after second reading for clause by clause study. The performance of this function by the committees in relation to administrative agencies was examined earlier in this chapter during discussion of the legislative process.[131] Secondly, the committees are actively involved in the government financial process. Most of the Estimates are now referred to committees for examination. Witnesses, such as heads of administrative agencies, appear before the committees to explain and justify the various requests for funds. Furthermore, the Public Accounts Committee is actively involved at the other end of the financial process, when the Auditor General reports on the way the government has spent the money granted to it. The role of the House of Commons committees in the financial process is examined later in this chapter.[132] Thirdly, committees are from time to time involved in general inquiries into substantive issues of policy arising from White Papers or general referrals from the House. Such an inquiry could easily relate to a particular administrative agency, or to administrative agencies generally. As will be seen later,[133] committees have no general mandate over a particular agency, but in practice all matters dealing with a particular agency are dealt with by one committee. Table I (p. 52) shows the committees and their related agencies.

(a) *Structure*

The House recognizes three types of committees. Special committees are those which are set up to perform some particular task, and cease to exist at the end of the session during which they are created. Standing committees exist for the life of a parliament, and are used to conduct the routine and ongoing business of the House. There are at present twenty standing committees, most with a maximum membership of twenty.[134] Joint committees consist of Members of the House and the Senate, and may be standing or special. The most important of these is the Standing Joint Committee on Regulations and other Statutory Instruments. The work of this committee as it relates to administrative agencies will be discussed in detail later in this chapter.[135]

TABLE I
PARLIAMENTARY COMMITTEES AS RELATED TO
ADMINISTRATIVE AGENCIES

| AGENCIES | STANDING COMMITTEE |
|---|---|
| Anti-dumping Tribunal | Finance, Trade and Economic Affairs |
| Atomic Energy Control Board | National Resources and Public Works |
| Canada Council | Broadcasting, Films and Assistance to the Arts |
| Canada Employment and Immigration Commission | Labour, Manpower and Immigration |
| Canada Labour Relations Board | Labour, Manpower and Immigration |
| Canadian Film Development Corporation | Broadcasting, Films and Assistance to the Arts |
| Canadian Human Rights Commission | Miscellaneous Estimates |
| Canadian Pension Commission | Veterans Affairs |
| Canadian Radio-television and Telecommunications Commission | Broadcasting, Films and Assistance to the Arts |
| Canadian Transport Commission | Transportation and Communications |
| Economic Council of Canada | Finance, Trade and Economic Affairs |
| Immigration Appeal Board | Labour, Manpower and Immigration |
| International Development Research Centre | External Affairs and National Defence |
| Law Reform Commission of Canada | Justice and Legal Affairs |
| Medical Research Council of Canada | Health, Welfare and Social Affairs |
| National Energy Board | National Resources and Public Works |
| Public Service Staff Relations Board | Miscellaneous Estimates |
| Restrictive Trade Practices Commission | Miscellaneous Estimates |
| Science Council of Canada | Miscellaneous Estimates |
| Social Sciences and Humanities Research Council of Canada | Miscellaneous Estimates |
| Tax Review Board | Justice and Legal Affairs |
| War Veterans Allowance Board Canada | Veterans Affairs |

From another perspective, the committees can be divided into two types: those which are functional and those which are topical. Functional committees perform a single function over a wide range of topics. Examples are the Public Accounts Committee, which reviews the accounts of all departments, and the Joint Committee on Regulations and other Statutory Instruments, which has jurisdiction over all statutory instruments regardless of their subject matter. Most of the committees are topical. They perform a number of functions relating to a single area of government, for example, debate on legislation, review of the Estimates and inquiries into policy matters. To illustrate, the Agriculture Committee performs these functions in relation to agriculture, the Northern Pipeline Committee in relation to the pipeline, and so on. The relevance of the distinction between functional and topical committees will be seen later.[136]

The committees of the Commons communicate with the House through reports. The Standing Orders provide that committees may report "from time to time".[137] In general committees will report each time they have finished discussing a matter that was referred to them. Reports of committees are usually very brief. A report on a bill referred to committee is usually little more than a list of the wording changes recommended by the committee. Reports on the Estimates are equally brief, usually amounting to little more than a general statement of concurrence. In fact there often is no report at all on Estimates, because Standing Order 58(14) provides that they are deemed to be reported on May 31, and many committees do not meet this deadline. On occasion, however, a standing committee will be asked to conduct a general inquiry into a specific matter and a more detailed, analytical report will result.

A committee only issues one report on any matter; there are no dissenting or minority reports. Any opposition to the recommendations of the committee must be recorded in the minutes of its meetings. This rule has been criticized as tending to hide diversity of opinions and as tending to obscure the opinions of Opposition Members. On the other hand there is the real fear that allowing minority reports would result in there being a "government" and "Opposition" report on every issue. There would no longer be any incentive for the committee to reach a consensus, and the committees would become considerably less useful.

There is no provision in the Standing Orders that provides for automatic debate of committee reports. While there will usually be debate on any report on a bill, and a vote on any proposed amendments, there is seldom any debate on substantive reports making policy recommendations. A considerable reduction in the impact of the report results, and there is a corresponding reduction in the incentive for committees to produce such reports. As a result there have been frequent suggestions that provision be made for the automatic debate of at least some committee reports, perhaps by setting aside a special committee time in the House.

The status of a committee report that has been concurred with by the House is unclear. Concurrence in housekeeping reports, such as those requesting permission to travel or to retain consultants, are generally treated as orders of the House. But concurrence on substantive reports is regarded as a mere expression of opinion, and the government may ignore the recommendations contained in them if it wishes. Giving reports the force of law would probably reduce the independence of the committees, for it would mean the government would not allow any recommendations to be made which were contrary to its policy. There might also be a reluctance to refer substantive issues to committees in the first place. The result would be a reduction in the ability of the back-benchers to play a role in policy formation. While it may not be desirable to give reports the force of law, the government should be forced to respond to every committee report and give its position on the recommendations in it.

In addition to the controversy over the extent to which use should be made of committees, there has also been considerable discussion on possible reform of the committee system. This has arisen from a perception that the committees are not now able to properly perform the tasks assigned to them. The problems being experienced by committees may stem from the fact that the procedural changes that increased their workload were primarily brought about to streamline proceedings in the House. Little consideration was given to the effect these changes would have on the committees themselves.[138] The discussion on the reform of the committee system revolves around the following issues: their mandate, their membership, their chairmen, and their staffing.[139]

(b) *Mandate*

Despite the generality of their names the topical committees have no broad mandate over their subject areas. The Agriculture Committee, for example, may not investigate, debate or recommend on anything to do with agriculture on its own initiative. Committees can deal only with those things which are specifically referred to them by the House; if nothing is referred they are inactive. No committee has jurisdiction over a particular bill or part of the Estimates until there is a motion in the House to refer the matter to them. No committee can conduct an investigation or attempt to develop policy on any topic without the permission of the House.

There are a few exceptions to this general rule. Under the Standing Orders the public accounts and all the Auditor General's reports are automatically referred to the Public Accounts Committee, and certain relevant documents stand permanently referred to the Committee on Northern Pipelines.[140] A few statutes also refer matters to the committees automatically, the most notable example being the *Statutory Instruments Act*.[141]

The lack of any general mandate has reduced the usefulness of the work of committees and has led to disputes over the proper scope of their deliberations. It means, first of all, that committees are at the mercy of the government's majority in the House. If the government for any reason does not want a committee to discuss or investigate a particular topic it can prevent it from doing so by simply refusing to send the matter to the committee. The rules also prevent committees from displaying any initiative in their policy areas. Ideally committees should develop a degree of expertise and be able to follow up on matters that arise during their proceedings and seem in need of investigation. If they had a general mandate they could begin discussions leading towards the creation of policy, thereby increasing Members' input into the policy process by involving them at an earlier stage. Committees could also perform their supervisory role in a more cohesive and integrated way if their general mandate included scrutiny of particular departments, Crown corporations, and administrative agencies.

While the granting of a general mandate to House committees would increase their vigor and independence, there is not unanimity on whether this would be a good thing. As has already been noted, there is opposition to strengthening committees at the expense of the House. If they were allowed to act on their own initiative it is likely that they would develop towards the American congressional model, where legislative committees overshadow the legislature itself.[142] Furthermore, the government is unlikely to look favourably on committees that are too enthusiastic in their scrutiny of the government, or that take too much of a lead in the creation of policy. If this were to happen it is likely that the government majority in the committee would be called upon to vote along Party lines to protect the administration and advance its programme. This would make committees increasingly partisan, and would result in their performing only those tasks agreed to by the government majority.[143] Debate would tend to follow Party positions, and committees would in the end be just as much at the mercy of the government majority as they are at present. In these circumstances the work of the committees could not hope to "assume a critical significance related more closely to the national interest as a whole than to simple political differences".[144]

(c) *Membership*

At the same time as the work of the committees was increased in volume and importance, changes were made which tended to increase the instability of their membership. At one time a change of membership could only be accomplished by a motion in the House itself; under the present rules changes are made by the Chief Government Whip filing a notification with the Clerk of the House.[145] Such changes are made frequently to ensure a government majority on committees when regular Members are

absent, to keep government Members in line,[146] and to allow Members who are not on the committee to participate in debates that affect their constituencies.[147]

Changes in the membership of committees under the new rules have been so frequent that they have not only prevented the development of any expertise and experience in Members in the subject matters dealt with by the committees, but they have also on occasion been so frequent as to actually disrupt the progress of meetings.[148] During the first three sessions of the 30th Parliament there were respectively 4,310, 1,749, and 1,409 substitutions of one member for another.[149]

Related to the problem of instability in committee membership is that of the size of committees. Even though there has been a marked reduction in this respect since the beginning of the century, the standing and standing joint committees existing in the last Parliament still provided for a total of 475 places. If the Members of the Cabinet, who do not sit on committees, are removed, there were about two committee places per Member. The work-load would, of course, be higher for smaller political Parties who try to maintain representation on all committees.

While the ratio of two committee places per Member does not seem large, it has been suggested that the number be reduced.[150] In the United Kingdom only about half the Members of Parliament sit on committees.[151] Members have large work-loads, and undoubtedly any relief would be welcome. Reducing membership would help reduce the problem of overlapping meetings of those committees with common membership, and would help Members schedule their time so that they can be in town when the committee is to meet. This in turn would reduce the need for frequent changes in membership to maintain the quorum or the government majority in the committee. It has also been said that in fact there is only a small core group of Members who take committee work seriously, and that it would be better if only they were appointed to them.

(d) *Chairmen*

With the exception of the Public Accounts Committee, the Chairmen of House of Commons committees are usually government back-benchers. There has been some uncertainty as to the role that these Chairmen should play. Under one model they would be like speakers of the committee — impartial leaders who attempt to run the committee in such a way that its work is done as efficiently as possible. Another approach sees them as being highly partisan Members, whose primary task is to push the government's business through the committee. At present the Chairmen are forced to try to be both speaker and government Member at the same time. It has been suggested that the Chairmen take on a more neutral role,

and that Parliamentary Secretaries take on the role of the chief promoters of the government's programme. This could be achieved by following the British practice of having the Speaker appoint the committee Chairmen from a panel of Members from both sides of the House.

So long as committees are split along Party lines it is difficult for them to progress beyond the partisan debate that takes place in the House. It is only when committee members develop a sense of common purpose and a determination to inquire into the merits of a proposal regardless of Party positions that committees have an impact on policy.[152] The Chairman is in the best position to promote the development of such a consensus, but only if he is not perceived as being primarily the champion of the government's cause. And even an impartial Chairman can only do this on the more routine matters that are relatively free of strongly held partisan positions, and regarding matters on which Parties have not yet taken a stand.

It is, of course, unrealistic to think that politics can be completely removed from House of Commons committees. It has however been suggested that by giving Chairmen greater independence from the government they would gain sufficient prestige to become a guiding force on the committees. This would enable them not only to improve the quality of committee work, but also to encourage constructive changes and improvements to the government's business before the committee. A Chairman of this kind is probably just as effective at obtaining speedy consideration and approval of government business as is a highly partisan one who will be faced with opposition to every step he takes. On routine matters, such as clause by clause study of uncontentious bills and the periodic review of the work of administrative agencies, these Chairmen could be a real asset. On the more controversial issues they could guide the proceedings while the Parliamentary Secretary carried the government's proposal towards the eventual test of the government's majority on the committee.

(e) *Staffing*

The provision of permanent expert staff for the committees of the House has been a frequently suggested reform in recent years.[153] This, it is argued, would both strengthen the committees and improve the quality of their work. It is felt that the only way committees can compete with the bureaucracy and the government is by having their own sources of information and some assistance with their work-load.

At present the committees have no permanent staff, but this is not to say that they are completely on their own. The Committees and Private Legislation Branch of the House provides them with all the necessary transcribing and translating staff. The Branch will also assist with the

drafting of Private Members' bills. While it has no fixed budget for hiring research staff, a committee is at liberty to ask the House for funds for this purpose any time it feels it necessary. Some have done this with great effectiveness. For example, the committee that considered the *White Paper on Tax Reform* made use of nearly twenty outside consultants.[154] The Standing Joint Committee on Regulations and other Statutory Instruments has for some time arranged to have counsel to work with it on a continuous basis.

Each Member of Parliament has a set budget for the operation of his office, part of which is usually used to hire a research assistant. Some of these people naturally deal with matters under discussion by committees. As well, the political Parties are given funds to hire staff. An important part of their work is briefing Members for committee work and accompanying them to committee meetings. In addition Members may make use of the Research Branch of the Parliamentary Library.[155] This facility has forty-five full-time researchers with training in a variety of disciplines who are available to assist Members as well as committees of the House. In fact about half the staff-hours of the Branch are devoted to committee projects, and one research officer spends all his time working for the Public Accounts Committee.[156] Finally, the Parliamentary Centre for Foreign Trade and Foreign Affairs has for a number of years played a valuable role in assisting certain committees of the House.

The provision for a permanent staff has not been universally seen as the saviour of committees. The Director of the Research Branch of the Library of Parliament is of the view that a central research staff is more efficient. The work of committees is subject to great fluctuations and a central agency such as the Research Branch, he argues, can account for this by shifting personnel.[157] In addition the Branch is said to be able to provide a much wider range of expertise than a committee could realistically expect to build up within its own staff. The Director of the Parliamentary Centre has concluded that the most serious problems facing the committees are lack of independence in the Chairmen, lack of strong Opposition critics, the partisan nature of the subject matter, changing membership and unmanageable schedules. Until these problems are overcome, he states, the provision for staff for committees will be expensive and ineffective.[158]

It is difficult to see how staffing for committees would work in practice. It is inevitable that they will remain somewhat partisan, and this will limit the role that staff can play. It is unlikely that Opposition Members would be happy with having the staff report to Chairmen given the present close association of that position with the government. To a certain extent the government and Opposition Members will always be interested in different things, and it would be very difficult for staff to one day research material for government Members, and the next day attack that material

on behalf of the Opposition.[159] For work on more controversial matters it is probably better to have resort to a facility like the Research Branch of the Library, which does not report to a government member. Alternatively, additional funds could be given to Party caucuses, a proposal which has the added advantage of allowing the Parties to decide which issues deserve the most attention.

Staff for committees would probably be more useful as a type of secretariat. As such they could collect information and put it in a more usable form for Members of Parliament. They could also screen material that comes before the committee, interpret technical data and point out matters of particular interest. On occasion they might be used to assist in the cross-examination of witnesses. It is this type of function that has been successfully performed by counsel to the Standing Joint Committee on Regulations and other Statutory Instruments. A committee secretariat could relieve the committee of some of its work-load while recognizing that in the end there is no substitute for a well informed and well prepared Member who has thought about the issues before the committee.

(f) *Conclusions*

If there is one common factor in all the issues raised about House committees, it is the degree of independence they should have from the House and the government. A committee with a general mandate would not have to rely on the government majority to refer matters to it. If committees were to be allowed a degree of independence the government would not call on its majority to vote the Party line as often, and this would mean that frequent membership changes to maintain government strength would not be necessary. An independent Chairman, whose primary task was not to speed the passage of government business, could provide needed leadership and direction to the work of the committee. Finally, a permanent staff would give committees the resources to take advantage of a general mandate and any degree of independence they might be given.

While any increased independence would strengthen the committee system, as has been noted, this is not seen by all as a desirable result. The government, naturally enough, does not want multi-party committees producing reports and recommendations which run counter to stated government policies or which are embarrassing to it. And as has also been noted, some individual Members fear the strengthening of committees if the result will be a weakening of the House of Commons. It is felt that a committee system such as that used by the United States Congress would be inappropriate in the Canadian system. Such a system will probably never develop here. Congressional committees have become independent because Congressmen are not under the control of the administration and because Party

discipline is weaker. This independence works both ways. Because the administration and Congress are separated, and because the survival of the government does not depend on votes in the legislature, the American system can afford to have committees generating policy recommendations that run counter to the position of the executive.

House of Commons committees will inevitably remain to some extent dependent on the government. It is the legitimate task of the government to govern, and this requires that their programmes be approved by committees. From time to time the government must call on its majority to have this done. Party discipline must also remain strong in Canada because the government must keep the support of the House of Commons. This will always create a certain tension in the position of Members of Parliament. Any participation in non-partisan supervision or policy making at the committee level will be limited by pressures from the government caucus to support government policy and from the Opposition caucuses to provide an alternative to government policy. These pressures, however, can be limited by providing for committee input at an early stage of the policy process, before Party lines have hardened and a question of confidence arises. This requires that more discussion take place on White and Green Papers, and less on government bills and Estimates.

Also important is a recognition of the role of Parliament as the scrutineer and critic of the government of the day. A large part of this function can be performed most effectively in committee, and committees require some limited degree of independence to do so. There is no justification for structuring them so that they are unable to perform this function. A certain allocation of resources and stability of membership is needed to accomplish this. In addition, at least the supervisory mandate of the committees should be guaranteed, so that each one is assigned the general scrutiny of the departments and administrative agencies it regularly deals with. A simple provision that the annual reports of these agencies be automatically referred to the committee may be all that is needed in this respect. Certainly such a rule would eliminate abuses such as occurred in 1967 when the government failed to refer the Auditor General's report to the Public Accounts Committee.[19]

The procedural changes made in the late 1960's were unfortunately implemented without there being any clear conception of what the committees' role in the system should be. It is important that this role be defined by first examining the role of the House of Commons itself, and by then seeing how committees can best help the House fulfil its role. Certainly committees should be put in a better position to assist in the performance of the House's supervisory role at the more detailed level. As well they can probably be developed to give the House a greater impact on govern-

ment policy. When this is done it will be possible to provide the mandate, membership and resources which committees need to perform their assigned functions.

The committee system as it exists today does not enjoy a good reputation. Observers, public servants and the Members of Parliament themselves are almost universally of the view that committees are largely ineffective. Examination of legislation is disjointed and ineffective, and as will be seen in the next section, review of the Estimates is almost non-existent.[161] While the structural and procedural problems noted above are partly responsible for this, many Members place some of the blame on their own attitude to committee work. They admit that Members are often poorly prepared, uninterested, overly partisan and too concerned with narrow constituency matters and getting their names in the minutes. A thorough, well prepared and persistent series of questions or comments is rare. Some Members are extremely pessimistic, believing that committees have deteriorated beyond salvation. But as the demands on the time of the House grow, an increasing amount of the work of Parliament will have to be done in committees or not done at all. This includes any effective scrutiny of, or contact with administrative agencies. It is therefore important that Members of Parliament re-examine their approach to committees, along with the committee structure. If this is not done Parliament will deny itself the opportunity to engage in such scrutiny.

## 2. The Financial Process and Chairmen Appearances

As has already been noted the House of Commons plays an important constitutional role in the government financial process.[162] Initially Parliament approves the raising of revenue by the government, and then authorizes the expenditure of the funds raised on specific programmes. The second part of the process involves the checking of the expenditures of the government for economy and compliance with spending authorizations. Both these functions are performed to a large extent by the committees of the House: the first by the various standing committees, and the second by the Public Accounts Committee. Since administrative agencies all depend to some extent on the public purse, the financial process is an important point of contact between them and Parliament through the committees of the House of Commons.

### (a) *Supply Procedure*

The initiative for preparing the Estimates of the agencies lies in the agencies themselves. Once they have ascertained what they will require for the upcoming fiscal year, the proposed budget is forwarded to the Minister through whom the agency reports. Since the Minister must take

the proposed expenditures to the Treasury Board and later to Parliament, he is naturally interested in their content. It is likely, therefore, that he will discuss the proposed budget with his advisers. This process is a potential problem area, for it could be used by the Department to "second guess" or attempt to lessen the independence of the agency by controlling its budget. All the agency Chairmen interviewed were cautious about the dangers this presented, but none reported any attempts to influence the agency in this way.[163] Some hoped the Minister would trust their judgment, while recognizing his right to seek advice from whomever he chooses. Others were more reproachful of the idea that department officials should be involved with their budgets. If the Minister had questions they thought he should put them to the agency. Generally speaking, the more independence the agency was granted in its statute, the more determined it was to retain full control of its financing.

After the agency, the Minister, and the Treasury Board have agreed on the budget, it becomes a part of the Estimates and goes to Parliament. Since the Blue Book is the document that forms the basis of the debate in the House, its contents are important. The information contained is similar for most of the administrative agencies, and an outline of the data submitted relating to the CRTC's budget for fiscal year 1979-80 can be used to illustrate the material available to the Members.

The budget of the CRTC is all contained in one "vote". Its funding is therefore distinct from the funding of any other programme. However, because the whole budget is in one vote, there is no opportunity for the House to vote approval of distinct portions of it. The information contained in the CRTC Estimates is divided into six parts. The first part simply states the total amount the agency is requesting under the broad title "Vote 15 - Canadian Radio-television and Telecommunications", with comparative figures for previous years. The second part provides more detail on the totals given in the first part, breaking them down into Administration (management, departmental, administration and legal services), Policy and Evaluation (policy advice on cultural, technical and programming matters), and Operations (licensing, processing of applications, hearings and economic advice). Also included is information about the revenue generated by licence fees, and the cost of services provided by other departments. The third type of information provided is a narrative of the objectives of the programme, which is essentially a paraphrase of section 3 of the *Broadcasting Act*.

In the fourth part of the Estimates the proposed expenditures are broken down in another way. Here the division is according to the type of expenditure: staff costs, transportation and communication, rentals and so forth. This is followed in the fifth part by a breakdown, with comparative data from previous years, of the authorized and actual staff of the Commission by department. The final part concerns the grants and contributions made by the CRTC. Since all the funds allocated for this purpose are

spent in the same way, there is no further breakdown of this sum, and the Estimates simply state: "Policy and Evaluation — Contributions towards Research under Section 18 of the *Broadcasting Act* — $75,000."

The format and content of the Estimates has been the subject of some criticism. Members of Parliament complain about a lack of detail and the difficulty of finding out exactly what the various entries mean. Part of the problem is the sheer volume of the Estimates, a result of the scope of modern government. The conflicting objectives of providing meaningful data while keeping the quantity of information within manageable bounds have yet to be reconciled. The Lambert Commission was also critical of the present Estimates. The Commission found them hard to understand and difficult to compare with the Public Accounts.

> In their present form the Estimates fall short of establishing a suitable base for accountability. They fail to disclose clearly why the government wants to spend money, how it will spend it, and what the benefits of the spending will be.[164]

The Lambert Commission was of the view that the objectives and sub-objectives should be more precisely stated, and that the proposed programmes and spending should be related more closely to them. As a part of its comprehensive report on the financial process of the federal public sector, the Lambert Commission made a number of recommendations designed to improve the format and content, and therefore the usefulness, of the Estimates.[165]

Once the Estimates are introduced into the House they are referred to the various standing committees for discussion. This is to happen before March 1 of each year, and the committees then have until May 31 to report back to the House. The deadline for reporting back, which is often not met, prevents a filibuster of the Estimates by the Opposition. While the Estimates are in committee, motions can be introduced to have specific amounts agreed to or reduced; only the government can move an increase or a change in application of an amount.

Committees considering Estimates will routinely call witnesses from the government to explain and justify the proposed expenditures. Among these witnesses are the heads of the various administrative agencies. Their appearances provide one of the most important contacts between the House and administrative agencies. Some of these agency heads, such as those of the CRTC, the CTC and the CHRC, appear alone, while others accompany the designated Minister. For example, it has become the practice for all parts of the Veterans Affairs portfolio, including the Minister and the Chairmen of the CPC and the WVAB, to appear together. In all cases the Chairmen are accompanied by members of their staff who assist in providing the more detailed and technical information requested.

Committee minutes relating to the discussion of the budgets of the CRTC, the IAB, the CPC and the WVAB were examined to identify the nature of the interaction that takes place between the House and agencies during the Estimates process. Supplementary data were obtained by interviews with Members of Parliament and the heads of seven administrative agencies.[166] The minutes reviewed cover approximately budget years 1977-78 and 1978-79.

(b) *The Canadian Radio-television and Telecommunications Commission*

The debate in the Committee on Broadcasting, Films, and Assistance to the Arts on the CRTC Estimates for 1977-78 began on March 17, 1977.[167] Mr. Harry Boyle, the Chairman of the CRTC, had circulated an opening statement to the Members earlier that day, and attended the meeting to discuss it and the Estimates. The written opening statement was short and included an outline of the work-load of the Commission, some discussion of the most rapidly increasing expenditures and an organizational chart. Essentially it attempted to expand on, and explain some of the information contained in the Estimates.

After a few opening formalities, the Members of the Committee began questioning Mr. Boyle. Two observations can be made about the discussion that followed. First of all it did not proceed with either the written statement or the Estimates as an outline or guide — indeed hardly any mention was made of these two documents. This may be due to the fact that some Members as much as admitted that they had not read the statement, and one suspects the same held true for the Estimates. The second point is that the discussion was very disjointed, with the Members jumping from one topic to another.[168] The procedures used in House committees partly explain this, for each Member is only allowed ten minutes of questioning at first. The Member who wishes to participate further must wait until all the others have had their ten minutes, at which time five more minutes are available to him. Ten minutes is too short a period to sustain an in-depth inquiry into a particular topic, and so if the next speaker does not pick it up, the Member must return to it later. Alternatively the Member of Parliament who has several topics on his mind must attempt to deal with them all superficially in this short time, only to be followed, perhaps, by another Member who will do the same thing with the same topics. There are several solutions to this problem. First of all, the Committee, or the Members of one Party on the Committee, could nominate one of their Members to lead the questioning through each topic, with other Members interjecting when necessary to follow up a point. This method is used successfully by the Senate, where the lead questioner is expected to undertake extra preparation for the meeting. Alternatively, the Committee could agree to an agenda on which all the topics would be listed. Discussion could then proceed from topic to topic

with each Member asking questions on those of interest to him. Some Members expressed reservations as to whether their colleagues would be willing to give up their own time to implement the former suggestion, or be willing to subject themselves to the discipline necessary for the latter.

When the Committee continued its "discussion of the Estimates" seven days later, the Chairman of the CRTC was again present. Of the nine Members of Parliament who spoke at the earlier meeting, one was no longer a member of the Committee, and three did not attend. The topics raised at this meeting were very similar to those at the first meeting, although the debate was a little more cohesive because most of the speakers referred, at least in part, to the inquiry the CRTC was holding into allegations of bias in the CBC. The only question relating to the Estimates concerned the number of persons employed by the CRTC, and the number of those who earned over $15,000 per year.[169] This second meeting concluded the discussion on the budget of the CRTC for 1977-78.

In November of 1977 the CRTC appeared before the Committee again, this time in relation to the Supplementary Estimates to pay for the inquiry into bias in the CBC. The new Chairman, Dr. Camu, was in attendance and he made a brief opening statement in which he outlined recent changes in the Commission membership and the work done on the CBC inquiry.[170] The Chairman mentioned the cost of the inquiry and outlined some of the research that had been undertaken in furtherance of it. However, since most of the money had already been spent, and the report of the CRTC on bias in the CBC was completed, there was no interest shown in the Supplementary Estimates themselves. As at the March meetings discussion ranged over a wide area: the new Chairman's view of his position, French television service in British Columbia, and various constituency problems. The main topic was, though, the report of the CRTC on allegations of bias in the CBC, and indeed the whole meeting was more of a discussion on this report than on the Estimates. Frequent references were made to it, and numerous questions were asked about the conclusions reached by the CRTC. In this way the Members of the Committee managed to discuss this report even though it had not been referred to them by the House.

The most recent discussion of the CRTC's Estimates occurred in April, 1978 when the 1978-79 Estimates were considered by the Committee.[171] The usual practice of the Chairman giving an opening statement was followed. In it Dr. Camu mentioned the total budget requested, and explained that the increase over the previous year was due to salary increases, a greater number of public hearings and more advertising for those meetings. Also outlined briefly were the work-load of the Commission, some recent appointments, and the anticipated move of the CRTC to Hull. The Committee debate was similar to that of the previous year in that no questions were asked about the Estimates. General policy and constituency problems were of primary interest. In the end the debate was a useful

forum for allowing Members to get information on the CRTC and to express their views on the principal issues of broadcasting policy facing the Commission. It was not, however, a meaningful examination of the Estimates.

(c) *The Canadian Pension Commission and the War Veterans Allowance Board*

The Estimates of the CPC and the WVAB are considered by the Standing Committee on Veterans Affairs. As was mentioned it is the practice of this portfolio that the Minister and Chairmen of the relevant administrative agencies appear as a group. The Minister makes an opening statement which covers the whole field. When questioning starts the agency Chairmen will take over when matters under their jurisdiction are raised. This procedure was followed when the 1977-78 Estimates were considered.[172] In addition to the Estimates and the Minister's speech, the Members were provided with a detailed supporting document which explained, *inter alia*, the objectives, work and organization of the CPC and the WVAB.[173] There was therefore available to the Committee a much better and more detailed document on which they could base their discussion of the Estimates.

Questions asked in this Committee were similar to those asked of the CRTC in that Members were primarily interested in broader questions of policy: the size of the pensions, hospital services, rules limiting eligibility and similar problems. However, because the Minister is at these meetings most such questions, which might otherwise have been asked of the Chairmen of the WVAB or CPC, are directed at the Minister himself. It is perhaps more appropriate that questions on the policy underlying the statute be answered by the Cabinet representative. But since Members are interested in little else, it means that the Chairmen of the CPC and WVAB are not as actively involved in the Committee meetings as they might be. In fact at the hearing on the 1977-78 Estimates Mr. Solomon, the Chairman of the CPC, was asked only one question. It related to the case of a particular constituent who was not receiving the pension he thought he deserved. Mr. Thompson, Chairman of the WVAB, also fielded only one question, relating to the effect of the collection of unemployment benefits on a veteran's allowance. Almost no time was spent in this Committee on an actual discussion of the Estimates. Because the Committee did not meet the May 31 deadline set out in the Standing Orders, the Committee did not complete its discussion of the Estimates, nor did it vote on them before they were automatically reported back to the House.

When considering the 1978-79 Estimates the Committee followed essentially the same procedures. A document to supplement the Estimates had been prepared, and the Minister outlined the changes in the proposed

budget. In this year the Estimates of the WVAB appeared as a separate programme "making more visible the independent and quasi-judicial nature of the Board."[174] Discussion in the Committee again was not directed to the Estimates; it concentrated on the policy behind, and eligibility for, pensions, and on the status of certain classes of persons. The Chairman and Deputy Chairman of the WVAB attended the meetings at which the Estimates were considered and answered a few general questions about eligibility. Mr. Solomon replied to a few questions on the operations of the CPC, especially on the backlog of cases, and on eligibility for pensions.

Supplementary Estimates for the 1978-79 year were presented in November, 1978 and again in March, 1979. On the first occasion one item concerned the writing off of debts that had arisen from the overpayment of war veterans' allowances. While Mr. Thompson was present no questions were directed to him on this or any other matter. On the other hand, even though there were no Estimates relating to the CPC before the Committee, Mr. Solomon attended and answered three questions on the availability of pensions in certain circumstances. Discussion on the main Estimates for 1979-80 followed the pattern of previous years.

In summary, the discussion on Estimates in the Committee on Veterans Affairs centred on two things. First of all, there were a number of proposals, many of them put forward year after year, for increasing the benefits paid to veterans. Secondly, there were numerous factual questions which essentially asked what the law or the regulations provided for in given situations. Few questions were actually directed to the Estimates even though the Members were always provided with a document containing supporting information on the proposed spending. This may indicate that the primary reason for a lack of discussion on spending is not the format and content of the Blue Book. Members viewed the Estimates process as an opportunity to promote their pet projects and to obtain information on the various programmes. Chairmen of agencies involved were willing to participate in such a discussion to the extent that they would appear even when their own Estimates were not at issue. In the end Members obtained a fair bit of information on the content of the statutes and regulations, but little knowledge of the Estimates.

(d) *The Immigration Appeal Board*

The IAB plays primarily an adjudicative role as the appellate body in the immigration system. As such it has the powers of a court of record. The Board also exercises important discretionary powers. In the Board's early years the Chairman, Miss Scott, attended the meetings during which the Estimates of the IAB were considered, but this is no longer the case. The last Estimates meeting attended by the Chairman was the one considering the 1972-73 Estimates.[175] Many of the questions put on that day

related to the serious backlog of appeals that had arisen. Some Members proposed solutions to this problem and asked the Chairman if she had any herself. Miss Scott indicated that it was not her function to propose changes to the immigration system. Many of the questions asked showed a basic misunderstanding of the work of the Board. Miss Scott answered some of these even though they had little to do with her jurisdiction, and on others suggested that the Minister should reply. Statistical data on the work of the Board were also requested, as was information on the way the Board processed certain difficult types of cases. At times the questions required that Miss Scott explain the existing state of the law. Only one inquiry was made into a pending case, the Member being interested in knowing when a decision would be handed down. Miss Scott indicated it would be soon. At this point the Minister interjected and pointed out that the question was "unfair" because the matter was *sub judice*.[176] Only one question was asked on the Estimates themselves.

The Chairman of the IAB has only appeared before the Committee once since this meeting, in order to discuss Bill C-24. This meeting was held *in camera* due to the presence of the United Nations High Commissioner for Refugees.[177] At subsequent Estimates hearings the Board has been represented by its Senior Registrar and its Director of Finance and Administration. The absence of members of the Board has been noticed. In response to one question the Minister replied:

> The chairman takes the view that, if the Committee insisted on her appearance, she would conform to that instruction, but that, as a judge of a court of record, unless there is a specific requirement for her to be here, she prefers not to be. I did not argue, although I did want officials here to answer technical questions, and particularly dealings with the estimates themselves. I believe this has been Miss Scott's practice for some time, although I think a few years ago she was appearing.[178]

Members responded that it had been a mistake to set up the Board as a court. On another occasion a Member described the meeting as "an exercise in futility" because without the Board members there it was impossible "to put questions in respect of the decisions the Board has made."[179] On both occasions Members with legal training tried, with some success, to explain the status of the IAB as a quasi-judicial agency.

In subsequent meetings on Supply, when the only representatives of the Board were its administrative officers, the direction of questioning changed. Those on immigration policy, on the present state of the law and on improvements to the system were now put to the Minister. The Board's staff were subjected to technical questions requiring statistical answers, and there were more questions on the Estimates *per se*. There was still the occasional question about the discretionary powers vested in the Board, the operations of the Board, and about the appeal process, but no further questions were put regarding particular cases before the IAB.

In the end the Estimates hearings provide a less complete point of contact between the House and the IAB than they do for the other administrative agencies examined. One can certainly appreciate the need to maintain the independence of the Board, especially in respect of its adjudicative functions, but on the other hand the House should have a way of monitoring its exercise of its important discretionary powers. One salutary effect of the absence of the Chairman at the meetings is that more questions are directed at the Estimates, although even in this Committee they were not subjected to an in depth inquiry.

(e) *The Lambert Studies*

Other research done on the Estimates hearings of House committees largely confirms the observations just made. In the course of its inquiry into the financial management and accountability of the government the Lambert Commission analysed and classified the questions asked during committee hearings on the Estimates of the CRTC, the CTC and the NEB.[190] One interesting thing noticed during this research was that appearances were not always annual. About one year out of every three the NEB did not appear, and the CRTC missed four out of the ten years examined. In recent years, though, attendance seems to have become more regular. In those years when Chairmen did appear, the average length of their appearances was found to be about one day.

The Lambert study found that the Chairman of the CRTC used the opportunity to make an opening statement with great success. The statements, which generally explained the jurisdiction of, and the issues facing the CRTC, helped to focus the questioning that followed. The type of questions asked about the CRTC remained fairly constant from year to year. The largest number (about a third) related to questions classified as broad policy. There were also frequent questions on the mandate and procedures of the agency, as well as on particular decisions that had been made in the past or that were pending. Very few questions were directed at the internal workings of the agency, the category of question that included matters most directly relevant to the Estimates. The researchers concluded that the Committee was more effective in reviewing broader policy than finances.

Appearances of the CTC were greatly influenced by the attitudes of the two Presidents which the Commission had during the period studied. The first, J. W. Pickersgill, declined to make any introductory comments, did not bring sufficient staff with him to answer technical questions, and generally had an obstructionist attitude. He often refused to answer questions. The meetings lacked direction, and the adversary relationship that developed made for a very frustrating experience for the members of the Committee. His successor, Mr. Benson, took a different approach. Always

accompanied by a large staff, he made helpful opening statements and was very co-operative in answering questions. Not only did the members of the Committee get more out of Mr. Benson's appearances, but it also took less time to do so. Mr. Benson was able to develop a dialogue with the Committee similar to that enjoyed with the CRTC.

Questions asked about the CTC concentrated on particular adjudicative decisions. Mr. Benson was willing to answer these questions, even those on cases pending before the Commission. (Mr. Pickersgill, on the other hand, had always taken the view that the decisions must speak for themselves, and that because the Commission was a court of record any comment by him would be inappropriate.) Constituency problems were another source of questions, particularly in regard to rail transport. Broad policy issues were not raised as frequently as with the CRTC. Again there were few questions that actually dealt with the Estimates. This Committee, it was concluded, played a large role as an *ex post facto* reviewer of agency decisions, thereby providing a useful source of feedback and input for the Commission to take into account in the future.

When the NEB Estimates are discussed it is usually the Minister and not the head of the agency who makes the opening statement. The Lambert researchers attributed this to the greater degree of political control that exists over the NEB. Questions asked of the NEB were similar to those asked of the CTC in that a large number of them related to particular decisions. There was not a lot of attention paid to broad policy issues, a reflection of the attitude of the Minister who insisted that such questions be directed to him. A number of questions were asked about the mandate and procedures of the agency, particularly on the interaction between the NEB's advisory and regulatory functions and on the overall independence of the Board. Again very few questions were directed at the Estimates themselves.

### (f) *Conclusions on Estimates Hearings*

At this point a number of conclusions can be drawn about the nature of the examination of government Estimates by the committees of the House. Overall the meetings seem to perform two functions. They are the only opportunity which Members have to ask Chairmen questions about the work, procedures, and jurisdiction of agencies. As such they are an important source of information on the programmes and organization of the government. That this is needed can be seen by the frequent questions that are essentially directed at ascertaining the existing content of the law as contained in statutes and regulations. Secondly these Estimates hearings function as a forum of accountability. During the hearings Members frequently question two things: policy (either of the government or the agency) and decisions that have been taken by the agency. The meetings

therefore provide the agencies with information on the range of opinion existing in the country about their work, and they provide Members with the opportunity to express their views on important issues of the day.

A third thing that is clear about the Estimates debates is that they have nothing to do with the Estimates. There are a number of reasons why a procedure that is ostensibly to deal with proposed expenditures ends up dealing with everything but that. First of all, Members tend to be placed on committees that deal with matters of most interest to them, and naturally regard these matters as being of importance and worthy of high priority in spending. It has often been noted that the individual Member of Parliament in such a situation has no interest in cutting spending. Members interviewed were generally willing to admit this, and agency Chairmen also commented that the only suggestions they received about their expenditures were that they should be increased. The result is that most Members are content with any spending that takes place and so are not interested in looking at it critically.

The second reason why Supply is not discussed may be the content of the Blue Book. Any committee discussion will be more germane when based on an agenda or document that can be used as the focal point of the debate. The Estimates do not provide enough information to do this, and the lack of information also conceals from the Members those things which they should question. The experience of the Veterans Affairs Committee, which is always provided with a document to supplement the Estimates, shows however that the absence of a meaningful framework for the discussion is not the only problem.

The third reason is a related one: opening addresses made by the Chairman or Minister do not always focus clearly on the Estimates. While they do explain some of the changes in spending, they are also used to outline the mandate of the agency and give an idea of the important policy issues that are presently being considered. That the discussion which follows should concentrate on these policy issues is not surprising. This is perhaps compounded by the fact that the annual reports of some agencies are tabled in the spring and so compete with the Estimates as the pole-star of the discussion.

The nature of administrative agency expenditures is the fourth reason why they are not discussed. Staff costs eat up most of these budgets and the few programme expenditures which do exist are often specified by statute. A fifth and related reason is simply that policy is much more interesting than spending. Given the opportunity Members will always steer the discussion to broader policy issues, and this is magnified by the fact that there is no routine occasion in committees specifically set aside to discuss policy. In fact one agency Chairman reported that it did not

matter why he appeared, be it on Estimates or on new legislation, the questions asked were always the same and were always on broader policy matters.

Finally, there are what may be called structural problems with the Estimates process. Among these are procedural problems such as the ten-minute rule on questioning and the failure of committee Chairmen to enforce relevancy rules. The government's general attitude of secrecy was also cited as a problem. Some Members were willing to admit that the unprepared MP should share the blame. There have also been isolated examples of agency Chairmen approaching the hearings with an uncooperative attitude.

The conclusion that Supply meetings are used for grievances, constituency problems and policy debate was confirmed in interviews with agency Chairmen and Members of Parliament. Generally speaking Members were most critical of the process, but both groups agreed that it did not result in an effective examination of the government's spending proposals. Some Members were of the opinion that under the present system the House really relies on the Treasury Board and the Auditor General to control expenditures. It may be that this will have to continue, with the House being content to spot check in detail selected Estimates each year. If this were done on a random basis, with an element of surprise as to which Estimates would be examined in any particular year, the House could probably conduct at least as effective a scrutiny as it presently does.

Despite its shortcomings all the Chairmen interviewed were willing and eager to continue to participate in the process in its present form. Many reported that the average MP had either no idea, or at best a mistaken one about the mandate and powers of their agency. This was of concern to them and they welcomed the opportunity to explain themselves. Some of them also noted that these meetings were the only real chance Members had to ask questions, and saw the resulting exchange of information as important for both sides. Also noted was the psychological and constitutional importance of agencies appearing on Supply. To do the Estimates poorly was seen as better than not doing them at all, for at least there was the potential for questioning expenditures. In this way the rights of the House were preserved, even if they were not exercised. The Chairmen also welcomed the opportunity to find out what was concerning Members. There was a strong feeling among many of them that Members knew what was going on in the country, and that the agency should keep in touch with their concerns. Some commented that at times they wished there was more reaction to their decisions and work. Furthermore, there were few negative aspects of the procedure; the meetings did not interfere with agency work because Members were willing to accept that matters *sub judice* could not be discussed. The experience of the IAB was the only exception in this regard, and even this agency maintains a dialogue with the committees through the appearances of its staff.

It is hard to assess the impact that committee appearances have on the policies followed by agencies. There is of course no power in the committees to pass resolutions binding agencies, but the Members can influence even if they are not able to control. One Chairman recalled an occasion when the interpretation by the agency of a statute was changed because of a comment made by a committee Member. Other Chairmen felt the meetings did have an influence on their agencies, even if it was only at the subconscious level. It was also pointed out that suggestions made by Members could become the subject of government policy or statutory amendment. There is certainly a place in the system for a periodic review of the work of administrative agencies by the House. It is perhaps unfortunate that the Estimates debate has come to be used for this purpose as this creates the worst of both worlds. Because the Estimates process is being used to review policy, the Estimates themselves do not receive proper attention. And because the Estimates debate is not designed for a review of policy, the broader policy review is not being properly carried out. Despite its shortcomings, though, the committee meetings to consider the Estimates remain an important point of contact between the House and administrative agencies.

(g) *Public Accounts and the Auditor General*

The House is also involved at the final stage of the government's financial process. Each year the Public Accounts of the government are prepared and then examined, along with the Auditor General's Report, by the Public Accounts Committee. The Public Accounts provide information on the actual expenditures of the government for the fiscal year. For comparative purposes information is also provided on the appropriations for the year, the difference between appropriations and expenditures, and the expenditures for the previous year. This data is generally provided on the total programme costs, the costs broken down by activity, the costs broken down by object (salaries, communications, rentals, etc.), and on grants and contributions.[181]

The Auditor General, as the auditor of the Public Accounts of Canada,[182] examines annually the records and accounts of administrative agencies. Any problems he finds will appear in his annual report to Parliament which is automatically referred to the Public Accounts Committee under Standing Order 65(1)(q). The Committee considers this report and reports to the House its own conclusions and recommendations. The reports to the House may cover a number of topics, or may be concerned with only one issue. An example of the latter is the report prepared in 1978 on the payment by Atomic Energy of Canada Ltd. of agency fees relating to the sale of nuclear reactors to foreign governments.[183]

On the whole administrative agencies have not had a great deal of contact with the Public Accounts Committee. This is partly because of the

relative insignificance of the amounts spent by agencies and the nature of their expenditures. They have not been mentioned frequently by the Auditor General, and accordingly do not often come to the attention of the Committee. None of the Chairmen of agencies interviewed had ever appeared before this Committee. In his report on the year ending on March 31, 1977 the Auditor General did note that the CTC had overpaid subsidies to a railway, but this part of the report was not discussed by the Committee and did not find a place in its report to the House.[184] The work of the Public Accounts Committee remains, however, an important potential point of contact between the House of Commons and administrative agencies.

## 3. The Standing Joint Committee on Regulations and other Statutory Instruments

The increase in the scope and size of government has been dealt with in a number of ways, one of them being an increased use of delegated legislation. Delegated legislation has been justified in a number of ways. It is said to save scarce parliamentary time, to enable quick decisions and changes to rules, to allow for unforeseen contingencies in new legislation, and to deal with technical matters in which Parliament has no expertise.[185] Its critics point out the dangers involved in enacting measures without public debate or consultation, and the possibility of abuse in the exercise of the power.[186] Parliament, as the legislative branch of government, naturally takes a great interest in this delegated power, and as the grantor of the jurisdiction owes a particular responsibility to ensure its proper exercise. In Canada, Parliament fulfils its obligations in this regard largely through one of its committees, the Standing Joint Committee on Regulations and other Statutory Instruments. As the right to create statutory instruments has at times been given to administrative agencies, the Joint Committee is another example of Parliament coming into contact with them through its committees.

### (a) *The Background of the Joint Committee*

Parliamentary review of delegated legislation got off to a rather late start in Canada. It was not until 1950 that the *Regulations Act* provided for the regular printing and publishing of a significant number of statutory instruments.[187] Regulations made under this Act provided for a review of the form of the instruments by various officials in the Department of Justice and the Privy Council Office.[188] Parliament did not itself engage in the review of statutory instruments at this stage, and in 1964 the Special

Commons Committee on Procedure and Organization recommended that the House become involved through a proposed new committee. Nothing was done, however, until 1968 when the Special Committee on Statutory Instruments (known after its Chairman as the MacGuigan Committee) was established.[189]

The function of this Special Committee was to recommend "procedures for the review by this House of instruments made in virtue of any statute." After a year of work it produced a comprehensive report covering many of the important issues raised by statutory instruments: the need for publication, the form of enabling statutes, the definition of a statutory instrument, limits on regulation-making power, and procedures for control of delegated legislation by the courts, the executive and Parliament.[190] The major recommendation of the Special Committee was that the House should set up a standing committee to monitor and review statutory instruments on a continuous basis. The new committee was to be primarily interested in questions of *vires* and form rather than content, but was to have the power to refer regulations to the topical committees of the House which would examine their substance. The only sanction the committee would have was to refer a regulation to the government for reconsideration.

The MacGuigan Report was generally well received. The government was of the view that its recommendations could not be implemented unless the old *Regulations Act* was replaced, and this was done in 1971 by the enactment of the *Statutory Instruments Act*.[191] The new Act was to apply not just to regulations but to a somewhat broader class of statutory instruments, although there were certain exceptions in respect of international relations, national defence and security, federal-provincial relations, voluminous regulations and those of limited application.[192] Most regulations were to be published or available for inspection, and most statutory instruments would be subject to review by a proposed new scrutiny committee. Not all the recommendations of the Special Committee were accepted. The exemptions were somewhat broader than the Committee had suggested, enabling clauses were not to be referred to the scrutiny committee, and not all statutory instruments would be available for public inspection.[193]

As to the scrutiny committee, it was eventually decided that this should be a Joint Committee of the Senate and the House of Commons. Section 26 of the new Act recognized the mandate of the committee:

> **26.** Every statutory instrument issued, made or established after the coming into force of this Act, other than an instrument the inspection of which and the obtaining of copies of which are precluded by any regulations made pursuant to paragraph *(d)* of section 27, shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments.

The Joint Committee itself was established through the Standing Orders of the House and the Rules of the Senate. It was given no power to approve or veto delegated legislation, or to refer instruments to other standing committees, but it could report to Parliament which in turn could ask the government to reconsider the instrument.

The scrutiny committee as established is unusual for a number of reasons. It is one of the few joint committees of Parliament. This will perhaps provide for some continuity in membership. The Joint Committee has a statutory mandate, meaning that it does not have to rely on the government majority to refer delegated legislation to it. As opposed to most committees which are "topical", this Committee has a "functional" jurisdiction, and its work ranges across the whole spectrum of government. Furthermore, a practice has developed of appointing an Opposition Member as House Joint Chairman, and the Committee has managed to work in an objective and non-partisan manner. Finally, the Joint Committee is one of the few which has a support staff to assist it in its work.

(b) *The Work of the Joint Committee*

On occasion the Joint Committee has had other matters (such as the Green Paper on Public Access to Government Documents) referred to it, but most of its time is spent examining statutory instruments. For this it has established a fairly routine procedure. As has been noted, the Committee's jurisdiction extends more to questions of *vires*, form, and "the liberty of the subject" than to the substance of the instruments. The Committee has developed fifteen criteria, relating mainly to clarity, publicity, *vires*, reasonableness and conformity to the *Canadian Bill of Rights*, which are applied in reviewing the instruments that come before it.[194] The criteria are not permanent and must be re-approved by the House at the beginning of each session.

Initially, counsel for the Committee examines all statutory instruments that come to their attention. If the staff comes across anything that violates a criterion, an opinion is prepared and the instrument, along with the opinion, is sent to the members of the Committee. The matter is then taken up at the next meeting. The usual reaction of the Committee, if it agrees that there may be problems with the instrument, is to direct counsel to write to the department or agency concerned outlining the Committee's concern and asking for a response.[195] If the problem is one that has arisen before and on which the Committee has taken a stand, counsel may write for an explanation on their own initiative. Often the response received is satisfactory to the Committee. On many other occasions discussions will result in a solution acceptable to all concerned. Where the problem remains unresolved the Committee has several alternatives. A few of the Committee's members may have informal discussions with the Minister concerned.

The Committee may send further correspondence outlining more clearly the position it takes and its reasons. The Committee may also engage in formal hearings to which it would call witnesses involved with the creation of the instrument. (During such hearings counsel has always participated in questioning witnesses, although some Committee members have taken the view that he should do no more than prepare questions for the Members to ask.) If in the end the problem remains, the only recourse of the Joint Committee is to report its findings, opinions and recommendations to Parliament.

The procedure just outlined would be applied to regulations made by administrative agencies.[196] A number of them have a regulation-making power (sometimes in their own right but usually subject to control by a Minister or the Governor in Council), and many issue decisions, orders or licences, which by definition, are statutory instruments. Obviously the work of the Joint Committee provides an important contact between these agencies and Parliament. Not only are their actions subject to scrutiny by the Committee based on the fifteen criteria, but there is also the possibility that there will be a change in agency decisions or policy based on Committee objections. This happened, for example, when the Committee convinced the CTC to remove the requirement that passengers on a charter flight provide their Social Insurance Number to the airline.[197] Despite the lack of any means of forcing changes to regulations, the work of the Joint Committee is one of the few areas where Parliament can go beyond mere supervision, and actually initiate changes in the conduct of administrative agencies.

(c) *Limitations on the Work of the Joint Committee*

The present *Statutory Instruments Act* and the work done by the Joint Committee undoubtedly represent an improvement over the type of review of statutory instruments that existed prior to this decade. There remain, however, some serious flaws in the system of review as it currently exists. Most of these problems were outlined by the Committee in a recent comprehensive report to Parliament.[198]

One problem is the very volume of statutory instruments. Even though many instruments never come to the attention of the Committee, those which do could easily overwhelm the small staff available to do the work. There are also definite limits on the amount of work the Committee can deal with, meaning that a large increase in staff might only serve to replace one bottle-neck with another. Resorting to several subcommittees might be a solution. This problem was recently brought to a head by the publication of the *Consolidated Regulations of Canada*, which place all the pre-1972 regulations under the jurisdiction of the Joint Committee for the first time.

Another unresolved problem relates to the scope of the review of statutory instruments. The Joint Committee has developed a complete set of criteria relating to form and *vires*, but the equally important task of reviewing their substance remains undone. The House at present is able to examine in detail the substance of any new legislation, and there does not seem to be any reason why it should not be able to do the same with delegated legislation. In this regard prior examination is naturally desirable, but even the more practical "after the fact" scrutiny would be a step forward. It will be recalled that the MacGuigan Committee's solution to this problem was to give the Joint Committee the power to refer regulations to the topical standing committees of the House. To date, this recommendation has not been acted on, nor has there been any provision for direct reference of statutory instruments to the topical committees of the House.[199]

One seemingly simple procedural problem has caused the Committee a great deal of trouble in fulfilling its mandate. The *Statutory Instruments Act* provides that certain statutory instruments "shall stand permanently referred" to the Joint Committee.[200] There is, however, no provision for the actual transmission of these instruments to the Committee. Those which are published in the *Canada Gazette* are easy enough to obtain, but the requirement for publication is incomplete. Counsel for the Committee must therefore rely on luck and the co-operation of the regulation-making authorities to locate many instruments.[201] There is no question that many are not located under existing circumstances, and the Joint Committee has recommended changes to correct this.[202]

There is also the problem of the lack of any effective sanction in the hands of the Committee. Clearly much has been and can be done through discussion and persuasion. Furthermore, as the opinions of the Committee become more widely known it is to be expected that officials drafting instruments will alter their views on the acceptability of certain kinds of provisions. But where these methods fail the Committee has no recourse but to report to Parliament, and even the approval of the report by the House and Senate does not compel a change in the offending instrument. Despite the fact that other jurisdictions have utilized a variety of procedures that allow their legislatures to affirm or annul delegated legislation, the MacGuigan Committee concluded that the only power needed in Canada was a power to refer a questionable regulation to the government for reconsideration.[203] Others have also expressed the opinion that publicity and persuasion are the most effective controls, because if the government is not prepared to reconsider, it will not allow the instrument to be defeated.[204] But the MacGuigan Committee was clearly working on the assumption that a reconsideration recommendation would be debated in the House. At present the Standing Orders make no provision for such a debate either automatically or on the initiative of a set number of Members.[205]

While the problems just noted are serious enough in themselves, the most difficult question facing the Committee has been the definition of a statutory instrument. A primary obstacle has been the drafting of the Act:

> The definition of a statutory instrument provided in the Act is incomprehensible. The Committee has devoted a great amount of time and effort to trying to glean from the words of section 2(1)(*d*) of the *Statutory Instruments Act* a clear meaning and a clear definition of a statutory instrument. The effort has been wasted and legislative action is necessary . . . Unfortunately, the definition of a statutory instrument is so hedged about with exceptions, at one and the same time explicit in nature but obscure in meaning, and with qualifications direct and indirect, and is so flawed with a triple negative that it is useless.[206]

The Committee has been unable to decipher the very definition on which its jurisdiction depends. Adding to this problem has been the refusal of some officials to release documents which they feel are not statutory instruments. When the Committee asks to see the document so that it can form its own opinion on whether it falls within the definition in the Act, it is often met with the rather circular argument that since the document is not a statutory instrument, the Committee has no right to see it.

A strict reliance by certain parts of the government on the definition of "statutory instrument" has led to other problems. A great many manuals, guidelines and directives contain rules that could just as easily have been put in regulations. Junior public servants who have no authority to allow exceptions to departmental policy are required to treat these guidelines as if they have the force of law, yet many of the departments involved insist that because these documents are not in the form of regulations, the Committee has no right to receive copies of them. Particularly troublesome have been the guides issued to Immigration Officers to assist them in deciding whether to allow persons to enter Canada. A related problem has been the adoption by the Department of Justice of what the Committee has named the "magic formula" method of deciding if something is a statutory instrument. At present the definition in the Act states that a statutory instrument exists under the execution of a power "by or under which *such instrument* is expressly authorized to be issued." As the Department put it:

> It is our reading of these words that in order for an instrument to be a statutory instrument, the enactment pursuant to which the instrument is made must expressly authorize its issuance, making or establishment. For example, a provision of an Act may provide that the Governor in Council may by order exempt persons from the application of the Act. In our view, the resulting order would be a statutory instrument because it would be an order made in the exercise of a power conferred by or under an Act of Parliament "under which such instrument (i.e. the order) is *expressly* authorized to be made". If the enactment had provided that the Governor in Council may exempt persons from the application of the Act, then the resulting instrument of exemption would not, in our view, be a statutory instrument because no instrument is expressly authorized to be issued, made or established.[207]

Even if the wording does bear this meaning, it is a particularly arbitrary way of deciding what will or will not be subject to parliamentary scrutiny.

Finally the Committee has had trouble with what it has termed a lack of co-operation. Confrontation and secrecy have characterized the appearances of many witnesses. Information has been withheld. Particularly important has been the refusal of some departments to give their reasons for believing that a regulation is *intra vires* when the Committee thinks otherwise. The refusal to explain their position on a particular regulation is supported by the argument that those reasons are confidential advice given by the Department of Justice to the government. The resulting lack of any dialogue on problems identified by the Joint Committee has reduced its ability to assess the correctness of its own opinions, and has prevented the resolution of these difficulties by informal agreement. Fortunately a number of the larger administrative agencies with independent legal offices have not adopted this attitude.

Despite the limitations on its work the Committee has managed to make some progress in controlling delegated legislation. In fact most of the shortcomings identified have acted only to limit the scope of the Committee's work, not the usefulness of the work itself. Constant appeals for reform by the Committee will hopefully be heard one day.

(d) *Other Types of Control*

The work of the Joint Committee is the most thorough and visible form of scrutiny of delegated legislation taking place today. There are, however, other types of control in operation, some of them parliamentary and some non-parliamentary. The list includes publication, prior consultation, various statutory provisions, another committee of the House, the *Bill of Rights*, the CHRC, and Cabinet control.

The MacGuigan Committee started off its report by stating that "this report is based on the assumption that public knowledge of governmental activities is the basis of all control of delegated legislation."[208] This assumption manifested itself in the recommendation that it was sufficient for the new scrutiny committee to have the power only to recommend reconsideration of statutory instruments. It also manifested itself in the recommendation that as many regulations as possible should be published, and that all others should be available to the public unless interests of national security prevailed.

The primary object of the *Regulations Act* had been to introduce the first systematic scheme for the publication of regulations. Under this Act the Governor in Council could exempt regulations from publication, but the exempting order had to be tabled in the House. The present *Statutory*

*Instruments Act* is wider in scope, and defines a sub-class of statutory instruments called "regulations". Only regulations are required by statute to be published, but the Governor in Council can order the publication of other statutory instruments.[209] Furthermore, the Governor in Council can exempt regulations from publication if they only apply to a small group of persons, or if registration and publication is "not reasonably practicable".[210] Exempted not only from publication but also from inspection and distribution are statutory instruments relating to international relations, national security, federal-provincial relations, and those the release of which would result in serious detriment to a person affected by the instrument. Unlike the situation under the old Act, the new Act does not provide for the tabling of exempting orders.

The availability of delegated legislation is of great importance. Compliance with the law cannot be expected if the persons affected by it do not know what it says or that it exists. Scrutiny of delegated legislation is not effective unless Parliament can obtain the statutory instruments that have been made. Under the existing system the provisions for the publication of regulations appear adequate, although for purposes of parliamentary scrutiny it would be desirable to have exempting orders tabled in the House. On the other hand the publication of statutory instruments that are not regulations is haphazard and incomplete. The problem is compounded by the previously noted lack of any method of transmitting these documents to the Joint Committee. It is here that the greatest need for change exists.

A major criticism of the use of delegated legislation is the lack of public debate and consultation before it is made. The required "three readings" of a bill provide ample time for interested persons to react to statutory proposals, and bills are often allowed to die on the *Order Paper* if substantial revisions appear necessary. There is no similar opportunity built into the enactment of statutory instruments. This, however, is a general rule to which there are exceptions. An example is found in the *Broadcasting Act* which gives the CRTC the power to pass regulations only after interested parties are given a reasonable opportunity to make representations.[211] There are twelve other statutes with similar provisions,[212] and no doubt a great deal of informal consultation also takes place.[213] Prior consultation is not always possible. In some cases the very reason for delegating a legislative power is the need for speedy changes that would be thwarted by a lengthy consultative process. In other cases prior notice of a proposed regulation could allow for widespread avoidance of its provisions. Consultation should be encouraged when possible as it enables a party to react before the regulation is made, whereas most other forms of scrutiny and control of statutory instruments only allow response to a *fait accompli*.

As was pointed out earlier the Joint Committee has no power to disallow regulations, and there is little that the House can do in response to a Committee Report. Some statutes do provide for an affirmative or negative power over statutory instruments. While these provisions have been enacted on a purely *ad hoc* basis, there are certain patterns that can be identified.

Several statutes provide for the revocation of statutory instruments on the initiative of parliamentarians.[211] Four of these allow this procedure to be set in motion by either House of Parliament, but require a negative resolution in both Houses before the instrument is revoked.[215] Two others give exclusive jurisdiction to revoke to the House of Commons.[216] One more provides that either House can start the procedure, and that a vote in either House is sufficient for revocation.[217] Another allows either House to present the Notice of Motion, but is silent as to whether one or both Houses must vote to revoke.[218]

The *Clean Air Act* provides in three places that certain instruments are "subject to negative resolution of Parliament."[219] This seems to be the only instance of the use of the standard terms "subject to negative (or affirmative) resolution of Parliament" as defined in the *Interpretation Act*.[220] These terms were first added to the Act when the *Statutory Instruments Act* was passed. Any regulation so subject must be tabled in fifteen days and may be annulled "in accordance with the rules of those Houses." Unfortunately neither House has adopted any rules that provide for setting the revocation procedure in motion, or which provide for time to debate a motion of revocation. The provisions of the *Clean Air Act* are therefore meaningless because it is impossible to use them. There are two other statutes which suffer from this same flaw: they provide for revocation (although not in the terms of the *Interpretation Act*) but do not set out any procedures to exercise this right.[221]

Provisions that statutory instruments will not come into force until affirmed by Parliament are rare in Canada. Regulations under the *Export Act* cease to have effect at the end of the session after they are made unless they are affirmed by both Houses.[222] Certain orders under the *Customs Tariff* are in force for only 180 days (or 15 days after Parliament next sits) unless approved by resolution of Parliament.[223] There is a provision in the *Employment and Immigration Reorganization Act* that allows the Canada Employment and Immigration Commission to extend the application of a Schedule "subject to affirmative resolution of Parliament."[224] Finally the *Anti-Inflation Act*, now spent, provided for its extension by Order in Council subject to approval of both Houses of Parliament.[225]

Related to these statutory provisions is a unique provision of the *National Parks Act*.[226] It allows the Governor in Council to extend the

boundaries of a national park by proclamation. A Notice of Intention to issue such a proclamation must be published in the *Canada Gazette*, whereupon it stands referred to the Standing Committee on Indian Affairs and Northern Development. The Committee is required to discuss the matter and then report to the House its approval or disapproval of the proposed proclamation. The section then provides for a binding vote of the House on the proclamation without debate. This appears to be the only statute that grants a committee of the House the power to recommend the revocation of a statutory instrument.

The *Bill of Rights* provides for another, albeit rather narrow, form of control over regulations. Section 3 directs the Minister of Justice to examine all regulations for compliance with the principles of the *Bill of Rights*, and gives the Governor in Council the right to prescribe how this examination will be carried out. The *Canadian Bill of Rights Examination Regulations* provide for the transmittal to the Minister of a copy of every regulation, and require that he attach to each a certificate stating that it has been examined.[227] If any violations of the *Bill of Rights* are discovered, the Minister prepares a report, which is deposited with the Clerk of the House of Commons. This type of scrutiny is also provided for in the *Statutory Instruments Act* and in the criteria used by the Joint Committee.[228]

The *Human Rights Act* authorizes the CHRC to "review any regulations, rules, orders, by-laws and other instruments" for compliance with the principle of the Act.[229] To date the Commission has not undertaken any systematic screening of such instruments, and has only made inquiries when a specific complaint is received. No system for exchanging information has been set up with the Joint Committee. It is perhaps unfortunate that this jurisdiction was not granted to the Joint Committee, for the routine checking of every regulation by the Commission would result in a great deal of duplication of effort.

The final method of controlling delegated legislation is through the Governor in Council. Most statutes which grant a power to make statutory instruments vest it in the Cabinet, even though the instruments will usually be drafted somewhere else. This provides a certain check on these instruments. However, what is more relevant here is the power often given to the Cabinet to vary regulations made by administrative agencies. The following subsection of the *National Transportation Act*,[230] covering rules made by the CTC, is representative:

> **64.**(1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in

Council may make with respect thereto is binding upon the Commission and upon all parties.

Since the executive would be responsible to Parliament for any action it took under this subsection, provisions of this type provide an indirect form of control by Parliament over statutory instruments created by an administrative agency. The MacGuigan Committee and the Lambert Commission both thought that all regulation-making agencies should be subject to this type of provision.[231]

(e) *Conclusions*

The scrutiny of delegated legislation falls into two parts: scrutiny of form and scrutiny of substance. Parliament at present has in place a system suitable for the review of the form of statutory instruments, though that system contains a number of flaws and anomalies. On the other hand, review of the substance of delegated legislation is virtually non-existent, being confined to a few isolated statutory provisions providing for positive or negative resolutions in the Houses of Parliament. There is no process that transmits statutory instruments to the Members, and no forum in which they can examine the content of those instruments which do come to their attention. Lacking these two things, Parliament is unable to fulfil its role as scrutineer of the government in this vital area. An important gap in the relationship between Parliament and those administrative agencies with delegated legislative power is the result. Clearly Parliament cannot do everything that needs to be done in relation to statutory instruments. This may be an area where priorities have to be set, with Parliament being content to concentrate on the substance of the instruments while leaving the review of form to other centres of responsibility.[232]

## C. Contacts through the Ministers

In the parliamentary system of government, it is the Cabinet that performs the executive functions of government: the implementation of the laws passed by the legislative branch, the spending of money as authorized, and the day to day control of the public service. Because by convention the Ministers are also Members of Parliament, there is a link between the House and the rest of the government. This section briefly discusses the nature of this link, especially as it applies to administrative agencies, and examines the role of the Minister as a point of contact between Parliament and the agencies.