CONSULTATION DURING RULE-MAKING: A CASE STUDY OF THE IMMIGRATION AND REFUGEE PROTECTION REGULATION

France Houle*

Since it prescribed its first regulatory policy in 1986, the Federal government implemented a consultation process with stakeholders and the general public during the rule-making process. This process is not legally mandatory (unlike in the province of Quebec). However, failure to conduct a consultation process results in an administrative sanction: the refusal to approve the new regulation by Cabinet.

This article reports on the results of an empirical research project we conducted in 2004 within the Immigration Division of the Citizenship and Immigration Canada Department [CIC]. Our general research question was exploratory in nature. We wanted to know how CIC civil servants understood their obligation to consult with citizens. Our case-study indicates that it is difficult to implement a consultative culture within a department that has a strong long-term commitment to protect the integrity of the Canadian territory.

Depuis la mise en oeuvre de sa toute première politique réglementaire en 1986, l'administration publique fédérale consulte les parties prenantes et le public en général lors de l'élaboration d'un projet de règlement. Ces politiques n'ont pas pour effet de rendre la consultation légalement obligatoire (comme au Québec), mais administrativement obligatoire. La sanction du non-respect de cette obligation résulte en le refus par le Cabinet d'approuver le nouveau règlement.

Dans cet article, nous faisons rapport sur les résultats d'une recherche empirique que nous avons menée en 2004 avec la section de l'immigration du ministère de la Citoyenneté et de l'Immigration du Canada [CIC]. Notre question générale de recherche était de nature exploratoire : nous voulions savoir comment les fonctionnaires de CIC comprenaient l'obligation qui leur était faite de consulter les citoyens. Notre étude de cas indique qu'il est difficile d'implanter une culture de consultation dans un ministère dont la mission est, depuis longtemps, de protéger l'intégrité du territoire canadien.

I. INTRODUCTION

In Canada, common law recognizes a right of citizens to participate in governmental decisions, 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, and the fact that those principles do not apply when the government is about to make a decision of a legislative nature, unless a statute prescribes otherwise. For example, the *Loi sur les règlements* in Québec requires the government to give notice that it is about to approve a regulation and give time to its citizens to

* Professor, Faculty of Law, University of Montreal. The author thanks the Quebec Fund of Research on Society and Culture as well as the Social Sciences and Humanities Research Council of Canada for their financial assistance.

comment. This notice and comment procedure represents, however, the bare minimum in terms of participatory rights.¹ In general, Parliament and legislatures have not shown great interest in improving the democratic legitimacy of regulations. This leaves the Executive to decide if, how and when it will consult with its stakeholders and the general public. Some governments have implemented consultation processes which are administratively, but not legally, mandatory to achieve this end.²

The Federal Government has been active on this front since it prescribed its first regulatory policy in 1986.³ Since then, consultations with stakeholders and the general public in the rule-making process has become a core element of this policy. Its most recent incarnation is the Cabinet Directive on Streamlining Regulation.⁴ A Cabinet Directive is unlike any other guideline. The use of this format indicates that this document is mandatory on all Government officials. This Directive, which came into effect on April 1, 2007, sends a clear signal to the public administration about the intention of Cabinet: it must conduct consultations with those who are affected by proposed regulations.⁵ Failure to do so will result in a form of administrative sanction: the refusal to approve the new regulation by Cabinet.⁶

¹ *Loi sur les règlements*, L.R.Q., c. 18.1, s. 10.

² For a detailed description of the legal and administrative steps during the federal and Québec regulatory processes, see Luc Gagné, *Le processus législatif et réglementaire au Québec* (Cowansville, PQ: Yvon Blais, 1997) at 269; *Le processus législatif et réglementaire fédéral* (Cowansville, Yvon Blais, 1999) at 424. See also on the federal regulatory process, Justice Canada, “The Regulatory Process”, online: Justice Canada < <http://www.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/part-2/toctdm.html> >. Other relevant readings on the regulatory process include: John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Markham, Ont.: Butterworths, 1992) at 308; Paul J. Salembier, *Regulatory Law and Practice in Canada* (Markham, Ont.: Butterworths, 2004) at 447.

³ Although the text of the Regulatory Policy is not available on the Government of Canada website, Carole Kennedy, Director of the *Canada Gazette* Directorate 1994-2007, refers to it. See “A Glance at the *Canada Gazette*, Past, Present and Future” online: Library and Archives Canada <<http://www.collectionscanada.gc.ca/canada-gazette/035001-2000-e.html>>.

⁴ *Cabinet Directive on Streamlining Regulation*, section 2.0, online: Government of Canada <http://www.regulation.gc.ca/directive/directive01-eng.asp#_Toc162687221>.

⁵ *Ibid* at s. 4.1.

⁶ See Treasury Board of Canada Secretariat, *Guide to the Federal Regulatory Development Process*, online: <<http://www.tbs-sct.gc.ca/ri-qr/documents/gfrpg-gperf/gfrpg-gperfb-eng.asp>>. The *Guide* states at Step 6:

Treasury Board Meeting and Decision: TBS-RAS is responsible for briefing Treasury Board ministers on regulatory proposals. Officials of the regulatory organization (preferably at the level of assistant deputy minister [ADM] but no lower than the director level) are sometimes required to be available during the meeting to provide additional information. TBS-RAS will inform you when this is the case, and TBS-RAS will advise as to the time and place of the meeting, which is a Cabinet confidence. The Treasury Board, as a Cabinet committee, may make any of the following decisions:

- Approve or reject pre-publication of the proposed regulation;
- Approve or reject requests for exemptions from pre-publication;
- Send the item to Cabinet or one of its other committees for consideration;
- Refer the matter back to the responsible minister for further consideration and information; and

This government orientation is not surprising given the advances in the theoretical work achieved by scholars since the model of the welfare state was questioned regarding its capability to implement successfully a Rawls-like system of distributive justice. Indeed, many scholars in different disciplines, such as political science, economics and law have proposed new approaches to explain how governments are now functioning.⁷ “New public management” and “Reinventing government” were two of the normative theories that were put forward in the eighties and nineties.⁸ Today, scholars such as Lester Salamon suggest that these two approaches are no longer useful because the changes that were proposed have mostly been implemented.⁹ Salamon is of the view that the challenge now is to better understand how the governments we have produced function: “one that acknowledges the existence and likely persistence of ‘third-party government’ and that focuses more coherently and explicitly on the distinctive challenges that it poses.”¹⁰

Salamon calls this approach the “New Governance.” First, he uses the term “governance” instead of “government” to emphasise “what is perhaps the central reality of public problem-solving for the foreseeable future—namely, its collaborative nature, its reliance on a wide array of third parties in addition to government to address public problems and pursue public purposes.”¹¹ He argues that collaboration is necessary “because problems have become too complex for government to handle on its own.”¹² Second, he uses the term “new” to recognize that these “collaborative approaches, while hardly novel, must now be approached in a new, more coherent way, one that more explicitly acknowledges the significant challenges they pose as well as the important opportunities they create.”¹³

This article is dedicated to learning more about the implementation of the “New Governance” model within the Canadian Federal Government. In order to illustrate some of the challenges that third party government poses, I report on the results of an empirical study I conducted in 2004 within the Immigration Division of the

-
- Defer the item to another meeting.

Approved submissions are sent to PCO for action (see Step 7). Your TBS-RAS analyst will inform you of any follow-up actions that may be needed, refusals of regulatory proposals by the Treasury Board, or proposals that are deferred”.

⁷ See e.g. William Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971) at 241; John A. C. Conybeare, “Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy” (1984) 28 *American Journal of Political Science* 479; André Blais & Stéphane Dion, “Are Bureaucrats Budget Maximizers? The Niskanen model and Its Critics” (1990) 22 *Polity* 655; Patrick Dunleavy, *Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science* (London: Pearson Education, 1991) at 286.

⁸ On this point, see Daniel Mockle, “La gouvernance publique et le droit” (2006) 47 *Les Cahiers de Droit* 89 at paras. 67-86.

⁹ Lester M. Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford, Oxford University Press, 2002) at 8.

¹⁰ *Ibid* at 8.

¹¹ *Ibid*; In fn. 26, he notes that he is indebted to George Frederickson, *The Spirit of Public Administration*, (San Francisco: Jossey-Bass, 1997) at 78-96, for his suggestion to use the term “governance.”

¹² *Ibid*. “...because disagreements exist about the proper ends of public action, and because government increasingly lacks the authority to enforce its will on other crucial actors without giving them a meaningful seat at the table.”

¹³ *Ibid*.

Citizenship and Immigration Canada Department [CIC].¹⁴ This case-study shows the difficulty in implementing a consultative culture within a department that has a strong long-term commitment to protect the integrity of a national territory.

A. Context

The first regulatory policy of the Federal Government came into effect in 1986.¹⁵ Its main feature was that it required departments and agencies to analyse the socio-economic impact of any new regulatory requirements or regulatory changes.¹⁶ 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.¹⁷ 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 that 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 conduct a socio-economic analysis of the impact of adding a new regulatory requirement or changing an existing one. Finally, it must examine the impact of the new measure and balance its benefits against its costs. It is only when the regulatory authority can convince the government that the proposed regulation will result in the greatest net benefit to the Canadian society (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.¹⁸

Enhancing the accountability of regulatory authorities and the transparency of the regulatory process were 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 form in order to be able to apply their own rules and procedures. For example, they could no longer resort to their legal power to regulate and be satisfied that that was sufficient justification for making new rules. In other words, a government could not regulate simply because a statute empowered it to do so. It

¹⁴ France Houle, "L'effectivité des études d'impact de la réglementation dans le processus réglementaire fédéral" (in progress).

¹⁵ Kennedy, *supra* note 3.

¹⁶ Government of Canada Privy Council Office, *Government of Canada Regulatory Policy*, online: PCO-BCP <http://beyondfactoryfarming.org/documents/Fed_Reg_Policy99.pdf> [Regulatory Policy 1999]. The 1999 policy document superceded the 1986 policy which is no longer available online.

¹⁷ See "Consultation", online: *Canada Gazette* <<http://canadagazette.gc.ca/consult/consult-eng.html>>. An example posted at the time of writing are the "Regulations Amending the Canadian Aviation Regulations (Parts I and IV — Conduct of Flight Tests)", Vol. 144, No. 48 — November 27, 2010.

¹⁸ Since its first appearance on the Canadian federal regulatory scene, the basic content of the impact analysis statement has not changed significantly. It is divided into six sections. Sections 1, 2 and 3 are called *description, alternatives, benefits and costs*. Sections 5 and 6 are called *compliance and enforcement* and *contact person*. 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.

needed to justify the soundness of the regulation from an economic and/or social perspective (by providing a regulatory impact analysis statement). Regulatory authorities 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 the social and economic systems into which regulations will operate.¹⁹

These bureaucratic failures were understood as a direct consequence of 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 existed and that the best solution to solve it would be to adopt a regulation because the net benefits for the population would be greater than their inconvenience.²⁰

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 has not misunderstood 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 purports 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 the one hand, if affected parties disagree with the government, perhaps their comments may bring the regulatory authority to partially or entirely rethink its approach. Even if such comments are not so well accepted, their mere 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 higher. 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.

Different types of information are contained in a RIAS to provide to those who would like to participate in the rule-making process the relevant background information to evaluate by themselves whether the regulation will achieve its intended goals. 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

¹⁹ On this issue, see any of the writings, *supra* note 7.

²⁰ On this issue, the writings of George Stigler on regulatory capture are of particular interest. George Stigler "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3; See also Jean-Jacques Laffont & Jean Tirole, "The Politics of Government Decision Making: A Theory of Regulatory Capture" (1991) 106 *Quarterly Journal of Economics* 1089; M.E. Levine & J.L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" (1990) 6 *JL Econ & Org* 167.

RIAS.²¹ 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 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.

B. Methodology

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.²²

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.

To formulate interview questions, I used relevant federal policies as a starting point: the Regulatory Policy²³ and the Regulatory Process Management Standards²⁴ which is incorporated in the former. These policies set the standards to solicit the views of stakeholders affected by proposed regulations and it is these standards that were applied by CIC at the time we conducted the interviews. In the section dedicated to consultation, one can read:

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

²¹ A RIAS [Regulatory Impact Analysis Statement] is published with the proposed regulation. In this RIAS, there is a section entitled “consultation” summarizing the first round of consultation and the format to conduct it chosen by the regulatory authority. For a description of the content of the RIAS, see “Regulatory Impact Analysis Statement” online: Department of Justice Canada < <http://canada2.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/part4/rias-reir.html> >.

²² See Houle, *supra* note 14.

²³ The latest version of the Regulatory Policy is published on the web site of the Privy Council Office of the Canadian Federal Government online: PCO-BCP <www.pco-bcp.gc.ca>.

²⁴ The standards were established by Treasury Board of Canada and they are applicable to all Departments’ Managers. The standards appear at the end of the *Regulatory Policy 1999*, *supra* note 16.

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.²⁵

Relevant federal policies therefore highlight the importance of timely, thorough and proportionate consultation as well as the need for a clear and iterative consultation process. These ideas were used to design the study's questions and to analyze its findings.

C. Findings

On the specific subject of consultations, interviews focused on four general themes: 1) Knowledge about Stakeholders; 2) Dynamic of Consultations; 3) Reasons Underpinning Consultations; 4) Procedural Aspects of Consultations.

1. Knowledge about Stakeholders

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

A stakeholder is an old legal concept. This person was originally the one who held money or other property while its owner was being determined. However, in the twentieth century, the word stakeholder took another meaning: it was used to describe a person or an organization with a legitimate interest in a project or entity. In this sense, a stakeholder is a term 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, it is said that authorities must be able to identify and contact interested parties including, where appropriate, representatives of labour and consumers' groups.²⁶

Were civil servants, who were involved in or in charge of consultation within CIC, able to identify their stakeholders? The results of the interviews revealed that civil servants divide stakeholders into two groups: governmental stakeholders and civil

²⁵ *Ibid.*

²⁶ *Ibid.*

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 stakeholder is a more loosely defined category. It can include practitioners, NGOs 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.²⁷

Although there is some value in letting civil servants of each division determine their stakeholders, the interviews showed there is some confusion among the CIC civil servants with regard 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 two or three 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 registry.²⁸

On the meaning of the concept, some participants were of the opinion that stakeholders include only experts such as practitioners and NGOs. Other participants were 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.

One criticism that can be made is that 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

²⁷ Interview 413. Notes on file with author.

²⁸ *Lobbying Act*, RSC 1985, c. 44 (4th Supp.), ss. 6-10. The registry of lobbyists is the principal means provided under the *Lobbying Act* to ensure transparency with regard to lobbying of public office holders. For specific information about the registry, see the section on "The Registry of Lobbyists" in the brochure published by the Office of the Registrar of Lobbyists entitled, *A Summary of New Requirements in The Lobbying Act*, June 2008, online: ORL <[http://www.oclc.ca/eic/site/lobbyistlobbyiste1.nsf/vwapj/Info_booklet_Eng.pdf/\\$FILE/Info_booklet_Eng.pdf](http://www.oclc.ca/eic/site/lobbyistlobbyiste1.nsf/vwapj/Info_booklet_Eng.pdf/$FILE/Info_booklet_Eng.pdf)>.

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

Administrative case law with respect to the choice of interveners during a policy-making exercise of a regulatory agency offers 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 hearing 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 wish to be, should be able to request that they be added to the list and state their reasons for wanting 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 general 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 consultation but prepublication note.

2. 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 mindset 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.²⁹ When they were asked to elaborate on this point, they added that some groups and practitioners have a better understanding of how things work at the operational level and that this knowledge is crucial to designing efficient and fair regulations. This indicates that these civil servants approached consultation with an open mind.

Five of the eight participants stated that civil society stakeholders' perspectives were not equal in importance to government stakeholders. They thought that the 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.³⁰ One participant said:

²⁹ Interviews 802, 212 and 309. Notes on file with author.

³⁰ Interviews 413, 608, 359, 111, 705. Notes on file with author.

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.³¹

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 NGOs was the same.³² When they were asked to elaborate on the similarities, they were not able to explain their answers. This may indicate a 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 build 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 in which they are about to engage. For example: What is on the table for discussion and debate? Is it possible to discuss their views on what the problem is and the solutions they propose? What are the cost and the benefit of the proposed solution? What is the impact on rights and freedoms? and so on. In sum, more training of the civil servants, focusing on specific objectives would be useful.

3. 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 for consulting 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 that it 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

³¹ Interview 359. Notes on file with author.

³² Interviews 359, 413 and 705. Notes on file with author.

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 necessary. As one civil servant stated:

It's ... 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.³³

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.³⁴

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 there 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.

4. 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 forms do consultations take? At which stage of the rule-making process are consultations conducted? How are the comments received processed?

³³ Interview 608. Notes on file with author.

³⁴ Interview 705. Other participants shared similar views: interviews 212, 413. Notes on file with author.

The perceptions of the participants to 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 1997:³⁵ “[In the *Immigration and Refugee Protection Act (IRPA)*] situation, we were consulting for at least three years before we actually published the draft regulation.”³⁶ 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 to conduct meaningful consultations as opposed to merely a formality.

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. [...]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!³⁷

This answer suggests that this civil servant was overwhelmed by the consultation process. This may mean that CIC did not control the process very well during the drafting 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 the CIC may illustrate the need to

³⁵ Canada, Legislative Review Advisory Group, “Not just Numbers: A Canadian Framework for Future Immigration” (Ottawa: Citizenship and Immigration, 1997) at 168 (Chair: Robert Trempe).

³⁶ Interview 111. Notes on file with author.

³⁷ Interview 802. Notes on file with author.

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.³⁸ 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."³⁹ 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 considered 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 form 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."⁴⁰

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.⁴¹ 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 occur, 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,"⁴² 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

³⁸ Canada, Treasury Board, "Guidelines for Effective Regulatory Consultations" online: Treasury Board of Canada Secretariat < <http://www.tbs-sct.gc.ca/ri-qr/documents/gl-ld/erc-cer/erc-certbeng.asp>>.

³⁹ Interview 212. Notes on file with author.

⁴⁰ Interview 705. Notes on file with author.

⁴¹ Immigration and Refugee Protection Regulations SOR/2002-227.

⁴² Interview 309. Notes on file with author.

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 or not the division had in the past thought 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?⁴³

Other divisions set aside the comments they qualified as representing "extreme and/or disconnected views with reality" and, therefore, "irreconcilable with what needs to be achieved under the statute."⁴⁴ 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 theoretically access them through an access to information request.⁴⁵ 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*.⁴⁶ Further inquiry would be needed to form a better view of the decision-making power of the civil servants staffing this unit (is it real or merely formal). In any case, the chances of the unit having access to all the comments, and uncensored, are very unlikely.

II. THE AARHUS CONVENTION

Although consultations in Canada during the rule-making process are still at a relatively early stage of development, the findings of this empirical research indicate that there are flaws in the consultation process followed by CIC. This suggests that governmental policy guidelines and standards should be thoroughly examined. In order to conduct a useful examination, a first step could be, in addition to more empirical research, to conduct comparative research between the content of the Canadian guidelines with that of other jurisdictions. In this regard, it would be useful for the federal government to turn its attention to the work of the *European*

⁴³ Interview 111. Notes on file with author.

⁴⁴ Interview 413. Notes on file with author.

⁴⁵ Generally, in Canada, the system of access to federal government information has suffered from significant challenges. See, for example, the federal Information Commissioner's most recent report on access and delay; Information Commissioner of Canada, *Out of Time* (A Special Report to Parliament) April, 2010.

⁴⁶ R.S., 1985, c. A-1.

Commission in general and the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* [*Aarhus Convention*] conceived at Aarhus, Denmark in 1998 in particular.⁴⁷

The *Aarhus Convention* is an example of a legally binding European instrument canvassing rules of conduct for an efficient and legitimate consultation mechanism. If the *Aarhus Convention* is seen as an innovation in the field of public participation, it is because of the importance of the subject it covers in the field of environment. Environmental measures have the characteristic of affecting a broad range of citizens, from the average citizen to farmers and agricultural organisations. Furthermore, the environmental policy sector is a field where the interests of the public with respect to openness and transparency frequently enter in conflict with the interests of businesses in keeping their data secret. Therefore, the *Aarhus Convention* gives individuals a right to access environmental information that is kept in the hands of public authorities.⁴⁸

In the preamble of the *Convention*, the parties recognize “that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.”⁴⁹ In other words, the *Convention* goes further than Canadian standards by not only acknowledging that the public needs to be informed, but also that the institutions need to make sure citizens know how to access the information. Also of interest in this *Convention* is that instead of putting forward a formal method for consultation, it developed a series of precise obligations for states to follow when they consult their populations on environmental matters.⁵⁰

III. CONCLUSION

After more than 20 years of consultations during the rule-making process it would be appropriate to determine whether some or all of the consultation process should be legally mandatory. On this point, two distinct legal avenues could be discussed. The first avenue would develop an argument based the principles of natural justice. The question could then be whether these principles can be adapted to support systems of new governance involving “third-party government” as Salamon puts it.⁵¹ The starting point of the discussion could be the decision of Evans J.A. in *Apotex*,⁵² for he 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.”⁵³ As Evans J.A. rightly pointed out in *Apotex*, the Supreme Court specifically said “that the doctrine

⁴⁷ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the *Aarhus Convention*), 25 June, 1998, 2161 UNTS 447, online: UNECE < <http://www.unece.org/env/pp/> >.

⁴⁸ *Ibid* at art. 4 (1).

⁴⁹ *Ibid* at preamble.

⁵⁰ *Ibid* at art. 6.

⁵¹ Salamon, *supra*, note 9 at 8.

⁵² *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 (C.A.). Leave to SSC denied [2000] S.C.C.A. no 379.

⁵³ Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 at 528.

has no application to the exercise of legislative powers”⁵⁴ as it would “place a fetter on an essential feature of democracy.”⁵⁵ 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.”⁵⁶ 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.”⁵⁷

The second avenue could take a fresher look at this issue by examining case-law pertaining to consultation with First Nations. This case-law is interesting because it is based, *inter alia*, on the fiduciary duty between government and Aboriginal people to support the view that the state exercises its authority in the name of Aboriginal people.⁵⁸ It would be of interest to explore the idea as to whether the same argument can be made when the state exercised its authority to govern all citizens on its territory as it was put forward by Evan Fox-Decent in a text on the fiduciary nature of state legal authority. As the author explains: “there is something deeply fiduciary about the state's relationship with the people over whom it asserts power, and that the fiduciary nature of this relationship explains the state's legal authority to announce, administer and enforce law.”⁵⁹ Simply put, the fiduciary nature of state legal authority may prove to be a powerful analytical tool to support the view that the state owes its citizens a legal duty to consult.

⁵⁴ *Apotex*, *supra* note 52 at para. 102.

⁵⁵ *Canada Assistance Plan*, *supra* note 53 at 559-560, cited with approval by Evans J.A. *ibid.* at para. 109.

⁵⁶ *Apotex*, *supra* note 52 at para. 110.

⁵⁷ *Ibid* at para. 126.

⁵⁸ There are several Supreme Court decisions on this subject, but of particular importance, see : *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

⁵⁹ “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen's LJ* 259 at 259.