

**REGULATORY HISTORY MATERIAL AS AN EXTRINSIC AID TO INTERPRETATION:
A EMPIRICAL STUDY OF THE USE OF RIAS BY THE FEDERAL COURT OF CANADA[†]**

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SUMMARY

Since 1986, the Canadian Public Administration is required to analyse the socio-economic impact of new regulatory requirements or regulatory changes. To report on its analysis, a Regulatory Impact Analysis Statement (RIAS) is produced and published in the *Canada Gazette* with the proposed regulation to which it pertains for notice to and comments by interested parties. After the allocated time for comments has elapsed, the regulation is adopted with a final version of the RIAS. Both documents are again published in the *Canada Gazette*. As a result, the RIAS acquires the status of an official public document of the Government of Canada and its content can be argued in courts as an extrinsic aid to the interpretation of a regulation. In this paper, an analysis of empirical findings on the uses of this interpretative tool by the Federal Court of Canada is made. A sample of decisions classified as unorthodox show that judges are making determinations on the basis of two distinct sets of arguments built from the information found in a RIAS and which the author calls ‘technocratic’ and ‘democratic’. The author argues that these uses raise the general question of ‘What makes law possible in our contemporary legal systems?’ for they underline enduring legal problems pertaining to the knowledge and the acceptance of the law by the governed. She concludes that this new interpretive trend of making technocratic and democratic uses of a RIAS in case-law should be monitored closely as it may signal a greater change than foreseen, and perhaps an unwanted one, regarding the relationship between the government and the judiciary.

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INTRODUCTION

In 1986, the Canadian Federal Government approved a regulatory policy requiring departments and agencies to analyse the socio-economic impact of any new regulatory requirements or regulatory changes¹. From then to now, a Regulatory Impact Analysis Statement (RIAS) accompanies a draft regulation and both documents are published in Part I of the *Canada Gazette* for notice to and comments by interested parties. After the allocated time for comments has elapsed, the regulation is adopted with a final version of the RIAS. Both documents are then published in Part II of the *Canada Gazette*. As a result, the RIAS acquires the status of an official public document of the Government of Canada and its content can be argued in courts as an extrinsic aid to the interpretation of a regulation.

In this paper, I propose an analysis of empirical findings on the uses of this interpretative tool by the Federal Court of Canada. It is important to report on this new legal phenomenon for two reasons. First, common law judges (as opposed to civil law judges) have shown restraint in using this type of material as an extrinsic aid to interpretation of statutes and regulations. Stringent limits on the weight given to legislative history material (in this instance, regulatory history material) in the interpretive process are imposed on judges. Indeed, if they were to grant decisive authority to this type of material, it would interfere with their exclusive constitutional function as final legitimate interpreters of the law. However, an analysis of Federal Court cases in which a RIAS is used as an extrinsic aid to interpretation shows greater deference to the views expressed by the regulatory authority in a RIAS than to any other type of legislative history material. This unorthodox use of a RIAS brings me to the second reason for writing this paper.

A sample of decisions classified as unorthodox show that judges are making determinations on the basis of two distinct sets of arguments built from the information found in a RIAS and which I call ‘technocratic’ and ‘democratic’. These uses raise the general question of ‘What makes law possible in our contemporary legal system?’ for they underline enduring legal problems pertaining to the knowledge and the acceptance of the law by the governed. These issues will be succinctly addressed in

¹ The latest version of the Regulatory Policy is published on the web site of the Privy Council Office of the Canadian Federal Government at www.pco-bcp.gc.ca. Regulatory reform has now become a major field of study in many countries, notably within the OECD and APEC. For a view on regulation and its reform around the world, see *inter alia* the OECD site (www.oecd.org) and AEI-Brookings Joint Centre (www.aei.brookings.org) In 2000, Robert W. Hahn, Director of the AEI-Brookings wrote a book in which a chapter is dedicated to regulatory reform around the world : *Reviving Regulatory Reform. A Global Perspective*, AEI-Brookings Joint Center for Regulatory Studies, Washington D.C. 2000, at p. 6-31.

the second part of this paper. But first, I will provide general background information on the RIAS and its rationale in the age of regulatory reforms.

PART I - THE RULE-MAKING PROCESS IN THE AGE OF REGULATORY REFORMS

The obligation to measure the impacts of a proposed regulation was one of the important tools created to address the economic crisis perceived to be directly linked to the regulatory state. During the decade of the 1980's, the government of Canada, following the United States, reaffirmed the superiority of the market economy to efficiently allocate resources. The government was committed to ensure that its regulatory powers would be used only when they would result in a socio-economic benefit to the population.

The content of a RIAS derives mainly from a functional perspective as well as a utilitarian analytical framework. It requires a regulatory authority to demonstrate that a problem exists which can be best addressed through the implementation of a new regulation. Before making a final determination on the choice of the instrument, the regulatory authority must provide a socio-economic analysis of the impacts of adding a new regulatory requirement or changing an existing one. Finally, it must examine the impacts of the new measure and balance its benefits against its costs. It is only when the regulatory authority can convince the government that the proposed regulation will result in the greatest net benefit to the Canadian society that it will be approved by the Governor-in-Council. But before this final approval, the regulatory authority must submit its analysis to public scrutiny. This is when the requirement for a regulatory authority to seek comments from the public comes into play.

From this account, two distinct purposes of a RIAS emerge. It is first and foremost a justificatory tool; second, a consultative tool. This choice of ends is coherent with two important tenets of the new regulatory model which aims to produce 'better'², 'quality'³ or 'smart'⁴ regulation implemented in OECD and APEC countries. It is also coherent with the content of a RIAS.

² In England, the terminology 'better regulations' is used and the British Government created a Better Regulation Task Force in September 1997. This Task Force is an independent body that advises Government on action to ensure that regulation and its enforcement accord with the five 'Principles of Good Regulation' which are: proportionality, accountability, consistency, transparency and targeting. For more information, see the publications on the website of the Task Force at: <http://www.brtf.gov.uk/publications>.

³ Within the OECD, the terminology 'quality regulations' is used in the documentation. See for example, OECD, *Government Capacity to Assure High Quality Regulation*, Éditions de l'OCDE, Paris, 1999, 71 p. The OECD has published many publications on regulatory reforms in OECD countries. See <http://www.oecd.org/topic>

A. Two Tenets of the New Regulatory Model

Although many criticisms were identified on the negative impacts that regulatory programs had on the economy (in particular, their high costs and their inefficiency), the necessity of regulation as an instrument of state intervention was not at issue for long in Canada⁵. Indeed, the deregulation project was quickly replaced by a questioning of the quality of regulatory programs and regulatory management. As Milhar writes “deregulation concentrates on the *quantity* of regulation, regulatory reform emphasizes the *quality* of regulation. Regulatory management is said to take a long-run view of regulation as a policy tool within the state”⁶.

However, despite these early government attempts to reform regulatory programs, they were still criticized for being poorly designed. One of the causes often cited to support this criticism was the internal operations of the bureaucracy itself. For example, the public administration would copy one regulatory system on top of another, without addressing the particular needs of the social and economic systems which the regulations would be applied. The perception was that it was acting only for reasons of administrative efficiency while the interests of the public were secondary⁷.

These criticisms, among others, had profound impacts on political science and management of the public administration theories. Lately in Canada, the goal of reforming the regulatory state crystallized with the implementation of the concept of ‘smart regulation’. The general goal is to ensure that Canada uses its regulatory system to “generate greater environmental and social benefits while

⁴ In Canada, the expression ‘smart regulation’ is used in the recent documentation. Each letter of the word ‘smart’ refers to a concept: sound, modern, accountable, results-based and transparent. The Canadian government created in May 2003 the External Advisory Committee on Smart Regulation which issued its first report in September 2004. See Canada, External Advisory Committee on Smart Regulation, *Smart Regulation. A Regulatory Strategy for Canada*, 2004, 145 p. This report is available on the web site of the Committee: <http://www.pco-bcp.gc.ca/smartreg-regint/>.

⁵ Some industries were deregulated, such as airlines, trucking, telecommunications, services. On deregulation, see *inter alia*: Walter Block and Lerner George, eds., *Breaking the Shackles: Deregulating Canadian Industry*, Vancouver, The Fraser Institute, 1991.

⁶ Fazil Mihlar, “Federal Regulatory Reform, Rhetoric or Reality”, (1997) 6 *Public Policy Sources* 1 at 9. Milhar further explains regulatory management in saying: “Its primary concerns include the impact of regulation on Canadians, coordinating mechanisms between different regulatory systems, ranking regulation and finding alternatives to command and control regulation so as to meet policy goals.” He quotes the work of Pr. Margaret Hill, “Managing the Regulatory State: From up, to In and Down, to Out and Across” in G. Bruce Doern et al. (eds.), *Changing the Rules: Canadian Regulatory Regimes and Institutions*, Toronto, University of Toronto Press, 1999, at pp. 259-276.

⁷ Many monographs were written on the failure of regulatory programs especially in United States. See, *inter alia*, the legal analysis of S. Breyer, who is now a judge at the United States Supreme Court. S. Breyer, *Regulation and its Reform*, Cambridge, Mass, Harvard University Press, 1982, 472 p.

enhancing the conditions for a competitive and innovative economy” to ensure a “comparative advantage in attracting investments and skilled workers.”⁸ For the success of this new regulatory model, ‘accountability’ and ‘transparency’ represent leading principles and they buttress the integration of the RIAS into the rule-making process⁹.

a. Accountability

Enhancing accountability of regulatory authorities was viewed as central for successful regulatory reforms. In particular, regulatory authorities needed to broaden their views on the complexity of the problems they encountered. Indeed, they could no longer reduce problems to their simplest expression in order to be able to apply their own rules and procedures or to inform themselves by exclusively resorting to formal exigencies of administrative law. For example, the public administration was criticized for taking decisions to regulate solely on the basis of statutory powers granted by Parliament and for relying too heavily on case-law to determine the wording of a regulation. To address these perceived shortcomings, it was proposed that the bureaucracy take into account parameters other than those which would either serve to maximise their budgets or adhere to their specific competencies when devising regulatory programs¹⁰.

These bureaucratic failures were understood as a direct consequence of the lack of constraints placed on departments and agencies to justify regulatory initiatives from a social and economic perspective. This lack of accountability of regulatory authorities was notably addressed through the obligation to produce a RIAS: regulatory authorities had to justify their decision to regulate by showing that a problem exists and that the best solution to solve it is to adopt a regulation because the net benefits for the population are greater than their inconvenience¹¹.

⁸ External Advisory Committee on Smart Regulation, *op. cit., supra*, note 4, at p. 13.

⁹ Canada, Treasury Board Secretariat, Audit and Review Group, *Number 14: Regulatory Reform Through Regulatory Impact Analysis: The Canadian Experience*, Ottawa, Public Affairs Branch, Treasury Board, 1997, 22 p. See also External Advisory Committee on Smart Regulation, *op. cit., supra*, note 4, at p. 126.

¹⁰ S. Breyer, *op. cit., supra*, note 7.

¹¹ External Advisory Committee on Smart Regulation, *op. cit., supra*, note 4, at p. 136 : Annex 3- A *Proposal for a New Regulatory Policy for Canada*, clearly points out the need for a RIAS under the heading accountability of this proposal: “The government is committed to explaining to Canadians how a new regulatory intervention is in the public interest and specifying the results expected from regulatory intervention. The government is committed to monitoring its regulatory performance, providing meaningful reports to Canadians and ensuring accountability for the results generated through regulatory action.”

b. Transparency

Promoting transparency was another key issue in the betterment of regulations. Consultation with the stakeholders and the general public aims at achieving two goals. The first goal is to ensure that the regulatory authority did not misunderstand the problem; the second is to ensure greater voluntary compliance with the new regulatory requirement. It is believed that by submitting its regulatory policies to economic and social actors the regulator enriched, not impoverished, its process. Since a regulatory authority is expected to know the cause of a problem and the best cure, why not submit its views for scrutiny to those who are affected by its proposed regulations? On the one hand, if affected parties disagree with the government, perhaps their comments may bring the regulatory authority to partially or entirely rethink its approach. Even if such comments are not accepted, their existence will give a clear signal to the regulatory authority that further persuasion is needed before it can adopt its regulation and achieve a measure of voluntary compliance. On the other hand, if affected parties agree with a proposed regulation, chances are that voluntary compliance with the new requirement will be high. The theory behind these assumptions is that the binding force of the law comes from the acceptance of the rule by those who are subjected to it¹².

The consultation mechanism put into place by the Canadian government is a two-step process. First, the regulatory authority consults its stakeholders at the stage of elaborating its regulatory policy. This is an informal procedure and the only record available is the short summary that one finds in the first version of the RIAS. Once the government decides to go ahead with a regulation, a second round of consultations occurs. It is at this stage that a RIAS is pre-published with the proposed regulation in Part I of the *Canada Gazette*. During this formal consultation process, the stakeholders and the general public are invited to submit their comments. At the end of the consultation period (which varies but does not appear to be less than 30 days), comments are analysed and may be used to modify the draft regulation. After the regulations are approved by the Governor-in-Council, they are published in Part II of *Canada Gazette* with a final version of the RIAS integrating a summary of this second round of consultations. But what precisely is the content of a RIAS?

¹² External Advisory Committee on Smart Regulation, *op. cit., supra*, note 4, at p. 131. The Committee is proposing a new analytical framework in annex II: A Public Interest Accountability Framework (PIAF).

B. The Regulatory Impact Analysis Statement (RIAS)

In Canada, the obligation to produce impact studies on regulations began to arise at the end of the 1970's¹³. It was after the first oil shock and the subsequent inflationary crisis that the Canadian government took a decision to re-examine the role of the State in the Canadian economy. In 1976, the Federal government announced its intention to profoundly revise the role it played in Canadian economic development, specifically with regard to micro-economic management. During this period, it declared its intention to halt the growth of government spending and to curtail growth in the public service. Projects to establish this new political orientation were announced such as, amongst others, the Federal Cabinet according a mandate to the Ministry of Consumer and Corporate Affairs and the Treasury Board for a study on the feasibility of the use of cost-benefit analyses and related methods to scrutinize the socio-economic benefits of regulatory changes.

In 1977, the Ministry and the Treasury Board tabled their report. They recommended that the government should start to “evaluate in the proper manner proposed regulation” to better guarantee that the cost, in terms of market efficiency, was on a net basis inferior “in relation to the practical advantages” of the regulation in question. This recommendation was followed up by Cabinet. In 1978, it adopted the first policy requiring the public administration to produce a regulatory impact statement with proposed regulations¹⁴. Although this policy has changed over time, the content of a RIAS has remained largely the same.

a. Development of the RIAS Policy

On the 14th of April, 1977, the President of the Treasury Board and the Minister of Consumer and Corporate Affairs announced the adoption of a pilot project in a policy relating to the production of a socio-economic analysis of the impacts of a regulation. On the 1st of August, 1978, this policy came into force. However, its effects were limited to thirteen departments and the socio-economic impact analysis had to be conducted for any new and important regulations affecting health, safety and

¹³ For a general article on the RIAS, see Fazil Mihlar, “The Federal Government and the ‘RIAS’ Process: Origins, Need, and Non-Compliance”, in G. Bruce Doern et al. (eds.), *Changing the Rules: Canadian Regulatory Regimes and Institutions*, Toronto: University of Toronto Press, 1999, at pp. 277-292.

¹⁴ Canada, Economic Council of Canada, *Responsible Regulation*, Ottawa, Canadian Government Publishing Centre, 1979.

environmental protection¹⁵. In 1986, the *1978 Policy* was replaced by a more formal policy concerning government regulation making it mandatory to provide a socio-economic impact analysis with every draft regulation produced by all government departments, as well as including a summary of that analysis. This summary became an annex with every draft regulation which was presented to Cabinet for approval. In this 1986 Regulatory Policy, the summary took on an actual name: Regulatory Impact Analysis Summary (RIAS).

Subsequent modifications to the Regulatory Policy (1992, 1995 and 1999) have been implemented to tighten up the details regarding the production of the RIAS by the creation of diverse mechanisms of surveillance and control. The most important of these mechanisms is set out in *Regulatory Process Management Standards* which can be found in the Appendix B of the Regulatory Policy.

These administrative norms require all Federal regulatory authorities “to develop and maintain a system to manage the regulatory process that meets the standards”, and to “document clearly how they are met” for each proposal to create or amend regulations¹⁶. As a result, it became clearly mandatory for regulatory authorities to show, when proposing new regulatory requirements or regulatory changes, “that a problem has arisen, that government intervention is required and that new regulatory requirements are necessary”¹⁷. It also became clear that consultation¹⁸ at the stage of the

¹⁵ For a brief summary of the development of the Federal Government regulatory policy, see Fazil Mihar, “Federal Regulatory Reform, Rhetoric or Reality”, (1997) 6 *Public Policy Sources* 1 at 8.

¹⁶ Canada, Privy Council Office, *Regulatory Policy. Appendix B: Regulatory Process Management Standards*. These standards are available on the web site of Privy Council, *supra*, note 1: “Regulatory authorities must document their regulatory policy and processes, including the responsibilities, authorities and interrelationships of personnel who manage, carry out and review regulatory programs. The process followed to develop each new or changed regulation must be documented. The documentation should include, but not be limited to, a description of the problem, alternative solutions, the risks involved, the reasons for regulating, the consultation process used and the benefit-cost analysis.”

¹⁷ *Id.*

¹⁸ It is important to note that the Federal government makes a distinction between ‘consultation’ and ‘pre-publication’ (which also involves consultation) in a RIAS. The so-called ‘consultation’ procedure normally begins as soon as possible during the stage of the elaboration of the regulatory policy “in order to get stakeholder input on the definition of the problem, as well as on proposed solutions.” In the *Regulatory Process Management Standards* it is written: “Regulatory authorities must clearly set out the processes they use to allow interested parties to express their opinions and provide input. In particular, authorities must be able to identify and contact interested stakeholders, including, where appropriate, representatives from public interest, labour and consumer groups. If stakeholder groups indicate a preference for a particular consultation mechanism, they should be accommodated, time and resources permitting. Consultation efforts should be coordinated between authorities to reduce duplication and burden on stakeholders. Regulatory authorities should consider using an iterative system to obtain feedback on the problem, on alternative solutions and, later, on the preferred solution.” The so-called ‘pre-publication’ is a form of consultation which occurs after the regulation is drafted and pre-published for

prepublication of the draft regulations were now part of the rule-making process: ‘Notice of proposed regulations and amendments must be given so that there is time to make changes and to take comments from consultees (sic) into account.’¹⁹

From a pilot project launched in 1978, the RIAS today is completely integrated into the regulatory process. Any regulatory authority has to produce this document in relation to any draft regulation. Without the RIAS, the draft will simply not be presented to Cabinet for approval.

b. Information Contained in a RIAS

Since its first appearance on the Canadian federal regulatory scene, the basic content of the impact analysis statement has not changed significantly²⁰. However, the Privy Office Council issued a guideline in 1992 describing the content of a RIAS. The *RIAS Writer’s Guide*²¹ was central to the achievement of greater uniformity in the drafting of impact analysis statements throughout the Federal Public Administration.

The *RIAS Writer’s Guide* states that a RIAS must be divided into six sections. The first section is called *description*. It must include a definition of the problem, how the regulation will solve the problem, an account of how the regulation impinges on the persons affected by it and an explanation as to why it was necessary to take such action.

Section two is called *alternatives*. Here, the regulatory authority must show that it explored other means of fixing the problem, rather than simply taking for granted that a regulation is the only

notice to stakeholders and the public in general in order to provide to them a last chance to make their views known on the proposed regulation before it is approved by the government.

¹⁹ *Regulatory Process Management Standards, supra*, note 16.

²⁰ The RIAS is supposed to be a summary of the strategic analysis (including the cost-benefit analysis) made before the decision to regulate is made. However, it is far from clear that such strategic analyses are conducted beforehand (or are as detailed as they should be), contrary to United States where this process is closely monitored by an independent research centre (AEI-Brookings Joint Centre for Regulatory Studies). The Centre published several studies criticizing the government in that regard. For example, see Robert W. Hahn, et al., “Assessing the Quality of Regulatory Impact Analysis: The Failure of Agencies to Comply With Executive Order 12,866”, (2000) 23:3 *Harvard J. L. & Pol.* 859-885. It is also interesting to note that in the US, scholars are asking their government to provide a summary of the regulatory impact statement, Robert H. Hahn, “An Assessment of OMB’s Draft of Guidelines to Help Agencies Estimate the Benefits and Costs of Federal Regulation”, AEI-Brookings Joint Centre, Regulatory Analysis 99-5, December 1999, p. 6. This paper is available of the web site of this research centre: www.aei.brookings.org.

²¹ This guideline is also published on the Privy Council Office web site. See note 1.

adequate instrument at hand. Other possible instruments are, for example, voluntary standards, tax credits, insurance, user fees and marketable property rights²².

Section 3 is called *benefits and costs*. The regulatory authority must design regulation in such a way that it will maximize the gains to beneficiaries in relation to the cost to Canadian governments, businesses and individuals²³. More precisely, the regulatory authority must take steps to minimize the regulatory burden on the population and to ensure that regulatory programs impede as little as possible Canada's ability to compete internationally. To achieve this goal, a regulatory authority estimates qualitative as well as quantitative impacts (when possible) of the proposed regulation on inflation, employment, distribution of income, international trade and operating costs on the government²⁴.

Section 4 is called *consultation*. The regulatory authority must describe who was consulted and the mechanisms that were used to conduct consultations. It must also include a discussion on the results of the consultation and the name of any group still opposed to the regulation. This section of the RIAS is revised after the notice and comment procedure is completed. The regulatory authority must state if comments received have led to a modification of the proposed regulation and, if not, the authority must explain the reasons why it chose not to change it²⁵.

²² Canada, Privy Council Office, *Regulatory Affairs and Orders in Council Secretariat, Assessing Regulatory Alternatives*, Ottawa, Privy Council Office, 1994, 96 p. This guide is available on the Privy Council web site. See note 1.

²³ Canada, Consulting Audit, *Benefit-Cost Analysis Guide for Regulatory Programs*, Ottawa, Consulting Audit Canada, August 1995, 110 p. This guide is available on the Privy Council web site. See note 1.

²⁴ There are different analytical approaches to assess social regulation. See Lave Lester, *The Strategy of Social Regulation*, Washington, D.C.: The Brookings Institution, 1981. The two major ones appear to be 'benefit-cost analysis' and 'cost-effectiveness'. The main distinction between the two is that the "benefit-cost analysis says something directly about the economic efficiency of a policy. Cost effectiveness analysis typically takes the goal of a policy as a *given*, and thus provides information that will help achieve that goal at the lowest social cost." See Robert W. Hahn, Robert E. Litan, "A Review of the Office of Management and Budget's Draft Guidelines for Conducting Regulatory Analyses", AEI-Brookings Joint Centre, Regulatory Analysis 03-6, March 2003, p. 3. This paper is available on the web site of this research centre: www.aei.brookings.org.

²⁵ Canada, Privy Council Office, *Consultation Guidelines for Managers in the Federal Public Service*, Ottawa, Privy Council Office, 1992, 6 p. These guidelines are available on the Privy Council web site. See *supra*, note 1. There is a growing concern of the issue of conducting meaningful consultation. On this topic, there is interesting documentation produced by the European Commission. See for example: Commission des communautés européennes, *Communication de la Commission, Vers une culture renforcée de consultation et de dialogue – Principes généraux et normes minimales applicables aux consultations engagées par la Commission avec les parties intéressées*, Bruxelles, 11.12.2002, 28 p.; *Gouvernance européenne, un livre blanc*, Bruxelles, 25.7.2001, at pp. 14 and ff.; *Rapport de la Commission sur la gouvernance européenne*, Luxembourg, Office des publications officielles des Communautés européennes, 2003, 45 p. These documents are available on the web site of the European Community at: www.europa.eu.int. In France, the Minister in charge of the Délégation aux usagers et aux simplifications administratives (DUSA), appointed Mr. Dieudonné Mandelkern as the rapporteur général of a working group studying the quality of regulation. The *Rapport du Groupe de travail interministériel sur la qualité de la réglementation* (particularly p. 20 and ff.) is available on the DUSA website at: www.dusa.gouv.fr.

Section 5 is called *compliance and enforcement*. When relevant to a particular regulation, this section articulates the compliance and enforcement tools created, describes the means to detect, and the penalties for, non-compliance²⁶.

Finally, section 6 is called *contact person* and provides the name, address and telephone number of the person who can answer requests for information after the publication of the RIAS.

In support of the argument made in this article, it is important to remember the following points about the types of information found contained in a RIAS. This information intends: (1) to persuade potential readers that the regulation conforms to government policy; (2) to provide to those who might like to participate in the rule-making process relevant background information to evaluate by themselves whether the regulation will achieve its intended goals and; (3) to inform the public of the results of the consultations.

In sum, these justificatory and consultative functions of a RIAS were designed to meet the principles of accountability and transparency which have been required by government since the second half of the last century. Although the RIAS was crafted to enhance the integration of these two principles into the daily operations of the bureaucracy, it quickly lost its original administrative vocation and has become an official public document of the Canadian government. Since then, it assumed added legal value and lawyers started to argue its content in the Federal court when an interpretative issue regarding a regulation was at stake. Today, there is growing use of this document in Federal Court decisions: judges use RIAS as an extrinsic aid to interpretation.

PART II - THE USE OF RIAS BY THE FEDERAL COURT OF CANADA

From 1988 to 2005, 128 decisions of the Federal Court (trial and appeal divisions) referred to a RIAS²⁷. Although at first glance these numbers may appear low, they are not when compared to the use of other types of legislative history material during the same period. Indeed, the RIAS is now used by the Federal Court as often as Hansard (in existence for over 100 years) which provides a

²⁶ There is also a growing regarding compliance and enforcement measures in the OECD countries. See OECD, *Reducing the Risk of Policy Failure: Challenge for Regulatory Compliance*, Organisation for Economic Co-operation and Development, 2000, 91 p., available on the OECD web site at: www.oecd.org.

²⁷ The research was made from the QuickLaw Data Bank available on line.

transcription of the House of Common Debates²⁸. It is even more interesting to note that when the period is narrowed to 1998-2005²⁹, the RIAS is cited almost twice as much (85 decisions) as Hansard (49 decisions). Of course, numbers are only one of the variables for consideration in relation to complex phenomena such as the construction of statutes and regulations. However, these numbers indicate, at the very least, a rapid adoption rate of a relatively new source of information. Judges now rely on RIAS to interpret a regulation because they perceive a RIAS as persuasive and legitimate.

For a better understanding of this phenomenon, it is necessary to classify the cases. In order to distinguish between relevant and irrelevant decisions, cases were first divided into two categories: descriptive and normative. A descriptive use of a RIAS means that the information does not influence judges in their interpretative tasks. Very often, a RIAS is cited at the beginning of a judgment to provide background information to either explain the functioning and the effect of a legal scheme or to simply give some contextual information regarding the regulation that is about to be analysed³⁰. The

²⁸ A summary research in the QuickLaw Data Bank show that during the same period (1988-2005), there are 126 decisions in which Hansard was referred to by Federal Court judge.

²⁹ 1998 marks the year when the Supreme Court delivered a very important judgment regarding the adoption of the modern method of interpretation to construct statutes and regulations: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27.

³⁰ See *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309, par. 16 (Cullen J.); *Arias v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. no 1948, docket Imm-3685-94, Imm-3706-94, December 15, 1994, par. 47 (Nadon J.); *Abdi-Egeh v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. no 1007; docket IMM-615-95, June 29, 1995, par. 5 (Gibson J.); *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410, par. 25 (F.C.A., Stone, Strayer and MacGuigan JJ.A.); *Mitov v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no 222, docket IMM-1499-95, February 19, 1996, par. 7 (Cullen J.); *Dubé c. Lepage*, [1997] A.C.F. no 616, docket T-1369-96, May 16, 1997, par. 3 (Teitelbaum J.); *Eli Lilly and Co c. Novopharm Ltd.*, [1997] A.C.F. no 1344, docket T-734-96, October 15, 1997, par. 13 (Dubé J.); *Adam v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. no 1901, docket Imm-5090-97, December 23, 1998, par. 16 (Nadon J.); *Nouranidoust v. Canada (Minister of Citizenship and Immigration)*, [2000] 1 F.C. 123, par. 2 (Reed J.); *Merck & Co. v. Nu-Pharm Inc.*, [2000] F.C.J. no 380, docket no A-804-99, March 13, 2000, par. 9 (F.C.A., Robertson, Rothstein and Sharlow JJ.); *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, [2000] F.C.J. no 585; docket no T-415-98, March 16, 2000, par. 12 (O'Keefe J.); *Farzad v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. no 607; docket imm-5387-99, February 14, 2001, par. 10 (Simpson J.); *Nu-Pharm Inc. v. Canada (Attorney General)*, [2001] F.C.T. 973, par. 15 (Blanchard J.); *Borisova v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 C.F. 408, par. 7 (Gibson J.); *Akram v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C. 826, par. 5 (Mosley J.); *Englander v. Telus Communications Inc.*, [2004] F.C.A. 387, par. 34 (Décary, Nadon and Malone JJ.A.); *Englander v. TELUS Communications Inc.*, [2005] F.C. 739, par. 34 (Décary, Nadon and Malone JJ.A.); *Say v. Canada (Solicitor General)*, [2005] F.C. 739, par. 23 (Gibson J.); *Rana v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C. 974, paras 1-3 (Von Finckenstein J.); *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)*, [2005] F.C. 1011, par. 195 (Gibson J.); *GlaxoSmithKline Inc. v. Apotex Inc., International Assn. of Immigration Practitioners v. R.*, [2004] F.C. 1302, par. 11 (Lemieux J.); *Begg v. Canada (Minister of Agriculture)*, [2004] F.C. 659, par. 15 (Campbell J.); *Singh v. Canada*, [1996] F.C.J. no 1473, docket Imm-3164-95, November 8, 1996, par. 12 (Pinard J.); *Nguyen v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ no 1478, Imm-3538-94, Nov. 13, 1996, para 8 (Reed J.); *Hoffmann-La Roche Ltd. v. Canada (Minister of National Health and Welfare)*, [1999] F.C.J. no 99, docket T-970-98, January 26, 1999, par. 5 (Reed J.); *Public Service Alliance of Canada v. Canada (Public Commissioner)*, [1992] 2 F.C. 181, par. 5 (Rouleau J.);

descriptive use of a RIAS is found in 36 decisions representing 28 percent of cases³¹. A descriptive use of a RIAS in a judgment is not contentious in legal theory regarding the construction of statutes and regulations. For this reason, these 36 decisions were considered irrelevant and set aside.

The remaining 92 decisions (representing 72 percent of cases) display a normative use of a RIAS. A normative use means that the information contained in a RIAS implicitly or explicitly influenced the judge in her interpretative task. The influence is implicit when, for example, the information contained in a RIAS was argued by one party, but was not referred to by the judge in her reasoning³². This implicit category, also called ‘normative in a weak sense’, comprises 16 decisions (13 percent of cases)³³. They are also excluded from the sample of decisions which will be used for the

³¹ I subdivided this category into four subgroups. For the references to cases in Group 1, see note 7. Group 2: A case is cited in the reasons in which a reference to a RIAS appears. See *Begg v. Canada (Minister of Agriculture)*, [2005] F.C.A. 362, par. 35 (Nadon, Scton, Malone JJ.A.); *Bear v. Canada (Attorney General)*, [2003] F.C.A. 40, par. 14 (Strayer, Nadon, Evans JJ.A.); *Esquimalt Anglers’ Assn. v. Canada* (1988), 21 F.T.R. 304 (Cullen J.); *Hu c. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no 1476, docket IMM-3387-95, November 8, 1996, par. 7 (Pinard J.); *GlaxoSmithKline Inc. v. Canada (Attorney General)*, [2003] F.C. 1055, par. 81 (Russell J.); *Revich c. Canada (MCI)*, [2005] C.F. 852, par. 14 (Tremblay-Lamer J.). Group 3: A RIAS is argued by one party, but the judge declares it totally irrelevant to the case at bar. See *Hydro Ontario v. Canada*, [1996] A.C.F. no 708, docket T-387-93, May 27, 1996, par. 29 (Simpson J.). Group 4: A RIAS is used to explain the rule-making process. See *Antonsen v. Canada (Attorney General)*, [1995] 2 F.C. 272, par. 31 (Reed J.); *Hoffmann-LaRoche Ltd. v. Canada (Minister of National Health and Welfare)*, [1996] F.C.J. no 348, docket T-1964-93, T-1898-93, March 20, 1996, par. 11 (Reed J.); *International Assn. of Immigration Practitioners v. Canada*, [2004] F.C. 630, paras 6-10 (Layden-Stevenson J.).

³² See *Canada Eighty-Eight Fund Ltd. v. Canada (Minister of Employment and Immigration)*, [1991] 48 F.T.R. 196 (Reed J.); *Apotex Inc. v. Canada*, [2003] F.C.T. 414, paras 15 & 19 (Russell J.); *Imperial Tobacco Canada Ltd. v. Canada (Minister of Health)* (2004), 247 F.T.R. 210, par. 28 (Lemieux J.); *Van Vlymen v. Canada (Solicitor General)*, [2005] 1 F.C.R. 617, par. 64 (Russell J.); *Vlymen v. Canada (Solicitor General)*, [2004] F.C. 1054, par. 64 (Russell J.); *Canada (Minister of Citizenship and Immigration) v. Vong*, [2005] F.C. 855, par. 21 (Heneghan J.); *Abbott Laboratories Ltd. v. Canada (Minister of Health)* [2005] F.C. 989, par. 35 (Russell J.); *Tihomirovs v. Canada (MCI)*, [2005] F.C.A. 308, par. 8 (Létourneau, Rothstein, Malone JJ.A.).

³³ Group 2: Other uses. In this category, there are five decisions in which a RIAS is argued by one party and judges address the argument. However, they dismiss it. In two cases, the Federal Court of Appeal found that whether the information contained in a RIAS is right or wrong is not a relevant issue to determine if a serious question is to be tried (in this case the validity of a regulation): *Teal Cedar Products (1977) Ltd. C. Canada (C.A.)*, [1989] 2 CF 15, par. 16 (F.C.A., Pratte, Heald, Mahoney JJ.A.); *Parker Cedar Products Ltd. v. Canada (Attorney General)* (1988), 92 N.R. 318 (F.C.A., Pratte, Heald and Mahoney JJ.); in two cases, the judge determines that the portion of the RIAS cited by one party is not relevant, but only after reviewing the argument: *Newman v. Canada (Minister of Agriculture)*, [1993] F.C.J. no 864, docket P-58-92, September 2, 1993, par. 14 (MacKay J.); *Collier v. Canada (Minister of Citizenship and Immigration)*, [2004] C.F. 1209, paras. 24-26 (Snider J.); in another case, the judge states that a RIAS is simply a comment by the Department: *Chen v. Canada (Minister of Citizenship and Immigration)*, (1997) 43 Imm. L.R. (2d) 83, paras 20-21 (Nadon J.). In this category, I also classified three other cases. In the first one, the judge distinguish a press release from a RIAS: *National Anti-Poverty Organization v. Canada (Attorney General)*, [1989] 1 F.C. 208, paras 24-25 (Muldoon J.); in the second case, the judge acknowledges that the RIAS may be the source of the ambiguity of the regulation: *Gonzales v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. no 1844, Imm-7042-93, December 6, 1994, paras 7 & 9 (Rothstein J.); in the third case, the judge used the RIAS as a statement of fact, to provide evidence that the minister acted in a cavalier attitude: *Popal v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 532, paras 23-25 (Gibson J.).

analysis in the following section because it is not possible to determine if any weight was given to the RIAS by the judge. This reduces the total number of cases used in this sample to 76 out of 128 (60 percent of cases). This sample forms a category that I call ‘normative in a strong sense’, because the influence of the RIAS is explicit on the interpretative reasoning of judges. They clearly use a RIAS as an extrinsic aid to construct their interpretation of a regulation.

A. Using RIAS as an Extrinsic Aid to Interpretation

The term ‘extrinsic aid’ refers to all materials which form part of the context of legislation or a regulation. This kind of material is distinguished from ‘intrinsic aid’ to interpretation of a legal text, such as case-law. As Sullivan states in the third edition of *Driedger on the Construction of Statutes*: “in modern interpretive practice, courts have become accustomed to considering legislation in a broad context.”³⁴ However, until recently, the official judicial discourse held that not all extrinsic materials could be utilized as legitimate aids to interpretation. Only foreign case law, international conventions, commission reports and scholarly publications could be used. Legislative history material, in which a RIAS belongs, was not admissible to assist interpretation³⁵ but Sullivan wrote in 1994 that “the exclusionary rule has been eroding at a rapid rate”, notably in the field of constitutional interpretation³⁶. She also noted that the exclusionary rule was relaxed in statutory interpretation cases, “but in a haphazard manner and to an uncertain degree” and concluded that the case law on the use of legislative history material was unsatisfactory³⁷.

Since the publication of the third edition of *Driedger on the Construction of Statutes*, the Supreme Court has solved this issue in a series of four cases decided between 1997 and 1999³⁸. In these decisions, the Supreme Court showed that it had resolutely embarked on the path of authorizing

³⁴ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., Toronto, Butterworths, 1994, p. 426.

³⁵ With the exception of commission reports.

³⁶ R. Sullivan, *op. cit.*, note 34, p. 440. Sullivan writes that the erosion of the exclusionary rule started in “a series of cases arising under the *Constitution Act, 1867*, the Supreme Court of Canada held that extrinsic materials, including the legislative history of an enactment, should not automatically be excluded in constitutional cases.” She cites: *Reference re Anti-Inflation, 1975*, (1978), 68 D.L.R. (3d) 452, at 468 (S.C.C.); *Residential Tenancies Act Reference*, (1981), 123 D.L.R. (3d) 554, at 562 (S.C.C.); *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, 318. Thereafter the rule was also relaxed in Charter cases. See for example: *Reference re Criminal Code Sections 193 & 195.1(1)(c)*, [1990] 4 W.W.R. 481 at 539-540 (S.C.C.); *Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486 at 508-509.

³⁷ In Great Britain, legislative history material was not clearly permitted to be used until the decision in *Pepper (Inspector of Taxes) v. Hart* (1992) 3 WLR 1032 (HL).

³⁸ *Construction Gilles Paquette Ltée. v. Entreprises Végo Ltée*, [1997] 2 S.C.R. 862; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 299; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688.

legislative history material as an extrinsic aid to statutory interpretation. The Court stated that this type of material is admissible to interpret statutes and regulations without any restrictions as long as the information contained in it was clear. However, the Court added that judges have to use this material with caution, which means that the material can only be used as a complement to interpretation. Therefore, judges can use the information included in a RIAS to confirm an interpretation already reached through the usual methods of interpretation, calling for an analysis of information provided by sources intrinsic to the legal system (analysis of the text of the regulation taking into consideration the context of the regulatory and statutory scheme as well as case-law). Subsequently, extrinsic information, such as a RIAS, can be used to provide an additional argument to support an interpretation, but it should not be understood as indispensable to the task of interpretation. In sum, a RIAS has to be viewed as a useful source of information, not as an authoritative one. It cannot be the only source of information upon which a judge constructs the meaning of a regulation³⁹.

Based on the application of these principles, it was possible to come to a more refined analysis of the decisions forming the ‘normative in a strong sense’ (NSS) category of cases. I further divided the cases into two additional categories: orthodox and unorthodox. Of the 76 decisions, there are 45 (59 percent NSS; 35 percent of all cases) in which judges make an orthodox (correct) use of a RIAS. It is only after a judge had reached an interpretation through the intrinsic methods of interpretation that she reinforced it with the information contained in a RIAS⁴⁰. In these decisions, a RIAS is treated as

³⁹ Two decisions of the Federal Court are particularly interesting of the issue of the weight to be given to a RIAS: *Eli Lilly Inc. v. Canada (Minister of Health)*, [2003] F.C.A. 24, paras 67-75 (Isaac J.A., dissenting); *Hoffmann-La Roche Ltd. v. Canada (Minister of Health)*, [2004] F.C. 1547, paras 2021 (Harrington J.).

⁴⁰ *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54, par. 17 (Strayer J.); *Tri-Seeds Ltd. v. Canada (Minister of Agriculture)*, 1993 F.C.J. No. 834 Docket P-83-92, July 23, 1993, par 18 (Gibson J.); *Eli Lilly and Co. v. Novopharm Ltd.*, [1995] F.C.J. no 174, T-890-94, February 2, 1995, paras 16-17 (Cullen J.); *Bochnakov v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. no 271, docket Imm-159-95, February 17, 1995, par. 11 (Rothstein J.); *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1995] F.C.J. no 450, docket T-2991-93, March 20, 1995, par. 11 (Wetston J.); *Hoffmann-La Roche Ltd. v. Canada (Minister of National Health and Welfare)*, [1995] F.C.J. no 985; docket no T-1325-94, June 21, 1995, par 39 (Noël J.); *Bayer Inc. v. Canada (Attorney General)*, [1999] 1 F.C. 553, paras 36-37 (Evans J.); *Murphy v. Canada (Attorney General)*, [1999] 2 F.C. 326, paras 30-31 (McGillis J.); *Diaz v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 496, par. 9 (Evans J.); *Hoffmann-La Roche Ltd. v. Canada (Minister of National Health and Welfare)*, [1999] F.C.J. No 348, T-2431-98, March 16, 1999, paras 18-21 (Sharlow J.); *Bayer Inc. v. Canada (Attorney General)*, (1999), 87 C.P.R. (3d) 293 at 296-297 (F.C.A., Stone, Rothstein and Sexton J.J.A.); *Jain v. Canada (Minister of Revenue)*, [1999] F.C.J. no 1201, docket no T-1588-98; July 30, 1999, par. 8 (Lufty J.); *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. no 1230, docket Imm-2003-98, August 6, 1999, paras 15-16 (Sharlow J.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2000 F.C.J. No. 559, docket T-418-98, May 3, 2000, paras 19-22 (O’Keefe J.); *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, par. 73; *Novartis Pharmaceuticals Canada Inc. v. Abbott Laboratories Ltd.*, [2000] F.C.J. No. 941, docket A-525-99, June 19, 2000, paras 10-15 (F.C.A., Linden, Rothstein, Malone J.J.A.); *Warner-Lambert Canada Inc. v. Canada (Minister of Health)*, [2001] F.C.T. 514, par. 17 (Pinard J.); *Parke-Davis Division v. Canada (Minister of Health)*, [2002] 1 F.C. 517, paras 40-45 (Dawson J.); *Kwan c.*

only one relevant source of information that is helpful – but not decisive - to resolve the interpretative issue.

The remaining 31 decisions (40 percent NSS; 24 percent of all cases) do not fit squarely within the parameters set by the Supreme Court on the use of legislative history material as an extrinsic aid to interpretation. In this sense, these decisions constitute an unorthodox use of a RIAS. This category is further sub-divided into two categories: technocratic and democratic.

a. Technocratic Use

Twenty-two decisions (32 percent NSS; 19 percent of all cases) fall into the category of a ‘technocratic’ use of a RIAS. It is called technocratic because judges rely on the expertise of the Public Administration to provide them with reliable information to resolve the interpretative issue put before them. The information referred to in these cases can be found in either section 1 (description), section 2 (alternatives) or section 3 (benefits and costs) of the RIAS.

Canada (MCI), [2002] 2 C.F. 99, par. 40 (Muldoon J.); *Eli Lilly Canada Inc. v. Canada (Minister of Health)*, [2002] F.C.T. 28, paras 15-16 (Hansen J.); *Wyeth-Ayerst Canada Inc. v. Faulding (Canada) Inc.*, [2002] 223 F.T.R. 189 paras 27-29 (Layden-Stevenson J.); *Parke-Davis Division c. Canada (Minister of Health)*, [2003] 2 C.F. 514, paras 30-33 (F.C.A., Linden, Sexton and Sharlow JJ.A.), ; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2002] F.C.T. 1205, docket T-1898-01, November 22, 2002, par. 53 (Blanchard J.); *Ferring Inc. c. Canada (Attorney General.)*, [2003] C.F.P.I. 293, paras 33-34 (Simpson J.); *Pfizer Canada Inc. c. Canada (Attorney General)*, [2003] C.F.A. 138 (Strayer, Nadon and Pelletier JJ.A.); *Biolyse Pharma Corp. v. Bristol-Myers Squibb Co.*, [2003] F.C.A. 180, paras 21, 32 (Strayer, Nadon and Evans JJ.A.); *Sunshine Village Corp. c. Canada (Parks)*, [2003] 4 C.F. 459, paras 45-46, 57-58 (Heneghan J.); *Englander v. Telus Communications Inc.*, [2003] F.C.T. 705, paras 44-48 (Blais J.); *Genpharm Inc. v. Canada (Minister of Health)*, [2004] 1 F.C.R. 375, par. 58 (Blais J.); *Biovail Corp. v. Canada (Minister of National Health and Welfare)*, [2003] F.C.A. 406, par. 31 (Décary, Létourneau and Nadon JJ.A.); *Adviento v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C. 1430, par. 52 (Martineau J.); *Townsend v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C. 293, par. 18 (Kelen J.); *Apotex Inc. v. Merck & Co.*, [2004] F.C. 314, paras 30-35 (Snider J.); *AstraZeneca Canada Inc. v. Apotex Inc.*, [2004] F.C. 647, paras 47-49 (Gauthier J.); *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, [2004] F.C. 736, paras 24-26 (Heneghan J.); *Bayer v. Apotex*, [2004] F.C.A. 242, paras 13-14 (Linden, Rothstein, Sexton JJ.A.); *Lee c. Canada (Minister of Citizenship and Immigration)*, [2004] F.C. 1012, par. 22 (Dawson J.); *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, [2005] F.C.A. 189, par. 54 (Noël, Sharlow, Malone JJ.A.); *Janssen-Ontario Inc. v. Canada (Minister of Health)*, [2005] F.C. 765, paras 15, 38-39 (DeMontigny J.); *Ontario Harness Horse Assn v. Canadian Pari-Mutuel Agency*, [2005] F.C. 1320, par. 40 (Heneghan J.); *Sinnappu v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 C.F. 791, paras 44, 59 (McGillis J.); *Canada (Minister of Citizenship and Immigration) v. Dular*, [1998] 2 C.F. 81, par. 20 (Wetston J.); *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244, par. 64 (McGillis J.); *Roy v. Canada*, [2002] 4 F.C. 451, paras 46-47, 72 (McKeown J.); *Eli Lilly Inc. c. Canada (Minister of Health)*, [2003] F.C.A. 24, para 73 (Sharlow, Malone J. for the majority; Isaac J. dissenting); *Hoffmann-La Roche Ltd. v. Canada (Minister of Health)*, [2004] F.C. 1547, paras 2021 (Harrington J.).

Here is an example of a RIAS produced to accompany the new live-in caregivers provisions in the *Immigration and Refugee Protection Regulations*⁴¹. Despite its length, it gives a good idea of the kind of information found in these three sections of a RIAS.

Description

The Live-in Caregiver Program brings qualified caregivers to Canada to respond to employer needs in situations where there are no Canadians or Canadian permanent residents to fill the available positions. Live-in caregivers who qualify for the program are allowed to apply for permanent residence in Canada after completion of a minimum of two years employment, within a three-year period, as a live-in employee in a private household providing child care, senior home support or care of the disabled.

Purpose of these provisions

(...) The intent of the new provisions is to get the fairest working arrangement possible for both the employer and the caregiver while ensuring that both parties understand what is expected of them.

What the regulations do

The regulations relating to live-in caregivers prescribe the criteria for eligibility to apply under the Live-in Caregiver Program; these requirements are held over from the Immigration Regulations, 1978.

The Regulations specify:

- the criteria which must be met by person applying under the Program;
- what is expected of the employee and employer;
- what is required of the employee to change employers; and
- the process by which the live-in caregiver might apply for permanent residence.

What has changed

New regulatory provisions specify that live-in caregivers:

- must enter into a contract with their employer which sets out the terms and conditions of the employment; and
- may change employers after they have presented their validated jobs offer to an officer and have received a work permit naming the new employer.

Alternatives

The objective of setting out the relationship in a contract is to get the fairest working arrangement possible for both the employer and the caregiver while ensuring that both parties understand what is expected of them. Leaving this exercise to the discretion of the employee and employer is likely to result in the inconsistent application of this important process. Incorporating the provision that live-in caregivers can change employers in regulation, rather than applied as an administrative policy, reinforces this right of caregivers.

Benefits and Costs

Benefits

A contract indicates what the employer expects of the caregiver and will reinforce the employer's legal responsibilities to the caregiver. As well, such a contract can help the employer to easily bring to the attention of the employee his or her employment responsibilities.

The live-in caregiver regulations take into consideration the unique circumstances and potential vulnerability of live-in caregivers, the majority of whom are women. Requiring that there be a written contract between the employee and employer, will give the employee a readily available reference should there be a need to use this in support of defining the parameters of the job duties, hours of employment, salary, benefits or other terms of the employment.

Costs

There will continue to be a processing fee incurred by the employee when changing employers.

In this category of cases, judges go beyond what is permitted by case-law for they have used a RIAS as the only source of information to either determine the purpose⁴² or the meaning of a

⁴¹ SOR/DORS/2002-227, p. 246-247.

regulation⁴³ – including if a regulation is *ultra vires* of its parent law⁴⁴ – or if it meets the conditions in interlocutory proceedings⁴⁵. For example in *Jiang v. Canada (MCI)*⁴⁶, McKeown J. had to determine whether an immigrant needed to ‘delay’ or ‘actively delay’ the execution of an exclusion or deportation order before he could be excluded from a particular immigration program (the Deferred Removals Order Class program also known as DROC). The wording of the regulation simply referred to an immigrant who had not ‘hindered or delayed’ the execution of the order. The text of the regulation was silent on the question whether proof of ‘active delaying’ was necessary. McKeown J. did not proceed with an intrinsic legal analysis based on the text and the whole regulatory and statutory context of the DROC program nor did he refer to case-law or make any comment regarding relevant or irrelevant case-law. Instead, McKeown J. relied exclusively on the information contained in the RIAS to find that immigrants had to actively delay the execution of an exclusion or deportation order before they could be excluded from the program. Even if McKeown J. clearly stated that he was not bound by the information found in the RIAS, he treated this evidence as determinative of the interpretative issue.

Of course, one may argue that judges will use such extrinsic material to resolve an ambiguity because there is no way of resolving it within the regular interpretive framework. While this argument is acceptable on its face, it is my contention that judges should explicitly demonstrate in their reasons that neither the legislative and regulatory legal frameworks, nor case law (because decisions are either inexistent or irrelevant), can help to resolve the issue. Indeed, it is important that judges make this

⁴² *Communications & Electrical Workers of Canada v. Canada (Attorney General)*, [1989] 1 F.C. 643, paras 32-33 (Denault J.); *Kaisersingh v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 20, par. 10 (Reed J.); *Darmantchev v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. no 1445, docket Imm-2807-95, October 31, 1995, par. 5 (Wetston J.); *Say v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. no 1478, docket Imm-3085-97, October 29, 1997, par. 5 (Rothstein J.); *SmithKline Beecham Pharma Inc. v. Apotex Inc.*, [1999] F.C.J. No. 1775; docket T-1042-99, November 22, 1999, par. 18 (McGillis J.); *Merck 7 Co. v. Canada (Attorney General)*, [1999] F.C.J. No. 1825; Docket T-398-99, November 23, 1999, par. 51 (McGillis J.); *Bristol-Myers Squibb Canada Inc. v. Canada (Attorney General)*, [2001] F.C.J. No. 51, docket T-1768-00, January 19, 2001, paras 17-21 (Campbell J.); *Pfizer Canada v. Apotex Inc.*, [2002] F.C.T. 805, paras 62-66 (Heneghan J.); *Shephard v. Canada (Royal Canadian Mounted Police)*, [2003] F.C. 1296, paras 22-26 (Snider J.).

⁴³ *Jiang v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no 631, docket Imm-2892-97, May 14, 1998, par 7 (McKeown J.); *Procter & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)*, [2003] 4 F.C. 445, paras 21-25 (Gauthier J.); *Adorable Junior Garments Inc. v. Canada (Minister of National Revenue)*, [1995] F.C.J. No. 1722, Docket T-2593-94, December 20, 1995, paras 17-20 (Simpson J.); *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, [2004] F.C. 1672, par. 104 (Martineau J.).

⁴⁴ *Bandali v. Canada (Minister of Employment and Immigration)*, [1994] FCJ no 922, docket Imm-2326-93, June 13, 1994, par. 8 (MacKay J.); *Smith v. Canada (Attorney General)*, [1999] F.C.J. no 1751, docket T-1296-97, November 9, 1999, paras 19-21, 36-37 (Blais J.); *Animal Alliance of Canada v. Canada (Attorney General)*, [1999] 4 C.F. 72, paras 42-43 (Gibson J.)

⁴⁵ *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2002] F.C.T. 1319, paras. 9-10, (Noël J.); *Chen c. Canada (Minister of Citizenship and Immigration)* (2004), 250 F.T.R. 285, par. 17 (Snider J.); *Figurado v. Canada (Solicitor General)*, [2005] F.C. 347, par. 40 (Martineau J.).

⁴⁶ *Jiang v. Canada (MCI)*, [1998] FCJ no 631, par. 7 (QuickLaw).

statement clearly for in its absence, the legality of the decision would be highly questionable if indeed the issue could have been resolved with a reasonable effort to construct the statute and regulations as a whole or with case law addressing the interpretative issue

In *Yu v. Canada (Minister of Citizenship and Immigration)*, the Court stated that the RIAS expressed a Departmental policy⁴⁷. Yu was a citizen of Taiwan. In 1990, his father applied for permanent residency under the entrepreneur class and included Yu in his application. His father's application was approved and the family was given landed immigrant status. However, Yu, who was 16 at the time, was unable to obtain a Taiwanese passport due to the government's policy not to issue passports to people 16 years or over who had not yet undergone mandatory military service and so, he remained in Taiwan. By the time his military service was completed, his visa had expired and he then re-applied, requesting that his application be considered on humanitarian grounds. His application was denied. The visa officer found that the application did not show humanitarian and compassionate grounds. The interesting point in this decision is that Richard J. was of the opinion that the RIAS dated in 1992 stated the Immigration Department's policy permitting a finding of dependency where a minor had to undertake military service prior to joining his family in Canada and presumed that it was indeed a policy of the Department because the statement in the RIAS "was repeated in an immigration policy dated February 1st, 1994."

Finally, in two other decisions, the question at stake was not about a substantive interpretation of a regulation, but procedural. The question concerned when the regulation was made public and the information contained in a RIAS was used to determine this question⁴⁸. Although this type of case is interesting, it will not be discussed because it raises fairness issues rather than interpretive questions.

⁴⁷ *Yu v. Canada (Minister of Citizenship and Immigration)*, (1999) 178 F.T.R. 84, paras 26-27, Richard J.

⁴⁸ *Kazi c. Canada (Minister of Citizenship and Immigration)*, [2003] C.F. 948, par. 33 (Martineau J.). In *Kazi c. Canada (Minister of Citizenship and Immigration)*, Kazi challenged the decision to reject his application as a qualified worker. A new point system came into force on June 28, 2002, requiring 75 points instead of 70 to pass as a qualified worker. Kazi made his application on January 3, 2002. On July 28, 2002 he was evaluated and he obtained 73 points. As a result of the new point system his application was rejected. In Court, he argued that he was not aware of the new point system and was not given a chance to make his case. Counsel for the Minister argued that Kazi should have known that the point system changed: the presumption of knowledge of the law applies here and ignorance of the law is not an excuse. Although Martineau J. agreed that the presumption would normally apply, he found that such was not the case at bar because the department could not expect the applicant, at the moment he made his application, to observe a regulation that was not yet in force. To support his argument, Martineau J. referred to the RIAS which was pre-published on June 14, 2002 and which made the announcement that a new point system would likely be put in place. Martineau J. used this statement to find that the earliest possible time at which the applicant could have known about the new point system was June 14, 2002. Consequently, between this date and the time his application was processed, the applicant would not have had sufficient time to become cognizant of the new rules and subsequently change his application accordingly.

b. Democratic Use

Nine decisions (12 percent NSS; 7 percent of all cases) fall into the category of a ‘democratic use’ of a RIAS. For a better understanding of the argument raised by these cases, it is important to remember that a key reason a Department or Agency is required to produce a RIAS is for consultation with the public. As has been said, a RIAS is pre-published in Part I of the Canada Gazette with the proposed regulations for a minimum period of 30 days. During this time, stakeholders and members of the general public can forward their comments to the Regulatory authority. Once the consultation period is closed, the comments are then analysed by the relevant authority who can then decide to modify (or not) the proposed regulations in accordance with the comments received. The decisions taken are thereafter summarized in the final RIAS which is published with the approved regulation in Part II of the Canada Gazette.

Here is a very brief example, pertaining to the detention and release of persons in the *Immigration and Refugee Protection Regulations*⁴⁹, of what one may read in a RIAS as published in Part II of the Gazette:

Consultation

(...) Consultations were held in July of 2000 and In August, and September of 2001.

Informal consultations on detention issues have taken place throughout the legislative process. (...)

Pre-publication

Following pre-publication, comments were received from a number of organizations including: the Canadian Bar Association, the Canadian Council for Refugees and the United Nations High Commissioner for Refugees. The Standing Committee on Citizenship and Immigration also made recommendations.

The main issues raised centred on the mandatory release; factors to consider when assessing if a person is a danger to the public; concerns relating to vulnerable groups, mainly minors, persons seeking protection and persons who have psychological and medical problems.

In response to comments made, the following changes have been made:

-The factors to consider when assessing if a person is a danger to the public have been changed to replace the expression ‘involved with an organized human smuggling or trafficking operation’ with ‘engagement in people smuggling or trafficking in persons’. This modification clarifies that the intent of the Regulations is to include only people responsible for smuggling or trafficking of persons; (...)

Interested stakeholders were contacted and informed of the changes in the detention regulations. Respondents supported the changes made to the detention regulations.

See also *9101-9380 Québec Inc. (Tabacs Galaxy) v. Canada (Agence des douanes et du revenu)*, [2005] C.F. 309, paras. 10-11, (Gauthier J.).

⁴⁹ SOR/DORS/2002-227, at p. 307-308.

In some decisions, the fact that consultation occurred in the rule-making process was used by judges as an argument to support their view on the proper interpretation of regulation, and in particular, its validity in relation to its parent law. As a result of the consultations or a lack thereof, judges assumed in these cases, although implicitly, that Canadians agreed or did not agree either to a particular interpretation of a regulation or to the general acceptability of the regulations which were adopted⁵⁰.

For example, in *Abel v. Canada (Minister of Agriculture)*, the plaintiff asked for a declaration that section 4 of the *Maximum Amounts for Destroyed Animals Regulations* made under the authority of the *Health of Animals Act* was *ultra vires* of the *Act*. Abel owned a herd of Elks in Alberta that were destroyed pursuant to section 48 of the *Act*, as it was suspected they had tuberculosis. In 1990, the *Act* required compensation to be at market value and Abel received \$13,500 for each female and \$15,000 for each male destroyed. Throughout the early 1990's, tuberculosis continued to be a problem in Elk herds in Alberta. However, when the *Act* was amended in 1991, section 4 of the *Regulations* placed a cap on the amount of compensation payable, and as a consequence, Abel received only \$3,500 for each male and \$7,000 for each female Elk destroyed after March 18, 1991. Abel argued that the amounts in the *Regulations* were to have some relationship to market value and since they did not, the quantum decided was not authorized and the section was *ultra vires*.

Campbell J. dismissed the action. He held first that a “plain reading of the words used in s. 51(2) and s. 51(3) do not admit to the interpretation placed upon them by the Plaintiffs. I find that the term ‘value mentioned’ in s. 51(3) means only the outcome of the process of valuation exercised under s. 52(2)(a), and, thus, s. 51(3) cannot be read to import a statutory requirement to have regard to the market value of elk when determining the cap to be placed on compensation to be made available by operation of s. 4 of the *Regulations*.”⁵¹

However, the ‘plain meaning’ interpretation of Campbell J. is not convincing because s. 52(2)(a) – to which s. 51(3) refers explicitly – clearly states that “the amount of compensation shall be (a) the market value, as determined by the Minister, (...)”⁵². Therefore, it is difficult to understand

⁵⁰ *Rogers Communications Inc. v. Canada (Attorney General)*, [1998] ACF no 368, par. 13 (QuickLaw).

⁵¹ *Abel v. Canada (Minister of Agriculture)*, [2001] F.C.T. 1378; par. 13 (Campbell J.).

⁵² In 1994, Sullivan, *op. cit.*, note 34, at 427 wrote that one of the reason why she found the case law unsatisfactory is because “in responding to these materials the courts often rely on the rhetoric of the plain meaning rule, even though the substance of this rule no longer commands respect.”

Campbell J.'s interpretive finding. Perhaps Campbell J. was aware his interpretation was inconclusive and, as a result, added an additional paragraph to his reasons:

“Nevertheless, on the evidence, I find that the Minister did have significant regard for the market value of elk in making the compensation determination contested in the present action. It is also clear that political and economic considerations were nevertheless properly in play in the exercise of the Minister’s discretion. *These conclusions are based on the extensive description of the process, including consultation with elk owners, used to reach the compensation decision, as described in the “Regulatory Impact Analysis Statement” appended to the Regulations under consideration*” (emphasis added).⁵³

Therefore, it is quite clear in this case that consultation had a significant impact on Campbell J.’s decision, and this is presumably for the reason that he did not want to find the regulations invalid because of the financial effect that this decision could have on the viability of the government compensation program⁵⁴.

In another case, *Teal Cedar Products (1977) Ltd. c. Canada (Attorney General)*, a different argument was presented to Muldoon J. to support the view that the regulation was *ultra vires*. In an injunction case, Plaintiff asked the Court for a stay to the application of a regulation in his case, while waiting for a final resolution of the issue. On the first criteria to be granted an injunction, the existence of a serious issue to be tried, he argued that contrary to s. 3a.1) of the statute – which aims to preserve employment in Canada on which the impugned regulation is based – the adoption of the Order C.P. 1988-288 was *ultra vires* because it had a devastating impact on employment in his business. His main argument was that the Governor in Council adopted this Order on the basis of misleading information concerning the object and effect of the proposed regulation as shown in the RIAS. Muldoon J.

⁵³ *Abel v. Canada (Minister of Agriculture)*, *supra*, note 51, par 14.

⁵⁴ There were two other decisions in which the judges referred to consultation. However, it is more difficult to evaluate the weight the argument had with the judge’s reasoning. As a consequence, these two cases are weaker examples, but they are nevertheless interesting because they show that judges refer to what is written in the ‘consultation’ section of the RIAS to make determinations. In *Cousins v. Canada (Minister of Agriculture)*, [1993] F.C.J.No. 581 (QuickLaw), Rothstein J. said: Par. 24. The regulatory impact analysis statement confirms Mr. Paynter’s evidence that the Regulations came about as a result of negotiations. It appears however that table stock growers were not involved in the negotiations. What impact their presence would have had on the Regulations is of course only speculative. However, it is clear that the plight of the table stock growers, although affected, albeit indirectly, by the PVYn Virus and restrictions on the sale of seed potatoes, has not been recognized under the Regulations, Par. 25. “I am bound by the law. Mr. Cousins does not qualify for compensation under the Regulations. I regret that I am unable to make an order for compensation in his favour.” *Rogers Communications Inc. v. Canada (Attorney General)*, [1998] F.C.A. no 368, par. 13 (QuickLaw) (Nadon J.).

accepted the argument and further added that this misleading information was obtained as a result of a badly conducted consultation process⁵⁵.

Finally, in the remaining cases, counsel argued that their clients had legitimate expectations to be consulted during the rule-making process and the failure to do so affected the validity of the regulations⁵⁶. However, these cases do not relate to a substantive interpretation of a regulation and will not be analysed further in this article.

Technocratic and democratic uses of a RIAS as an extrinsic aid to interpretation raise several interesting topics for further research which will briefly be touched upon in the next section.

B. Making Law Possible

In 1994, Sullivan stated that case law was unsatisfactory on the use of extrinsic evidence. The first reason was the “recurring discrepancy between the rules that courts purport to follow and what they actually do. Second, with some exceptions, little effort has been made by courts to address the theoretical and practical assumptions underlying these rules or to analyse the appropriate uses of extrinsic aids.”⁵⁷ As was shown earlier, the first problem was solved by the Supreme Court in the late ‘90s. But the second issue is still largely uncharted by Canadian courts including the Supreme Court. This section is an attempt to draw attention to some theoretical and practical issues and to explore possible avenues to resolve them.

In this vein, it is useful to note that the vast majority of cases displaying a technocratic use of a RIAS involve a problem concerning the purpose or the meaning of a regulation, while those showing a democratic use concern the validity of a regulation in relation to its parent law. It is important to keep this distinction in mind as it affects the application of two distinct legal presumptions. Searching for the meaning of the law has to do with the presumption of the *knowledge* of the law by the governed.

⁵⁵ *Teal Cedar Products (1977) Ltd. v. Canada (Attorney General)*, [1989] 2 F.C. 135, paras 10-11, 24-26 (Muldoon J.) This decision, and this line of argument particularly, was quashed by the Federal Court of appeal: [1989] 2 F.C. 158, par. 10-16 (Pratte, Heald, Mahoney JJ.A.)

⁵⁶ *Apotex Inc. v. Canada (Attorney General)*, [1997] 1 F.C. 518, par. 78 (MacKay J.); *Bowen c. Canada (Attorney General)*, [1998] 2 C.F. 395, paras 34, 49-50, 84-86 (Campbell J.); *Animal Alliance of Canada v. Canada (Attorney General)*, [1999] 4 C.F. 72, paras 51-52, 57-58 (Gibson J.); *Association des pilotes de ligne internationales c. Urbino*, [2004] F.C. 1387, paras 10-13, 19-22 (Pinard J.); *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, 266 (Sexton and Décary JJ.A.), 268-269 (Evans J.)

⁵⁷ R. Sullivan, *op. cit.*, *supra*, note 34. She also states another problem which will not be addressed in this article. She writes: “Third, in responding to these materials the courts often rely on the rhetoric of the plain meaning rule, even though the substance of this rule no longer commands respect.”

Indeed, citizens must understand the rules and this understanding has to be stable and predictable. However, looking at the validity of a regulation in relation to its parent law is connected to the presumption of the *acceptance* of the law by the governed. In the realm of regulation, the application of this presumption raises particular problems since there is very little public participation in the rule-making process compare to the legislation-making process. Although the Government is undoubtedly trying to address this issue with the pre-publication of proposed regulation with a RIAS in part I of the Canada Gazette, the content of regulations is still tightly controlled by the bureaucracy.

a. Knowledge of the Law

The presumption of knowledge of the law can be applied in multiple legal contexts, including the choice of the method of interpretation. Since “societies operate on the basis that citizens are presumed to know the law”, it follows that individuals falling within the ambit of a given legal rule “should be able to ascertain the limits of permissible conduct under it”⁵⁸ after a simple reading of the rule. This is one of the reasons why, up until the turn of the last century, judges preferred a literal approach to interpretation of legal rules⁵⁹. This method was coherent with judges’ representations of a ‘free and democratic society’ since they were abiding by the words chosen by the freely elected representatives of the people. However, until the emergence of the Welfare State, it was understood that the main function of judges was to give effective protection to individuals’ rights and freedoms. The contextual background against which a judge ascertained the meaning of a rule was relatively one-dimensional.

The implementation of the Welfare State resulted in the creation of legal schemes requiring judges to balance competing interests. The complexity of goals sought through the enactment of these new statutes rapidly showed the analytical limits of the literal method of interpretation. This method needed to be relaxed to permit judges to also consider social and economic objectives underlying modern legal schemes. At first, judges resorted to intrinsic methods of interpretation (analysis of the whole legal scheme including relevant case-law) to find the intention of Parliament. However, since Parliament rarely stated its goals explicitly in a statute, judges’ findings were fragile from a legal perspective as well as open to criticism from a legitimacy perspective. In order to justify judge’s reasoning, they were thereafter permitted to use extrinsic aids to support their interpretation. As a

⁵⁸ *R. v. Boucher*, [2001] N.F.C.A. 33, par. 83.

⁵⁹ P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., Cowansville, Québec (Can.), Éd. Yvon Blais, p. 398.

result, a balancing of the interpretation between reliance on the ‘text’ and the ‘intrinsic/extrinsic contexts’ became the new interpretative current.

In 1998, the Supreme Court officially adopted this ‘modern method to interpretation’ in *Rizzo & Rizzo Shoes Ltd*⁶⁰. Later, in *Bristol-Myers Squibb Co.*⁶¹, majority and minority judges of the Supreme Court proposed different frameworks of analysis for the modern method of interpretation: the ‘successive circles of context’ and the ‘step-by-step’ approaches. Binnie J., for the majority, speaks of an interpretation made in ‘successive circles of context’ during which the examination of the text and the intrinsic and extrinsic context do not follow a particular order. Contrary to Binnie J., Bastarache J. followed a step-by-step analysis. This is a more structured approach since an analysis of the text of the rule is made first; second, an analysis of its intrinsic context and; third, the interpreter makes an analysis of the extrinsic context. Although more structured, Bastarache J. says that it should not be viewed as an interpretation made in a ‘formulaic manner’⁶². In both cases, a RIAS was consulted for the examination of the purpose of the regulation which was under scrutiny in the case at bar.

Understanding the rationale of using a RIAS to support an interpretation is one thing; using it as an authoritative source is quite another. At the beginning of the last century, it was generally recognized that a trial judge could not abdicate responsibility for the interpretation of legislation to a civil servant⁶³. This tenet of non-abdication remains a principle of contemporary application in a legal system based on the doctrine of the separation of powers between the government and the judiciary. This has notably been canvassed in the principles of independence and impartiality of judges⁶⁴. For this reason, reconciling the use of extrinsic aids to interpretation with the doctrine of separation of powers can be achieved by recognition of the usefulness of a RIAS, not its authoritativeness, as reflected in the sample of decisions labelled ‘technocratic’ in this paper⁶⁵.

However, the sample of Federal Court decisions noted herein show that judges give greater weight to this type of information than legal principles would officially authorize. Although this result

⁶⁰ See *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra*, note 38, par. 21.

⁶¹ *Bristol-Myers Squibb Co. v. Canada (Attorney-General)*, [2005] 1 S.C.R. 533.

⁶² *Id.*, paras 44, 96 and 104 and ff.

⁶³ *Marquis Camden v. Commissioner of Inland Revenue* (1914), 1 K.B. 641.

⁶⁴ *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1991), 78 D.L.R. (4th) 333 (Ont. C.A.)

⁶⁵ See also *R. v. Boucher*, *supra*, note 58, par. 76 where Marshall J.A. stated: “such Statements have rapidly come to be recognized as authoritative sources of purpose and intent in construing federal legislation”.

may be partly due to unclear guidelines from the Supreme Court regarding this issue⁶⁶, it may also be the result of the evolution of our legal system. It is possible judges see the examination of this material as one central condition for correctly assessing the ambit of polycentric questions at stake in given regulatory programs. As a consequence, they would more readily respect governmental views in order to reach a correct interpretation: an interpretation which would properly balance competing interests⁶⁷.

This discussion highlights three issues related to the general question ‘what makes law knowable’. The first issue is: Is the information found in a RIAS reliable? Recall that Muldoon J. questioned its accuracy in *Teal Cedar Products (1977) Ltd.*⁶⁸ It is also worth noting that a reading of thirty-three RIAS’ that were produced by the Citizenship and Immigration Department with the new *Immigration and Refugee Protection Regulations* (IRPR) show that, for the most part, the section called ‘description’ is often vague and it is doubtful that this information could be found conclusive to resolve any interpretive issue. As far as the sections ‘alternatives’ and ‘cost and benefits’, they rarely propose a meaningful analysis of these questions. In addition, after conducting interviews with civil servants in charge of drafting the RIAS for the IRPR, it is clear that they are very aware of the use of RIAS by courts and draft them keeping this reality in mind. Therefore, judges have to be cautious: arguments that are elaborated and approved by the government very much resemble self-serving evidence.

The second issue is related to the question of ranking. What is the most reliable source to find the meaning of the law: Is it the text of the rule or its context, or even perhaps the values underpinning rules? Given the answer to this question, what would be the ideal framework of analysis to apply to the modern method of interpretation? In my view, the step-by-step framework of analysis directs judges toward an orthodox use of a RIAS, while the ‘successive circles of context’ framework gives far more discretion to a judge choosing to defer to the expertise of civil servants. Therefore, the choice of analytical framework is a crucial question to be resolved in this regard.

The third issue is related to the second concerning the choice of an analytical framework. If the Supreme Court were to prefer the ‘successive circles of context’ framework, it will effect the understanding of the doctrine of separation of powers, notably if it leads judges to a greater

⁶⁶ See *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

⁶⁷ The polycentric objectives sought by the government in its regulatory programs has been used by the Supreme Court as an argument to show deference to administrative decisions. See for example: *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, par. 95 (Bastarache J. dissenting); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, par. 55.

⁶⁸ *Teal Cedar Products (1977) Ltd.*, *supra*, note 55.

technocratic use of the RIAS. Indeed, one may question whether the Federal Court and the Supreme Court (Binnie J.) are not implicitly relying on a type of ‘dialogue metaphor’ when they rely too heavily on a RIAS to resolve an interpretive issue. In this regard, further research could focus on the underpinnings of the ‘dialogue metaphor’ referred to by courts when they examine if a legal scheme can be saved by the limiting clause of the *Canadian Charter of Rights and Freedoms*. As the Supreme Court pointed out, the dialogue metaphor requires courts to be open to arguments and to show cooperation and mutual respect for the various actors in the constitutional order. It is in this sense that the interaction between the various branches of government are described as a dialogue by the Supreme Court, with the result that “each of the branches is made somewhat accountable to the other. For this Court, the dialogue between, and accountability of, each of the branches has the effect of “enhancing the democratic process, not denying it”⁶⁹. Even if someone were to accept the validity of this last argument in a *Charter* context when legislations are challenged, its application in the regulatory context raises serious difficulty, notably when put in relation to the discussion in the next question.

b. Acceptance of the Law

With respect to the role of a RIAS in the application of the concept of “acceptance of the law by the governed”, it is interesting to note that the Privy Council of the Government of Canada states in the *RIAS Writer’s Guide* that a “RIAS is very much a social contract” between the Government and the governed. Although this claim is contentious, it encompasses a democratic ideal of ‘rules made by the people’. However, how far can this argument be carried?

The two decisions above, classified under ‘democratic use of a RIAS’ and which were subsequently summarized, raise two sides of the argument – tautological and logical - based on the fact that consultations were conducted during the rule-making process. However, both arguments are presumably aimed at protecting the financial stability of public programs and private enterprise.

In my view, *Abel* represents the decision in which the argument becomes a tautology. On the one hand, Campbell J. rejected Abel’s argument that the price for destroying elk should be fixed by taking the market value of elk into consideration. Yet, on the other hand, Campbell J. stated that the Minister did exercise his discretion not only by taking the market value of elk into consideration, but also the broader political and economic considerations. Indeed, as Campbell J. continues this line of

⁶⁹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, par. 139.

argument, he stated that the content of the RIAS confirms that these factors can be used to reach the compensation decision. At this point, Campbell J. adds that consultations were conducted with elk owners when a decision to use these factors was reached. By saying this, he implies that elk owners, including Abel, agreed to such factors being used in the compensation decision. As a consequence, he also implies that the Minister's discretionary decision was fair and reasonable.

As I said earlier, presumably Campbell did not want to find the regulations invalid because of the financial implications his decision would have had. In sum, it is possible that the argument was aimed at protecting the financial stability of a government program⁷⁰.

Contrary to *Abel*, *Teal Cedar Products (1977) Ltd.* represents a case in which a logical argument was carried by Muldoon J. Even if his argument was quashed on appeal⁷¹, it is nevertheless interesting to discuss the issue that he raised. Indeed, as the evidence shows, the Governor in Council approved a regulation which was based on misleading information. This information was obtained as a result of consultations which were badly conducted since it did not include an important stakeholder (*Teal Cedar Products (1977) Ltd.*) who would be seriously affected by the regulation. As a result of this regulation, the wood trade of this company became too costly and the owner had to shut it down. As a result, 150 workers lost their job. This case reveals the importance of governments to not only integrate stakeholders into the rule-making process but also to plan and organise consultations seriously and thoroughly. On this issue, further research would be needed to inquire into possible legal consequences of government's failure in this regard.

CONCLUSION

The application of presumptions such as 'knowledge of the law' and 'acceptance of the law' appears to have acquired a particular scope in the regulatory realm. Through technocratic and democratic uses of the RIAS, judges of the Federal Court are more inclined to show deference to the government's view on the purpose and the meaning of a regulation, as well as to give more significance to the fact that consultations occurred with stakeholders during the rule-making process. As noted earlier, these uses of a RIAS open interesting avenues for future research. In addition, the emerging trend in using RIAS' to construct regulations is a phenomenon which may have very

⁷⁰ Presumably, this would also be the case in the *Cousins* decision, *supra*, note 54.

⁷¹ *Teal Cedar Products (1977) Ltd.*, *supra*, note 55.

important impacts on at least two fields of administrative law: rule-making procedure and judicial review of regulations.

If a duty on the part of the government to consult during the rule-making process were to become reality, it would undoubtedly be welcomed by non-governmental actors. Regulation is a phenomenon which is not likely to disappear in the near future and, in order to address the democratic deficit inherent to the actual statutory rule-making process, it would be desirable that Parliament decides, at last, to redesign the *Statutory Instrument Act* to incorporate a legal obligation to consult minimally with stakeholders representing competing interests.

The hope that Parliament would take this step is not high. Indeed, this question has been debated for over 25 years. However, since 1986, the Canadian government has chosen to impose on itself an administrative duty to consult (through pre-publication of proposed regulations) and this administrative duty may provide room for courts to intervene more robustly in this debate. Indeed, it is useful to recall that judges played a central role in requiring the parliament to adopt a statute providing for the general publication of regulations at the beginning of last century⁷². Second, it is important to mention that one judge of the Federal Court of Appeal made a significant contribution to this debate, but, unfortunately, his dissenting opinion was largely unnoticed.

In *Apotex*⁷³, Evans J.A. proposed an interesting development to the doctrine of legitimate expectations. This doctrine, as explained by the Supreme Court, “is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can only create a right to make representations or to be consulted.”⁷⁴. As Evans J.A. rightly pointed out in *Apotex*, the Supreme Court specifically said “that the doctrine has no application to the exercise of legislative powers as it would place a fetter on an essential feature of democracy”. In the exercise of delegated legislative powers, however, Evans J.A. stated that similar considerations do not apply because these powers are not subject to the “same level of scrutiny as primary legislation that must pass through the full legislative process”. He concluded that “in the absence of binding authority to the contrary, the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a

⁷² *Duncan v. Knill and Another*, (1907), 96 (XCVI) The Law Times, 911 (Lord Alverstone, C.J., Darling and Phillimore, JJ.); *Johnson v. Sargant & Sons*, (1917), 87 K.B. Div. 122 (Bailhache J.)

⁷³ *Apotex Inc. v. Canada (Attorney General)*, *supra* note 56. Leave to SSC denied [2000] S.C.C.A. no 379.

⁷⁴ *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at 528.

demonstrably urgent need.”⁷⁵ The Supreme Court denied leave to appeal this case, but this refusal to hear the case leaves the door open for later consideration of this very issue.

With respect to judicial review of regulations, a sustained increase in cases in which judges make a technocratic use of a RIAS will undoubtedly affect the degree of deference accorded to civil servants. Although it is too soon to make a judgment on whether this trend is desirable or not, this issue may take a different turn if the full implementation of the ‘smart regulation’ project were to become a reality. Indeed, this project implies that the government will move toward results-based regulatory programs. It will therefore leave the determination of the appropriate means to reach these objectives in the hands of stakeholders. In this type of regulatory system, if too much weight is given to the expert views of the government as to the purpose of the regulation as well as to the fact that stakeholders agreed with the objectives because they were consulted, it may become illusory to challenge the validity of regulations in relation to its parent law, outside of constitutional parameters. For this reason, this new interpretive trend should be monitored closely as it may signal a greater change than foreseen, and perhaps an unwanted one, regarding the relationship between the government and the judiciary.

⁷⁵ *Apotex Inc. v. Canada (Attorney General)*, *supra* note 56, at 268.

**COMMENTARY ON PAPER BY
ASSOCIATE PROFESSOR FRANCE HOULE**
by **STEPHEN ARGUMENT***

At the risk of being jingoistic, Professor Houles' fascinating insight into the way Canada deals with delegated legislation⁷⁶ demonstrates that, like other jurisdictions, Canada has much to learn from Australia, rather than the other way around.

In this commentary, I will pick up just a few of the matters that Professor Houles has dealt with and offer some comments about the Australian experience. I will also make some observations about the effect of the *Legislative Instruments Act 2003 (LIA)* and the role that it has in keeping Australia at the cutting edge of delegated legislation.

Regulatory impact assessment in the Australian jurisdictions

Over the past 20 years, “regulatory impact” has developed as a criterion for legislative scrutiny in Australian jurisdictions. Victoria led the way, introducing a statutory requirement for “Regulation Impact Statements” (**RISs**) in 1984.⁷⁷ New South Wales, Queensland, Tasmania and the ACT have subsequently followed this lead.

While I do not propose to give a detailed assessment of the effectiveness of regulatory impact assessment in these jurisdictions, it must be said that it is patchy (to say the least). In all jurisdictions, there is a significant discretionary element, insofar as to whether or not a regulatory impact assessment is required. In the ACT, for example, an RIS must be prepared if a proposed subordinate law is likely to impose appreciable costs on the community, or part of the community.⁷⁸ It is for the Minister administering the proposed subordinate law to decide whether or not the proposed law will impose appreciable costs on the community, etc. The requirement is also subject to various exemptions.⁷⁹

In NSW, Tasmania and Victoria (but not the ACT), the regulatory impact assessment process involves public consultation or, at least, a requirement to consider whether public consultation is necessary. While (as I discuss further below) public consultation can never replace proper parliamentary scrutiny of legislation, the extent to which these mechanisms produce “better” delegated legislation cannot be under-stated. There is no doubt that input from affected persons or bodies (including through avenues provided by parliamentary review committees) can only lead to an end product that is better than what might ordinarily be produced by government departments and agencies left to their own devices.

Regulatory impact assessment at the Commonwealth level

I should say something about the position in the Commonwealth. Earlier versions of the LIA (of which there were several) contained detailed regulatory impact and consultation requirements. As enacted, however, the consultation requirements of the LIA (contained in Part 3) are much less onerous and entirely discretionary.

Section 17 of the LIA requires a rule-maker to undertake “appropriate” consultation before making a legislative instrument. The obligation is imposed “particularly” where the

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⁷⁶ In this commentary, the term “delegated legislation” is preferred, though the term “subordinate legislation” is used where that is the term used in a particular jurisdiction.

⁷⁷ See *Subordinate Legislation (Review and Revocation) Act 1984* (Vic). The terms “regulation impact statement” and “regulatory impact statement” are variously used by Australian jurisdictions. In this commentary, the abbreviation “RIS” is used to refer to both derivations.

⁷⁸ See *Legislation Act 2001* (ACT), section 34.

⁷⁹ See *Legislation Act 2001* (ACT), section 36.

instrument is "likely ... to have a direct or substantial indirect effect on business" or is "likely ... to restrict competition" (subsection 17(1)). Consultation is very much at the discretion of the rule-maker, however, in that the obligation is on the rule-maker to be satisfied that "any consultation that is appropriate and that is reasonably practicable to undertake" has been undertaken. This contrasts with the more detailed and prescriptive consultation requirements set out in previous versions of the legislation (and recommended by the Administrative Review Council, in its report on *Rule making by Commonwealth agencies*⁸⁰). Subsection 17(2) provides rule-makers with guidance in determining whether any consultation that has been undertaken was "appropriate". Subsection 17(3) indicates what forms consultation might take. Section 18 exempts certain categories of instruments from the consultation requirements. Section 19 provides that a failure to undertake consultation does not affect the validity or enforceability of a legislative instrument. While it remains to be seen what use rule-makers make of the Part 3 requirements, it should also be noted that these requirements do not in any way derogate from the consultation requirements imposed by the Office of Regulation Review (ORR).⁸¹ These requirements apply equally to both primary and delegated legislation.

The ORR website states:

It is mandatory for Australian Government departments, agencies, statutory authorities and boards to prepare a RIS for all reviews of existing regulation, proposed new or amended regulation, quasi-regulation and proposed treaties involving regulation, which will directly or indirectly affect business, or restrict competition. The Australian Government's RIS requirements are explained in *A Guide to Regulation* (1998).

In April 1995, the Council of Australian Governments (COAG) endorsed a set of guidelines - which were amended in November 1997 and June 2004 - to promote good regulatory practice, including the use of RISs by Ministerial Councils and national standard-setting bodies. These principles and guidelines apply to agreements or decisions to be given effect through principal and delegated legislation, administrative directions or other measures which, when implemented, would encourage or force businesses or individuals to pursue their interests in ways they would not otherwise have done. In the communiqué of 25 June 2004 ..., COAG made several changes to the principles and guidelines to ensure greater clarification about the operation of RISs involving Australia and New Zealand regulators.⁸²

The ORR website also sets out the following information on the RIS process:

Aims of the RIS Process

While much regulation is necessary and beneficial this is not always the case. In some circumstances, regulation may not be the best means of achieving relevant policy objectives. Where regulation is needed, there will usually be a number of options from which to choose, with different features and effects. The Regulation Impact Statement (RIS) process seeks to assist officials to move towards "best practice" regulatory design and implementation.

Preparation of a RIS formalises and documents the steps that should be taken in policy formulation. It provides a consistent, systematic and transparent process for assessing alternative policy approaches to problems. It includes an assessment of the impacts of the proposed regulation, and alternatives, on different groups and the community as a whole. The primary role of the RIS is to improve government decision-making processes by ensuring that all relevant information is presented to the decision maker when a decision is being made.

⁸⁰ Parliamentary Paper No 93 of 1992.

⁸¹ See Attorney-General's Department, Legislative Instruments Act e-bulletin No 2 (May 2004). See also the Office of Regulation Review website, at www.pc.gov.au/orr/reform/risaims.html, for the RIS requirements.

⁸² <http://www.pc.gov.au/orr/reform/risrequirements.html>

A RIS has seven key elements which set out:

- (1) the problem or issues which give rise to the need for action;
- (2) the desired objective(s);
- (3) the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s);
- (4) an assessment of the impact (costs and benefits) on consumers, business, government, the environment and the community of each option;
- (5) a consultation statement;
- (6) a recommendation statement; and
- (7) a strategy to implement and review the preferred option.

In addition, relevant to all seven criteria is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

For proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition;

both of which are requirements under the Competition Principles Agreement.

Finally, apart from the seven elements outlined above, timing and the extent of consultation with the ORR is also taken into consideration when assessing compliance with the Government's RIS requirements.⁸³

I have always been sceptical of the effectiveness of the ORR requirements, as opposed to the legislated requirements that would have been imposed if one of the earlier versions of the LIA had been enacted. My scepticism stems from the ease with which I assumed that non-legislated requirements could be avoided. This scepticism may have been misplaced, however.

In its most recent survey on the operation of the RIS process, *Regulation and its Review 2004-05*,⁸⁴ the ORR reported that, in 2004-05, RISs were prepared for 84% of the 85 Commonwealth regulatory proposals that required them. Of those prepared, three were assessed as inadequate, giving an overall compliance rate of 80%.⁸⁵ While I thought these figures were surprisingly good, in fact, they represented a significant decrease in overall compliance from the previous year, when the rate was 92%.

These statistics aside, I am not in a position to offer an opinion about the effectiveness of the RIS process at the Commonwealth level. Apart from any other reason, it is not the focus of my interest in the scrutiny of delegated legislation. On the figures, however, it would seem that there is a relatively high level of compliance with the ORR requirements, despite their lack of legislative basis.

RISs as an extrinsic aid to interpretation

If an RIS is prepared in relation to a Bill, the *Cabinet Handbook* (May 2000) indicates that it should generally be included in the Explanatory Memorandum to the Bill.⁸⁶ Though the *Federal Executive Council Handbook* contains no such requirement in relation to delegated

⁸³ <http://www.pc.gov.au/orr/reform/risaims.html>.

⁸⁴ <http://www.pc.gov.au/research/annrpt/reglnrev0405/index.html>.

⁸⁵ See pp xvi to xix.

⁸⁶ See *Cabinet Handbook* (May 2000) (<http://www.pmc.gov.au/parliamentary/index.cfm>), para 2.13.

legislation, I am advised that the practice is to include the RIS with the Explanatory Statement to a regulation, if one has been prepared.

If an RIS has been incorporated into an Explanatory Memorandum or an Explanatory Statement (as the case may be), this means that, as a result of paragraph 15AB(2)(e) of the *Acts Interpretation Act 1901*, the RIS can be used as an extrinsic aid to interpreting the relevant legislation. In particular, if it is capable of assisting in the ascertainment of the meaning of the provision, it can be used:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

It is therefore uncontroversial that an Australian court could make use of an RIS as an aid to interpretation. The more important issue is whether it would actually assist the court in its deliberations, not whether the court has the wherewithal to make proper use of the RIS. Explanatory memoranda and statements are, in the Commonwealth jurisdiction at least, notoriously bland and unhelpful documents. This point was eloquently made by Chief Justice Higgins of the ACT Supreme Court, when, in a recent decision, his Honour stated:

The explanatory memorandum, consistently with the apparent purpose of such documents of explaining as little as possible, merely stated in respect of the proposed s 51A⁸⁷

That said, I am not aware of any use, by a court, of an RIS *pre se* as an extrinsic aid to interpretation.

The deference of the courts to the Executive

In her paper, Professor Houles refers to the "technocratic" use of Regulatory Impact Analysis Statements (**RIASs**) in Canada. As I understand this term, it refers to the reliance, by the courts, on the expertise of the "Public Administration" in putting material in a RIAS that the courts can then rely upon to assist in resolving issues of interpretation. It occurs to me that this has echoes of the deference that Australian courts have had to the Executive in matters of delegated legislation.

⁸⁷ See *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, para 82.

In *Douglas and Jones's Administrative Law* (5th edition), the authors state:

It should be noted that successful attacks on the validity of subordinate legislation are rare. There are various reasons for this. They include the relative discretion enjoyed by rule-makers as compared with administrative decision-makers; the fact that rule-makers normally have much more time to devote to decision-making than makers of purely administrative decisions; the careful vetting process which typically characterises the rule-making process; and review by parliamentary committees charged, *inter alia*, with examining the legality of the legislation before them.⁸⁸

A similar view is put in Pearce and Argument's *Delegated Legislation in Australia* (3rd edition), where the authors note that the courts' approach to delegated legislation generally involves a presumption as to validity and a reluctance to substitute judicial opinion for that of the legislation-maker (see, for example, paragraphs [14.6] and [21.12]).⁸⁹

Pearce and Argument refer to the High Court's decision in *Gibson v Mitchell* where, in considering what was "necessary or convenient" for carrying out the purposes of the *Post and Telegraph Act 1901* (Cth), Isaacs J stated:

Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily, they signify what the Governor-General may consider necessary or convenient, and no court can overrule that unless utterly beyond the bounds of reason and so outside power.⁹⁰

A similar approach can be found in the approach of various courts to the concept of unreasonableness. An interesting proviso, however, occurs (in Pearce and Argument's view) in the context of situations where the delegated legislation in question is not subject to scrutiny by the Parliament. In *Evans v Minister for Immigration and Multicultural and Indigenous Affairs*, Gray J stated:

The absence of legislative scrutiny to the content of the notice is a further ground on which the need for strict judicial scrutiny of the performance of the Minister's function is based.⁹¹

This echoed a statement of Thomas J in *Paradise Projects Pty Ltd v Gold Coast City Council*:

The by-laws which I have concluded to be *ultra vires* are typical examples of lazy drafting. It is much easier to frame general prohibitions than to define exactly what is intended. Those who draft ordinances should identify their true target rather than attack the community with grapeshot. Unless this trend is identified and curbed by the courts, we may find practically every form of human activity contrary to some by-law or regulation, or that a permit is

⁸⁸ Douglas, R, *Douglas and Jones's Administrative Law* (5th edition), (2006, The Federation Press, Sydney), p 333.

⁸⁹ Pearce, DC and Argument, S, *Delegated Legislation in Australia* (3rd edition), (2005, LexisNexis, Sydney).

⁹⁰ (1928) 41 CLR 275, p 279.

⁹¹ (2003) 203 ALR 320, p 326.

required for virtually every form of everyday activity. If the courts do not control these excesses, nobody will.⁹²

Strong stuff!!

In my view, one of the advantages of an RIS process is that it helps to identify the true "target" and lessens the chance of legislation as "grapeshot".

Knowledge of the law

In her paper, Professor Houles notes that, since societies operate on the basis that citizens are presumed to know the law, it follows that individuals affected by a law should be able to ascertain the limits of permissible conduct under the law. This is an issue that I have previously written about, in the context of my tirades against the use of "quasi-legislation".⁹³ The gist of my concern has been that a subsidiary - but perhaps more serious - aspect of the difficulty encountered by the general public in gaining access to the vast body of quasi-legislative instruments promulgated under various Acts is the effect that this has on the legitimacy of such instruments. In *Blackpool Corporation v Locker*, Lord Justice Scott (a member of the Donoughmore Committee on Ministers' Powers) stated:

[T]here is one quite general question affecting all ... sub-delegated legislation, and of supreme importance to the continuation of the rule of law under the British constitution, namely the right of the public affected to know what the law is.⁹⁴

This passage was cited with approval by Justice Stephen of the High Court in the leading Australian case of *Watson v Lee*.⁹⁵

After noting the obligations which existed under British law (as they do in Australia) to publish Acts of Parliament and statutory instruments, Lord Justice Scott went on to say:

On the other hand, if the power delegated to the minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either at statute or common law, to publish his sub-delegated legislation: and John Citizen may remain in complete ignorance of what rights over him and his have been secretly conferred by the minister on some authority or other, and what residual rights have been left to himself.⁹⁶

His Honour went on to say that, if this was the case, then

[f]or practical purposes, the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired.⁹⁷

In the course of his decision, Lord Justice Scott also referred to the maxim that ignorance of the law is not a defence. This point was made in a similar context by Professor Dennis Pearce, in 1989, in the course of his address to an Administrative Review Council conference on rule-making. Professor Pearce suggested to the conference that

the possibility arises that a court might hold that there is an obligation to publish legislation if the presumption that a person is presumed to know the law is to be maintained.⁹⁸

⁹² [1991] 1 Qd R 314, p 321.

⁹³ See, generally, Argument, S, "Parliamentary scrutiny of quasi-legislation" (15) *Papers on Parliament*.

⁹⁴ [1948] 1 KB 349, p 361.

⁹⁵ (1979) 144 CLR 374, at p 394.

⁹⁶ [1948] 1 KB 349, p 362.

⁹⁷ [1948] 1 KB 349, p 362

These points are well made. Fortunately, however, they are now less of an issue in the Commonwealth jurisdiction, as a result of the enactment of the LIA.

Delegated legislation and the *Legislative Instruments Act 2003*

This is an opportune time for me to say something about the LIA.

The enactment of the LIA was, arguably, the single greatest legislative contribution to the law of delegated legislation since Henry VIII. By far the most significant element of the LIA is its application to all instruments made in exercise of a power delegated by the Parliament that are "of a legislative character".

Section 5 of the LIA provides that an instrument is "of a legislative character" if:

- (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
- (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Why is this definition significant?

The significance of this definition is that, unlike other jurisdictions, the regime provided for by the LIA operates by reference to what an instrument *does*, rather than by what it is *called*.

While the operative definitions in some other jurisdictions refer to instruments having a legislative character, the fact is that, in all other Australian jurisdictions, whether or not an instrument is subject to the relevant regime for publication, tabling and disallowance is governed by whether or not the instrument in question is a "disallowable instrument",⁹⁹ a "regulation",¹⁰⁰ a "statutory instrument",¹⁰¹ a "statutory rule",¹⁰² a "subordinate law",¹⁰³ "subordinate legislation"¹⁰⁴ or "subsidiary legislation",¹⁰⁵ depending on the jurisdiction.

The effect of the approach to instruments in the non-Commonwealth jurisdictions is that all that is required for an instrument not to be subject to the relevant publication, tabling and disallowance regime is for it to be designated as something other than the term that triggers the operation of that regime. From a theoretical perspective at least, it is difficult to justify a process that operates on the basis of what legislative instruments are called, rather than what they do.

Nomenclature should be irrelevant, not the least because (in my experience) it is a reflection of variations in bureaucratic practices and preferences, drafting approach or in what the Parliament might be prepared to allow at a particular time. More importantly, however, I consider that this sleight-of-hand with nomenclature has, in the Commonwealth at least, been the single biggest contributor to the explosion of "quasi-legislation" that occurred in the 25 or so years prior to the enactment of the LIA.¹⁰⁶ I am confident that the LIA has put a stop to

⁹⁸ Pearce, DC, "The Rule of Law and the Lore of Rules", *Legislative Studies*, Vol 4, No 2, Spring 1989, 3, at p 4.

⁹⁹ *Legislation Act 2001* (ACT), section 9;

¹⁰⁰ *Subordinate Legislation Act 1978* (SA), section 4; *Interpretation Act* (NT), section 61.

¹⁰¹ *Statutory Instruments Act 1992* (Qld), section 7.

¹⁰² *Subordinate Legislation Act 1989* (NSW), section 3; *Subordinate Legislation Act 1994* (Vic), section 3; *Statutory Instruments Act 1992* (Qld), section 8.

¹⁰³ *Legislation Act 2001* (ACT), section 8;

¹⁰⁴ *Statutory Instruments Act 1992* (Qld), section 9; *Subordinate Legislation Act 1992* (Tas), section 3.

¹⁰⁵ *Interpretation Act 1984* (WA), section 5.

¹⁰⁶ See, generally, Pearce and Argument, *Delegated Legislation in Australia* (3rd edition), at [1.11] to [1.18]. See also "Quasi-legislation: Greasy pig, Trojan Horse or unruly child?", paper delivered to the Fourth Australasian Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills, held on 28-30 July 1993 (published in (1994) 1 (3) *Australian Journal of Administrative Law* 144).

this exponential growth in legislative instruments that fall outside of the publication, tabling and disallowance regime, and the discipline that this regime brings with it.

Why is the publication, tabling and disallowance regime important?

Four basic problems are manifested in the "development" of delegated legislation in the 20 or 30 years prior to the enactment of the LIA. They are:

- the proliferation of instruments not covered by the existing regimes;
- the poor quality of drafting of such instruments;
- the inaccessibility of such instruments; and
- the lack of appropriate parliamentary scrutiny for such instruments.

The LIA addresses all four issues. Proliferation becomes irrelevant, because instruments are now covered by the LIA, irrespective of what they are called. All that matters is whether or not they are "of a legislative character".

Poor drafting is addressed in two ways. First, section 16 of the LIA gives the Secretary of the Attorney-General's Department an obligation to "cause steps to be taken to promote the legal effectiveness, clarity and intelligibility to anticipated users, of legislative instruments". These steps may include (but are not limited to):

- undertaking or supervising the drafting of legislative instruments; and
- scrutinising preliminary drafts of legislative instruments; and
- providing advice concerning the drafting of legislative instruments; and
- providing training in drafting and matters related to drafting to officers and employees of other departments or agencies; and
- arranging the temporary secondment to other departments or agencies of Australian Public Service employees performing duties in the department; and
- providing drafting precedents to officers and employees of other departments or agencies (subsection 16(2)).

Subsection 16(3) of the LIA also requires the Secretary to cause steps to be taken to prevent the inappropriate use of gender-specific language.

The second way in which the drafting issue is dealt with is in the sense that if instruments are recognised as having a legislative effect and have to be registered, then surely agencies will take more care to ensure that they say and do what they are supposed to do. It is too much of a risk not to do so.

It is the accessibility issue that is arguably the most important, however. What the LIA does is ensure that people can work out what the law is, by virtue of the fact that all "legislation" is now publicly available. Requiring that instruments be tabled in the Parliament could have been enough in itself (in the sense that the Table Offices of both Houses are an excellent source of documents and information tabled in the Houses) but the LIA does more. It establishes a Federal Register of Legislative Instruments (**FRLI**),¹⁰⁷ on which all legislative instruments must be registered. If they have to be registered on FRLI, you would like to think that this guarantees that they can be found. Indeed, if nothing else, it helps ensure that persons

¹⁰⁷ Available at www.frli.gov.au.

affected by legislative instruments can at least be aware that they exist. This is another great leap forward.

The parliamentary scrutiny issue is dealt with by the fact that the LIA ensures that instruments of a legislative character receive appropriate scrutiny by the legislature.

Acceptance of the law

This leads me to my final comment on Professor Houles' paper. Professor Houles refers to the "contentious" claim that the public consultation involved in an RIAS process gives rise to a "social contract" between the Government and the governed, indicating an "acceptance of the law by the governed".

This caused me to re-visit my "Parliamentary scrutiny of quasi-legislation" paper, where I stated:

Though consultation might offer many benefits to the people affected by a proposed rule or guideline and while several of the provisions referred to involve a collateral benefit in ensuring wider publication, they do nothing toward redressing the problem of proper accountability to the Parliament and the further problems which that lack of accountability involves. The executive arm of government still ends up making the laws (or the quasi-laws) instead of the Parliament. In any event, consultation matters little unless those doing the consulting actually listen to and act on the responses that they receive.¹⁰⁸

Acceptance of the law, by the public, is one thing. It cannot, however, operate to give validity to legislation that is otherwise invalid.

Conclusion

As I stated at the outset, Professor Houles' paper gives a fascinating insight into recent developments in delegated legislation in Canada and, in particular, into the use by the courts of the RIAS process as an extrinsic aid to the interpretation of regulations. It also provides an opportunity to measure the Australian approach to delegated legislation against that of Canada. In the light of that comparison, Australians can justifiably feel proud about the way in which Australia (in many ways) leads the world in relation to delegated legislation.

¹⁰⁸ Argument, S, "Parliamentary scrutiny of quasi-legislation" (15) *Papers on Parliament*, pp 23-24.