# DUTY TO CONSULT IN CANADIAN PUBLIC LAW : SOME PARAMETERS[†]

(work in progress; please do not cite without the permission of the author)

**FRANCE HOULE**[*]

## OUTLINE



*** * * * ***

## INTRODUCTION

Common law recognizes a right to citizens to participate in governmental decision, but only when their individual rights and interests are affected. We are all familiar with the application of the principles of natural justice in administrative adjudication. However, the principles do not apply when the government is about to make a decision of a legislative nature. Besides providing for a notice and comment procedure in some statutes (which represents the bare minimum in terms of participatory rights) Parliament and legislatures have not yet showed great interest on this question. Governments appear to be more supportive of the idea to take into consideration the views of their stakeholders when they are proposing regulations. To this end, they have prescribed regulatory policies.

---

[†] The author thanks the Quebec Fund of Research on Society and Culture as well as the Canada Social and Human Sciences Research Council for their financial assistance.

[*] France Houle is an Associate Professor at the Faculty of Law, University of Montreal.

In this paper, I will describe the regulatory policy of the Federal Government as applied to the solicitation of views of stakeholders affected by proposed regulations. This policy started to be developed in an informal manner in the late 1970 in the form of guidelines. In 1986, the Federal government approved a formal policy, the *Regulatory Policy*[1]. The last version of this policy, approved in 1999, includes the *Regulatory Process Management Standards.* These standards impose mandatory requirements on the Public administration when it proposes new regulations or modifications of existing ones. In addition, there is a section dedicated to consultation:

> Regulatory authorities proposing new regulatory requirements, or changes to existing regulatory requirements, must carry out timely and thorough consultations with interested parties. The consultation effort should be proportional to the magnitude of the impact of the proposed regulatory change. Notice of proposed regulations and amendments must be given so that there is time to make changes and to take comments from consultees into account.
>
> 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.
>
> Consultations should begin as early as possible in order to get stakeholder input on the definition of the problem, as well as on proposed solutions.

This paper will focus on the application of some of the requirements of the Federal Regulatory Policy, namely the Regulatory Impact Analysis Statement and the consultation process followed during the making of a regulation. This policy is not a formal legal document and cannot be enforced by courts. However, it is now regular practice for the Federal public administration to consult its stakeholders. Does this practice raises legitimate expectations? So far, the Federal Court of Canada gave a negative answer to this question, but this may change in the future and perhaps with the development of case-law in the field of aboriginal law. Although the duty to consult Aboriginal peoples is based on s. 35 of the Constitution Act, 1982, the legal parameters that are developed by the Supreme Court with respect to adequate consultation, and in particular for regulation affecting aboriginal rights, will provide basic standards which may be, in turn, applied in favour of all stakeholders and perhaps the public in general. The principles which may be used by judges to support such a legal development could be democracy and accountability.

On the principle of democracy, it is useful to quote the Supreme Court of Canada in the *Reference re Secession of Quebec*:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and

[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.

> an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live[2].

On the principle of accountability, the Court referred to it in the quote above but it is also important to take note of governments' initiatives, and especially those by OECD members, to adopt statutes providing for accountability measures. During the Fall of 2006, the Canadian government adopted its *Federal Accountability Act*[3].

In the first part of this paper, I will focus on the duty to consult with citizens during a rule-making process. In the second part, I will briefly describe some principles emerging in the Supreme Court case-law pertaining to the Crown's duty to consult with Aboriginal peoples.

## PART I – DUTY TO CONSULT WITH CITIZENS DURING A RULE-MAKING PROCESS

The obligation to measure the impacts of a proposed regulation was one of the important tools that was created to address the economic crisis which was perceived to be directly linked to the imposition of burdensome regulations by the 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 and was committed to ensure that the government's regulatory powers would be used only when they would result in a socio-economic benefit to the population.

To achieve this goal, the Canadian Federal Government approved a regulatory policy in 1986 requiring departments and agencies to analyse the socio-economic impact of any new regulatory requirements or regulatory changes[4]. From then to now, a Regulatory Impact Analysis Statement (RIAS) accompanies a draft regulation and both documents are published in Part I of the *Canada Gazette* for notice to and comments by interested parties. After the allocated time for comments has elapsed, the regulation is adopted with a final version of the RIAS. Both documents are then published in Part II of the *Canada Gazette*. As a result, the RIAS acquires the status of an official public document of the Government of Canada and its content can be argued in courts as an extrinsic aid to the interpretation of a regulation.

In the first section, I provide general background information on the RIAS. In the second section, 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.

---

[2] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 68.

[3] *Federal Accountability Act*, C.S. 2006, c. 9, received royal assent on December 12, 2006.

[4] 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.

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, the 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.

A sample of decisions classified as unorthodox show that judges are making determinations on the basis of two very 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 systems?' 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 by reporting, in the second section, on some data gathered through empirical research conducted on the consultation process followed by Citizenship and Immigration Canada during the formulation of the Immigration and Refugee Protection Regulations.

## Section 1. The Regulatory Impact Analysis Statement

The content of a RIAS mainly derives 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 make 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 their benefits against their 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 (the public interest) that it will be approved by the Governor-in-Council (the Cabinet). 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. The reasons underlining this choice of ends will be briefly outlined and thereafter a summary of the content of the RIAS will be made.

### a. Objectives and Content

Although many criticisms were formulated 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 very long in Canada. Indeed, the deregulation project was quickly replaced by a questioning of the quality of regulatory programs. However, one of the main causes cited for poorly designed regulatory programs remained: the government machinery. Indeed, the perception was (and still is) that the public administration was acting only for reasons of administrative commodity. The interests of the public came second when it was time to design regulatory programs.

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 on the implementation of the concept of 'smart regulation' (each letter of the word 'smart' referring to a concept: **s**ound, **m**odern, **a**ccountable, **r**esults-based and **t**ransparent). 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 (i). In order to meet these substantial goals, a procedural framework was needed to provide for their implementation in the public administration. Since its first appearance on the Canadian federal regulatory scene, the basic content of the impact analysis

statement has not changed significantly. However, the Privy Office Council issued a guideline in 1992 describing the content of a RIAS. The *RIAS Writer's Guide*[5] was central to the achievement of greater uniformity in the drafting of impact analysis statements throughout the Federal Public Administration (ii).

**i) Accountability and Transparency**

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. They could no longer reduce problems to their simplest expression in order to be able to apply their own rules and procedures. For example, they could not inform themselves by exclusively resorting to formal exigencies of administrative law. A government cannot regulate simply because a statute empowers it to do so. They also needed to learn to take several parameters into consideration when devising regulatory programs, and not only the ones that would serve the maximisation of their budget and their field of competence. Indeed, when regulatory authorities have adopted a narrow analytical framework in the past, it led them, for example, to copy one regulatory system on top of the other, without really addressing the particular needs of social and economic systems into which regulations will operate.

These bureaucratic failures were understood as a direct consequence to the lack of constraints placed on departments and agencies to justify any regulatory initiatives based on their soundness from social and economic perspectives. This lack of accountability of regulatory authorities was notably addressed through the obligation to produce a RIAS: regulatory authorities would justify their decision to regulate by showing that a problem exists, that the best solution to solve it is to adopt a regulation because the net benefits for the population are greater than their inconvenience[6].

Improving transparency was another key-issue to 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 contends to know the cause at the root of a problem and the best cure, why not submit its views for scrutiny to those who are affected by its proposed regulations? On 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 so well accepted, just 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 in fact very 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.

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 the elaboration of the regulatory policy. This is an informal procedure and the only record available is the short summary that one can find in the first version of the RIAS. Once the government decides to go ahead with its project of making 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

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

[6] Many monographs were written on regulatory reforms especially in United States. A good book to start with is the legal analysis done by 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.

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?

**ii) Information Contained in a RIAS**

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

Section two is called *alternatives*. Here, the regulatory authority must show that it explored other means of fixing the problem, rather than simply taking for granted that a regulation is the only adequate instrument at hand. Other possible instruments are, for example, voluntary standards, tax credits, insurance, user fees and marketable property rights.

Section 3 is called *benefits and costs*. The regulatory authority must design regulation in such a way that it will maximize the gains to beneficiaries in relation to the cost to Canadian governments, businesses and individuals. 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 on 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.

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

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

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

Different types of information are contained in a RIAS, but in support of the argument made in this article, it is important to remember the following points. This information intends: (1) to persuade potential readers that the regulation conforms to government policy; (2) to provide to those who would 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 on the results of the consultations.

* * * * * *

In sum, these justificatory and consultative functions of a RIAS were designed to meet the exigencies of the principles of accountability and transparency which gradually imposed themselves in the

machinery of contemporary government throughout the second half of the last century. But although the RIAS was crafted to enhance the integration of these two principles into the daily operations of the government machinery, it quickly lost its sole administrative vocation to become an official public document which, over time, assumed added legal value. Indeed, it is now used by Federal Court of Canada judges as an extrinsic aid to interpretation.

### b. Use of RIAS by the Federal Court of Canada

From 1988 to 2005, there are 126 decisions from the Federal Court (trial and appeal divisions) in which a reference to a RIAS appears[7]. Although these numbers may appear low at first glance, they are not when compared to the use of other types of legislative history materials during the same period of time. Indeed, the RIAS is now used by the Federal Court as often as the very well known Hansard (existing for over 100 years) and which provides a transcription of the House of Common Debates[8]. It is even more interesting to note that when the period of time is narrowed to 1998-2005[9], the RIAS is cited almost twice as much (cited in 85 decisions) as the Hansard (cited in 49 decisions). Of course, numbers are only one of the many variables that one should consider to report on complex phenomenon 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 that judges now rely on to come to an interpretation of a regulation that they perceive persuasive and legitimate.

For a better understanding of this phenomenon, it is necessary to proceed with a classification of the cases. In order to distinguish between relevant and irrelevant decisions, cases were first classified into two categories: descriptive and normative. A descriptive use of a RIAS means that the information contained in this document 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. Descriptive use of a RIAS is found in 34 decisions which represent 27 percent of all cases. A descriptive use of a RIAS in a judgment is not contentious in legal theory on construction of statutes and regulations. For this reason, these 34 decisions are considered irrelevant and were set aside.

The remaining 92 decisions (representing 73percent of all 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. This category, called ‘normative in a weak sense’, is comprised of 16 decisions (13 percent of all cases). They are also excluded from the sample of decisions which will be used for the analysis proposed 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 of cases used in this sample to 76 out of 126 (60 percent of all cases). This sample formed a category that I call ‘normative in a strong sense’, because the influence of the RIAS is explicit

[7] The research was made from the QuickLaw Data Bank available on line. It will be updated when the paper will be closer to its final form.

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

[9] 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.

on the interpretative reasoning of judges. They clearly use a RIAS as an extrinsic aid to construct their interpretation of a regulation.

In the common law tradition, legislative history material was not clearly permitted to be used until the English decision in *Pepper* v. *Hart* in 1992[10]. Since then, Canadian judges have started to refer to legislative history material in their judgments, but parsimoniously, until the Supreme Court of Canada clarified the situation in a series of four cases made between 1997 and 1999[11]. 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 interpretation. The Court stated that this type of material is admissible to interpret statutes and regulations without any restrictions as long as the information contained in it is 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. 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). Thereafter, 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.

Based on the application of these principles, it was possible to make 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 categories of use of a RIAS: orthodox and unorthodox. Out of the 76 decisions, there are 44 (58 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 usual intrinsic methods of interpretation that she confirmed it with the information contained in a RIAS. In these decisions, a RIAS is treated as one relevant source only. It is helpful information to resolve the interpretative issue, but not decisive. The remaining 33 decisions (43 percent NSS; 26 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 which are also divided into two categories: technocratic and democratic.

### i) Technocratic Use of a RIAS

The category called 'technocratic' is comprised of 24 decisions (32 percent NSS; 19 percent of all cases). When judges use the information contained in sections 1 (description), 2 (alternatives) and 3 (benefits and costs) of the RIAS, I call this use '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. In this category of cases, judges go beyond what is permitted by case-law for they have used a RIAS as the sole source to either determine the purpose or the meaning of a regulation, the validity of a regulation, or the meeting of conditions in interlocutory proceedings.

Right at the outset, it is to be noted 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

---

[10] *Pepper (Inspector of Taxes)* v. *Hart* (1992) 3 WLR 1032 (HL).

[11] *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)*, *supra*, note 6; *R.* v. *Gladue*, [1999] 1 S.C.R. 688.

meaning of the law has to do with the presumption of the *knowledge* of the law by the governed. Citizens must understand the rules and this understanding has to be stable and predictable. Looking into 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. Through parliamentary deliberations, representatives come to adopt legal rules, some of them delegating legislative functions by conferring regulatory powers to the government.

The presumption of the 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'[12] after a simple reading of the rule. This is one of the reasons for which, up until the turn of the last century, judges preferred a literal approach to interpretation of legal rules[13]. 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, up until the Welfare State, it was understood that the main function of judges was to give effective protection to individuals' rights and freedoms. This contextual background against which a judge had to ascertain the meaning of the rule was relatively one-dimensional.

The implementation of the Welfare State resulted in the creation of legal schemes which would require from 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 was rarely stating its goals explicitly in a statute, judges' findings were fragile from a legal perspective as well as open to criticisms from a legitimacy perspective. In order to solidify judge's reasoning in this regard, they were thereafter permitted to use extrinsic aids to support their interpretations. As a result, a balancing of the interpretation findings between the 'text' and the 'intrinsic/extrinsic contexts' became the new interpretative current and, in 1998, the Supreme Court officially adopted this 'modern method to interpretation' in *Rizzo & Rizzo Shoes Ltd*[14]. Later, in *Bristol-Myers Squibb Co.*[15], majority and minority judges of the Supreme Court proposed different frameworks of analysis of the modern method of interpretation (the 'successive circles of context' and the 'step-by-step' aproaches[16]), but suffice to say that in both cases, a RIAS was resorted to for the examination of the purpose of the regulation which was under scrutiny in the case at bar.

Understanding the rationale of using a RIAS to support an interpretation is one thing; using it as an authoritative source is quite another. At the beginning of the last century, it was generally recognized that a trial judge could not abdicate responsibility for the interpretation of legislation to a civil servant[17]. 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, notably canvassed in

---

[12] *R.* v. *Boutcher*, [2001] NFCA 33, para. 83.

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

[14] See *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra* note 6, para. 21.

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

[16] *Id*., para. 44, Binnie J. for the majority who 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 more structured framework of analysis since an analysis the text of the rule is made first; second, is the analysis of its intrinsic context and; third, the interpreter makes an analysis of the extrinsic context (see paras 104 and *ff)*. Although more structured, Bastarache J. says that it should not be viewed as an interpretation made in a 'formulaic manner' (para. 96).

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

the principles of independence and impartiality of judges[18]. For this very reason, conciliating the use of extrinsic aid to interpretation to 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[19].

However, this sample of Federal Court decisions show that judges give greater weight to this type of information than legal principles would officially authorize. Although this result may be partly due to unclear guidelines of the Supreme Court regarding this issue[20], it may also be the result of the evolution of our legal systems. Therefore, it is possible that judges see the examination of this material as one central condition to correctly assess 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[21].

This avenue of research highlights a worthy dimension to the question 'what makes law knowable'. 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 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 if he chooses to defer to the expertise of civil servants. Therefore, the choice of analytical framework is a crucial question to be resolved as it will have an effect on our understanding of the doctrine of separation of powers, if, indeed, the 'successive circles of context' framework were to lead judges to a greater technocratic use of the RIAS. In this regard, another topic of 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*. The dialogue metaphor requires courts to be open to arguments, show cooperation and mutual respect to the various actors in the constitutional order. It is in this sense that the interaction between the various branches of government is 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"[22].

### ii) Democratic Use of a RIAS

With respect to the second category, it is important to recall that the other purpose for which a Department or an Agency is required to produce a RIAS is for consultations with the population. Therefore, when judges are using the information found in the fourth section ('consultations') of the RIAS, I call this use 'democratic' because judges rely on information such as 'who' commented on the proposed regulation and 'what' was the gist of their comments as an argument to reach a decision on the validity of a regulation. These decisions display an unorthodox use of a RIAS because judges build uncommon legal arguments to support their findings regarding the validity of a regulation. For example,

---

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

[19] See also *R.* v. *Boutcher, supra*, note 14, para. 76 where Marshall J.A. stated: 'such Statements have rapidly come to be recognized as authoritative sources of purpose and intent in construing federal legislation'.

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

[21] 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, para. 95 (Bastarache J. dissenting); *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 55.

[22] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, para. 139.

it was argued in a case that a regulation was invalid because, *inter alia*, it was based on misleading information which was the results of a badly conducted consultation process[23]. In other cases, the regulation or a decision based on a regulation was found to be valid, because, among other arguments, the government consulted the stakeholders before it approved the regulation as it was shown in the RIAS[24]. Finally, in the majority of these cases, counsels argued that their client had legitimate expectations to be consulted during the rule-making process and the failure to do so affected the validity of the regulation[25]. In the nine decisions forming this category (12 percent NSS; 7 percent of all cases), the sitting judge assumed, although implicitly, that Canadians agreed or did not agree to the new legal order which was put in place as a result of the consultations or a lack thereof[26].

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 which could be better embedded in our legal systems if, at the very least, one condition was met: a legal obligation to consult minimally with stakeholders representing competing interests. However, since 1986, the Canadian government has chosen to impose itself an administrative duty to consult, not a legal one. Therefore, given the slow pace at which the government moves, is it the duty for courts to intervene more robustly in this debate? First, 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 regulation at the beginning of last century. Second, it is important to mention that one judge of the Federal Court of Appeal made a significant contribution to this debate, but his dissenting opinion went unfortunately unnoticed.

In *Apotex*[27], Evans J.A. proposed an interesting development to the doctrine of legitimate expectations. This doctrine, as explained by the Supreme Court, "is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can only create a right to make representations or to be consulted."[28]. As Evans J.A. rightly pointed out in *Apotex*, the Supreme Court specifically said "that the doctrine has no application to the exercise of legislative powers as it would place a fetter on an essential feature of democracy". In the realm of the exercise of delegated legislative powers, however, Evans J.A. stated that similar considerations do not apply because these powers are not subject to the "same level of scrutiny as primary legislation that must pass through the full legislative process". He concluded that "in the absence of binding authority to the contrary, the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need." [29]

The permission to appeal this decision to the Supreme Court was denied, but this refusal to hear the case leaves the door open for later consideration of this very issue. In the meantime, the question remains: when the expectations of the stakeholders to be consulted are met, does it mean that they accept the regulations that were adopted, as some decisions of the Federal Court suggest? To answer this question satisfactorily, empirical research is necessary and, in particular, conducting interviews with stakeholders would be crucial to form a better understanding of their representations in this regard. For

---

[23] *Teal Cedar Products (1977) Ltd.* v. *Canada*, [1989] 2 F.C. 135 at 140.
[24] For example, see: *Cousins* v. *Canada (Minister of Agriculture)*, 1993 F.C.J.No. 581, para. 24 (QuickLaw).
[25] The most interesting reasons in this regard are those of Evans J.A., dissenting, in *Apotex Inc*. v. *Canada (Attorney General)*, [2000] 4 F.C. 264, 268 and *ff*.
[26] *Rogers Communications Inc.* v. *Canada (Attorney General)*, [1998] ACF no 368, para. 13 (QuickLaw).
[27] *Apotex Inc.* v. *Canada (Attorney General)*, *supra* note 12. Leave to SSC denied [2000] S.C.C.A. no 379.
[28] *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at 528.
[29] *Apotex Inc.* v. *Canada (Attorney General)*, *supra* note 12, at 268.

the moment, the only information available for analysis is the one which should be found in section 4 of a RIAS called 'consultations' as per the instructions of the *RIAS Writers' Guide*. Recall that this section should provide information on: (1) Who was consulted; (2) Mechanisms used to consult; (3) Discussions on the results of the consultation, and; (4) Name of any group still opposed to the regulation. The scope of this article does not allow for a comprehensive examination of the information contained in these four subsections from a sample of regulations and their RIAS in different fields. However, a summary examination of the 33 RIAS produced with the *Immigration and Refugee Protection Regulations* in 2002 shows that the Immigration Department followed the instructions in the *RIAS Writers' Guide*.

* * * * *

To sum up, the application of presumptions such as 'knowledge of the law' and 'acceptance of the law' appeared 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. Although, these are new directions which open interesting avenues for future research, empirical data at the Citizenship and Immigration Department show that the consultation process which is followed is not very rigorous. This indicates that one should not rely too heavily on the content of a RIAS; either its substantive or procedural contents.

## Section 2. A Preliminary Account of a Case Study on a Consultation Process

In 2004, I completed the primary research phase of a project studying, among other things, the consultation process followed by the different divisions of Citizenship and Immigration Department during the formulation of new Immigration and Refugee Protection regulations. This primary research consisted of a series of interviews conducted over a period of twelve months with as many divisions of the Department as possible.

I interviewed civil servants working in 11 different divisions of the Department focusing on immigration matters, as it was the subject-matter of the proposed regulation. These civil servants were either in charge of, or involved in, the consultation process that was followed during the formulation of the regulation. They were working in the following divisions: legal, medical, cost recovery, sponsorship, selection, enforcement, ports and border, citizenship, administrator of regulatory matters (coordination of consultations), refugee resettlement, and visa policy.

On the specific subject of consultations, interviews focused on four general themes: a. Knowledge about Stakeholders; b. Dynamic of Consultations; c. Reasons Underpinning Consultations; d. Procedural Aspects of Consultations. The analysis of the data collected during the interviews is not yet completed. The results are preliminary and the issues raised by the findings are tentative.

### a) Knowledge about Stakeholders

The main objective of this theme was to ascertain whether the civil servants in charge of consultation process, in each division included in the research sample, had a clear idea of who their stakeholders were.

A stakeholder is an old concept in the law. This person was originally the one who holds money or other property while its owner is being determined. However, in the last 20th century, the word

stakeholder took another meaning: it is used to describe a person or an organization with a legitimate interest in a project or entity.[30] In this sense, a stakeholder is a concept used to speak of any interested party in the regulations to be adopted, be they individuals or groups affected by them.

In the Federal Regulatory Process Management Standards[31], it is said that authorities must be able to identify and contact interested parties including, where appropriate, representatives of labour and consumers' groups.

Were civil servants, who were involved or in charge of the consultation within the Citizenship and Immigration Canada (CIC), able to identify their stakeholders? The results of the interviews revealed that stakeholders are divided into two groups : *governmental stakeholders* and *civil society stakeholders*. Governmental stakeholders include other governments, such as other divisions in CIC and federal departments and agencies as well as provincial and municipal governments. All of the participants identify these parties as *governmental stakeholders*. The *Civil society stakeholders* is a more loosely defined category. It can include practitioners, NGO's and public interest groups as well as any individual affected by the regulatory policy. Each civil servant is in charge of making a determination as to who is a stakeholder for the purpose of consultation within his or her division. As one participant put it:

> "[ … ] you want to make sure that you consult widely enough that you're hitting your target audience, but not so widely that you're diluting opinions, because that could be a problem."

Although there is some value to let civil servants of each division determine their stakeholders, the interviews showed there is some confusion among the CIC civil servants with regards to the identification of their stakeholders, the difference between the two stages of the consultation process and the very meaning of the concept of consultation itself.

Concerning the identification of the stakeholders, some participants were able to clearly name the complete list of their stakeholders. Others were able to name 2 or 3 of their main stakeholders. Finally, some participants were not able to name any of their stakeholders or gave vague answers such as the Canadian Public. Knowing who is going to be consulted in advance is the starting point to a transparent procedure. It is also a more efficient way to avoid undesirable lobbying practices. Individuals and groups intending to participate in the rule-making process should have their name registered in the lobbyist registrar.

On the meaning of the concept, some participants are of the opinion that stakeholders include only experts such as practitioners and NGO's. Other participants are more of the view that any person or group affected by the proposed regulation, whether or not they have any particular expertise on the subject-matter, should be included. In fact, for them the concept of stakeholders was much closer to the idea of that of a client of a Department than that of a stakeholder. This definition is too broad at the first stage of the consultation process; that is to say, at the stage of the development of the regulatory policy. During the first round of consultations, participation should be limited to those whose aim is to influence the development of a policy in a way they consider to be in the public interest. Fixing boundaries on who, among possible stakeholders, can participate meaningfully to a consultation process aimed at quality discussions and debates on regulatory policy options. The aim is quality, not quantity. It is at this stage that the perceived problems and possible solutions are discussed and the choice of instruments made. It is

---

[30] 1 From Wikipedia, the free encyclopedia: http://en.wikipedia.org/wiki/Stakeholder

[31] The standards were established by Treasury Board of Canada and they are applicable to all Departments' Managers. The standards are available on the web site of the Board at : http://www.tbs-sct.gc.ca/ri-qr/ra-ar/default.asp@language=e&page=publications&doc=federalregulatoryprocess_2ffederalregulatoryprocess_e.htm

the most important round of consultations, the one that really matters and this is the main reason for which it is crucial to ensure quality of this process.

Administrative case-law with respect to the choice of interveners during a policy-making exercise of a regulatory agency offer useful guidelines. There are two general rules: a) when a regulatory board has to select persons or groups who will be admitted to intervene during the proceedings, the board must take into account the advantages to hear contributions by responsible and informed persons, and; b) the necessity to save time and energy. Finally, it should be clearly recognized that it is up to the Department to select its stakeholders and invite them to submit their views on a regulatory policy. In addition, those who are not on the list, but wished to be, should be able to request it and state their reasons for which they want to participate in the rule-making process.

On the basis of the information gathered by CIC during the first round of consultations, the proposed regulation and the accompanying RIAS are published in the Canada Gazette. This, in turn, triggers the second stage of the consultation process during which the members of the public in general, including CIC clients, are invited to submit comments. At this point in time, the regulatory policy is decided and it is unlikely that it will be changed, save for minor details. Therefore, this second step of the consultation process should be viewed more as a formality. Indeed, it is interesting to note that in the final RIAS, the one published with the approved regulation, this second step is not called *consultations* but *prepublication*.

**b) Dynamic of the Consultations**

The objective pursued by this set of questions was to form a better understanding as to how the participants approached consultations they undertook with government stakeholders or civil society stakeholders. The gist of the conversation was to find out whether the participants approached consultations with a particular mind set depending on which type of stakeholder they consulted.

Eight participants said that the dynamic of the relationship was not the same with civil society stakeholders. Three of the eight participants were of the view that civil society stakeholders' perspectives were different, but that they were equally important. When they were asked to elaborate on this point, they added that some groups and practitioners have a better understanding on how things work at the operational level and that this knowledge is crucial to design efficient and fair regulations. This indicates that these civil servants approached consultation with an open mind.

Five of these eight participants stated that civil society stakeholders' perspectives were not equal in importance to government stakeholders. They thought that civil society stakeholders' perspective was too narrow, not solution-oriented and confrontational. They also stated that government stakeholders had a better understanding of immigration operations and, as a result, their views have more weight than those of the civil society stakeholders. One participant said:

> "They are advocates, their role is strictly to be a watchdog and that's good, you need that, but it' s not often solution oriented. Also because they are always criticizing, it's very difficult to find a way to solve problems that are going to (inaudible) to others. That makes it difficult because then they will charge that we' re not consulting with the right people, that only they are the right people to consult on the refugee issues and yet (inaudible) not solution oriented enough. That's not their role, their role is to be a watchdog so you know it creates a lot of tension sometimes."

These results indicate that these civil servants do not approach consultations with a mind as open as one would likely hope for. Finally, three participants said that the dynamic of the relationship between both categories of stakeholders, and especially NGO's was the same. When they were asked to elaborate on the similarities, they were not able to explain their answers. This may indicate lack of frankness. If these two last figures are added up, two-thirds of the participants do not appear to have a positive attitude toward consultations. This raises the question of the level of good faith required to engage in a meaningful consultation process and built long-term relationships with the stakeholders.

These findings also suggest that there is a need to define more clearly the purpose of consultations during the development of a regulatory policy. It would be the responsibility of the Department to clearly state in its consultation documentation what they wish to achieve with the consultations they are about to engage in. What is on the table for discussion and debate: Is it possible to discuss their views on what is the problem? The solution they propose? The cost and the benefit of the proposed solution? Its impact of the rights and freedoms? Etc. In sum, more training focusing on specific objectives would be useful.

**c) Reasons for Consulting**

The objective with this theme was to form a better understanding of the perception of the participants on whether they view consultation as an important mechanism in the rule-making process and, if yes, why? Not surprisingly (it is part of the official discourse in the public administration), all of them said that they were of the opinion that consultations are a very important mechanism in the rule-making process. Some were able to substantiate their support with solid reasoning, while others were very vague, indicating a limited understanding of why consultations are important.

Two types of well-founded reasons emerge from the interviews. Some participants said that consultations were important to ensure that regulations are truly operational. For them, the goal of consultation is to make a better regulation in the sense of a regulation that is efficacious : a regulation which accomplishes what it is intended to accomplish. Others said that consultations were important to "flesh out the concerns of the outside world", whether they approved or disapproved of the regulations. These civil servants of the CIC said that when stakeholders disapproved of the regulation, it is important for them to know why they disapproved, for discussions and debates can occur on the issues. Thereafter, CIC civil servants can help to dissipate a misunderstanding (explaining regulatory choices), to mitigate or to accommodate whenever possible by bringing some changes to the proposed regulations, or even to not go forward with a proposed change when CIC civil servants deem it to be necessary. As one civil servant stated:

> "It's a … because you're getting into the political side of things and it's very difficult to, sometimes, foresee the impact of something that you're going to do, which we try to mitigate that through the consultation process."

From this last account, it is interesting to note that for these participants it is crucial that CIC makes acceptable regulations for those affected by it. This concern is linked to the broader issue of democracy as it provides greater transparency in the process of formulating a regulation. As some participants put it:

> "… the whole intention of the government is to make sure that there's an agreement between the lawmakers and those subject to it. [… consultations] "do not necessarily help to make better regulations, but regulations that will be better accepted by the Canadians."

Two types of limited understanding of the importance of consultations emerged from the interviews: 1) those who believe that consultation is useful for identification purposes, that is to say to meet people, to put a face on a name and to know them better; 2) others thought that consultations served the purpose of exchanging information and to educate stakeholders about immigration processes. These purposes are not completely irrelevant – they occur during a consultation process. However, they are not the primary reasons why consultation is done.

These findings also suggest that here is confusion around the objectives of the consultation process. During the first round of the consultation, the main focus of the issues –acceptability of policy choices based on principles or whether the policy choices are operational– should also be on the table for discussion. Too often, there is still no real dialogue between the regulator and the stakeholders, only two parallel monologues. When expectations are not clearly stated, a sense of frustration and of wasting time and energy grows exponentially.

**d) Procedural Aspects of Consultations**

Here the objective was to form a view of the perception of the participants on issues such as: How much time is devoted to consultations? How to determine the scope of the consultation? What are the forms consultations take? At which stage of the rule-making process consultations are conducted? How the comments received are processed?

The perceptions of the participants as the quantity of time they spent on consultations during the rule-making process varied from one interview to the other. However, all participants seemed to be of the opinion that too much time was devoted to consultations. Indeed, some participants used qualifications such as "huge, massive, hundreds". But for some of them, the consultation process also included the consultations conducted by Deputy Minister Robillard on the Green Paper (Trempe Report) in 1997: "[In the] IRPA situation, we were consulting for at least three years before we actually published the draft regulation.» However, the Trempe Report gives only general legislative policy orientation and is by no means a document which can be cited in the RIAS as proof that consultations occurred with stakeholders on the specifics of the regulations (as one can read in some RIASs accompanying the final IRP Regulations and published in the Canada Gazette, part II). One question that this last practice raises is whether the division in charge of writing this RIAS had time, indeed, to conduct meaningful consultations as opposed to merely formal.

Another participant said that he spent about 5 to 10 percent of his time on consultations, but qualified his answer by adding it is a lot "because after a while it adds up". When asked to put a percentage on the time they spent consulting, the participants' answers varied significantly. One participant said:

> «It takes up well over 50 percent of the time of policy officers. Depending on where you are in the cycle, it can be 100 percent. In the…during some periods of getting ready for the IRPA regulations, the only thing we were doing was consultation. And that means preparing the documents, setting up meetings, sending the documents out, reading with the individuals, talking with them, receiving their comments, feeding back their comments. Often, for periods of six months, or eight months, or nine months, the only thing we did is consulting. I would say, we do a lot consulting. But consulting is one of those things you can never do enough of. You can always do more. The problem is you can always do more and you can always find someone else that you should have talked to. Particularly immigration is one of those areas of public policy where it seems everyone has an opinion and we talk about engaging with the public!»

This answer suggests that this civil servant was overwhelmed by the consultation process. This may mean that CIC did not control very well the process during the making of the new Immigration and Refugee Protection Regulations. On the one hand, since the entire regulation was completely redrafted, the task of coordinating the workload was no doubt daunting and this may explain the reaction of this civil servant. On the other hand, the situation faced by CIC may illustrate the need to better plan the rule-making procedure when a regulation is re-done entirely, as opposed to modification to some parts or provisions of a regulation.

On the question as to how to determine the scope of the consultation, almost all participants were of the view that the criteria of proportionality should guide their decision. This is not surprising since Treasury Board guidelines are clear on this aspect of the procedure. Proportionality is assessed through two main criteria: whether the change is contentious or not and the extent of the change proposed to the regulations: "If it is a small modification which is not contentious, consultations should be very small". The first criterion is relatively easy to apply. The main stakeholders will voice their concerns quickly and clearly. The second criterion is less clear. A participant was of the view that consultations should be less extensive when the change is purely technical. However, when asked what he meant by the words 'purely technical' this participant did not answer. It would be useful for Treasury Board to clarify the concept of proportionality.

As to the forms of consultations, one participant stated clearly that although it is mandatory to consult, the government does not impose a rigid procedural form. It can be done formally or informally, during a face-to-face meeting, on the telephone or in writing (paper or electronic).

> "We followed the process as best we could I guess and we did have lots of informal consultations. People calling up, writing, asking for a meeting and so we would meet with them or respond."

On the procedural steps followed for consultations on the regulations, most of the participants were not able to describe all of them. Some participants referred to papers and documents prepared on the policy orientation in the proposed regulations which were sent out and stakeholders were invited to make their views known. They were not able to state very clearly whether this occurred before or after the first RIAS was issued with the proposed regulation in the Canada Gazette.

A minority of participants referred to a unit which was created within CIC and that was put in charge of the consultations process. In fact, a unit was created especially to manage the entire rule-making process engaged in by CIC to re-write the Immigration and Refugee Protection Regulations. The role of this unit was to check that the whole Regulatory Policy was followed before sending the regulations to Treasury Board. As long as the consultations go, this unit was satisfied when the goals of the policy were formally met. The task of this unit was not to check the quality of the consultations conducted by each division of CIC. As long as the division reported that consultations were conducted, this was sufficient to let its section of the regulation continue its way in the system.

This unit was also in charge of receiving all the comments, classifying them "in a spread sheet or a table", sorting them out using criteria such as the importance of the comment, its repetitiveness or, contrarily, presenting some significant differences, and, finally, dispatching the relevant comments to each division of CIC. Therefore, it seems that each division did not receive all the comments, although one participant said that they read all the comments, but others thought that the unit was summarizing all of them. In my opinion, this unit does not have the qualifications to exclude or summarize comments. They should only classify them and direct them to the relevant division.

In the batch of comments received, the division would sort them out further using other criteria such as whether the division thought or not about a particular issue raised by a stakeholder:

> "What we are trying to find is things that we hadn't thought about or issues, comments, or concerns that we hadn't already addressed. […] what is missing, what is new, where they've raised issues that we haven't thought about. Is there any potential problem?"

Other divisions set aside the comments they qualified as representing "extreme and/or disconnected views with reality" and, therefore, "irreconliable with what need to be achieved under the statute". These findings suggest that each division is in charge of deciding the criteria they will use to include or exclude comments. There should be some discussions among CIC as to the proper criteria to be used for the purpose of sorting out comments in order to reach a good level of uniformity.

As far as transparency goes, some participants said that sometimes they will take the time to respond to some comments, but it was not possible to find out more on this point. It is also useful to know that the comments are not posted on the CIC web site, but one can access them through an access to information request. These requests are managed by a unit within CIC which decides to grant access to the information in all or in part based on the provision of the Access to Information Act. Further inquiry would be needed to form a better view as decision-making power of the civil servants staffing this unit (is it real or merely formal). In any case, the chances of having access to all the comments and uncensored are very unlikely[32].

* * * **

Consultations in Canada during the rule-making process are still at an early stage of development. Some governmental documentation in the form of policies guidelines and standards exists but, in my opinion, they should be thoroughly revised. In this regard, it would be useful for the federal government to turn its attention on the work of the European Commission in general and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in particular, conceived at Aarhus, Denmark in 1998.

Generally speaking, the findings of this empirical research indicate that there are flaws in the consultation process followed by CIC during the making of the IRP regulations which are important enough to take seriously the warning of the Supreme Court on the use of extrinsic aid to interpretation, such as a RIAS. As the Court warned this material should be used with caution. As far as the CIC RIASs are concerned, it would be a good judicial policy to not rely too much on the information is contains. As far as we know, the quality of the information is not established. There is no way to verify whether the problem and the solution reflect a consensus among CIC and its stakeholders or the mere preferences of the former.

---

[32] This opinion is based on a personal experience as a legal counsel at the Immigration and Refugee Board in the beginning of 1990. For a while, I was assigned to the task of the access to information agent at the Board. The amount of censorship and very broad interpretation of the statute (in favor of the Board) exercised at the time was not, to say the least, reflecting the spirit of the Access to Information Act. For example, information that the Board did not want to go out, but that could not be legally excluded, was very often channeled through 'legal services'. This process provided to some information the veneer of information protected under the solicitor-client privilege. If CIC applies the same policy as the Immigration and Refugee Board, that is to say to refuse access by any means to any information which may contentious, the comments made accessible or uncensored may possibly reflect a smaller percentage than one would hope for. I made such a request and I will be able to report on the quality of the information I received in another study.

One basic question still needs to be discussed: why use this material if there is no possibility to ascertain whether its content reflects some consensus among the players? When courts are referring to legislative history material, they have access to views expressed in favour or disfavour of a provision or of a statute. When courts are using international norms (conventions, declaration, resolution, etc.), there is also a sense that their content reflects some consensus among the signatories. However, one cannot draw similar conclusions as far as RIASs are concerned. The process needs to be streamlined and until this is done, their contents are open to criticism. On this point, the Government can obviously play a leading role, but faced with a lack of political will courts should step in the arena. Justice Evans started this process in *Apotex*. It may be prudent for courts to not shut the door to this legal remedy, especially that such a thinking-process is now on-going in the field of Aboriginal Peoples' ancestral rights. Next, I will present a brief account of this case-law.

## PART II – DUTY TO CONSULT WITH ABORIGINAL PEOPLES: A BRIEF SUMMARY OF CASES

The duty to consult with Aboriginal peoples was imposed on the Crown by the Supreme Court in a series of decisions based on the application of Section 35 (1) of the Constitution Act, 1982:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Since the Supreme Court recognizes that there is a variety of types of rights which can be claimed by Aboriginal peoples, the scope of the duty to consult will depend on the prior qualification of the type of right which is at stake and its impacts on Aboriginal peoples. Modulating procedural protection to the type of rights at stake has been part of Supreme Court decisions in public law (and especially administrative law) for some time. This type of analysis (which is somewhat pragmatic and functional as opposed to purely positivist) seeks to capture the complexity of a legal phenomenon and to balance rights and interests of all litigants. In order to reach this goal in the field of aboriginal rights, the Supreme Court first proposed a classification of aboriginal rights. This classification is only an instrument. Its long-term usefulness will be safeguarded if it remains flexible and adaptable to the contexts. However, depending on the importance of the right affected and its impact on Aboriginal peoples, the Court will evaluate if the Crown, given the circumstances, appropriately consulted with Aboriginal peoples. Here again, the Court proposes three models for consultation.

### A. The Scope of Aboriginal Rights

In *Delgamuukw*[33], the Supreme Court held that aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* "fall along a spectrum with respect to their degree of connection with the land". There are three categories of rights which are comprised in the concept of aboriginal rights: a. Activities, customs and traditions; b. Site-specific rights and; c. Aboriginal title.

#### a. Activities, customs and traditions

The first category of rights, located at the one end of the spectrum, consists of "practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right". However, these activities are not taking place where the use and occupation of the land is sufficient to support a

[33] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; see also *R.* v. *Côté*, [1996] 3 S.C.R. 139; *R.* v. *Adams*, [1996] 3 S.C.R. 101.

claim of title to the land. In the Supreme Court decisions, activities such as fishing[34], hunting and fishing[35], selling fish[36], harvesting wood for personal uses[37] were claimed by Aboriginal peoples as rights under this first category of rights.

*Van der Peet*[38] is the first decision in which the Court looked more carefully into the issue of defining and circumscribing more precisely the concept of "activities, customs and traditions" as a species of aboriginal rights. In this case, the applicant argued that her people possessed an aboriginal right to sell, trade and barter fish for their livelihood, support and sustenance. For Lamer C.J., writing the opinion for a majority of seven judges, the first step of the analysis consisted in correctly characterizing the claim. This would be done by scrutinizing: 1. the nature of the activity; 2. the nature of the government regulation and; 3. whether the activity is an integral part of the distinctive Aboriginal society prior to contact. On this point, Lamer C.J. agreed with the qualification of the applicant. He also found that the legislative provision under constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish. However, upon analysis of the third factor, he found that the appellant:

> "…had failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*."[39]

He made this finding on the basis of the "integral part" approach for determining whether an aboriginal right exists:

> "To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown. The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior

---

[34] R. c. *Sparrow*, [1990] 1 S.C.R. 1075. The appellant was charged in 1984 under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*. *See also* *Côté*, *supra*, note 30; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Marshall*, [1999] 3 S.C.R. 533

[35] *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Badger*, [1996] 1 S.C.R. 771 (hunt)

[36] *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723

[37] *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686.

[38] *Van der Peet*, *supra*, note 33. The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibited the sale or barter of fish caught under such a licence. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*. *See also* *Gladstone*, *supra*, note 33; *N.T.C. Smokehouse Ltd.*, *supra*, note 33.

[39] *Id.*, para. 91.

> to contact with European society. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided." [40]

Therefore, Lamer J. dismissed the appeal and affirmed the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of the *Fisheries Act*.

> The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time -- for centuries before the arrival of Europeans -- and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* were met.[41]

McLachlin J. concluded, however, that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right[42]. Although she wrote a strong dissenting opinion, most notably on the third point of Lamer C.J.'s analysis[43], she nevertheless rallied with the majority in later cases, such as *Mitchell*[44] and *Sappier* and *Gray*[45].

**b. Site-specific rights**

The second category of rights, located in the middle of the spectrum, is comprised of activities "which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of

---

[40] For a critical assessment of Lamer J.C.C.'s reasoning in defining the aboriginal right and especially its lack on internal coherence, see : M.D. Walters, «The 'Golden Thread' of Continuity : Aboriginal Customs at Common Law and Under the Constitution Act, 1982» (1999) 44 McGill L.J. 711, 741-742.

[41] *Van der Peet, supra*, note 33, para. 93. McLachlin J. disagreed. Writing the opinion for the minority (two judges), she stated that the sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce." For Justice McLachlin, the critical question was not "whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource." Therefore, the gist of the disagreement between the majority and the minority opinions resided in the characterization of the nature of the aboriginal's claim. 2. The nature of the government regulation.

[42] *Van der Peet, supra*, note 33, para. 284. She also found that this right was not extinguished by the regulation (para. 294), that the regulation infringed on Van der Peet's right and, finally, that this infringement did not constitute a justifiable limitation to her right (paras 295; 321).

[43] *Id*. McLachling J. rejected the "integral part" approach for determining whether an aboriginal right exists, although she recognized this test captures an important facet of aboriginal rights. She preferred an empirical approach based on historical facts to draw inference as to the sort of things which may qualify as aboriginal rights under s. 35(1), rather than attempting to describe *a priori* what an aboriginal right is. Most importantly, she stated that an aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms. However, for this purpose history is also important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial. Continuity -- a link -- must be established between the historic practice and the right asserted.

[44] Mitchell v. Canada (Department of National Revenue), [2001] 1 S.C.R. 911.

[45] *Sappier and Gray*, *supra*, note 34.

land". In this case, however, an aboriginal group "may not be able to demonstrate title to the land", but may "nevertheless have a site-specific right to engage in a particular activity"[46]. A definition of a site-specific right or a test has not yet been provided by the Court. However, case-law suggests a government's knowledge of the potential existence of aboriginal rights and serious impacts of a decision on their rights and titles would be sufficient to trigger the protection afforded by Section 35. Two decisions of the Supreme Court can be cited as examples of this type of intermediary right.

The first case is the Haida Nation decision[47]. The Haida people have claimed title to all the lands of Haida Gwaii (an area consisting of the Queen Charlotte Islands) and the waters surrounding it for more than 100 years. But, at the time of the decision, that title has not been legally recognized at the time of the decision. The litigation arose when the Province of British Columbia issued a Tree Farm License[48] (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer. They claim that they were made without their consent and, since at least 1994, over their objections. The Court recognized that the Haida's claims to title and aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles.

The second case is the *Mikisew Cree First Nation* decision[49]. In this case, the First Nations who lived in this area surrendered 840,000 square kilometres of their land to the Crown under Treaty 8 in 1899. In exchange for this surrender, the First Nations were promised reserves and some other benefits including the rights to hunt, trap and fish throughout the land surrendered to the Crown except on "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The Mikisew Reserve is located within an area of land contained in Treaty 8 and is now called Wood Buffalo National Park. In 2000, the Federal Government approved a winter road, which was to run through the Mikisew's reserve. After the Mikisew protested, the road alignment was modified to track around the boundary of the reserve. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Court accepted the argument. While recognizing that the Crown has a treaty right to "take up" surrendered lands, it is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights. On this point, the Court found that "the impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question."[50]

### c. Aboriginal Title

Finally, the third category of rights, located at the other end of the spectrum, included aboriginal title itself "which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures"[51]. In *Delgamuukw*, the Supreme Court

---

[46] *Delgamuukw*, *supra*, note 30.
[47] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
[48] A Tree Farm License is a permit from the Provincial government of limited duration given to private forest companies for the purpose of harvesting the timber resources in a particular geographic area of Crown land.
[49] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
[50] *Id*., paras. 54-55.
[51] *Delgamuukw*, *supra*, note 30.

recognized that an aboriginal right can be extended to the territory itself and beyond the practice a specific activity.

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their Houses, claimed separate portions of 58,000 square kilometres in British Columbia. Their claim was originally for ownership of the territory and jurisdiction over it. However, before the Supreme Court the appellants transformed their claim into a claim for aboriginal title over the land. As a result, the Court was asked to answer questions such as : What is the content of aboriginal title? How is it protected by s. 35(1) of the *Constitution Act, 1982*?

Lamer J. wrote the opinion for the majority (4 judges). On the first question, he decided that "aboriginal title is a right to the land itself". That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). The land title encompasses the right to "exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures." The protected uses must not be "irreconcilable with the nature of the group's attachment to that land".

As to the proof of the title, Lamer J. stated that the purpose of Section 35 is to reconcile the prior presence of Aboriginal peoples with the assertion of Crown sovereignty. Therefore, the Court must recognize and affirm both aspects of that prior presence - 1) The occupation of land and; 2) The prior social organization and distinctive cultures of aboriginal peoples on that land. He further added that the test for the identification of *aboriginal rights to engage in particular activities* and the test for the *identification of aboriginal title*, although broadly similar, are distinct in two ways.

> "First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land."[52]

*** * * * * ***

This classification of types of aboriginal rights was devised by the Supreme Court to guide judges when they are asked to determine the scope of the duty to consult as part of the fiduciary obligation of the Crown.

## B. Three Models for Consultation

Legal scholars, such as Otis, Émond and Slattery are of the opinion that at the time of the Royal Proclamation, the promises made by the King of England seek to consolidate a relationship of respect between the Crown and the Aboriginal peoples[53]. Hence, the duty to consult was historically part of fiduciary relation between the Crown and the Aboriginal peoples[54]. However, this egalitarian view of the relations between the English Crown and the Aboriginals was transformed in the and centuries and took

---

[52] *Id.*, para. 142.

[53] G. Otis and A. Émond, «L'identité autochotone dans les traités contemporains : de l'extinction à l'affirmation du titre ancestral», (1996) 41 McGill L.J. 543, 547; G. Otis, «Le titre aborigène : émergence d'une figure nouvelle et durable du foncier autochtone?» (2005) 46 C. de D. 795, 832; B. Slattery, «Understanding Aboriginal Rights», (1987) 66 *Can. Bar Rev*. 727, 753.

[54] *Royal Proclamation 1763*, R.S.C. 1985, app. II, no 1.

a paternalistic trend with the decrease in numbers of aboriginals. The fiduciary relation started to mean that the Crown knew better than the Aboriginal peoples what was good for them.

Before the *Guerin* case in 1984[55], the Supreme Court did not interpret the fiduciary relation to mean a duty of consult with Aboriginal peoples[56]. Since then, and through the interpretation of s. 35(1) of the *Constitution Act, 1982*, the Court incorporated the duty to consult with Aboriginal peoples within the Crown's fiduciary obligations (corriger)[57]. It developed three basic models for consultation: 1. Consultation; 2. Consultation and accommodation; 3. Consultation and compensation. Within each model, there is room to adapt the consultation process to specific circumstances (from a general notice and comment procedure to a distinct consultation process to negotiation, etc.). Moreover, even if each model can be viewed as corresponding to the three types of rights circumscribed by the Court, there is no necessary link between the type of right and the type of consultation model. Each case must be assessed on its merits.

**a. Crown's Duty to Consult**

The Supreme Court started to built the analytical framework of the Crown's duty to consult in cases in which an aboriginal right to exercise a specific activity, custom or tradition was infringed by governmental regulations. In these cases, Aboriginal peoples contested the validity of federal or provincial regulations aiming at controlling the exercise of such activities.

One of the first questions that the Court needed to resolve was whether the very act of regulating such activities, customs and traditions (for example, fishing or hunting) had the effect of extinguishing aboriginal rights. This issue was important since section 35(1) applies to rights in *existence* when the *Constitution Act, 1982* came into effect. In *Sparrow*[58], the first case in which the Supreme Court explored

---

[55] *Guerin* c. *La Reine*, [1984] 2 S.C.R. 335, para. 35.

[56] *Haida*, *supra*, note 44, para. 18 : "The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples: . . . "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title."

[57] *Mikesew*, *supra*, note 45, para. 51: The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty."

[58] *Sparrow*, *supra*, note 31.

the scope of s. 35(1), it was unanimously decided that an aboriginal right is not extinguished merely by its being controlled in great detail by regulations[59]. Unless there is a clear and plain intention stated in regulations and its parent act to extinguish an aboriginal right, the Court will refuse to read-in such a purpose in state-law[60]. In this case, the Court decided that the Crown failed to discharge its burden of proving extinguishment of the right to fish by adopting the *Fishery Act* and by prescribing detailed regulations. This legislative scheme creates a framework to authorize fishing through the mandatory delivery of permits. It is "simply a manner of controlling the fisheries, not of defining underlying rights"[61].

After the Court found that the aboriginal right existed and that it was not extinguished, it found that the regulation was an infringement on the aboriginal right and that the Crown then had the burden to justify its regulation: although governments' regulations do not, per se, extinguish rights, they "must however be in keeping with s. 35(1)"[62]. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)[63]. Section 35(1) does not explicitly authorize courts "to assess the legitimacy of any government legislation that restricts aboriginal rights"[64]. However, the words "recognition and affirmation" in section 35(1) incorporate the government's responsibility to act in a fiduciary capacity with respect to Aboriginal peoples and "so import some restraint on the exercise of sovereign power."[65] The Court insisted on a purposive interpretation of section 35(1), one that will favour a flexible interpretation so as to permit the evolution of existing aboriginal rights overt time[66].

Therefore, the Government must justify its regulations and for this purpose the Court designed a "justification test"[67]. Dickson C.J. and La Forest J., writing the judgement of the Court in *Sparrow*, stated that the justification test has two parts: 1. aboriginal rights protected under section 35(1) are not absolute and may be infringed by the federal and provincial governments[68] if the infringement furthers a compelling and substantial legislative objective[69]; 2. An assessment of whether the infringement is consistent with the "special fiduciary relationship between the Crown and the Aboriginal peoples."[70] This second part of the test of justification requires foremost that the fiduciary duty be interpreted and applied in terms of the idea of priority: the fiduciary relationship between the Crown and Aboriginal peoples peoples demands that aboriginal interests be placed first[71], but it does not demand that Aboriginal peoples rights always be given priority[72]. Finally, he Court added these two questions were not the only ones

---

[59] *Id*., at 25 (PDF electronic version).
[60] *Id*., at 26.
[61] *Id*., at 27.
[62] *Id*. at 29.
[63] *Id*., at 36.
[64] *Id*., at 36.
[65] *Ibid*.
[66] *Id*., at 34.
[67] *Id*. at 37. The idea of integrated a justificatory process within s. 35(1) was proposed by B. Slattery, "Understanding Aboriginal Rights", (1987) 66 *Can. Bar Rev*. 727, 782.
[68] Aboriginal rights may be infringed, both by the federal *(Sparrow, supra*, note 52) and provincial (*R. v. Côté*, [1996] 3 S.C.R. 139) governments.
[69] *Sparrow*, *supra*, note 31 at 40 (PDF electronic version);. *Gladstone*, *supra*, note 33, para. 54. The two parts of this test of justification also applies in cases in which an aboriginal title is the centre of the litigation: *Delgamuukw supra*, note 30, para. 161.
[70] *Sparrow*, *supra*, note 31 at 42 (PDF electronic version); in *Gladstone*, *supr*a, note 33, paras 56 and ff., this part of the test was adapted to the context of selling fish.
[71] *Sparrow*, *supra*, note 31 at 42 (PDF electronic version).
[72] *Gladstone*, *supr*a, note 33, para. 60.

which needed to be addressed within the analysis of justification. Depending on the circumstances of the inquiry, further issues may need to be taken into consideration, including consultation:

> "These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, *whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented*." The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, *would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of fisheries*.[73] (Emphasis added)

In sum, the justification test may, when appropriate, include a consultation process. When the government proposes a regulatory policy which may impact on this first category of aboriginal rights, a Court may find that, given the context, the aboriginal group should have been consulted on it. In *Sparrow*, the Court appeared to suggest that it may not be a mandatory requirement for the government to consult each time it proposes such a regulation. However, in *Haida* the Court decided that as a general principle there is a duty to consult with Aboriginal peoples when their rights and interests are affected by a government's decision[74]. However, the content of the duty to consult would vary from a minimum, the duty to discuss important decisions with Aboriginal peoples (mere duty to notify and listen), to a maximum, *viz*., obtaining full consent of an Aboriginal nation[75].

### b. Crown's Duty to Consult and Accommodate

When site-specific rights are at stake, such as in the *Haida*[76] and *Mikisew*[77] cases, the Supreme Court imposed a clear legal duty to consult on the Crown[78]. The Court stated that this duty is grounded in the principle of the honour of the Crown, which principle must be understood generously[79]. However, the scope of the duty to consult would have to be "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[80] In addition, the duty to consult may encompass a duty to

---

[73] *Sparrow*, *supra*, note 31 at 46 (PDF electronic version).

[74] Speaking on the duty to consult, McLachlin C.J. wrote the following paragraphs in *Haida*, *supra*, note 44: 21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow*, *supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented". 22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110). 23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery . . ., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

[75] *Id*., para. 24. The Court cited *Delgamuukw*, *supra*, note 30, para. 168 in support of its decision.

[76] *Haida Nation*, *supra*, note 44 .

[77] *Mikisew*, *supra*, note 45.

[78] *Haida*, *supra*, note 44, para. 10.

[79] *Id*., paras.. 16-17.

[80] *Id.*, para. 39.

accommodate aboriginals' interests when such accommodation is required[81]. In *Haida*, the Court established a "general framework for the duty to consult and accommodate, where indicated before Aboriginal title or rights have been decided"[82].

On the duty to consult in "pre-proof claims (such as in *Haida*)", the Court stated that the Crown had to act in good faith to provide meaningful consultation appropriate in the circumstances. And while it was not under a duty to reach an agreement, it has to commit to a "meaningful process of consultation" conducted in good faith[83]. To do so, procedural safeguards of natural justice mandated by administrative law may be taken into consideration[84]. The Court reiterated that the content of the duty varies with the circumstances and each case must be approached individually[85]. Each must also be approached flexibly "since the level of consultation required may change as the process goes on and new information comes to light."[86] The Court further added that the controlling question in all situations is: "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake[?]"[87].

With respect to the kind of duties that may arise in different situations, the Court referred to the concept of a spectrum as it "may be helpful". However, it should not "suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances."[88]

> "At one end of the spectrum lie cases where the claim to title is weak, the aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal peoples' concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.[89]

---

[81] *Id*., para. 47: "The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."
[82] *Id.*, para. 11.
[83] *Id.*, para. 42.
[84] *Id*., para. 41.
[85] *Id*., paras 39-45.
[86] *Id*. para. 45.
[87] *Ibid*.
[88] *Id*., para. 43.
[89] *Id*., para. 43-44. T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49.

With respect to the duty to accommodate[90], the Court explained that "meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations." [91] Therefore, when the "consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation."[92] The duty to accommodate does not give "Aboriginal groups a veto over what can be done with land pending final proof of the claim. [..] Rather, what is required is a process of balancing interests, of give and take."[93] The Court made a final comment implicitly suggesting to the government to set up regulatory schemes "to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[94] In *Mikisew*, the Court stated that consultation "that excludes from the outset any form of accommodation would be meaningless."[95]

On a final note, it is also important to say that since the Court recognized that the Crown had a legal duty to consult, it follows that administrative review is open to challenge a government's conduct on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution[96]. With respect to the standard of review, the Court made a few suggestions based on general principals of administrative law[97].

---

[90] *Id*., para. 49: "The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them."

[91] *Id*., para. 46. The Court cited the New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) provides insight (at pp. 21 and 31): Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed […] genuine consultation means a process that involves: gathering information to test policy proposals; putting forward proposals that are not yet finalised; seeking Mäori opinion on those proposals; informing Mäori of all relevant information upon which those proposals are based; not promoting but listening with an open mind to what Mäori have to say; being prepared to alter the original proposal; providing feedback both during the consultation process and after the decision-process."

[92] *Id*., para. 47. "Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[93] *Id*., para. 48 : "The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."

[94] *Id*., para. 51: As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[95] *Mikisew*, supra, note 45, para. 55.

[96] *Id*., para. 60.

[97] *Id*., paras 61-62-63: 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings

In applying all these principles to the *Haida* case, the Court found that the Crown had an obligation to consult the Haida Nation on the replacement of T.F.L. 39. First, McLachlin C.J., writing the opinion of the Court, found that the province "had knowledge of the potential existence of Aboriginal rights or title and contemplated conduct that might adversely affect them."[98]. This triggered the duty to consult. Second, she analysed the scope of the duty. She took into consideration the strength of the case and found that the Haida Nation had "a prima facie case in support of Aboriginal Title, and a strong *prima facie* case to harvest red cedar."[99] After, she examined the potential impact and found that the decision of the province points to potential impact of on the aboriginal rights of the Haida Nation[100]. She then moved to the issue of when the duty to consult arises and found that "[if] consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences."[101] Finally, on the question of accommodation, she decided that the Crown's duty went beyond consultation to include accommodation: "the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claim."[102]

In *Mikisew*, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting this Cree Nation. They protested and the road alignment was modified to track around the boundary of the reserve. But again the government did not consult the Mikisew. It simply gave standard public notices and held open houses. Binnie J., writing the judgment of the Court found this procedure was not sufficient: the Mikisew were entitled to a distinct consultation

---

of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. 62 .The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty. 63. Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[98] *Id*., para. 64.

[99] *Id*., para. 71.

[100] *Id*., paras 72-74.

[101] *Id*., paras 76.

[102] *Id*., para. 77. Last, McLachlin J. answered the question whether the Crown fulfilled its duty (paras 78-79). On this point, it is interesting to note that the Province argued that it took "various measures and policies taken to address Aboriginal interests. […] that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits. . . . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting . . .". The Court answered that "these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions." And at para. 79, the Court concluded "that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all."

process. Consequently, the Court held that the duty of consultation, which flows from the honour of the Crown, was breached[103].

The particularity of this case is that the government has a right to take up land as per the provision of Treaty 8, but the Court found, nonetheless, that the Crown was under a duty to act honourably. Even if the Crown has a right to build the road, it has a duty to consult with the Mikisew Nation because its action is going to adversely affect aboriginal rights to hunt, fish and trap recognized in a treaty. Therefore, it triggers the duty to consult[104]. It is also interesting to note that the *Sparrow* justification analysis does not apply to every "taking up" by the Crown land[105]. However, the duty to consult must nonetheless be honoured by the Crown because "Treaty 8 demands a process by which lands may be transferred from one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not)"[106].

> "As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barreled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well."[107]

In the case at bar, the Court found that the duty to consult was triggered. However, "given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the 'taking up' limitation", the content of the Crown's duty of consultation in this case "lies at the lower end of the spectrum."[108]

> "The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general

---

[103] *Id*., para. 4.
[104] *Id*., para. 34.
[105] *Id*., para. 31-32: "I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed."
[106] *Id*., para. 33.
[107] *Id*., para. 57.
[108] *Id*., para. 64.

> public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights."[109]

Finally, the *Taku River Tlingit First Nation* is a good example of a case in which the Crown discharged honourably its duty to consult with an Aboriginal Nation[110]. A mining company sought permission from the British Columbia to reopen a mine. An environmental assessment process was engaged in by the Province under the *Environmental Assessment Act*. The Taku Nation participated in the process, but objected to the company's plan to build a road through a portion of the Taku's traditional territory. The Court found that the Province fulfilled the requirements of its duty to consult and accommodate. Indeed, the consultation process was lengthy and gave a full opportunity to the Taku Nation to make its views known and the authorities accommodated their concerns whenever possible[111].

### c. Crown's Duty to Consult and Compensate

*Delgamuukw*[112] is the first case in which the Supreme Court examined the nature and scope of s. 35(1) of the *Constitution Act, 1982* as applied to common law aboriginal title. The Court examined, inter alia, if the title, as a right in land, "mandates a modified approach to the test of justification laid down" in *Sparrow* and *Gladstone*[113].

Just like aboriginal rights, aboriginal title is not absolute. It may be infringed and s. 35(1) "requires that those infringements satisfy the test of justification"[114]. As said before, the test of justification has two parts. First, the Crown must show that the infringement of an aboriginal right or title be in "furtherance of a legislative objective that is compelling and substantial."[115] On this point, Lamer C.J., writing the opinion of the majority on the test of justification (4 judges), enumerated a list of valid and invalid legislative objectives:

> "The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams*, *supra*) would fail this aspect of the test of justification."[116]

---

[109] *Ibid*.
[110] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550.
[111] For a description of the whole consultation process and accommodations made, see *id*., paras 33-46.
[112] *Delgamuukw*, *supra,* note 30.
[113] *Id*., para. 2.
[114] *Id*., para. 160.
[115] *Id*., para. 161.
[116] *Ibid*.

The second part of the test requires that a judge assess the infringement to determine whether it is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. In *Sparrow* and *Gladstone*, the Court interpreted the fiduciary duty in terms of priority (and aboriginal interests to be placed first, but does not demand that they always be given priority). In other words, the fiduciary duty may be articulated in many ways. In *Delgamuukw*, the majority also stated that in addition "to variation in the form which the fiduciary duty takes, there will also be variation in the degree of scrutiny required by the fiduciary duty of the infringing measure or action"[117] and these two aspects of the justification test and the choice between the different articulations of the test "will in large part be a function of the nature of the aboriginal right at issue"[118]. On this point, Lamer C.J. specified that there were three aspects of aboriginal title that were relevant to take into consideration:

> "First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component."[119]

On the exclusive nature of aboriginal title, Lamer C.J. was of the opinion that this aspect was relevant to the degree of scrutiny of the infringing measure or action. On the issue of assessing priority, he said that it is "the altered approach to priority that I laid down in *Gladstone* which should apply."[120]

> "What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive."[121]

Therefore, the majority of the Court decided that the duty of accommodate (at least when aboriginal title is concerned) was built in the altered approach to priority. The minority disagreed on this point. La Forest J. wrote that accommodation is not a simple procedural matter. It is much broader than this and it may encompass the duty to give fair compensation[122]. However, the majority did not articulate the idea of compensation at this part of its analytical framework, but in the third aspect of aboriginal title (economic component). Lamer C.J. was also of the opinion that the idea of consultation should be integrated in the analysis of the second aspect: the right to choose.

After his analysis of the first aspect (exclusive nature of the title), Lamer C.J. explained that the fiduciary duty may be articulated in a manner different than the idea of priority as far as the two other aspects were concerned. With respect to the meaning of the fiduciary duty in relation to the *right to choose*, Lamer C.J. wrote:

---

[117] *Id*., para. 163.
[118] *Id*., para. 162.
[119] *Id*., para. 166.
[120] *Id*., para. 167.
[121] *Ibid*.
[122] *Id*., para. 203.

> "First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples *may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation.* Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*."[123]

With respect to the meaning of the fiduciary duty in relation to the *economic aspect* of aboriginal title, Lamer C.J. wrote:

> "Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."[124]

## CONCLUSION

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 the evolution toward the creation of a legal duty on 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 for the Supreme Court to make its move if another opportunity such as the *Apotex* decision presents itself to the Court.

---

[123] *Id*., para. 168. In the second part of this paragraph, Lamer C.J. express again that idea that the nature and scope of the duty of consultation will vary with the circumstances: "In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

[124] *Id*., para. 169.

With respect to judicial review of regulations, a sustained increase of cases in which judges make a technocratic use of a RIAS will undoubtedly affect the degree of deference accorded to civil servants. Although it is too soon to make a judgment on whether this trend is desirable or not, this issue may take a different turn if the full implementation of the 'smart regulation' project were to become a reality. Indeed, this project implies that the government will move toward results-based regulatory programs. It will therefore leave the determination of the appropriate means to reach these objectives in the hands of stakeholders. In this type of regulatory system, if too much weight is given to the expert views of the government as to the purpose of the regulation and if stakeholders agreed with the objectives because they were consulted on them, it may become illusory to challenge the validity of regulations in relation to its parent law, outside of constitutional parameters. For this very 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. However, if consultation were to become a procedural duty subject to administrative review, the public administration would have to structure its processes to ensure that the requirements of natural justice are met. In the end, the content of the RIAS would likely be improved.

In this regard, case-law on the duty to consult with Aboriginal groups and nations is useful to design consultation processes in other areas of governmental action because it is a serious attempt to give content to the idea of a true dialogue, a dialogue that is not empty[125]. Concepts such as justification, proportionality, meaningful consultations and accommodation are principles which can structure the discretion of any public authority and be adapted to numerous and diversified situations.

[125] J. Tully, «Recognition and Dialogue : The Emergence of a New Field» (2004) 7 :3 Critical Review of Int'l Social & Political Philosophy 84.