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THE FOI ACT 1982 AND THE FOI ACT 2000 (UK): ARE THERE LESSONS WE CAN LEARN FROM EACH OTHER?

Philip Coppel*

Introduction

In inviting me to give this seminar, Professor Creyke has been particularly generous. Not only has she permitted me to address you, but she has given this session as vague a title as one could hope for. I believe in accepting generosity. I have taken the vague title as a licence to range over the subject area as I see fit. I shall concentrate on those aspects that are of more universal and enduring interest: the object of freedom of information; its inter-relationship with other aspects of public law; and the public interest that it serves to secure.

It is almost a quarter of a century since the Commonwealth's *Freedom of Information Act 1982* was enacted. At about the same time, similar legislation was passed in New Zealand (the *Official Information Act 1982)* and in Canada (the *Access to Information Act 1985*). More than a decade earlier the US had passed its *Freedom of Information Act 1966*. The United Kingdom was thus decidedly the last of these comparable democracies to enact freedom of information legislation. Its *Freedom of Information Act*, passed in 2000, only came fully into force on 1 January 2005.

This difference of maturity provides an opportunity to measure the effect of such legislation on public administration. It provides an opportunity to examine whether the ethos reflected in the legislation has been embraced by public administrators.

The McKinnon case

Next month, the High Court of Australia is to hear what is arguably, the most important appeal on the 1982 Act to have come before it. *McKinnon v Secretary, Department of Treasury*[1] concerns two fairly prosaic requests for documents made by the FOI editor of the Australian newspaper. First, Mr McKinnon applied for reports on the first home buyers scheme. In particular, he sought documents summarising its fraudulent use and its use by high-wealth individuals. Secondly, he applied for the disclosure of documents relating to tax 'bracket creep'. In particular, he sought reports on the extent of bracket creep, its impact on revenue collection and the impact on taxpayers. Many documents were released, but some 50-odd were not.

The Treasurer issued two conclusive certificates under s 36(3), in identical terms, spelling out why their disclosure would be contrary to the public interest. Mr McKinnon appealed to the Administrative Appeals Tribunal. The appeal was dismissed. In August last year, a majority of the Full Court of the Federal Court dismissed an appeal from that decision.

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Underneath the appeal lies an ideological difference. Its importance cannot be properly appreciated without some reflection on the purpose of freedom of information legislation. We do not know, of course, exactly what is contained in the documents. But we do know that the only exemption invoked requires that each of the documents be an internal working document and that its disclosure be contrary to the public interest. The President of the Tribunal said that the withheld documents described options, that they were provisional in nature. He found that the documents contained jargon and acronyms which would be meaningless to the average reader; the average reader would have difficulty in understanding the conclusions and even greater difficulty in understanding the reasoning and methodology.

I do no more than summarise why it was said by the Treasury that the release of such material would be contrary to the public interest. These grounds reveal an ideological fault line. These grounds are universal in their application. Any internal, deliberative document, however anodyne, however prosaic, however routine, can have these grounds pinned to them. Thus it was said that disclosure would impede free communication between public servants and their Minister. It was said that:

> '...officers should be able freely to do in written form what they could otherwise do orally, in circumstances where any oral communication would remain confidential'.

It was said that the public would not be able to appreciate that the documents were tentative in nature and that public confusion and misunderstanding would result.

Misunderstanding is, of course, a possible consequence whenever one puts pen to paper or whenever one opens one's mouth. Responsibility tempers our outpourings. Once beyond our infancy, there is no such thing as an absolute freedom of expression. One cannot decouple what one says or writes from all and any consequences.

The public interest grounds in *McKinnon* go to the heart of the concept of freedom of information. It is a small step from invoking these grounds to contending that freedom of information is contrary to the public interest. The Treasury's first public interest ground was that:

> Officers of the Government should be able to communicate directly, freely and confidentially with a responsible Minister and members of the Minister's office on issues which are considered to have ongoing sensitivity and are controversial and which affect the Minster's portfolio.

It is difficult to quarrel with such a bland statement of principle. Indeed, we can take the statement further without adding controversy. Officers of the Government should be able to communicate directly, freely and confidentially with each other. They should be able to do so on any issues with which they are dealing. Yet, if that be right, it must follow that there is a public interest in keeping all that they write out of the public gaze.

The Treasury's third and fourth public interest grounds were that the documents, if released, might mislead or be misunderstood. Similarly bland, it has universal application. Any document can mislead. Any document can be misunderstood. A policy, even if adopted, can be abandoned or changed. This can cause confusion. This can be misleading.

The *McKinnon* appeal raises the question whether the s 58(5) certificated appeal process involves a balancing exercise. But in answering that question, it provides a useful opportunity to remind ourselves why it is that this legislation exists. To do that, we need to go back to basics.

Freedom of information legislation

It is frequently suggested that Sweden was the first country to pass freedom of information legislation and that it did so in the late 18th century. It did indeed pass legislation bearing that phrase, or, to be more precise, something like it in Swedish. But it meant something different from what you or I understand by the phrase. It was concerned with guaranteeing the freedom to impart information. It was the 1966 US Act that commandeered the phrase to describe a right to elicit official information. Thus, when in the late 1940s the fledgling United Nations asked each member state to report on its guarantees of freedom of expression and on statutory constraints on freedom of expression, it did so under the rubric of 'freedom of information'. One can still find echoes of that use in certain international instruments: for example, Article 19 of the United Nations Universal Declaration of Human Rights (1948) and Article 10 of the European Convention on Human Rights (1950).

It was, as I have said, the United States' *Freedom of Information Act 1966* that first used the phrase to describe the right as we now know it. Whichever jurisdiction one is in, its unifying attributes remain much the same. It is a right given to every person. It is a right that requires no demonstrable interest in order to be invoked. It is a right to see all recorded information held by a public authority, regardless of subject matter and regardless of provenance. But the right is invariable shaped by a series of exemptions that describe a protected interest: national security, law enforcement, the law of confidentiality, legal professional privilege and so forth.

The onus of demonstrating the applicability of any exemption lies on the public authority. Exemptions do not apply in a blanket form to all information captured by a request: the public authority must instead consider the bits of information to see whether any can be released. These, then, are the essential attributes of freedom of information legislation. Whilst there is variation in the exact description of exemptions, there is a remarkable cross-jurisdictional similarity in terms of the interests that are protected by the exemptions.

The timing of the US Act and the background to it serve as important reminders of the underlying objective of such legislation. A right of access had, in fact, been included two years earlier in the *Administrative Procedure Act 1964*. The 1966 Act was little more than a revision of a part of that Act. It is telling that the original right of access was included within a statute intended to codify an individual's right to challenge decisions of the federal administration. It followed a decade's consideration and debate on the issue. It came at a time when in that country, as elsewhere, the basic and now familiar, principles of administrative law were being established.

It came, moreover, at a time when many of the most important, the most seminal international instruments defining the relationship between individual and state were being drawn. In the soul-searching period immediately after 1945 there was an imperative to define in abstract terms those aspects of that relationship which had been so offended in the preceding decade. The ballot box alone had not provided the individual with the necessary protection. The unqualified subordination of the interests of the individual to those of the State had shown itself to be corrosive. Once sufficiently corroded, it eased the way to a normative free-fall. Then, perhaps more so than now, it was recognised that certain universal principles had to be cast in enduring form. They had to be articulated to provide a yardstick against which to identify deviation. The United States was, at that time, one of the nations ready to identify those principles. And so it was that it took the plunge. It conferred an innovative right of universal access to government information, restricted only by reference to recognised, protected interests. It provided the conceptual model upon which all such legislation has since been based.

The UK experience

What then of the United Kingdom? If freedom of information is an integral part of the mature relationship between citizen and State, why did the self-styled mother of parliaments drag its heels for almost 40 years? The answer is both complex and illuminating. It is complex because there is a patchwork of reasons. It is illuminating, because within that patchwork we find the fundamental principles for and against such legislation pulling in opposite directions.

Whatever might have been the case elsewhere, the United Kingdom's *Freedom of Information Act 2000* was more evolutionary rather than it was revolutionary. The first step in the evolutionary process came 40 years earlier. It came in the form of an Act introduced as a Private Members Bill by the member for Finchley in London, a Mrs Margaret Thatcher[2]. In her maiden speech to Parliament, she introduced what was to become the *Public Bodies (Admission to Meetings) Act 1960.* In a single provision it gave members of the Press, for the first time, the right to see the reports and documents supplied to members of local authorities in connection with meetings open to the public. Local authorities play a very important role in the government of the United Kingdom. Local authorities are charged with performing many of the functions of government that most immediately concern members of the public: education, planning, local taxes, public housing and so forth.

In her second reading speech, the Member for Finchley said:

> The public has the right...to know what its elected representatives are doing.....Unless the Press, which is to report to the public has some idea from the documents before it what is to be discussed, the business of allowing the Press in becomes wholly abortive.....The Press must have some idea from the documents what is the true subject to be discussed at a meeting to which its representatives are entitled to be admitted....I hope that Hon. Members will think fit to give this Bill a Second Reading, and to consider that the paramount function of this distinguished House is to safeguard civil liberties rather than to think that administrative convenience should take first place in law.

It will be noticed that the documents contemplated for release by the Member for Finchley were deliberative documents. The Press were to be entitled to see official documents that discussed options for members to consider. These are the very sorts of documents that lie at the heart of the *McKinnon* appeal. These were to be provided to the very sorts of body that made the request that led to the *McKinnon* appeal. Mrs Thatcher's reasoning was that there was little point in inviting the Press to attend the business of local authorities, if all that they could report on was that which had been decided.

The Bill was passed. Local authorities continued to transact business. The Act remains on the statute book. I have yet to see it suggested that any section of the public have been consequentially engulfed in confusion and misunderstanding. I have yet to see it suggested that local government officers have consequentially compromised their professionalism.

Indeed, the history of information rights in the United Kingdom might suggest the opposite. In the forty years after 1960 numerous statutory provisions were passed each giving individuals a limited right of access to information. The right was invariably limited by subject matter. The right was often limited by the person who could invoke it. Most of these rights imposed an obligation on local authorities, rather than on Central Government. Thus, for example, in the United Kingdom the public has long had a right to see files held by local authorities relating to applications for planning permission. So, too, the *Local Government Act 1972* has long given members of the public a wide-ranging power to see documents held by local authorities.

Central Government in the United Kingdom, while busily imposing these obligations on local authorities, showed itself less keen on like obligations being imposed on itself. Those obligations to which it became subject were invariably the result of European Directives.

Thus, the Data Protection Acts of 1984 and of 1998 gave effect to European Directives that, amongst other things, give natural persons a right of access to information relating to themselves. The Environmental Information Regulations give everyone a right to environmental information held by public authorities, subject to the usual exceptions.

Nevertheless, the pressure mounted for comprehensive freedom of information legislation. The response in 1994 was to introduce a Code of Practice on Access to Government Information. The Code provided a comprehensive scheme for access to information held by Central Government. It resembled freedom of information in all respects other than that it did not confer an enforceable right of access. Its grounds for exemption were the familiar ones. Unsuccessful applicants could appeal to the Parliamentary Ombudsman who could report and recommend, but who could not compel.

The efficacy of this voluntary Code was betrayed by the official statements extolling the virtues of the Freedom of Information Bill. The Act, it was said, would represent a 'radical advance in open and accountable government'. It would '...begin to change for good the secretive culture of the public service'[3]. In fact, the most significant difference between the Code and the Act is that the former did not confer an enforceable right, whereas the latter does. Disclosure recommendations of the Parliamentary Ombudsman had been routinely ignored. Cultural change, if it comes at all, does not come from exhortation. It comes from legal compulsion.

The United Kingdom's *Freedom of Information Act 2000* is in conventional form. It gives a right of access to every person, natural or corporate. It is given regardless of age, residency or nationality. It is a right given in respect of all recorded information, in whatever form, held by a public authority. Public authorities subject to the Act include all Government Departments, all local authorities, the police, the NHS, schools, universities and thousands of quangos. The Act is unlimited by subject matter, and the right is given regardless of the provenance of the information. It is a right that requires no demonstrable interest in order to be invoked. The only limitations on the right derive from the recipient public authority's entitlement to show that an exemption applies to the requested information or that compliance would exceed cost limits spelled out in regulations.

The burden of FOI

As with all such legislation, the burden on each public authority can be immense. At one level, it seems counter-instinctive that someone holding information should be compelled to disclose it to anyone who might care to ask. We can understand why someone having a recognisable interest in particular information should be able to see it. But, by convention, freedom of information legislation has no such limitation. It seems unduly invasive to gratify a requester who has no demonstrable interest in the information; or where the only object of the request is to satisfy an idle curiosity; or where the motive is nothing purer than a general desire to embarrass. Why should public authorities be given the run-around merely in order to indulge such sentiments?

The first year of the full-scale operation of the Act in the United Kingdom saw many public authorities asking themselves these questions. The answer is elusive when confronted by an apparently pointless request; or by a disruptive request; or by a potentially damaging request. The answer can only satisfactorily be found by returning to the origins of the right.

Freedom of information marks an important component in the evolution of the modern relationship between the executive and the individual. The equilibrium of that relationship is in large part maintained by four components:

First, a coherent body of principles governing the supervision of the lawfulness of the decision-making process — what we call 'judicial review'. Towards the end of his distinguished judicial career, Lord Diplock described this '.... as having been the greatest achievement of the English courts in [his] judicial lifetime'[4].

Secondly, the appointment of permanent office holders to investigate maladministration — what we call 'ombudsmen'. It is a concept, and a word, derived from Sweden. They have had one since 1809. The focus here is investigative, rather than coercive.

Thirdly, the spread of independent bodies whose remit is to come up with the right decision — 'the tribunal system'.

And *fourthly*, a universal right of access to official information, not confined by subject matter; not confined by the persons who may exercise the right, and not confined by some recognised need to know — what we call 'freedom of information'.

The real importance of 'open government' does not lie in feeding Press curiosity or facilitating the embarrassment of government officials. Its greater importance is at once both more mundane and more diffuse. Freedom of information provides the means for ensuring transparent decision-making; it provides the means for greater individual involvement in and understanding of the workings of officialdom as it affects the individual.

It is difficult to over-state the significance of this greater individual involvement and understanding. We have seen in the last 60 years a growth in State activity and regulation that has exceeded what many feared. The information held on each of us could not rationally have been predicted 60 years ago. No-one could have imagined our current ability to analyse and process that information.

Yet, for most of us, most of the time, the Orwellian dystopia has not come to pass. The novel *1984* remains a great work of fiction, not of premonition. It is not through mere acclimatisation that most of us have become reconciled to this fact. Hand-in-hand with greater state involvement, there has been a transformation of the processes by which those same public bodies are held accountable for what they do. That greater accountability has been secured by the fundamental changes in the legal relationship between those governing and those whom they govern. The relationship is a more responsible and responsive one. And rights of access to official information form an important part in this changed relationship.

So viewed, the burden on public authorities is more easily borne. So viewed, we see that it enables public authorities to increase their involvement in all manner of activity, without necessarily generating widespread antagonism. It is the very counter-intuitiveness of the right that serves to dispel the misapprehensions.

McKinnon, again

And so I return to the battle lines in the *McKinnon* appeal. Public authorities in the United Kingdom have not been slow to profess the Act's 'chilling effect'. Whether by design or by coincidence, claims for exemption bear an uncanny cross-jurisdictional resemblance.

I mentioned earlier that at a primal level there is something counter-intuitive about being compelled to disclose one's own information to anyone that cares to ask. This is particularly so where the information constitutes a record of one's own thought processes. We view that as a private space. Freedom of information, however, requires a public authority to take itself beyond the prehensile urge to hold onto everything. It is quite true that we are more careful in what we commit to writing if there is a risk that it will be seen by others. Indeed, most of us

exercise at least a little thought before we speak or commit to paper what is in our minds. By speaking and by writing, we convey to others something definite. By doing so, we are more apt to influence others.

It is only right, therefore, that officials should be cautious in committing their thoughts to writing. It is a virtue, not a vice, that thoughts that do not bear examination stay off a file. I have long practised chilling the written extravagances of my pupils by insisting that they ask how their drafts will sound when read aloud in court. I remember the same chill being sent down my spine when, as a solicitor, I was told that one should always assume that every phone call made or received was being recorded. Yet, neither the advice I gave nor the advice I received was bad advice. The advice made for greater care. Thoughts committed to writing take on a life of their own, informing and shaping the views of others who pick up the file and who may be charged with making decisions.

It is, of course, the responsibility of many public officials to express their views frankly. The suggestion that any such official would be prepared to abdicate or compromise that responsibility because those views might see the light of day is somewhat surprising. What is yet more surprising is that those who assert most vigorously that administrative anaemia will ensue, are those who are best qualified, best placed and best experienced to take and defend points of view. Such dialectic is part and parcel of the upper echelons of any public authority. Why should those skills crumble simply because the audience has changed?

Like the Australian Act, the UK 2000 Act has an exemption for internal working documents. Although the UK provision is worded differently from the Australian provision, the thrust (and, for that matter, the section number) is the same. The UK Government's Departmental 'guidance' on s 36 begins:

> Section 36 is central, along with section 35, to protecting the delivery of effective central government. Whilst there is an important public interest in disclosure of information about, for example, the advisory and deliberative processes of central government, there is also a powerful public interest in ensuring that there is a space within which Ministers and officials are able to discuss policy options and delivery, freely and frankly.

Typically, where a public authority receives a request it wishes to refuse, the wardrobe of exemptions is examined. One by one, each is examined to see whether it can be made to fit. The lycra in the wardrobe is s 36. It has special qualities. It has an elasticity like no other. Section 36 of the UK Act provides for an exemption where 'in the reasonable opinion of a qualified person' the disclosure of the information would or would be likely inter alia to inhibit 'the free and frank provision of advice' or 'the free and frank exchange of views' or would otherwise be likely 'to prejudice the effective conduct of public affairs'.

The section departs from every other exemption in the Act by lowering the threshold for exemption from an objective assessment of harm or prejudice or attributes, to one of reasonable opinion. It is self-evident that that reasonable opinion will be informed by the views that that individual holds as to the overall merits of the concept of 'freedom of information'.

Who then is the qualified person whose opinion is to be determinative? In relation to a government department, it means any Minister of the Crown. In relation to most other public authorities, it is usually the head of the organisation: the chief executive and the monitoring officer of a local authority and so forth.

What of the appeal structure? The first tier (internal reconsideration) does not apply where s 36 is relied upon. Because the 'qualified person' is generally the head of the public authority, an internal review is not practicable. The second tier of appeal is to the Information Commissioner. In relation to s 36 the Information Commissioner has said that he:

> ....considers a reasonable opinion to be one which lies within the bounds of reasonableness or range of reasonable opinions and can be verified by evidence. Any opinion which is not outrageous, or manifestly absurd or made with no evidence, or made on the basis of irrelevant factors or without consideration of all relevant factors, will satisfy such a test. The Commissioner may well take a different view of what would have been the best decision in the circumstances but this is immaterial where the qualified person's opinion lies within the bounds of reasonableness.[5]

Thus, the Information Commissioner considers himself to have only a supervisory role. The third tier of review, the Information Tribunal, is concerned only with reviewing the decision of the Information Commissioner.

In short, the most powerful exemption in the Act has the crudest form of review. While 'safeguarding national security', while 'prejudice to the defence of the British Islands', while 'prejudice to law enforcement' and so forth must all stand the test of external merit review, the '...powerful public interest in ensuring that there is a space within which Ministers and officials are able to discuss policy options ...[6]' is protected from such intrusions.

All of us, then, wait with some interest to see what the High Court makes of ss 36 and 58 of the 1982 Act in the *McKinnon* appeal. That appeal is defined by the peculiar appeal right given in a certificated claim under s 58. But it is fanciful to think that the competition between the alternative readings of that section can be decided without reference to s 36; or without reference to the public interest that is served by the Act; or without reference to the very purpose of freedom of information legislation. Thus, the short answer to the question posed by this seminar is 'yes'.

Endnotes

1 [2005] FCAFC 142 (2 Aug 05)
2 Without wishing to suggest any pattern, it is to be noted that one of the Congressional sponsors of the USA's *Freedom of Information Act 1966* was Donald Rumsfeld.
3 http://www.dca.gov.uk/foi/guidance/exguide/sec36/chap01.htm
4 R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 1617 at 641.
5 http://www.ico.gov.uk. Awareness Guidance no. 25.
6 http://www.dca.gov.uk/foi/guidance/exguide/sec36/chap01.htm.

FROM BARRATT TO JARRATT: PUBLIC SECTOR EMPLOYMENT, NATURAL JUSTICE, AND BREACH OF CONTRACT

Michael Will*

Introduction

The High Court's decision in the case of *Jarratt v Commissioner of Police for NSW*[1], is significant for a number of reasons. It provides an authoritative analysis of the applicability (or otherwise) of Crown prerogative and the meaning of service 'at pleasure' in the context of employment heavily regulated by statute in a modern public service. It also analyses the interaction between the statutory and contractual aspects of a government appointment. Finally and not surprisingly given the course of recent High Court decisions, it restates and reemphasises the central importance of affording natural justice to those whose livelihoods are affected by government decision making.

A very interesting aspect of the decision is the way in which a highly favourable outcome for Mr Jarratt contrasts with that in the case of another senior public official dismissed from office in recent memory, former Defence Secretary Paul Barratt (see *Barratt v Howard & Ors*[2]. The facts of both cases have been covered extensively previously, so apart from a brief comparison of some of the important facts and statutory provisions, I will concentrate on the procedural history and actions of the two employee applicants, the timing of those actions, and the reactions of the two public service employer respondents which were determinative of the two outcomes: $642,936.35 awarded to the Deputy Commissioner (plus costs), compared with nothing in damages for Mr Barratt, and an order against him for payment of the Commonwealth's costs.

Procedure and actions of the two applicants compared

Jarratt

On 5 September 2001 the NSW Police Commissioner, without prior notice to Mr Jarratt, notified the media that he had recommended to the Police Minister that Mr Jarratt's appointment be terminated 'on the grounds of performance'. Two days later, Mr Jarratt received written notification of the Commissioner's actions, and on 10 September 2001, he received a 'Statement of Reasons" for dismissal for the purpose of the Statutory and Other Officers Remuneration Tribunal assessing his entitlement to statutory compensation under s 53 of the *Police Service Act 1990* (NSW). The Governor in Council acted to terminate his appointment on 12 September 2001.

[1] *Partner, Phillips Fox. This paper was presented at an AIAL Seminar, Canberra, 14 February 2006. I would like to acknowledge the assistance of my former colleagues, Liana Westcott, and Robert Walsh. Liana for researching material for the seminar paper and preparing an earlier draft, and Robert Walsh for drawing my attention to the factual and legal similarities between the Barratt and Jarratt cases notwithstanding their outcome.*

Having been so dismissed, Mr Jarratt applied to the Tribunal and was awarded the maximum amount of compensation available, being the equivalent of 38 weeks' salary.

Mr Jarratt then applied to the Supreme Court for declarations that his removal from office was invalid and that the consequent termination of his contract was wrongful. Simpson J at first instance granted these declarations and awarded compensation for breach of contract in the amount of $642,936.35, assessed by reference to the salary he would have received for the remainder of his 5 year term, less the amount already received from the Tribunal.

The Commissioner appealed all the Judge's findings, and was successful in having them overturned by the Court of Appeal.

Mr Jarratt was granted special leave to appeal to the High Court, and the appeal was heard instanter. The High Court unanimously, albeit in four separate judgments, overturned the Court of Appeal's findings and reinstated those of Simpson J.

Importantly, Mr Jarratt made no interlocutory administrative law application to the effect that he was entitled to be afforded natural justice *before* he was dismissed. On the respondent's side, because of the attitude taken by the Police Commissioner and those advising him, that natural justice need not be afforded in cases such as this, because of (ultimately erroneous) reliance on the employment at pleasure principle, no natural justice was afforded to Mr Jarratt:

- he was not notified at the contemplation stage of the impending removal action proposed to be taken against him;
- he was not told of any specific allegations against him;
- he was not told of the contents of any adverse report about his performance;
- nor was he given the opportunity to respond to any such allegations or criticisms of his performance.

Mr Jarratt of course took issue with this behaviour, but *only* in the substantive proceedings themselves, and after the event of dismissal, which, very wisely, involved a combination of an administrative law challenge on natural justice grounds, *and* an action for damages for breach of contract.

Barratt

In December 1997, Mr Paul Barratt was appointed to the position of Secretary to the Department of Defence for a 5 year term. At the time of his appointment, he was Secretary to the Department of Primary Industries and Energy.

There was a cabinet reshuffle following the 1998 Federal election, and the Hon John Moore MP was appointed as Minister for Defence. Following Mr Moore's appointment to this position, there appears to have been a progressive breakdown in his relationship with Mr Barratt, and he apparently raised his concerns with the then Secretary of the Department of Prime Minister and Cabinet, Mr Moore-Wilton, on a number of occasions.

In July 1999, Mr Moore-Wilton informed Mr Barratt that a report recommending his termination was imminent. Mr Barratt asked what he had done to warrant his termination and was told the reason was nothing specific, just 'things in general'.

Mr Barratt then filed two applications in the Federal Court. The first was to restrain Mr Moore-Wilton from issuing the report until Mr Barratt had been accorded procedural fairness, including a reasonable opportunity to be heard. He also sought an order that the Prime Minister be restrained from recommending his termination 'except for cause shown', and declaratory relief. After an urgent hearing, Hely J made a declaration in accordance with the first order sought, namely that Mr Barratt be provided with reasons for his dismissal and be afforded an opportunity to make written submissions, before any report recommending his termination went to the Prime Minister. Mr Moore-Wilton duly provided Mr Barratt with written reasons for the recommendation in accordance with this order and asked Mr Barratt to place any material before him which he would wish to be taken into consideration in making his report to the Prime Minister. An exchange of correspondence ensued in which Mr Barratt provided his responses to the matters raised in those reasons, which in essence amounted to the Minister's lack of confidence in Mr Barratt's performance of his duties.

In the second application heard by Hely J, Mr Barratt sought a declaration that he was entitled to know the reason for the Minister's lack of confidence in him. This application was dismissed and Mr Barratt appealed against both judgments in September 1999.

In March 2000, after Mr Barratt's appointment had been terminated as proposed, the Full Federal Court dismissed both appeals. He made no private law claims, for example for breach of contract, and received no statutory or other compensation, and had a costs order made against him arising from the dismissal of both of his appeals.

Comparison of relevant facts and statutory provisions

Element	Jarratt	Barratt
Type of appointment	Appointed on 5 February 2000 to the position of Deputy Commissioner under the *Police Service Act 1990 (NSW),* s36	Appointed on 31 December 1997 to the position of Secretary to the Department of Defence under ss 36 and 37 of the *Public Service Act 1922*
Duration of appointment	Fixed term of 5 years	Fixed term of 5 years
Relevant statutory provisions	*Police Service Act 1990 (NSW)* **s 40** office to be held for period (up to 5 years) specified in contract **s 41** employment governed by contract, but not appointed by the contract **s 51** appointment can be terminated *'at any time'* by the Governor acting on recommendation from the Commissioner with the approval of the Minister	*Public Service Act 1922 (Cth)* **s 36 (1)** The Governor-General may, in writing, appoint a person to an office of Secretary. **s 37** instrument of appointment may specify fixed term of up to 5 years; **s 37 (5)** Governor-General may direct that the appointment be terminated on a specified day … where Governor-General so terminates the appointment, the person will be retired from the Service

		(Note: the *Public Service Act 1999* has the relevant termination provision at s 59. It provides that the Prime Minister, not the Governor-General, has the power of dismissal, and the words may terminate '*at any time'* have been added. In *Jarratt*, these words were not seen as excluding the operation of natural justice, but rather identifying the timing at which an otherwise valid termination could take effect.)
Source of power to terminate	**s 51** of the Act	**s 37** of the Act
Reason given for termination	'Performance' – later elaborated upon (after the purported termination took effect) as comprising: • Management of operations in Cabramatta, including recommendations for senior appointments and supervision of other officers; • Provision of inaccurate and inappropriate advice with respect to the working environment in Cabramatta during 1999 and 2000; • Timeliness and accuracy of advice on operational issues; and • A series of unsatisfactory judgement decisions on a range of issues.	'Irreconcilable conflict' between Mr Barratt and the Minister – later elaborated upon (before the termination took effect) to comprise: • The Defence Minister's loss of trust and confidence in Mr Barratt's ability to perform his duties as Secretary; • That this loss of trust and confidence is detrimental to the effective and efficient administration of government.
Content of the duty to afford natural justice / procedural fairness	The Commissioner argued that there was no such duty and conceded that, if there was one, it had not been complied with here, whatever its content.	Found to comprise at least an entitlement to be told the grounds upon which a recommendation for termination was proposed, and an entitlement to be heard in relation to them, before such recommendation was sent to the Prime Minister for consideration.

	The High Court said it would have been what Simpson J at first instance identified as the appropriate content, namely: notification of the proposal to remove him, advice of any specific allegations or adverse reports against him, and an opportunity to respond to allegations and criticisms.	Found not to extend to an entitlement to know the reasons why the Minister had lost confidence in him
Was the appointment validly terminated under the relevant Act?	No, by reason of the failure to afford natural justice in the exercise of the power in s 51.	Not a matter to be determined by the Court, but seemingly yes because there was no failure to afford natural justice because of the application to Hely J, his orders, and the subsequent affording of natural justice (reasons, and an opportunity to be heard) before termination.
Contractual consequences of termination	Valid termination has the automatic consequence that the individual ceases to be an executive officer, and ceases to be a member of the Police Service if not appointed to another position. Invalid termination of the appointment constitutes either a repudiation of the contract of employment, or alternatively, that the termination has not taken effect and the officer remains an officer and is therefore entitled to be paid for the remaining term of his contract.	Valid termination has the automatic consequence of retirement from the Service. As the appointment was impliedly found to be validly terminated, the contractual relationship would likewise have been found to have been validly terminated, had it been pleaded. No discussion of what would have been the contractual consequences had the appointment been invalidly terminated.
Available remedy	Damages, calculated by reference to the salary that would have been received had the appointment continued for the full 5 year term. The cap on compensation under s 53 applies only in the case of a valid removal from office.	None.

Outcomes

In financial terms, the discrepancy between the outcomes for Mr Jarratt and Mr Barratt are vast. Mr Jarratt was awarded damages in the amount of $642,936.35 and his costs at first instance and for both the first appeal to the NSW Court of Appeal, and the subsequent appeal to the High Court. Mr Barratt received no monetary compensation, and was ordered to pay the Commonwealth's costs. In total, the disparity between the financial positions of the two applicants after the decisions would be likely to be well over $1 million.

Analysis and discussion

The cases are consistent on all relevant points of law, despite variances in the exact statutory terminology, and the authorities cited by each court. They each found that:

- An appointment 'at pleasure' must be interpreted in the context of the modern public service, and in light of developments in the law;

- Termination of a statutory appointment must be by reference to a provision of the Act authorising such dismissal;

- Natural justice is only excluded from the operation of a statutory power where there is clear legislative intent;

- The characterisation of a statutory appointment as being validly or invalidly terminated will flow through to the contract of employment.

The factual scenarios that gave rise to the disputes are likewise almost identical. Both applicants were senior public officials, appointed under statute to terms of employment of 5 years each, and whose appointments were terminated for reasons other than misconduct in the second year of their term. Both were subject to statutory provisions which provided for termination at any time, but without any requirement for clear grounds. Both sought to be afforded natural justice, in the form of notification of the reasons for their termination and a chance to respond.

The only identifiable difference between the cases is the timing at which judicial assistance was sought: Mr Barratt had notice of his impending termination, and was able to seek urgent interlocutory relief to secure his legal rights. As a result, he was afforded natural justice (at the appropriate level of content) before his appointment was terminated. Mr Jarratt had no warning that his appointment was to be terminated, and thus could not seek relief until after the fact. He had no opportunity to receive natural justice prior to his termination, so was compensated for being denied that right given the contractual consequences of that denial.

The question, then, is of what benefit is the exercise of a legal right if, in exercising it, an individual is denied the substantial compensation to which he or she may be entitled if it is not exercised? Put another way, why is there an apparent disparity in value between the right itself, and the remedy for its deprivation?

The answer lies, perhaps, in the well known words of Megarry J in *John v Rees*[3]:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.

What this excellent summary of the underlying reasons for affording natural justice makes clear is the value which the law places on the right of a person affected by a potential adverse decision, to be heard, to put an opposing point of view, to answer charges, to explain conduct, to influence, persuade, and change another's mind, particularly when that other person is in a powerful position to affect livelihood.

Notwithstanding the high importance which natural justice or procedural fairness is afforded by the law, historically, the denial of such a right usually only results, in straight applications for judicial review, in no more than a declaration of the existence of the right, together with an order for a reconsideration by the original decision maker, sometimes with the result that

the same decision is reached again. All the natural justice in the world will not make up for a fundamentally unmeritorious claim.

To put it another way, the remedy for a failure to afford natural justice, when looked at in isolation from any other concurrent or resultant private law remedy, is an order that natural justice be afforded: not damages. The case of *Jarratt* does not change that position: whether it is a step towards opening up the possibility for damages to be awarded in cases of administrative defect remains to be seen, but it was decided on the basis of the particular statutory circumstances of an appointment to an office concurrent with a contract of employment so it is much more likely that its effects will be limited to such cases, or cases capable on their facts of argument by analogy where a public law remedy subsists with a private law one.

A further answer to why Mr Jarratt succeeded where Mr Barratt failed, is perhaps an understanding of the limitations of administrative law remedies such as that just described, coupled with the requisite *sang-froid* to keep one's powder dry and not launch an immediate challenge to a potentially flawed process, particularly where one's claim contains private law remedies as well, such as damages for breach of contract, and one can show that the procedural flaw either led to the breach, or had consequences akin to cases in which damages might be awarded.

Mr Jarratt was awarded damages because the failure to afford him natural justice meant that his removal from his statutory appointment was invalid. This also amounted to a wrongful termination, by repudiation, of his contract of employment. Contracts of employment are not, for policy reasons, usually subject to an order for specific performance, therefore he was entitled to damages. Alternatively, as Callinan J would have it, there was no removal from office or termination, and Mr Jarratt remained in office and was entitled to be paid his emoluments. That, however, was not how Mr Jarratt pleaded his case, and it would seem, on the authority of *Lucy v The Commonwealth*[4] at 245 per Isaacs J, that if a former employee has done anything inconsistent with still holding office, such as accepting retirement benefits, or an offer of other employment (which Mr Jarratt had done, at least on a consultancy basis) a finding of continued employment would not be possible.

The ability to display the necessary coolness under pressure, let the flawed procedure germinate and mature into a combined public and private law remedy sounding in damages, and then attack the actual result after the event, rather than launch a pre-emptive strike, is likely in cases such as these, to bear much larger and tastier fruit for a plaintiff.

Mr Barratt's case may well have been one of premature litigation.

From the respondents' perspective there is also a salutary reminder of the importance of affording natural justice in these two cases as well. Without being cynical, and acquiescing in the view that as long as you go through the empty formality of affording procedural fairness then as a decision maker you have met the highest standards of good administration, it is well to note how the actions of the two employers (albeit only at the behest of the Federal Court in the case of the Commonwealth in *Barratt*) affected the outcome: where natural justice was given, and the officer nevertheless terminated, no damages were awarded. Where it was not, and the employer insisted erroneously that it need not be, substantial damages flowed from the resultant contractual effects of the wrongful dismissal. Simpson J at first instance summarised the position of the NSW Police Commissioner as follows:

> The position adopted by the defendants is stark and brutally simple. Conceding that nothing that could be classified as procedural fairness had been afforded to the plaintiff in respect of the process of his removal, the defendants contend that they were under no obligation to afford procedural fairness to him; that, pursuant to the relevant legislation, the plaintiff could be removed from office at any time, without explanation, justification or excuse; that the decision to remove him could be made

> capriciously, unfairly, whimsically, in bad faith, for good reason or bad or no reason at all; and that such a decision is nevertheless unassailable. Unpalatable though that argument may seem, the defendants were able to support it by reference to a considerable body of respectable authority. The principle on which they rely is that Crown employees hold their offices during and at the pleasure of the Crown and that they may therefore be dismissed at the will – and indeed on the whim – of the Crown.

Perhaps if Mr Jarratt had been given more time, he too would have launched a pre-emptive administrative law strike against the Commissioner for Police. Had he done so and been successful, and had he been afforded an opportunity to present his case and done so, but nevertheless been subsequently validly removed from office he would not have been entitled to the damages he was ultimately awarded.

What these two cases tell us is that if appealing to the ideals of good administration is not a sufficient carrot, then perhaps liability in the form of a large damages claim is a big enough stick to ensure that natural justice, proper process, hearing the other side, becomes the accepted norm, rather than the judicially ordered exception, in public sector termination of employment decision making.

Endnotes

1 [2005] HCA 50
2 [2000] FCA 190
3 [1970] Ch 345 at 402
4 (1923) 33 CLR 229

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

France Houle*

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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Outline

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 changes[1]. From then until 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 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.

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 Canada[5]. 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 secondary[7].

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 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 process[9].

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 programs[10].

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 inconvenience[11].

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 it[12].

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 1 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?

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's[13]. 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 scrutinise 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 '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 regulations[14]. Although this policy has changed over time, the content of a RIAS has remained largely the same.

a. Development of the RIAS policy

On 14 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 1 August 1978, this policy came into force. However, its effects were limited to 13 departments and the socio-economic impact analysis had to be conducted for any new and important regulations affecting health, safety and environmental protection[15]. 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 regulations[16]. 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 consultation[18] at the stage of the 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 significantly[20]. 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 the *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 *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 adequate instrument at hand. Other possible instruments are, for example, voluntary standards, tax credits, insurance, user fees and marketable property rights[22].

Section 3 is *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 individuals[23]. 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 government[24].

Section 4 is *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 it[25].

Section 5 is C*ompliance 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-compliance[26].

Finally, section 6 is the C*ontact 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 has assumed added legal value and lawyers have started to argue its content in the Federal court when an interpretative issue regarding a regulation is 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 RIAS[27]. 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 transcription of the House of Common Debates[28]. It is even more interesting to note that when the period is narrowed to 1998-2005[29], 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 analysed[30]. The descriptive use of a RIAS is found in 36 decisions representing 28 percent of cases[31]. 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 reasoning[32]. 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 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 *Driedger on the Construction of Statutes (3rd ed)*: '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 interpretation[35] but Sullivan wrote in 1994 that 'the exclusionary rule has been eroding at a rapid rate', notably in the field of constitutional interpretation[36]. 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 unsatisfactory[37].

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 1999[38]. In these decisions, the Supreme Court showed that it had resolutely embarked on the path of authorizing legislative history material as an extrinsic aid to statutory interpretation. The Court stated that this type of material was 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 regulation[39].

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 RIAS[40]. In these decisions, a RIAS is treated as 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.

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 purpose[42] or the meaning of a regulation[43] − including if a regulation is *ultra vires* of its parent law[44]− or if it meets the conditions in interlocutory proceedings[45]. 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 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 policy[47]. 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 question[48]. Although this type of case is interesting, it will not be discussed because it raises fairness issues rather than interpretive questions.

a. 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 summarised 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.

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 adopted[50].

For example, in *Abel v Canada (Minister of Agriculture)*, the plaintiff asked for a declaration that s 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 s 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, s 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 18 March 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 authorised 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 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 program[54].

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, the 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 accepted the argument and further added that this misleading information was obtained as a result of a badly conducted consultation process[55].

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 regulations[56]. 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. 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 rules[59]. 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 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 recognised that a trial judge could not abdicate responsibility for the interpretation of legislation to a civil servant[63]. 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 judges[64]. 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 paper[65].

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 authorise. Although this result may be partly due to unclear guidelines from the Supreme Court regarding this issue[66], 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 interests[67].

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 33 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 affect the understanding of the doctrine of separation of powers, notably if it leads judges to a greater 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 summarised, 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 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 J 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 program[70].

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 appeal[71], 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 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 century[72]. 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 JA 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 JA 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 JA 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 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 judgement 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.

Endnotes

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 pp. 6-31.

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

4 In Canada, the expression 'smart regulation' is used in the recent documentation. Each letter of the word 'smart' refers to a concept: **s**ound, **m**odern, **a**ccountable, **r**esults-based and **t**ransparent. 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.

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.

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.'

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).

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.

15 For a brief summary of the development of the Federal Government regulatory policy, see Fazil Mihlar, '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.' The *Regulatory Process Management Standards* state: '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 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.

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 of 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.

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.

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.*, *Internatioal 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.);

31 I subdivided this category into four subgroups. For the references to cases in Group 1, see note 7. Group 2: A case in 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, Secton, 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 Heath)* [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 or 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 distinghuish 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.).

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.

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.* c. *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-LaRoche 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 JJ.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 JJ.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. *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.).

41 SOR/DORS/2002-227, p. 246-247.

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.CJ. 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).

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. 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.

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."
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.).
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 JJA), 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.'
58 *R.* v. *Boutcher*, [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.
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. *Boutcher, supra*, note 58, par. 76 where Marshall JA stated: 'such Statements have rapidly come to be recognized as authoritative sources of purpose and intent in construing federal legislation'.
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.
69 *Vriend v Alberta*, [1998] 1 S.C.R. 493, par. 139.
70 Presumably, this would also by the case in the *Cousins* decision, *supra*, note 54.
71 *Teal Cedar Products (1977) Ltd*., *supra*, note 55.
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.
75 *Apotex Inc.* v. *Canada (Attorney General)*, *supra* note 56, at 268

COMMENTARY ON PAPER BY ASSOCIATE PROFESSOR FRANCE HOULE

Stephen Argument*

At the risk of being jingoistic, Professor Houle's fascinating insight into the way Canada deals with delegated legislation[1] 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 dealt with by Professor Houle 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' (RIS) in 1984.[2] 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.[3] 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.[4]

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 understated. 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.

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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 instrument is 'likely … to have a direct or substantial indirect effect on business' or is 'likely … to restrict competition' (subsec 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*[5]).

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).[6] 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.[7]

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.
>
> 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.[8]

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*,[9] 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%.[10] 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.

The RIS 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.[11] Though the *Federal Executive Council Handbook* contains no such requirement in relation to delegated 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 para 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 Higgins CJ 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 51A ……[12]

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 Houle refers to the 'technocratic' use of Regulatory Impact Analysis Statements (RIAS) 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.

In *Douglas and Jones's Administrative Law* (5th ed), 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.[13]

A similar view is put in Pearce and Argument's *Delegated Legislation in Australia* (3rd ed), 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, paras [14.6] and [21.12]).[14]

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.[15]

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.[16]

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 required for virtually every form of everyday activity. If the courts do not control these excesses, nobody will.[17]

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 Houle 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'.[18]

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*, Scott LJ (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.[19]

This passage was cited with approval by Stephen J of the High Court in the leading Australian case of *Watson v Lee*.[20]

After noting the obligations which existed under British law (as they do in Australia) to publish Acts of Parliament and statutory instruments, Scott LJ 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.[21]

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.[22]

In the course of his decision, Scott LJ 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.[23]

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', [24] a 'regulation',[25] a 'statutory instrument',[26] a 'statutory rule',[27] a 'subordinate law',[28] 'subordinate legislation'[29] or 'subsidiary legislation',[30] 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.[31] I am confident that the LIA has put a stop to 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, s 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 (s 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),[32] 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 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 Houle's paper. Professor Houle 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.[33]

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 Houle's 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.

Endnotes

1 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.
2 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.
3 See *Legislation Act 2001* (ACT), s 34.
4 See *Legislation Act 2001* (ACT), s 36.
5 Parliamentary Paper No 93 of 1992.
6 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.
7 http://www.pc.gov.au/orr/reform/risrequirements.html
8 http://www.pc.gov.au/orr/reform/risaims.html.
9 http://www.pc.gov.au/research/annrpt/reglnrev0405/index.html.
10 See pp xvi to xix.
11 See *Cabinet Handbook* (May 2000) (http://www.pmc.gov.au/parliamentary/index.cfm), para 2.13.
12 See *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, para 82.
13 Douglas, R, *Douglas and Jones's Administrative Law* (5th ed), 2006, The Federation Press, Sydney, p 333.
14 Pearce, DC and Argument, S, *Delegated Legislation in Australia* (3rd ed), 2005, LexisNexis, Sydney.
15 (1928) 41 CLR 275, p 279.
16 (2003) 203 ALR 320, p 326.
17 [1991] 1 Qd R 314, p 321.
18 See, generally, Argument, S, 'Parliamentary scrutiny of quasi-legislation' (15) *Papers on Parliament.*
19 [1948] 1 KB 349, p 361.
20 (1979) 144 CLR 374, at p 394.
21 [1948] 1 KB 349, p 362.

22 [1948] 1 KB 349, p 362
23 Pearce, DC, 'The Rule of Law and the Lore of Rules', Legislative Studies, Vol 4, No 2, Spring 1989, 3, p 4.
24 *Legislation Act 2001* (ACT), s 9;
25 *Subordinate Legislation Act 1978 (SA), s 4; Interpretation Act (NT), s 61.*
26 *Statutory Instruments Act 1992* (Qld), s 7.
27 *Subordinate Legislation Act 1989* (NSW), s 3; *Subordinate Legislation Act 1994* (Vic), s 3; *Statutory Instruments Act 1992* (Qld), s 8.
28 *Legislation Act 2001* (ACT), s 8;
29 Statutory Instruments Act 1992 (Qld), s 9; Subordinate Legislation Act 1992 (Tas), s 3.
30 *Interpretation Act 1984* (WA), s 5.
31 See, generally, Pearce and Argument, *Delegated Legislation in Australia* (3rd ed), 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).
32 Available at www.frli.gov.au.
33 Argument, S, "Parliamentary scrutiny of quasi-legislation" (15) *Papers on Parliament*, pp 23-24.

MERIT REVIEW IN WA: THE COST OF APPLYING GOVERNMENT POLICY IN THE COURSE OF REVIEW

Elizabeth Morrow*

Western Australia has a generalist merit review body in the form of the State Administrative Tribunal ('SAT') established under the *State Administrative Tribunal Act 2004* ('SAT Act'). Section 29 of the SAT Act provides that SAT, in its review jurisdiction, has the 'functions and discretions' of the original decision-maker. This provision begs the question: if SAT has the powers of the original decision-maker, and that decision-maker was influenced by government policy, what role should that policy play in SAT's decision? Section 28 of the SAT Act constitutes a response to that question. Titled 'Considering government policy', s 28 provides that SAT must 'have regard to' a policy applied by the original decision-maker.

In this article I consider the extent to which s 28 enhances or hinders SAT's ability to provide administrative justice for individuals. I look first at the common law principles relating to merit review and policy. I then examine the scope and operation of s 28, commenting on departures from the common law position. Finally I discuss my view of what administrative justice requires in relation to merit review and policy. I conclude that SAT's ability to provide administrative justice is diminished by s 28.

For the purpose of this article I define policy as a non-statutory direction to an administrative decision-maker about the way in which that decision-maker is to exercise his or her decision-making power. By 'non-statutory' I mean that the direction is neither written into, nor expressly authorised by, the law under which the decision is made. This article then does not involve consideration of the extent to which SAT is bound by a government direction authorised by the statute under which the relevant decision is made.[1]

This article is also confined to consideration of merit review by bodies external to the government department or agency responsible for administering the legislation under which a reviewable decision is made.

Finally, in this article I have set myself the task of examining the extent to which s 28 enhances or hinders SAT's ability to provide administrative justice for individuals. In undertaking this task I have taken it as given that the role of a merit review body is to provide administrative justice, and that administrative justice involves the protection of individuals against the unjust exercise of administrative power. However these 'givens' are contestable. It can be argued that review bodies do not exist to check the exercise of administrative power but instead are merely part of the administrative process, having as their objective efficient administration. In this article I have assumed to the contrary.[2] It can also be argued that the focus of administrative law, and of the courts (and by implication, the tribunals) that dispense it, is not the attainment of administrative justice for individuals, but merely the 'declaration and enforcing of the law which determines the limits and governs the exercise of" administrative power.[3] Again, in this article I have assumed to the contrary.

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Merit review and policy: the common law position

The current common law principles guiding a review body's approach to policy are based on the judgment in *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 ('*Drake'*). *Drake* was heard before Brennan J, then President of the Administrative Appeals Tribunal ('AAT'). The administrative decision at issue was the subject of a previous finding by the AAT that had been appealed to the Federal Court and remitted to the AAT by that court for re-hearing.

At issue in *Drake* was a decision by the Minister for Immigration and Ethnic Affairs to deport Mr Drake pursuant to section 12 of the *Migration Act 1958*. That section provided that the Minister could deport a person who was an 'alien' if that person had been convicted in Australia of a violence-related or drug-related crime and been sentenced to 12 months imprisonment or longer. At the time of the Minister's decision, Mr Drake was an alien and had been sentenced to 12 months imprisonment for possession of cannabis.

Mr Drake appealed to the AAT from the Minister's decision. There were a number of factors in Mr Drake's case which weighed against the exercise of the discretion to deport him. For example, Mr Drake had an Australian son and partner whose lives would be negatively affected by his deportation. The ground of Mr Drake's appeal was that the 'correct or preferable' decision required these factors be given greater weight than other factors supporting Mr Drake's deportation.

The Minister's decision was defended as having validly given greatest weight to the public interest in deporting those who posed a criminal threat to the Australian community; 'validly' because this weighting of competing factors was guided by a statement of government policy. A central question then was the extent to which the AAT was required to apply that policy. The answer to that question could not be discerned from the *Administrative Appeals Tribunal Act 1975*, as that Act did not (and does not) contain a provision equivalent to s 28 of the SAT Act.

The conclusion arrived at by Brennan J in *Drake* was that the AAT should adopt 'a practice of applying lawful ministerial policy, unless there are cogent reasons to the contrary.'[4] This statement of the relationship between merit review and policy raises a series of questions.

When is a policy lawful? Brennan J referred to a series of grounds on which a policy would be unlawful: unlawful fettering of discretion, unlawful consideration of irrelevant matter (or failure to consider relevant matter), and unlawfulness due to improper purpose. Is a review body required only to apply policy authored by a Minister: what of policy made by the department responsible for administration of the legislation under which a decision is made? In *Drake* Brennan J advocated the application of 'ministerial policy'. However what constitutes 'ministerial policy' is unclear in a number of circumstances: for example, when a ministerial statement as to the exercise of a discretion is in an ambiguous form[5] or when a departmental guideline exists in published, if not public, form and so is known (or at least should be known) to the Minister responsible for administering the department[6].

How is policy to bear on the decision of a review body? In *Drake*, an answer to this question is embedded in Brennan J's discussion of unlawful fettering of discretion. In the course of that discussion, Brennan J observed:

> That is not to deny the lawfulness of adopting an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the Minister usually applies.[7]

So when Brennan J speaks of a review body 'applying' policy he envisages that body engaging in a decision-making process 'guided', not 'controlled', by policy.

What are the 'cogent reasons' that will negate a review body's obligation to apply policy? In *Drake* Brennan J stated:

> If it were shown that the application of ministerial policy would work an injustice in a particular case, a cogent reason would be shown…[8]

In this statement, Brennan J makes it clear that policy is not to be applied to merit review where its application would produce an outcome that results in injustice to the individual.

Section 28: its scope and operation

Section 28 of the SAT Act requires SAT to 'have regard to' a policy applied by the original decision-maker. Provisions requiring a tribunal to consider policy in the course of merit review are also contained in Victoria's *Victorian Civil and Administrative Tribunal Act 1998* (see s 57) and New South Wales' *Administrative Decisions Tribunal Act 1997* (see s 64). Western Australia's s 28 is closely based on Victoria's equivalent provision. In the course of examining the scope and operation of s 28, I refer to these other provisions to the extent that they provide guidance as to the interpretation of s 28.

The kind of policy to which SAT must have regard under s 28 is limited in two significant ways:

(a) the policy must be one that a minister has certified as having been, at the time the original decision was made, 'published in the *Gazette* under a written law' and applied to previous decisions of the same kind as the decision under review; and

(b) the policy must not be 'outside power'.

On the face of it then s 28 appears to adequately circumscribe the role of policy in administrative review, and to do so by reference to basic rule-of-law and democratic principles. Limiting SAT's s 28 obligation to gazetted policy is consistent with the principle that a person should not be bound by a law about which they could not have known. Gazettal achieves public notification. In turn, limiting SAT's s 28 obligation to policy that has been previously applied is consistent with the principle that a law is to have general application rather than discriminatory application to a targeted individual. The previous application of a policy verifies the general nature of that policy. Finally, limiting SAT's s 28 obligation to policy that is within the power given to the primary decision-maker under the enabling statute ensures that the power of the administration is contained within the limits defined by the elected legislature.

However certain aspects of s 28 undermine, or at least have the potential to undermine, these limitations on SAT's obligation to apply policy in the course of review.

In *Drake*, Brennan J advocated consideration of 'ministerial policy' in the course of review.

Section 28 goes beyond this position, in so far as it does not make reference to the source of the policy which SAT must apply. This approach stands in contrast to NSW, where the tribunal's obligation to apply policy is limited to a policy 'adopted by' either the Cabinet, the Premier or the Minister. In Western Australia then, a policy authored by a member of the public service could be gazetted, applied to a series of decisions and so come within the scope of SAT's s 28 obligation. Perhaps the true importance of certification by the Minister (as required by s 28) is that, in such circumstances, it will give Ministerial imprimatur to

departmentally-authored policy. It is arguable as to whether this gives rise to 'ministerial policy' in the sense intended by Brennan J.

SAT's obligations under s 28 are limited to policy which has been applied in previous decisions. This limitation is an important means of protecting a person from policy formulated specifically to influence their case. However the wording of SAT's obligation to apply policy, undermines this limitation. SAT is obliged to apply policy 'as in effect at the time of the review'. Does this permit the modification of policy in the period between the original decision, and SAT's decision? Writings by a founding member of SAT suggest that SAT will find that it does.[9]

There are two distinct views which bear on the question as to whether a government may modify relevant policy in the course of review. If policy is viewed as part of the body of facts relating to a decision, then it falls within the scope of the proposition that a review body bases its decision on the facts existing at the time of the review.[10] This appears to be the view of policy that informs the NSW legislation that confines the tribunal's policy obligations to 'policy in force at the time the reviewable decision was made'. If policy is viewed as akin to the law under which a decision is made, then it falls within the scope of the proposition that a review body applies amended law in force at the time of review, except to the extent that the amendments diminish individual rights.[11] This appears to be the view of policy that informs s 28. In my view, the interests of the individual are undermined to the extent to which government is permitted to modify policy to achieve the outcome it desires in individual review cases.

SAT's obligation to consider policy does not apply where the policy is 'outside power'. This provision goes to the lawfulness of a policy: but it is not clear which of the common law grounds of unlawfulness will render a policy 'outside power' for the purposes of s 28. A narrow application of this aspect of s 28 could confine unlawfulness to circumstances in which a policy is inconsistent with the terms or purpose of the statute under which a decision is made.[12] Accordingly, unlawful fettering of discretion, for example, could be viewed as a matter within (rather than outside) power. If this narrow approach were applied, SAT could be bound to apply highly restrictive policy, and, to borrow Brennan J's terminology, be 'controlled' rather than 'guided' by policy. While this scenario is an extreme one, it is a possible one and therefore illustrates the extent to which the scope of SAT's s 28 obligation will turn on SAT's attitude towards the common law principles of unlawfulness.

To this point I have discussed matters going to the question of whether policy is of a kind that SAT must consider. But, having established that a policy falls within the scope of the obligation on SAT under s 28, how does that policy bear on SAT's decision making process? Section 28 requires SAT to 'have regard to' policy. In my view this expression is an attempt to give effect to Brennan J's view that a review body is to be 'guided' but not 'controlled' by policy falling within the scope of s 28. The freedom bestowed on SAT by the expression 'have regard to' is perhaps best understood by reference to the way in which the NSW tribunal is constrained by the obligation to 'give effect to' policy: while SAT is required to consider policy, its NSW's equivalent appears to be required to implement policy.

In concluding this interpretation of the meaning of s 28 it is important to note that a critical element of the principle articulated by Brennan J in *Drake* was the power of a review body to choose against the application of policy where the result of such application would produce injustice to the individual.[13] SAT has been divested of this power by s 28.[14] If a policy has been gazetted, applied previously and is within power, SAT must apply that policy without regard to whether it produces injustice for the person affected by the decision. This is contrary to the recommendations of the two inquiries that preceded, and inspired, the establishment of SAT.[15]

To date, s 28 has not been determinative of the outcome of a decision by SAT. While several cases have come before SAT involving the question of how policy is to bear on the review decision, the cases have been in the context of planning law, which has its own unique principles governing the approach to policy.[16] Section 28 has not been viewed by SAT as applying to these cases. Therefore, at this point in time, how SAT will interpret s 28 is an open question.

What does administrative justice require in relation to policy and merit review?

In the course of interpreting s 28 I have commented on departures from, and the challenges in applying, the principles in *Drake*. To the extent that *Drake* represents the proper approach to merit review and policy – 'proper' in so far as administrative justice is achieved by that approach - then s 28, in its departures from *Drake*, fails to achieve administrative justice. However, does *Drake* represent the 'proper approach' for review bodies striving for administrative justice?

The central rationale for requiring review bodies to apply policy derives from the assumption that policy is a valid means by which a government implements its political agenda. From this assumption, it is argued that a review body must apply policy since to ignore it would undermine the political process and usurp the power that properly resides in elected representatives. This is the reasoning that underpins Brennan J's principle in *Drake*. [17] Other arguments exist to support this central rationale: justice requires consistency in decision-making and such consistency can only be achieved by adherence to policy[18]; the judicial-like process in which review bodies engage is unsuited to consideration of the public-interest element of administrative decisions[19]. I believe these latter arguments are "supporting" rather than "central" in so far as they ignore what I regard to be the fundamental question underlying the debate about policy and merit review: what, from the perspective of political theory, is the proper role of government in the administrative review function of the state? In so far as these latter arguments are "supporting" I do not intend to engage with them.

I reject the central rational for considering policy in the course of merit review. My reasons are as follows.

Democratic theory requires that political power be limited. One means of limiting power is to divide it, vest that divided power in separate institutions and impose an overriding constitution preventing each institution from usurping the power of the other. This is the rationale underlying the separation of powers doctrine that inspires the design of the Australian polity. This doctrine requires the division of power between legislature, executive and judiciary. The role of the legislature is to make the laws which regulate the activities of citizens, while the role of the executive is to administer that law.

However, in reality, the roles of legislature and executive are blurred. Social activity is complex and, as a result, a legislature, when attempting to regulate a particular activity, may not always be able to articulate a rule with universal application. Sometimes a legislature must leave open the question of how the law is to apply to individual cases, and vest the power to answer that question in an entity able to consider the proper application of the law in individual cases as they arise.[20] In general that power is vested in the executive, be it either a minister or a member of the public service (who is answerable to the minister, and therefore part of the executive). So is the executive, when exercising such power, administering the law, or making law? To the extent that a decision-maker is exercising a discretion that is un-guided by decision-making criteria articulated in the empowering statute, that decision-maker is making law.

Creation of decision-making power is unavoidable in the modern polity. However, the legislature abdicates its legislative-making responsibility to the extent that it vests decision-

making power in the executive and fails to articulate the criteria by reference to which that power is to be exercised. Conversely, to the extent that the executive directs decision-making by means of policy, it is usurping the role of the legislature. The democratic ideal, and more specifically separation of powers doctrine, requires that a government implement its agenda through the legislative process: this democratic imperative overrides the argument that the legislative process is too unwieldy a tool for implementing a political program.[21] Where the nature of a decision is such that the decision-making criteria must be responsive to changing circumstances, then the legislature can delegate the power to articulate those criteria. The legislature will not be abdicating its role to the extent that such directions are to be tabled, and are disallowable.

What then does this mean in relation to merit review and policy? It negates the central rationale for requiring review bodies to consider policy. What remains are these propositions: The focus of merit review is administrative justice, that is, the protection of individuals against the unjust exercise of administrative power. A review body cannot fearlessly check the exercise of administrative power if its decision-making process is subject to government control. Given these propositions, I do not believe *Drake* represents the 'proper approach'. In my view, merit review should operate independently of policy, and a review body should address itself solely to the issue of justice for the individual. Section 28 is a radical departure from this approach.

Conclusion

Section 28 of the SAT Act reflects general political dissatisfaction with the failure of review bodies to defer to government policy in the course of review.[22] Section 28 reflects the Western Australian Parliament's unanimous intention to curb the freedom that *Drake* established for review bodies: 'unanimous' in so far as after referral to the Standing Committee on Legislation and scrutiny before both Houses of Parliament, s 28 retained the form in which it was expressed in the bill introduced in June 2003. Applying either the *Drake* standard, or the ideal I have argued for in this article, s 28 diminishes SAT's ability to provide administrative justice.

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Endnotes

1 For an example of such a provision see *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287
2 For an article embodying the role of review bodies assumed in this article, see G Brennan, "The Anatomy of an Administrative Decision", (1980) 9 *Sydney Law Review* 1 at 9; the contrary view is implicit in *Committee on Administrative Discretions: Final report* (1973) (Bland Report) see para 172(e).
3 *Attorney General (NSW) v Quin* (1990) 93 ALR 1 at 25 per Brennan J
4 *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, at 645
5 See *Re Everfresh Seafoods Pty Ltd and Australian Fisheries Management Authority (1997)* 45 ALD 418 at 423 in which a ministerial press release was found not to be binding on the AAT.
6 See *Re Lumsden and Secretary, Department of Social Security* (1986) 10 ALN 225, in which the court rejected the argument that it was bound by a departmental guideline.
7 Ibid., n. 4 at 641
8 Ibid., n. 4 at 645
9 Eckert J., 'Detailed overview of the State Administrative Tribunal (SAT) legislation', *Brief* 32 (Feb. 2005) 6 at 10-11
10 For the application of this proposition see *Re Greenham and Minister for Capital Territory (1979)* 2 ALD 137 at 141
11 For the application of this proposition see *Esber v Commonwealth (1992)* 174 CLR 430
12 See *Green v Daniels (1977)* 13 ALR 1 for a case in which policy was not binding because it was inconsistent with the terms of the empowering statute
13 Ibid, n. 4 at 644
14 While the Victorian tribunal has also been divested of this critical power, it is retained by the NSW tribunal.
15 *Report of Tribunals Review to the Attorney General by Commissioner Gotjamanos and Mr G Merton*, August 1996, at p. 57; *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal*, May 2002, at 131.
16 See for example *Gangemi and Shire of Augusta-Margaret River [2005]* WASAT 113
17 Ibid., n. 4 at 644. See also M Kirby, 'Administrative Law: Beyond the Frontier Marked 'Policy – Lawyers Keep Out'", (1981) 12 *Federal Law Review* 121 at 146
18 Ibid, n. 4 at 639
19 Ibid, n. 4 M Kirby at 149-150
20 *Re Aston and Secretary, Department of Primary Industry (1985)* 8 ALD 366 at 380
21 For comment on the unwieldy nature of legislative process, see L Woodward, 'Does Administrative Law Expect Too Much of the Administrator?' in S Argument (ed), *Administrative Law & Public Administration: Happily Married or Living Apart under the Same Roof?* (1993, AIAL) at 42; also ibid, n. 4 M Kirby at 146
22 For comment on general political dissatisfaction see J McMillan, 'Review of Government Policy by Administrative Tribunals', (1998) 9 *Law and Policy Papers* 27 at 27-29