

Tribunals and Policy-Making: From Legitimacy to Fairness*

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“Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.” (Chief Justice McLachlin in *Ocean Port*.)¹

Introduction

In *Ocean Port*, the Supreme Court affirmed that all administrative bodies have some policy-making role (and that this is, in its view, what distinguishes executive decision-makers from judicial decision-makers). It would appear beyond debate that a variety of different types of policies are created and formalized by executive tribunals, boards and agencies across Canada. Moreover, these policies are created and formalized in a variety of ways. First and foremost, tribunals, boards and agencies make policy through their decision-making. Second, tribunals make policy through rule-making, whether using policy instruments such as guidelines, codes of conduct, internal procedures and “quasi-regulation” or through more informal processes such as full-board meetings, case conferences or institutional practices, as discussed in *Consolidated-Bathurst*² and *Ellis-Don*.³ These policies may relate to substantive aspects of statutory interpretation or to procedural aspects of the tribunal, board or agency’s functions. We also know that other institutions make policy through formal regulation-making functions delegated by Parliament as discussed in the Supreme Court’s judgment in *Bell Canada v. Canadian Telephone Employees Association*.⁴ The line distinguishing formal regulation-making from quasi-regulatory (non-legislative) policies will not always be easy to draw, as highlighted in *Friends of Oldman River*

*Society v. Canada (Minister of Transport)*⁵ and *Capital Cities Communications Inc. v. CRTC*.⁶

The analysis below will focus in the main on adjudicative tribunals, or other administrative bodies with adjudicative functions, because it is in such settings that policy-making is least understood and most controversial (and we will refer generically to “tribunals” to reflect this adjudicative focus). However, policy-making dynamics in regulatory decision-making, front-line discretionary decision-making and other decision-making settings will also be examined.⁷

The goal of this chapter is to raise questions about the policy-making role of tribunals considering its legitimacy on our Canadian constitutional system. In light of this focus, there is a telling slippage in the passage excerpted from *Ocean Port* above. First, McLachlin C.J. notes that tribunals are created “precisely for the purpose of implementing government policy.” When tribunals create and formalize policies, whose policy preferences are they acting to further? To whom are they accountable for their policy choices? Finally, should governments and/or courts be authorized to interfere with these policy choices where they are found to conflict with broader political and/or legal values?

At the heart of this analysis lies the question of whether it is legitimate for tribunals to create and formalize policies at all. Addressing this question begs a further one—what do we mean by legitimacy? Legitimacy remains a contested term in Canadian public law. On one level, legitimacy in an administrative law sense often is understood in jurisdictional terms. A tribunal may only engage in policy-making (whether in the sense of decision-making or rule-making) to the extent it has the authority to do so within the terms of its empowering statute. On the other hand, it must engage in policy-making where and to the extent it has the mandate to do so. To borrow the terminology of *Roncarelli*, as confirmed in *C.U.P.E. v. Ontario (Minister of Labour)*⁸ (the *Retired Judges* case), a tribunal’s policy-making must remain within the “objects and purposes” of the statute to remain valid and consistent with the rule of law.

But does formal validity end the debate on legitimacy? We think not. Legitimacy may (and should), in our view, be approached from the standpoint of the values underlying tribunal policies and from the standpoint of Canada’s constitutional system. In light of these distinct but interrelated perspectives on legitimacy in tribunal policy-making, our analysis will be divided into three parts. In Part I, we will discuss

problems faced by tribunals in their daily operations, which raises some issues related to the legitimacy of policies based on values. In Part II, the legitimacy of policies created by tribunals in the context of the separation of powers in Canadian constitutional law will be discussed. In Part III, we turn to the implications of tribunal policy-making, including questions regarding tribunal capacities to create and formalize policies, and questions regarding their relationships with their stakeholders, especially with respect to the participatory role, if any, of affected parties to have a say in tribunal policy-making.

Part I Tribunals' Perspective: Legitimacy of Guidelines Based on Values

Tribunals may engage in policy-making by issuing norms to guide decision-making. These may take the form of guidelines, directives, a code or rulebook or a manual of some other kind, and may be published or unpublished. These instruments may perform several different, important roles in the policy-making process, including shaping the interpretation of law, constraining the exercise of broad discretion, and demarcating procedures before the tribunal.⁹

The dominant view on the purpose of the guidelines can be found in *Discretionary Justice*, the landmark study of K.C. Davis on administrative discretion.¹⁰ Davis advocated rule-making as an important tool both for confining discretionary power and for structuring it.¹¹ His main concern was countering the potential for arbitrary or oppressive uses of administrative discretion. For Davis, plans, rules, findings, reasons, precedents and a fair, informal procedure were all variations on the same theme of greater fairness as manifested in its many facets, such as predictability and consistency of the legal order. He was also of the opinion that guidelines could increase accountability and transparency in public administration. This approach to guidelines has met with some judicial favour. As McGilivray J.A. observed in *Re Hopedale Developments Ltd v. Town of Oakville*, “[i]t is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion.”¹²

K.C. Davis envisioned a spectrum of governance measures applicable to discretionary authority, with policy statements merging into interpretive rules and interpretive rules blending into legislative elaboration. Davis' view of bottom to top norm production is

illuminating for it is a phenomenon that can be observed more and more in the daily functioning of today's administrative tribunals. This phenomenon could be explained in part by the autonomy that these public institutions have gained over decades and also the incapacity of the legislature to repair quickly the problems encountered by tribunals. After their creation, tribunals are more or less left to govern themselves. Sometimes, the legislature has provided tribunals with the legal powers they need to fix problems arising within their own governance and sometimes, it has not. However, whether or not tribunals have legal powers such as the ability to issue binding guidelines does not stop them from acting. Within administrative tribunals, policies are used to solve different problems affecting their daily operations. Long delays, obvious and unjustified inconsistency in decisions, obstacles to access and possible violations of constitutional rights and freedoms are some of the problems which may need to be addressed by tribunals through policy-making. From the tribunal perspective, policy-making is closely linked to its credibility as a public institution.

In order to understand the many difficult issues surrounding the use of guidelines by tribunals, it is useful to look at them from their perspective. To illustrate this point, we will examine a sample of policies created by the Immigration and Refugee Board and explore the role tribunal policies play. When the statute constituting a tribunal does not give clear indication as to what they are precisely entitled to do, can they justify their actions by resorting to broad organizational principles of the legal order, such as fairness?

A. A Functional Classification of Policies

A functional classification of tribunal policy-making is required in order to have some understanding of the reasons why a tribunal created a particular policy at a given time in its history. While issuing guidelines is not the only way in which tribunals make policy, it is arguably the clearest and most revealing form of tribunal policy-making. Guidelines are issued for a variety of purposes relating to what we characterize as the legal order surrounding tribunal decision-making. At least two categories of guidelines can be drawn from our sample of research coming from the Immigration and Refugee Board ("IRB"). Guidelines are used in the IRB's decision-making process to: 1) fill in gaps in the legal order governing their actions and 2) develop their legal order.¹³

1. Completing the Legal Order

In many cases, the legislative mandate given to tribunals through their empowering statute is intentionally left incomplete so that the tribunal will use guidelines to complete its legislative mandate. At the IRB, there are a few examples of such guidelines, particularly with respect to procedures and evidence.¹⁴ We will describe two sets of guidelines that are related to setting procedural boundaries relevant to the exercise of the power to conduct inquiries. This power has been granted to members of the Refugee Protection Division and the Immigration Division under section 165 the *Immigration and Refugee Protection Act*.¹⁵

The first guideline of the IRB that we will examine – *Guideline 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection*¹⁶ – was issued in accordance with the legislative authority conferred upon the Chairperson of the IRB by section 159 of the *Immigration and Refugee Protection Act*.¹⁷ *Guideline 7* circumscribes inquiry powers of IRB Members so that they can limit the scope of the inquiry, and as such, be in a position to control the conduct of the hearing in order to ensure efficient and speedy determinations of claims. *Guideline 7* “changes the order of questioning by having the Refugee Protection Division (RPD) leading the inquiry in the hearing room. The purpose of this change is to allow the RPD to make the best use of its expertise as a specialist tribunal by focusing on the issues which it has identified as determinative.”¹⁸

At the Refugee Protection Division, it is particularly important to clarify the issue of who can first question the claimant for at least two reasons. The first is that this practice existed long before the guideline was drafted, but it was controversial because the generally accepted view was that it is the individuals asking for a benefit, right or status from the State who should present their case first, before being questioned by the opposite party or the tribunal’s agent or decision-maker. Therefore, board members needed to know whether they had the authority to proceed in this fashion. As a result, and in the absence of clear case-law on this issue, the Chairperson used his legal power to fill in the gap with a guideline.

The second reason involves the exercise of this policy-making power, which was also informed by the context in which the RPD operates. The RPD receives approximately 40,000 claims for refugee

status every year and has insufficient personnel to process this amount of claims in an efficient manner, leading to backlogs. The availability of hearing room time is also limited. Therefore, a clear opinion was needed as to whether RPD Members could ensure the speediest resolution of a claim by setting boundaries as to which issue(s) were to be resolved during the hearing in order to make a reasonable determination. This too is controversial for it may prevent a claimant from introducing relevant evidence circumstantial to the core issue as framed by an RPD Member in charge of a case.¹⁹

The second guideline to be examined is called *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division (Instructions)* and it was issued in 1996 in accordance with subsection 58(3) of the former *Immigration Act*. This subsection states that the Chairperson of the Immigration and Refugee Board is the “chief executive officer of the Board and has supervision over and direction of the work and staff of the Board.” The same power is also attributed to the Chairperson under the current *Immigration and Refugee Protection Act* in s. 159a).²⁰ The *Instructions for the Acquisition and Disclosure of Information* state among other things that the RPD “will acquire information through an accountable and consistent process that is managed and structured to ensure fairness in decision-making” and that the RPD “will acquire ‘Specific Information’ (i.e., claimant-specific information) only where it is satisfied that acquisition of this information will not result in a serious possibility that the life, liberty or security of the claimant or any other person would be endangered.”²¹

These *Instructions* clearly aim at specifying how communications outside of the hearing room should be conducted in order to preserve fairness of the process in an inquisitorial setting. Claims for refugee status are not characterized as a *lis inter partes* (the Minister of Immigration almost never contests a claim and as a result is usually not present during a hearing). An individual asks the Canadian state to recognize the status based on evaluation of criteria set by the legislation. In this type of setting, the task of RPD Members is to determine whether the case of the claimant is based on credible evidence, but most of the time the only version of the facts available to the decision-maker is the one presented by the claimant. In order to ensure that members have the necessary information to check the credibility and trustworthiness of the facts offered as evidence by the claimant, they must use their inquisitorial powers. Hence, they play a greater role in the gathering of evidence for or against the claimant. But they have to be careful in doing so, for if their

actions raise suspicions as to their impartiality and fairness during the process, the whole process can be invalidated for violation of the principles of natural justice. The values and predispositions of RPD decision-makers are critical to the outcome of these hearings.²²

In sum, *Guideline no 7* and the *Instructions* were created to settle the legal boundaries of the inquiry powers conferred to Board members (acting as decision-makers at the RPD and Immigration Division). It is the incompleteness of the formal legal framework regulating the actions of these Board members which triggered the issuance of these particular guidelines. Indeed, they were needed to ensure fairness of the process, meaning here ensuring predictability of the procedures followed during the decision-making process of the IRB.

2. Developing the Legal Order

In addition to the development of policies designed to address clear legislative gaps, there are other legislative mandates which require or permit the tribunal to adopt a statutory interpretation to suit a given circumstance. In this way, the tribunal is not so much completing its legal order as furthering its development. One example of a tribunal developing its legal order is the first version of the Immigration and Refugee Board's *Guideline 4 Women Refugee Claimants Fearing Gender-Related Persecution*.²³

Briefly, the definition of the "Convention refugee" states that a claimant for refugee status must prove that he or she fears to be persecuted and that his or her fear is linked to one of the five grounds provided for in this provision, one of which is "membership in a particular social group." At the beginning of the 1990s, different events on the international scene forced more and more women to leave their country of origin to seek asylum. Among these events, the civil war in Bosnia-Herzegovina became one of the most notorious. Amongst the strategies of ethnic cleansing employed by the Serb Army, rape of Muslim and Croat women was a favorite that was widely used. Before this guideline was created, RPD Members were receiving more and more refugee status claims coming from women who argued they were being persecuted because of their gender. However, since the gender of a person is not an explicit ground stated in the definition of a refugee, the question was raised as to whether "gender" could be considered a "social group." At

the time, a significant number of RPD Members rejected the idea that there existed such a link between the two concepts.

In the first version of this Guideline, drafted in the early 1990s, the then President of the Board (Nurjehan Mawani) settled the question. She purposefully pushed for the development of refugee law with this guideline. She adopted an innovative interpretation of the ground “membership in a particular social group” and proposed that a “social group” could be defined by an “innate or unchangeable characteristic.” The construction of the expression “social group” proposed by the Board allowed the members to adjust to a new social context where there was a clear and important increase of refugee claims based on gender and also to a new set of values relating to the rights of women that was rapidly gaining acceptance since the ’80s, both in domestic and international law. Soon after the guideline was made public, the Supreme Court adopted a similar approach in the *Ward* case in 1993.²⁴ On the one hand, fairness and consistency are the two central values that triggered this initiative. Today, the IRB precisely refers to consistency and fairness to justify its guidelines in its Handbook for CRDD members: “Guidelines are issued by the Chairperson to address matters of national importance, emerging issues, or ambiguities in the law. They also ensure a consistent and fair treatment of all cases dealing with like issues heard by the Refugee Division.”²⁵ On the other hand, the Chairperson took advantage of statutory criteria which were open to interpretation to establish an interpretation which reflected her policy preference.

B. Discussion: Fairness of the Decision-Making Process

If we agree with the premise of Davis that all guidelines derive from discretionary powers conferred upon them by the legislator, how far can administrative tribunals go in relying on these legal powers? As Davis wrote, “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.”²⁶ As affirmed in *Roncarelli*, however, these choices in Canadian administrative law are always jurisdictionally circumscribed. For example, an exercise of discretion, including the issuance of a guideline, may be invalidated where it is found to be undertaken in bad faith, or for improper purposes or based on an irrelevant consideration (or not taking into consideration relevant factors/values).²⁷ What does it mean to say that a tribunal policy was created or formalized for improper purposes or irrelevant considerations?

These two grounds are particularly interesting to discuss, especially since *Baker*, for we now know that “purposes” and “considerations” not only mean “facts,” but also “values.” As Justice L’Heureux-Dubé stated:

...discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.²⁸

Therefore, the authority of tribunals to issue policy guidelines is circumscribed by “fundamental values” such as: 1. fairness, procedural stability and predictability (e.g. *Guideline no. 7* and *Instructions*); and 2. fairness and substantive consistency (e.g. the *Guidelines on Women*).

1. Fairness and Predictability

Fairness is a core value whose roots can be found in the elaborate system of procedural safeguards developed in the common law tradition. Fairness and predictability are woven into the idea of the rule of law in the context of administrative discretion and its aversion to arbitrary decision-making. When tribunals create procedural guidelines to maintain stability and predictability in the legal system, they are striving to achieve an important goal in our legal system. Therefore, if a procedural guideline is compatible with common law values and provisions of the enabling statute of an administrative tribunal, why would they not be mandatory to follow?

The first Supreme Court case to consider the status of such procedural policy guidelines was *Martineau v. Matsqui Institution*,²⁹ in which an inmate of a federal penitentiary appealed against a disciplinary order made pursuant to directives issued by the Commissioner for Penitentiaries. The governing legislation authorized the Commissioner to make rules for disciplinary purposes. The directives at issue in the case concerned procedural rights for an inmate at a hearing which could result in a decision to revoke remission points toward the early release of the inmate for disciplinary infractions. The directives had not been followed and one of the issues in the case was whether these directives gave rise to legal rights. Four Justices held that the directives were merely “administrative” and thus could not bind the Board. Four dissenting Justices held that the directives were “law” since they were authorized by the Act and affected the rights of an individual. The deciding “swing”

Justice, Judson J., dismissed the appeal for the reasons given by the Federal Court of Appeal. The Court of Appeal in the course of its disposition of the case had treated the directives as administrative in nature. For the majority in *Martineau no. 1*, therefore, the directives themselves could not give rise to procedural rights, nor could the Board be sanctioned for not following them. Pigeon J., writing for the four Justices in the majority, characterized the directives in the following terms:

In my opinion it is important to distinguish between duties imposed on public employees by statutes or regulations having the force of law and obligations prescribed by virtue of their condition of public employees. The members of a disciplinary board are not high public officers but ordinarily civil servants. The Commissioner's directives are no more than directions as to the manner of carrying out their duties in the administration of the institution where they are employed.³⁰

The Court's dichotomous understanding of "hard" law (statutes, etc) on the one hand, and "soft" law (guidelines, etc) on the other, has waxed and waned over the years. The narrow issue in *Martineau no. 1* as to whether guidelines can give rise to procedural obligations was resolved shortly after that decision in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*.³¹ There, the Court held, led by the dissenting Justices from *Martineau*, that directives and guidelines could give rise to procedural obligations, although this was not necessarily the same as their being treated as "law." Once again, the Court approached non-legislative guidelines with ambivalence. As we suggest below, this ambivalence arises, at least in part, because the legitimacy of tribunals engaging in explicit policy-making remains unresolved.

In *Bezaire v. Windsor Roman Catholic Separate School Board*,³² the Ontario Divisional Court considered the status of Ministry guidelines where a School Board had failed to follow procedural steps as part of a school closure decision, as mandated by the guidelines. The guidelines in question called on school boards to develop closure "policies" which provided for input from affected communities. The Court held that "[i]t is clear from our reading of s. 150(1) para 6 of the *Education Act* that a board, when closing a school, must follow its policies and, furthermore, that those policies must substantially conform with the guidelines."³³ In *Bezaire*, without accepting that the guidelines were "subordinate legislation," the Court nonetheless recognized a legal duty based on the procedural norms contained in the guidelines. These norms contemplated

some variation through different board policies, but no policy could be permitted which was inconsistent with those norms. In the result, the school closure decision was held invalid because the Board in question had failed to allow for the affected community to have input into the decision and therefore its decision was inconsistent with the guidelines.

In the case of procedural guidelines, two scenarios can be analyzed. The first is when a procedural guideline improves individuals' rights and interests to a fair procedure. If the guideline cannot be considered "law," can it be said to give rise to legitimate expectations that a certain procedure will be followed by the tribunal?³⁴ If not, what are the reasons countering this point of view?

The second scenario is the case where a procedural guideline imperils individual rights to a fair procedure. In such a situation, there may be a possibility of challenging the guideline on the basis of a violation of a *Charter* right. For example, if it were proven that *Guideline 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division* seriously impairs the right to be heard of refugee claimants, could it also be declared invalid under s. 7? Another issue, related to the principle of fairness, begs the question of whether or not it could be proven that the application of this guideline amounts to an abuse of process and has an impact on the fairness of the hearing process as a whole. In this case, what could a court do with respect to the guideline?³⁵

In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*,³⁶ Guideline 7 was challenged as a breach of procedural fairness and on the grounds that it fettered the discretion of Board members to decide the order of questioning appropriate to a particular claim. The challenge was raised in the context of a refugee application involving a Tamil student claiming persecution if returned to Sri Lanka. While the Court reaffirmed that Guideline 7 does not violate the Board's duty of fairness, the Court nullified the denial of refugee status on the basis that the Board had fettered its discretion by operating as if it were bound by the guideline.

The Federal Court of Appeal affirmed the Court's finding with regard to Guideline 7 and the duty of fairness but reversed the aspect of the decision dealing with administrative discretion.³⁷ Evans J.A., writing for the Court, held that Guideline 7 expressly directs members to consider the facts of the particular case before them in order to determine whether there are circumstances warranting a deviation from the standard order of questioning. Also, it was not evident that board members generally

disregarded this aspect of Guideline 7 and unthinkingly adhered to the standard order of questioning.

2. Fairness and Consistency

As indicated above, fairness is mainly a procedural value and, in administrative law, it has been more often coupled with predictability and efficiency of the legal system than consistency. Consistency, however, is a core substantive value in tribunal policy-making, especially where policies are worked out on a case-by-case basis through the individual decisions of tribunal members. The ambivalence of tribunals to “*stare decisis*” continues to shape this issue. Tribunal members are caught in a bind. They cannot disregard past tribunal decisions for fear of undermining the goal of fairness through consistency, yet they cannot appear to have their decision-making entirely fettered by precedent either. Indeed, as Simpson explains, elaboration of rules and principles governing the use of precedents and their status as authoritative rules is relatively modern in common law courts.³⁸ As far as administrative tribunals are concerned, this idea is even newer. Until the Supreme Court decision in *Consolidated-Bathurst*, the dominant view was that decisions of a particular quorum of members of an administrative tribunal could not be used as a precedent by another quorum of this tribunal. As Reid J. said in *Broadway Manor Nursing Home*:

The doctrine of *stare decisis* which prevails in the courts tends to the avoidance of conflict in their decisions and such conflict as does occur may be resolved by the mechanism of appeal. But the doctrine of *stare decisis* does not apply to referees, or arbitrators, or, for that matter, to administrative tribunals generally, nor are referees, or arbitrators, or administrative tribunals generally (there are exceptions) subject to appeal. These are characteristics of tribunals which legislators have created to provide what they believe to be for certain purposes more appropriate forums for decision-making than the courts.³⁹

This view was particularly artificial. The practice of many tribunals was to rely on their own former decisions to justify the outcome of the case. Thus, in *Domtar*⁴⁰ and also in *Consolidated-Bathurst*,⁴¹ *inter alia*, the majority of the Court took the opportunity to make a statement on the principle of consistency. The majority stated that consistency is a valuable goal to reach for an administrative tribunal. This view is shared by scholars. For MacLauchlan, consistency plays an important role. It fosters “public confidence in the integrity of the regulatory process. It

exemplifies “common sense and good administration.”⁴² Comtois adds: “as regards administrative tribunals exercising quasi-judicial functions, [...] the specialized nature of their jurisdiction makes inconsistencies more apparent and tends to harm their credibility.”⁴³ From this perspective, *Consolidated-Bathurst*, in particular, had a profound impact on many tribunals for it gave them stronger authority to resort to guidelines or other means to enhance the consistency of their decisions.

In the context of administrative tribunals, the proper balancing between ensuring evolution of the law at the pace of the evolution of the society and maintaining a reasonable degree of certainty and predictability in the legal system is very much present in the debate over judicial review of consistency. Although courts seem to have reached a certain common understanding of what judicial review principles related to this issue are, the question of whether fostering consistency should vary depending on the type of legislative mandate attributed to administrative tribunals remains largely unresolved.

a. Judicial Review of Consistency

The starting point for a discussion on judicial review of consistency is the decision of the Supreme Court in *Domtar*.⁴⁴ This case was about an alleged jurisprudential conflict between two distinct tribunals (Commission d’appel en matière de lésions professionnelles) and the Québec Labour Tribunal (Tribunal du travail) on the interpretation of s. 60 of the *Act respecting Industrial Accidents and Occupational Diseases*. Although the Court recognized the importance of consistency in tribunal decisions, it also stated that a jurisprudential conflict does not constitute an independent basis for judicial review.⁴⁵ The objective of consistency cannot be absolute and from a judicial review perspective, the problem of inconsistency “cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.” After a pragmatic and functional analysis, the Court decided that the test of patent unreasonableness applied to the tribunal’s decision and that the principles underlying curial deference should prevail. As a consequence, the decision of the CALP was not quashed.

In much Canadian jurisprudence, inconsistency is still understood in terms of an intrajurisdictional error, meaning that the question of inconsistency should be resolved by the tribunal, unless the inconsistency is patently unreasonable. In Québec, for example, jurisprudential conflict

has been argued in front of the Tribunal administrative de Québec (TAQ), the Commission des lésions professionnelles (CLP) and other tribunals but is rejected most of the time on the basis that inconsistency is not an autonomous ground of review.⁴⁶

b. Consistency and Types of Administrative Tribunals

To start, we will distinguish between three types of legislative mandate given to administrative tribunals. As Lebel J. famously observed in his dissenting reasons in *Blencoe v. B.C. (Human Rights Commission)*: “...labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows!”⁴⁷ However, as he also observed: “Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate.” For this reason, it is important to take into consideration the object of a tribunal as a useful tool to determine the degree of consistency required from decision-makers within a particular tribunal.

The first type of tribunal is comprised of those performing an “administrative decision-making function.” By this we mean that the legislator conferred on them the power to exercise broad discretionary power, such as decisions to ensure the safety of the public, or decisions to further the public interest, and the like. Parole Boards are a good example of this type of tribunal.⁴⁸ This type of discretionary power is given for the very purpose of ensuring that each case will be treated in and of itself, regardless of similar cases analyzed in the past (to the extent that there is no prejudice caused to an individual because of a violation of the principles of natural justice).

The exercise of broad discretionary powers aims at ensuring that decisions can evolve over time. They may be characterized as “sponge-like rules,” because their role is to absorb the changes occurring in their environment and adapt to new situations and values in society.⁴⁹ It is a fundamental reason why tribunals exist. To achieve this end, the legislator can create specialized tribunals to which a greater degree of deference will be accorded, not because the decision-makers are experts in their fields (although this can also be the case), but because “special procedures or non-judicial means of implementing the Act” are used during the decision-making process.⁵⁰ This is the case with the Parole

Board. It decisions are not based on evidence, but on any relevant information and opinions that they receive.

For this very reason, inconsistency in the decision-making process is inevitable insofar as, from the outsider point of view, two apparently similar situations will appear to be treated very differently. In such a legislative setting, as David Mullan has observed, there is a “real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions.”⁵¹ Indeed, it is difficult to imagine how a court could exercise its jurisdiction properly without conducting a detailed inquiry into the facts and opinions upon which the decision was based. In such a situation, would it be appropriate to apply the standard of patent unreasonableness to “condemn unexplained or inexplicable inconsistencies in the administration of statutory discretions?”⁵² Or could we say that a tribunal such as the Parole Board does not have to explain or justify inconsistencies; that, power in this case, review for inconsistency can simply not be a ground of review, period?

Second, there are tribunals performing “jurisdictional decision-making functions,” meaning the legislator gave them the competence to make individual decisions, but that the decisions must be based on strict legislative criteria. The Immigration and Refugee Board, the TAQ and the CLP are examples. Usually, they have no discretionary powers. This type of tribunal is the closest to the idea of a court of justice. In this case, and as a general principle, could we say that consistency should be fostered to its highest degree? In Québec, both Chairs of the TAQ and the CLP were given the power to formulate guidelines “to maintain a high level of quality and coherence of decisions.”⁵³ They also maintain a “bank of jurisprudence.”⁵⁴ In the case of the CLP, the legislation distinguishes between its jurisprudence (s. 382) and its decisions (s. 383).⁵⁵ Sections 382 and 383 of the Act do not explain the distinction between “jurisprudence” and “decisions.” Presumably, “jurisprudence” refers to decisions in which a principle was established. “Decisions” refers to ordinary decisions in which the law and case-law was simply applied and that do not establish any new principle. Because the TAQ and CLP are appeal divisions for a very important number of decisions taken by front line civil servants, it is easier to understand the importance of given jurisprudential value in its decisions.

The idea of recognizing some “jurisprudential value” of tribunal decisions was also codified in the new *Immigration and Refugee*

Protection Act. Section 159 (h) serves not only as a basis for the Chairperson to issue guidelines but also to “identify decisions of the Board as jurisprudential guides.” In this light, the IRB issued a *Policy on the Use of Jurisprudential Guides*,⁵⁶ which governs “the exercise of the Chairperson’s authority to identify a decision as a jurisprudential guide in the Immigration Division, the Immigration Appeal Division and the Refugee Protection Division of the Immigration and Refugee Board.”⁵⁷ The distinction between the two types of decision lies in the degree to which they may bind decision-makers. As the Policy states:

It is necessary to emphasize that persuasive decisions are not decisions which have been designated by the Chairperson as jurisprudential guides pursuant to s. 159(1)(h) of the *Immigration and Refugee Protection Act*. Where a decision has been designated as a jurisprudential guide and the facts underlying the decision are sufficiently close to those in the case before a Member, then Members are expected to follow the reasoning in the jurisprudential guide. A member must explain in his or her reasoning why he or she is not adopting the reasoning that is set out in a jurisprudential guide when, based on the facts of the case, they would otherwise be expected to follow the jurisprudential guide.

While the jurisprudential guide has received judicial approbation, Courts have been more critical of tribunals using test cases or “lead” decisions to set policy in an adjudicative context. In *Geza v. Canada (Minister of Citizenship and Immigration)*,⁵⁸ the Federal Court of Appeal found that the attempt by the IRB of establishing a “lead” case in relation to Roma seeking refugee status infringed the reasonable apprehension of bias standard. In part, this finding was based on evidence in the case that the IRB was attempting not only to ensure consistency but also to dissuade similar refugee claims from arising in the future.⁵⁹ Evans J.A., writing for the Court, distinguished lead cases from jurisprudential guides in the following terms:

A “lead case” is different in at least two respects from a “jurisprudential guide,” another technique used by the Board to enhance the quality and consistency of decisions. A Board decision is identified as a jurisprudential guide after it has been rendered, while a “lead case” is planned and organized before the case is heard. In addition, a jurisprudential guide is normally intended to be persuasive on questions of law, and mixed law and fact. In contrast, it was intended that lead cases would also establish persuasive findings of fact on country conditions.⁶⁰

The Court’s consideration of the IRB’s initiatives to enhance consistency raises the broader question of what degree of deference

should be accorded to tribunals in such endeavours. Should the standard of reasonableness apply to the consistencies of tribunal decision-making? Would an unexplained and inexplicable inconsistency be considered unreasonable? What factors would mitigate against such a point of view? What about inconsistencies that the tribunal would have attempted to give reasons to explain the different treatment given to the individual, but would have failed to provide reasonable explanation for it to the eyes of the Court because judges would be of the opinion that the reasons are not based on a reasonable application of the distinguishing common law technique?

Third, there are tribunals performing “regulatory decision-making functions,” meaning that the legislator gave them the competence to set general norms to be applied in particular cases. The Canadian Radio-television and Telecommunications Commission (CRTC), National Energy Board (NEB), and Industrial Relations Boards are examples. General norms can be set with different legal instruments, authorized by law, such as formal regulations and directives. It can also be done incrementally, through decision-making. Therefore, whether the tribunal decides to resolve the issue of inconsistency relatively quickly in issuing a guideline, or by having a plenary meeting with Board members, or to not resolve it and leave it to law to settle itself through as an incremental development of individual decisions,⁶¹ it is the Board’s decision and Courts generally will not interfere unless it leads to patently unreasonable decisions.

While classifying tribunals according to these three types sheds light on the different problems of legitimacy and fairness to which tribunal policy-making gives rise, there will be some tribunals which do not fit within these categories, and even more which fit into more than one of the categories. For this reason, understanding dynamics of tribunal policy-making, like understanding dynamics of administrative law more generally, is inherently contextual.

Below, in Part II, we shift our focus from the tribunal’s perspective to that of the court. However, the two perspectives clearly are and should be seen as related. Tribunals will often shape their policy-making with a view to conforming to judicial standards and avoiding judicial interference.⁶² Courts on the other hand, as discussed below, attempt to fashion standards with an understanding of the realities and complexities of tribunal decision-making. Consequently, it is appropriate to see tribunal policies (whether in the form of guidelines, decisions or

practices) as shaping and shaped by an ongoing dialogue with the judiciary.⁶³ Finally, both tribunals and courts must be alert to the role of affected parties in tribunal policy-making (which will be discussed in Part III).

Part II Courts' Perspective: Legitimacy of Guidelines Based on Legislative Authority

Courts in Canada have not developed an overarching framework or approach toward tribunal policy-making in the wake of the Supreme Court's stark pronouncements in *Ocean Port* on the "policy-making" role of tribunals. On the topic of tribunal policies contained in instruments such as guidelines, however, judges have adopted a somewhat nuanced attitude. They say that these policies are normative, for example, but their normativity is somewhat insufficient to make of them genuine legal rules. One of the consequences of this point of view is that it implicitly justifies upholding the legitimacy of guidelines in a legal 'grey zone,' or even sometimes completely outside the legal order. This lack of determination in the status of guidelines has resulted in an equivocal approach to the confining and structuring of discretionary power. The starting point of the discussion is often that decision-making bodies and ministries must not fetter their own discretion by adopting fixed rules of policy in the absence of specific statutory rule-making authority.⁶⁴ Treating a policy statement as a mandatory rule without the kind of express statutory authority discussed in *Bell* or *Friends of the Oldman River* is viewed as usurping the legislative function and normally will justify judicial intervention to quash the guideline or policy statement as *ultra vires*.⁶⁵

However, the rationale for finding that a particular guideline will have binding effect on the actors of the system is not always clear, insofar as the justifications that are used may vary greatly from one case to another. Take, for example, *Capital Cities Communications* and *Friends of the Oldman River*. In the first case, the Supreme Court found that the guideline at stake was mandatory because it was the product of a deliberation between the CRTC and private entities during a hearing where all parties were able to make their opinion known to the Board. At that time, there was no provision in the statute stating that the CRTC can regulate broadcasting and telecommunications through guidelines.

In *Friends of the Oldman River*, it is the very wording of the statute which had a determining effect on the outcome of the case.

Section 6 of the *Department of Environment Act* gave explicit power to the Minister to issue guidelines:

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.⁶⁶

In this case, the wording of the guideline was clearly mandatory and it was argued that the guideline was invalid because s. 6 did not “empower the enactment of mandatory subordinate legislation, but instead only contemplates a purely administrative directive not intended to be legally binding on those to whom it is addressed.” The Court agreed that the power to make subordinate legislation has to be found in the enabling statute. However, the Court added that the word “guidelines” cannot be construed in isolation. The Court said: “[Section] 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is “law,” and thus amenable to enforcement through prerogative relief.” In this case, because the statute stated explicitly that a guideline was issued by order, with approval of the Governor in Council, the Court found sufficient indication that it was indeed of the nature of subordinate legislation.

Of course, the comparison between the two cases could be considered weak insofar as the time difference between the two cases (10 years) is also important. The difference could simply show that the court had reached a greater understanding of the many ways in which guidelines can be used by all types of public institutions. However, what we want to pinpoint here are the different conclusions that a judge can reach depending on the wording of the enabling statute. Factors such as the type of public institution which created the guideline, the wording of the statute and the objective of the legislator as a whole can all be indicia to determine the degree of obligation to follow a guideline for civil servants and Board members. This is important because it means that discretionary powers are of very different types and it is no longer possible to analyze all the guidelines on the same footing. Even if they are all a product of the exercise of a discretionary power, the category “discretionary powers” must be refined.

The Court tends to focus its inquiry on the legal context in which the policy is developed rather than the institutional and operational

contexts which shape its application. In other words, a court likely will be more interested in whether a guideline is worded in mandatory or discretionary fashion rather than whether, empirically, it is routinely followed or disregarded. This approach was apparent in the Federal Court's decision in *Thamotharem*, discussed above, where at first instance, the Court held *Guideline 7* to be *ultra vires* even though the guideline was worded in a fashion that clearly indicated IRB members had discretion not to follow the reverse-order questioning in a particular case.⁶⁷ Blanchard J. accepted evidence from a former board member and other extrinsic evidence to reach the conclusion that the institutional culture of the IRB created an expectation that the guideline be followed, including the fact that members' use of the guideline was monitored and that this could be a factor in performance appraisals.⁶⁸ In overturning this aspect of the decision, Evans J.A. observed:

In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.⁶⁹

Following the Supreme Court's lead, three main elements will be considered when determining the validity of a guideline: 1) The wording of the guideline itself: Is the language mandatory? 2) The wording of the specific power conferred to the tribunal in the statute: Does Parliament confer explicit powers to issue guidelines (and if so, in what form must they be issued)? 3) The general wording of the overall statute: What is the legislative objective? These same three factors may be used to suggest a classification of policy guidelines that will help focus the discussions around several issues linked to the enforcement of the separation of powers doctrine by courts.

A. Classification of Policies

It is trite to say that there is not one type of discretionary power, but several types and that the difference between them must be taken into account in order to have an appropriate understanding of the role of a policy in a particular legal setting. The degree to which a policy is treated as "binding," as noted above, is of special legal significance and lies at the heart of the judicial perspective on tribunal guidelines.

For the purpose of this analysis, we suggest that there are at least three types of discretion that can be conferred on public institutions, and

more particularly on administrative tribunals. This classification tracks policies from the least to the most binding. This classification is more conceptual than empirical in nature. Therefore, it is more of the nature of “ideal types” than “real types” and it is neither exclusive, nor exhaustive.

Types of Discretion	Degree of “mandatory” effect
1. Open discretionary powers	1. Self-limiting guidelines
2. Jurisdictional discretionary powers	2. Interpretive guidelines (procedural and substantive)
3. Instrumental discretionary powers	3. Quasi-regulatory guidelines

1. Open powers/Self-limiting guidelines

By open discretionary powers, we refer to the type of broad discretion that entitles, for example, a tribunal to take decisions either in the “public interest,” for “the public safety” or for “humanitarian and compassionate” reasons. We call this type of power “open” because the legal standards are so loose, porous or sponge-like that they give very minimal indications as to how decisions should be made. This type of power leads tribunals to issue guidelines that are in a true sense “confining and structuring the discretion” of decision-makers. For this reason, we call them “self-limiting guidelines.” In the course of applying their policies, administrative tribunals affect the rights and interests of individuals subjected to them. Although judges and administrative law specialists recognized that soft law instruments such as policy guidelines, procedural rules, codes, directives and protocols may be treated as binding internally, they disagree as to whether they can give rise to externally enforceable rights.⁷⁰ Because they may be seen by courts as incapable of creating rights, tribunals may, without any specific statutory authority, issue guidelines and other non-binding instruments.⁷¹ The manner and form of these policy instruments varies widely and is subject to little if any design constraint. Similarly, the critical decision whether to publish and/or disseminate these instruments once they are developed is subject to virtually no legal constraint. However, once “soft law” policy mechanisms are in place, the decision to apply or not to apply the policy

is completely left to the whims of the decision-makers. The decision-maker cannot simply ignore the policy or apply it blindly. A party must be given the opportunity to question the application of such a policy in a deserving case. As a consequence, although “self-limiting discretionary powers guidelines” may not give rise to enforceable rights (*elles ne sont pas opposables*), they can nonetheless be called upon by the individual either as an aid to make his or her case, or as an aid to argue a contrary case (*elles sont invocables*). The National Parole Board is a good example. The *Corrections and Conditional Release Act* provides:

151. (1) There shall be an Executive Committee of the Board consisting of the Chairperson, the Executive Vice-Chairperson, the Vice-Chairperson, Appeal Division, the regional Vice-Chairpersons and two other members of the Board designated by the Chairperson after consultation with the Minister.

(2) The Executive Committee

(a) shall, after such consultation with Board members as it considers appropriate, adopt policies relating to reviews under this Part;⁷²

Pursuant to this mandate, the *NPB Policy Manual* was created. The stated purpose of the Manual “is to guide Board members in making pre-release conditional release decisions which may result in the release of an offender to the community.” The purpose of conditional release is to contribute to the maintenance “of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.” (s. 100) Board members have to exercise their functions in accordance with these policies and it is stated in s. 105(5). “Members of the Board shall exercise their functions in accordance with policies adopted pursuant to subsection 151(2).”

2. Jurisdictional Powers/Interpretive Guidelines

By jurisdictional discretionary powers, we mean explicit and specific powers conferred on boards and tribunals which delineate their jurisdictional specialization. There are two, often interrelated, sub-types of jurisdictional powers: procedural and substantive. By procedural, we mean all the powers conferred on a tribunal that explicitly state “how” decisions should be taken: inquiry, hearing, adjournments, representations, examination, etc. The scope and limit of the procedural boundaries to exercise their jurisdiction needs to be spelled out for the

decision-makers because they may not necessarily possess the legal knowledge necessary to know how precisely the power can be used. In Part I, we described *Guideline 7* and the *Instructions* of the IRB. This type of guideline is very close to the rules of practice and procedures that tribunals can normally issue under their enabling statutes. Although the rules of practice and procedure are formal regulations and are issued following the same legal procedure of any other regulation, they are not meant to be followed blindly by board members.

By substantive jurisdictional discretionary powers, we mean the object of the jurisdiction of the tribunal: the “what.” What are the specific decisions of this particular tribunal about? In the case of the IRB, it is to determine, *inter alia*, who can be recognized as a “refugee” from strict legislative criteria: a refugee is a person who has a well-founded fear of persecution based on five grounds, such as nationality, race and membership in social group. In this case, the idea of “self-limiting discretionary powers” does not make as much sense as it does for the first category. Here, it is clearer to speak of “interpretation” for this type of guideline because they set legal parameters of the meaning of the legislative criteria. The guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution*,⁷³ for example, set boundaries on the interpretation of “membership in social group” insofar as “gender” is concerned.

While courts may well find this analogy problematic, jurisdictional guidelines often will be treated as binding by tribunal decision-makers in a very similar way as case-law is treated by judges. They are intended to be followed unless the facts, circumstances or issues are such that a different analysis is appropriate.⁷⁴ The IRB goes further than the NPB where members simply have to exercise their functions in accordance with the guidelines. The guideline itself provides that:

Refugee Division Members are expected to follow the Guidelines unless there are compelling or exceptional reasons for adopting a different analysis. Individuals have a right to expect that the Guidelines will be followed unless compelling or exceptional reasons exist for departure from them. At the same time, the Guidelines are not binding in the sense that Members may use their discretion in individual cases to follow a different approach where warranted, as long as the reasons for departure are set out in their reasons for a decision.⁷⁵

3. Instrumental Powers/Quasi-regulatory Guidelines

By instrumental discretionary powers, we mean powers to use instruments of regulation (to set norms) which can go from genuine regulation to quasi-regulation. Norm-setting can also be done incrementally, through decision-making. This choice of “regulatory instrument” was recognized by the Supreme Court in *Capital Cities Communications*, in 1979⁷⁶ and commented on in an influential article by Hudson Janisch.⁷⁷ By quasi-regulatory guidelines, we mean that the instrument has the same effect as a regulation, but that it was not created in conformity with the procedural requirements of actual regulations. At the federal level, these procedural requirements are set out in the *Statutory Instruments Act*⁷⁸ and in Québec by the *Loi sur les règlements*.⁷⁹ In the case of quasi-regulatory guidelines, the applicable legislation will often indicate whether guidelines or policies are meant to be mandatory.

To produce effective results in terms of norm-setting, these guidelines arguably have to be mandatory or at least strongly influential. They have *erga omnes* value, just as any “hard law” might have. As a consequence, they are enforceable policies (*opposable*) binding on all actors involved in a particular decision-making process and conceivably, it is an error of law for a decision-maker to not apply the relevant policy. In addition to regulatory tribunals (such as the CRTC involved in the case of *Capital Cities Communications*), the Supreme Court has also recognized the mandatory nature of some policies in a different type of administrative tribunal.

In some statutory contexts, a tribunal’s empowering legislation may contemplate an explicit policy-making role for tribunals. The most notable recent example of litigation concerning such a delegation of legislative authority was in *Bell v. CTEA*,⁸⁰ which raised the issue of the use of guidelines by Canadian Human Rights Commission and the Canadian Human Rights Tribunal. Bell brought a motion before a panel of the Canadian Human Rights Tribunal, which had been convened to hear complaints filed against Bell by female employees alleging that Bell pays female employees in certain positions lower wages than male employees performing work of equal value, in violation of s. 11 of the *Canadian Human Rights Act*.⁸¹

11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

Section 27 of the CHRA empowered the Commission to issue guidelines:

27.(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

Although not involving an administrative tribunal, it is worthy to also note the Supreme Court's decision in *Friends of the Oldman River*⁸² where the mandatory nature of guidelines, authorized by enabling statute of the federal Department of Environment was recognized. An Alberta environmental group, Friends of the Oldman River Society, brought applications for *certiorari* and *mandamus* in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta. The Guidelines Order, established under s. 6 of the federal *Department of the Environment Act*, required that all federal departments and agencies submit any proposal that may have an environmental effect to an impact study in order to determine whether it may give rise to any potentially adverse environmental effects. In respect to the construction of the dam of the Oldman River, no assessment under the Guidelines Order was made. At the Supreme Court, constitutional and statutory validity of the Guidelines Order as well as its nature and applicability were raised. The majority of the Court decided that the Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and was mandatory in nature.

When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law," and amenable to enforcement through

prerogative relief. The “guidelines” are not merely authorized by statute but must be formally enacted by “order” with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister’s authority.⁸³

B. Discussion: The Separation of Power Doctrine

The doctrine of separation of powers postulates that each organ in a state has an exclusive power to execute its own task in the state. Legislators make laws, judges determine the scope and the limit of those laws and the government executes them.⁸⁴ Of course, these distinctions and the exclusivity apparently attached to their exercise do not represent the reality of legislative, executive or judicial actions in Canada. To a certain extent, each organ of the State is involved in law-making, law-interpreting or law-applying. This is especially true in the case of the government, which has slowly developed as a state within a state with the creation of autonomous boards and agencies. As we saw in the first part, some administrative tribunals play a role that is very similar to a court, while others engage in legislative functions (ie. regulation-making) or more purely policy-making executive functions. With respect to tribunal policy-making, one size does not fit all.

This intermingling of governmental action raises a central constitutional puzzle: which branch of government has the legitimacy and capacity to make a rule of law? When analyzing the treatment by courts of guidelines, one can see that no satisfactory answer has been yet proposed to solve this puzzle which takes into consideration the actual practices of tribunals, courts and legislatures. The result is that the realities of the administrative state have not yet penetrated the logic of the doctrine of separation of powers, at least where the policy/law distinction is concerned.⁸⁵ This tension surrounding tribunal policy-making in the context of the separation of powers is apparent when guidelines are considered from the standpoint of the effect that they have on the rights and interests on members of civil society.

1. Effect on Individual Rights and Interests

Self-limiting discretionary power guidelines and interpretative guidelines are used to delimit the parameters of decision-makers. They are not meant *per se* to change the legal order as quasi-regulatory

guidelines do. However, as David Mullan has observed, “because of their longevity and the expectations built up around them they will be treated as though they were binding both by the agency responsible for promulgating them and the regulated community”⁸⁶ and by having this effect, does it mean that they are changing the legal order, just like customs (or usages)? Although this question was not raised in case-law, we can observe that there is a shift at the Supreme Court in the last decade in that there seems to be some recognition that guidelines have some legal effect. This observation is based in part on the fact that the thoughts around the classification of guidelines seem to be more nuanced today than in the ’70s or the ’80s.

Indeed, in 1978 at the time of *Martineau no 1*, we knew of one category of guidelines: the administrative directive (*règle de régie interne*).⁸⁷ This view also prevailed in *Maple Lodge Farms Ltd. v. Government of Canada*⁸⁸ in which the Supreme Court was of the opinion that there “was little doubt that ordinarily a Minister had an implicit power to issue directives to implement the administration of a statute for which he is responsible.... It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law.” In a similar vein, the category of administrative guideline (*règle de régie interne*) was defined by Dussault and Borgeat in the following terms:

When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of “law” and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of “law” must be respected.⁸⁹

Therefore, for Dussault and Borgeat there is law and non-law and this view corresponds with the understanding of the organization of the legal order and is reflected in the separation of powers doctrine. Only Parliament can make law or formally delegate its power to the

government in the form of enabling the latter to make formal regulations. At that time, there were very few legislative powers conferring to administrative tribunals the ability of make guidelines, such as the one given to the IRB. Usually, guideline-making power was predominantly understood as an exercise of supervisory powers conferred to a public authority. It seems that they were very much understood as an instrument which could be used by Ministers (or Director of a penitentiary as in *Martineau I*) to guide the actions of their employees. The idea that autonomous boards and agencies, and especially administrative tribunals with a purely jurisdictional function, would also use them to guide the decision-making process of Board members (for whom some degree of independence and impartiality was recognized) was not yet part of the administrative law landscape.

The post-*Martineau* departure from the distinction between administrative and quasi-judicial functions and the shift instead to a focus on the rights and interests of the individual enabled the Court, in the context of litigation around the use of guidelines, to view decision-making from the perspective of the rights and interests of a claimant. Although this shift was an important one with respect to the protection of claimants in administrative law, it also led to a blurring between guidelines which are used to confine the exercise of broad discretionary powers and those which are used to interpret the parameters of strict legislative criteria that constitute the basis of the jurisdiction conferred to purely adjudicative tribunals. This is particularly clear since *Baker*, where L'Heureux-Dubé J. observed, "there is no easy distinction to be made between interpretation and the exercise of discretion."⁹⁰

In *Baker*, the decision to deny an application for exemption from the *Immigration Act* on humanitarian and compassionate grounds was challenged.⁹¹ Mavis Baker was an illegal immigrant who had had four Canadian-born children during the 11 years she had lived illegally in Canada. The question for the immigration officer was whether the prospect of separating Mrs. Baker from her children constituted humanitarian and compassionate grounds for exempting her from being deported pursuant to the *Immigration Act*. The immigration officer denied her application, disclosing in his reasons a number of biases against Mrs. Baker. The decision of the officer was quashed by the Supreme Court on the basis of bias. The Court also concluded that the officer's decision should be quashed on the grounds that it was an unreasonable exercise of discretion. In this part of the decision, the Court

considered the ministry guidelines upon which officers were supposed to rely.

L’Heureux-Dubé J., writing for the Court in *Baker*, characterized the Minister’s guidelines as “great assistance to the Court in determining whether the reasons... are supportable... They are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section.”⁹² At another point in the judgment, she acknowledged that these guidelines “constitute instructions to immigration officers about how to exercise the discretion delegated to them,”⁹³ and set out the criteria on which discretion should be exercised. In general, they provide a decision-making framework for the reasonable exercise of discretion.⁹⁴ In *Baker*, the Court did not address the legal status of the guidelines *per se*, but the following passage from the judgment suggests that guidelines may be treated, *de facto*, as limiting the scope of lawful discretion even if *de jure*, they cannot be considered binding *per se*:

The guidelines also set out the basis upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined—public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. ... Guideline 9.07 states that humanitarian and compassionate grounds will exist if “unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada.” The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person’s home country should also be considered.

Thus, the Court held that it should consider the guidelines in determining whether the exercise of discretion in a given context was “reasonable.”⁹⁵ That the decision taken in that case was at odds with the guidelines was held to be one of several grounds for quashing it as an unreasonable exercise of discretion.⁹⁶ While tribunal policies or ministerial guidelines may not give rise to legal rights, they can impose legal duties on administrative decision-makers. In such circumstances,

does the law/policy distinction or the binding/non-binding distinction, continue to serve any constructive purpose in Canadian administrative law?

The breakdown of this type of logic is also apparent in the treatment of international law norms in the development and application of procedural and substantive guidelines. With respect to substantive guidelines challenged on the basis that they are taking into consideration irrelevant factors (or not taking into consideration relevant factors), the *Baker* case is particularly interesting to examine for it takes values into consideration, and not only Canadian values (such as administrative law principles), but also international values.⁹⁷ Indeed, the majority of the Court took into consideration values in an international treaty, the Convention on the Rights of Children (ratified by Canada but not formally incorporated into Canadian law) to state that the guidelines—the Immigration Manual—were compatible with international law. L’Heureux-Dubé J. expressed this relationship in the following terms:

Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections.⁹⁸

2. The Existence of a Rule of Law under s. 1 of the *Charter*

The law/policy distinction also arises in the *Charter* analysis of administrative discretion. Section 1 of the *Charter* states that rights and freedoms can be limited by a reasonable limit “prescribed by law.” Does this include administrative or tribunal policies? So far, the Supreme Court has expressed ambivalence toward the law/policy distinction in this context, as reflected by the Court’s analysis in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.⁹⁹

Little Sisters bookshop in Vancouver specialized in gay and lesbian material. The owners claimed that their *Charter* rights were violated by the targeting actions of Customs officers in seizing material over a period of years which Little Sisters sought to import across the border. The *Customs Act* authorized officers to seize material that meets the threshold for obscenity set out in the *Criminal Code*—a standard discussed by the Supreme Court in *R. v. Butler*.¹⁰⁰ After a complex trial,

the judge concluded not only that Customs officials had wrongly delayed, confiscated, destroyed, damaged, prohibited or misclassified materials imported by the appellant on numerous occasions, but that these errors were caused “by the systemic targeting of Little Sisters’ importations in the [Vancouver] Customs Mail Centre.” The trial judge found that the *Customs Act*, to the extent it violated *Charter* rights, was a reasonable infringement under s.1.

Justice Binnie, writing for the majority, characterized the administration of the *Customs Act* as oppressive and dismissive of Little Sisters freedom of expression and concluded that its effect—whether intended or not—was to isolate and disparage the appellants on the basis of their sexual orientation. The Court recognized that a source of the targeting of Little Sisters lay in the Operations Manual (Memorandum D9-1-1) which was relied upon by Customs officials. To take but one example, the Manual suggested that all acts of anal penetration violated the obscenity standard in direct contradiction of prevailing constitutional standards and the position of the Department of Justice. Notwithstanding the evidence that Customs officers followed the Manual in virtually every instance, Binnie J. was unwilling to subject this non-legislative instrument to *Charter* scrutiny, in part because, for the reasons discussed earlier, such non-legislative guidelines cannot be construed as binding. He concluded:

The trial judge concluded that Customs’ failure to make Memorandum D9-1-1 conform to the Justice Department opinion on the definition of obscenity violated the appellants’ *Charter* rights. However, I agree with the British Columbia Court of Appeal that the trial judge put too much weight on the Memorandum, which was nothing more than an internal administrative aid to Customs inspectors. It was not law. It could never have been relied upon by Customs in court to defend a challenged prohibition. The failure of Customs to keep the document updated is deplorable public administration, because use of the defective guide led to erroneous decisions that imposed an unnecessary administrative burden and cost on importers and Customs officers alike. Where an importer could not have afforded to carry the fight to the courts a defective Memorandum D9-1-1 may have directly contributed to a denial of constitutional rights. It is the statutory decision, however, not the manual, that constituted the denial.¹⁰¹

In a situation where decision-makers are obliged to follow guidelines (whether by formal or informal direction), the Court’s reliance on the distinction between the decision and the manual may obscure more than it reveals. Would a similar approach be applied if tribunal guidelines

(for example, of the kind employed by the IRB discussed in part I) were challenged on *Charter* grounds?

The answer to this question is clouded by the Court's apparent willingness to subject other forms of policy instruments (and guidelines in other settings) to *Charter* scrutiny. In *Eldridge v. British Columbia (Attorney General)*,¹⁰² for example, the Supreme Court of Canada held unconstitutional the British Columbia Medical Services Commission's and individual hospital's policies to not fund sign language interpretation services for the deaf as part of the publicly funded provision of medical services. La Forest J., writing for the Court, found that while the enabling legislation did not violate the Appellants' *Charter* rights, the administrative implementation of the legislation, in the form of policy guidelines, did. The legislation granted discretionary authority to the Medical Services Commission and individual hospitals to determine what services would be provided and/or funded, and neither demanded nor prohibited the funding of sign language interpreters. According to the Court, the decision (in other words, the policy) to refuse funding for sign language interpretation was itself the exercise of discretion which was inconsistent with the s.15 *Charter* rights of the applicant.¹⁰³ Addressing the issue of whether to subject the policy to *Charter* scrutiny, La Forest J. stated:

There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority. [Emphasis added]

The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is also apposite: "The Constitution," he wrote, "is not to be mocked by substituting executive for legislative interference with freedom;" see *James v. Cowan*, [1932] A.C. 542 (P.C. Australia), at p. 558.¹⁰⁴

Other decisions by lower courts support the view that guidelines could be subject to *Charter* scrutiny. In *Glasgow v. Nova Scotia (Minister of Community Services)*,¹⁰⁵ for instance, the Nova Scotia Supreme Court reviewed the substance of a Department of Community Services policy for its compliance with the *Charter*, the *Freedom of Information and Privacy Act*,¹⁰⁶ and the principles of natural justice. The impugned policy in that case required income assistance applicants to sign a consent form authorizing the Department to gather a wide range of information from third parties in order to determine eligibility. The applicant argued that the policy constituted a violation of the right to privacy as implied by section 7 of the *Charter*, and the right to be free from unreasonable search and seizure under section 8. While Davison J. did not agree that the policy violated *Charter* rights, it was not because of a prohibition on reviewing the policy in that light, rather the Court simply disagreed with the applicant's submissions on those points.¹⁰⁷

In the same year as *Glasgow*, the Supreme Court of Canada again appeared willing to subject the policy guidelines of a law society governing legal aid services to *Charter* review. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,¹⁰⁸ the Law Society of New Brunswick's policy to deny legal aid funding to parents subject to state custody applications was challenged. Legal aid services in New Brunswick were at that time provided by both the Government of New Brunswick through its Domestic Legal Aid Program, and by Legal Aid New Brunswick. Both programs were authorized by the *Legal Aid Act*.¹⁰⁹ The *Legal Aid Act* conferred policy-making authority on the Law Society, and it was pursuant to that authority that the Law Society formulated its policy to refuse legal aid funding to persons subject to custody applications brought by the New Brunswick Department of Health and Community Services. Upon finding that the decision to refuse legal aid to the appellant in that case violated section 7 interests and was not justifiable under section 1, Chief Justice Lamer, speaking for the majority, turned to the question of remedies. The Supreme Court considered whether it would be appropriate in that case to direct that a new policy be adopted. The *Charter* violation in that case turned on the particular situation of the appellant and would not necessarily apply to every person subject to a custody application. However, the Court held that the least intrusive remedy would be to leave the policy intact, subject to a trial judge's discretion to order state-funded counsel where necessary in order to protect procedural fairness.¹¹⁰

The fact that in neither *Glasgow* nor in *G.(J.)* did the courts invalidate or order changes to policy guidelines pursuant to the *Charter* does not diminish the point that in both of these cases, the possibility for either result was clearly present. One could argue that in *G.(J.)*, the policy implications were precisely what kept the matter before the Court, since by the time the case reached the Supreme Court the Appellant's matter had long been resolved. In the absence of a clear need to address what would potentially be an ongoing violation of others' *Charter* rights, the Court may well have declined to decide the matter as moot.

Thus, as the above discussion demonstrates, tribunal policies are approached with ambivalence by the courts. Policy guidelines are held not to be "law" but nonetheless to be capable of imposing procedural and substantive constraints on tribunal discretion. These policies cannot purport to be treated as binding (unless legislatively mandated to bind decision-makers) and yet cannot be ignored. Guidelines shape the exercise of discretion but are also themselves discretionary decisions. The judicial treatment of tribunal policy-making is a product of the separation of powers doctrine and yet also a challenge to the coherence and sustainability of those boundaries. Finally, as long as opposing approaches (binding/non-binding) to the issue dominate the administrative law debate, a coherent, principled and pragmatic approach to tribunal policy-making appears to be an elusive goal.

Part III Citizens' Perspective: Legitimacy of Guidelines Based on Acceptance

In this third and final section of the paper, we turn our attention to the question of how tribunals make policy and how much input citizens have when a tribunal engages in policy-making. What is and should be the citizen's (or affected party's) role in tribunal policy-making? Here again, this issue engages the fundamental questions surrounding the legitimacy and capacity of tribunals to carry out the policy-making role which the Supreme Court affirmed in *Ocean Port*. Do tribunals have sufficient expertise, resources and authority to undertake extensive consultations, research or policy evaluation to fulfill policy-making mandates which may be conferred by their empowering legislation? In the Westminster system of centralized policy-making and ministerial accountability, is there a role for direct accountability between executive bodies and citizens in the policy context? Is this a matter for judicial supervision through the traditional doctrines of administrative law?

Finally, to whom are tribunals accountable for their policy-making procedures and practices?

A. A Procedural Classification of Policy-Making

As we discussed in Part II, some administrative tribunals clearly have legislative powers to elaborate policies creating enforceable rights, while others do not. The distinction between the two is still very much linked to the idea of a separation between law-creation and law-application. However, as noted by the Supreme Court in *Paul v. B.C. (Forest Appeals Commission)*,¹¹¹ a case on the issue of tribunal jurisdiction to apply constitutional law including aboriginal rights:

Admittedly, within the administrative state, the line between adjudication and legislation is sometimes blurred. Administrative tribunals that develop and implement policy while adjudicating disputes, such as the Competition Tribunal and a provincial Securities Commission, come to mind. Indeed, this Court's standard of review jurisprudence is sensitive to the deference that may be appropriate where an expert tribunal is simultaneously adjudicating and developing policy, which may sometimes be viewed as a legislative function: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 28; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 48.¹¹²

Indeed, whether we speak of elaboration of a guideline or adjudication based on a guideline there is some degree of policy-making making in both cases. However, the idea that some procedural rights to participate in the primary creation of a guideline is not often recognized by a statute. As Professor Cartier wrote: “[in] an era when executive authority seems to be growing at the cost of parliamentary accountability, democratic control seems ever more urgent. Yet judges seem unwilling to participate in the development of accountability mechanisms. One clearest manifestation of this judicial restraint is the persistent refusal on the part of the courts to impose procedural obligations on administrative decisions makers exercising powers of a ‘legislative nature,’ absent statutory indication to that effect.”¹¹³ Before, we address this issue, is it useful to first describe procedural rights of citizens recognized by courts in the adjudication process. In the second section, we will describe some existing procedural schemes involving the elaboration of guidelines in order to show how much participatory rights are given to citizens when a

tribunal is given a formal guideline-making power of the kind discussed above.

1. Adjudication Based on a Policy

Procedural rights accorded citizens in an adjudication based on a policy are different depending on whether the adjudication involves the changing of that policy or whether the facts open the door to the application of the policy in a given case. The first scenario concerns tribunals which make policy through their decisions and their interpretation of their legislative mandate. Some tribunals recognize this function through providing for full-board meetings to discuss the policy implications of particular cases. Because they involve discussion on the very content of a policy, we will name this process “substantive dialogue.” In the second scenario, the question of modifying the policy is not at issue; rather, the only question is whether it is applicable in a given case. During the decision-making process, citizens may be entitled to engage in a “procedural dialogue” with the tribunal.

a. Substantive Dialogue

Participatory rights maintaining a substantive dialogue between the tribunal and its stakeholders is mainly found in the practice of full board meetings.¹¹⁴ One of the most significant decisions of the Supreme Court in articulating the limits of bias, independence and the duty of fairness, *Consolidated-Bathurst*,¹¹⁵ concerned whether post-hearing consultations between tribunal members, including tribunal members who did not hear the case, violates the duty of fairness. In that case, which involved a full meeting of a labour board, the Court held that, as long as the discussion in the full-board meeting concerned legal or policy issues of general application, as opposed to factual matters unique to the dispute being heard, the duty of fairness will not have been violated. The Court returned to this question, and extended its approval of full-board meetings, in *Ellis-Don*.¹¹⁶

Ellis-Don involved a labour dispute as to whether an employer was bound to a collective agreement heard by a three-member panel of the Ontario Labour Relations Board. A first draft of the three-member panel’s decision would have dismissed the grievance based on the abandonment of bargaining rights. However, after a full Board meeting

discussed that draft decision, a majority of the panel found that there had been no abandonment of bargaining rights and upheld the grievance.¹¹⁷ Ellis-Don applied for judicial review. It alleged that the change between the draft and the final decision was of a factual nature as opposed to a legal or policy change, which had been the case in *Consolidated-Bathurst*, and therefore that a breach of natural justice had occurred.¹¹⁸ The Ontario Divisional Court dismissed Ellis-Don's application for judicial review.¹¹⁹ The Ontario Court of Appeal unanimously dismissed Ellis-Don's appeal.¹²⁰

The majority of the Court found that the duty of fairness had not been violated by the full-board meeting in this case. The Court affirmed its earlier rationale from *Consolidated-Bathurst*, that institutional consultation is beneficial as it ensures consistency in the decisions of an administrative body. According to Lebel J., writing for the majority, institutional consultations may create an apprehension of bias or lack of independence, or violation of the duty of fairness, where the consultation is imposed by a superior level authority within the administrative hierarchy, where the consultation is not limited to questions of policy and law; or where, on questions of law and policy, the decision-makers are not free to make their own decision. Lebel J. emphasized that the mere fact that litigated issues were discussed by a full board did not amount to a breach of the *audi alteram partem* rule, although if new issues had been addressed, the parties would have been entitled to an opportunity to respond to them. As for the change in the decision between drafts, a presumption of regularity applied, so that the mere fact of a different result following the full board meeting could not of itself create a presumption that something improper occurred during institutional consultations.

The majority characterized the question before the tribunal as a "pure question of law."¹²¹ The dissenting Justices, Major and Binnie asserted that the distinction between questions of law and policy on the one hand, and questions of facts on the other, was stretched in *Ellis-Don* "beyond its breaking point." The result in their view was that a full-board meeting was being permitted to "micro-manage" the output of the panel. The dissenting Justices found the change in the panel's reasons to constitute a re-assessment of fact. *Ellis-Don* reflects the tension between tribunal policy-making and tribunal adjudication in its decision-making.¹²² While fairness dictates participatory rights by affected parties in the adjudication of their claims, no such rights arise for affected parties to influence tribunal policy-making. However, this case shows how

easily questions of law, policy and fact blur into one another in the decision-making of tribunals.

Ellis-Don also raises the question of whether tribunals make policy at an institutional or an individual level. In other words, can and should tribunals seek to ensure consistency in how individual panels apply specific provisions to specific facts or is tribunal policy-making simply the aggregate of the various decisions individual tribunal members and panels decide on a given issue? While most observers would agree that all tribunals make policy to some extent through their decision-making, this is not to suggest that tribunals always are conscious of a policy-making role when reaching decisions in particular disputes. By contrast, some tribunals also have an explicit statutory power to develop and implement policies in their area of expertise. It is to the clearest of such powers that our discussion now turns.

b. Procedural Dialogue

When the question at stake is whether or not a policy should be applied in a given case, and not whether it should be modified, procedural rights granted to citizens will vary depending on a certain number of factors. However, the bottom line is that an affected party must be given the opportunity to question the application of the guideline in a deserving case. As Lord Reid said in *British Oxygen Co. Ltd. v. Board of Trade*, “[w]hat the authority must not do is to refuse to listen at all,” even if its policy is so precise that it “could be called a rule.”¹²³ He saw “nothing wrong with that” provided that “the authority is always willing to listen to anyone with something new to say—of course I do not mean to say that there need be an oral hearing.”¹²⁴

When the issue of the application of a guideline is at stake, the duty of fairness will also be flexible. And, just as for any other case, the factors affecting the content of the duty of fairness will depend on “an appreciation of the context of the particular statute and the rights affected”¹²⁵ In *Baker*, L’Heureux-Dubé J. reviewed the factors: 1. the nature of the decision being made and the process followed in making it;¹²⁶ 2. the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates;”¹²⁷ 3. the importance of the decision to the individual or individuals affected;¹²⁸ 4. the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances;¹²⁹ and 5.

“the respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.”¹³⁰

On this issue of participatory rights, L’Heureux-Dubé J. discussed the failure to accord an oral hearing and give notice to the claimant and whether it was inconsistent “with the participatory rights required by the duty of fairness in these circumstances.”¹³¹ She added, “At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly.” In the case of Mavis Baker, L’Heureux-Dubé found after an analysis of the five factors that the circumstances required a full and fair consideration of the issues.¹³²

2. Elaboration of Policies

In this section, we will distinguish degrees of participatory rights of citizens when an administrative tribunal has explicit or implicit legislative power to create policies. There exist different models of procedural schemes for the elaboration of policies. Some involve deliberation; others, formal consultation or “notice and comment” exchanges. While still in other cases, there are no participatory rights formally recognized for citizens at the stage of the elaboration of a guideline or policy, although some informal consultation may in fact take place. The choice of the procedure by the legislator appears to be crucial when determining the effect of a guideline in a legal setting (regulatory, binding or persuasive effect.)

a. Participation through Public Deliberation

By “participation and deliberation,” we mean full participatory rights recognized to citizens in order that public deliberation be possible and effective. The CRTC is a good example to illustrate this point. The CRTC can use different instruments, adopt formal regulation¹³³ or issue guidelines,¹³⁴ to regulate in its fields of activity. Being a regulatory board, it was afforded powers akin to those accorded to the organs of the State: legislative, judicial and executive. For this reason, the members appointed to these types of Boards are supposed to, at least in an ideal world, represent various interests in the society. When the Board engages

in policy-making, it follows a public consultation process.¹³⁵ These consultations are usually conducted through public hearings in which stakeholders will appear in person and make a public statement to present their observations, arguments and evidence in support or against the policy. These submissions will be interrogated by Board members and opponents. Public notice is given that a hearing will be held. It is announced not only in the *Canada Gazette*, but also in major newspapers across the country.

The Supreme Court recognized the significance of this policy-making process in *Capital Cities Communications*. While the Court recognized that the existing regulations would prevail against policy statements, it said that absent any regulation, the CRTC was obliged to consider its policy statement in making the determination at issue. In reference to the policy guidelines under discussion, Laskin C.J., writing for the majority, referred approvingly to democratic input as a justification for giving weight to the guidelines. He noted, “the guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions.”¹³⁶

b. Participation through Formal Consultation

In contrast to the CRTC, where a genuine form of deliberation takes place, participatory rights of citizens can also take the shape of formal consultation. We distinguish between deliberation (e.g. public hearings prior to the formulation of a policy decision) and consultation (where for citizens make their views known, usually in writing, only after a policy decision has already been drafted).

The drafting of guidelines by the Human Rights Commission of Canada is an example. The *Equal Wages Guidelines, 1986*, were adopted by following the procedure in the *Statutory Instrument Act*. As a result, they were published in the *Canada Gazette*.¹³⁷ For this reason, in the *Bell* case, the Supreme Court characterized the power of the Commission to make guidelines as akin to the power of Cabinet or a Ministry to make Regulations. The Court noted that the fact that the Commissions guidelines were subject to the *Statutory Instruments Act* and that the process for developing guidelines involved consultations analogous to the legislative process further distinguished them from non-legislative, administrative guidelines.

Like regulations, the Commission's guidelines are subject to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and must be published in the *Canada Gazette*. Moreover, the process that is followed in formulating particular guidelines resembles the legislative process, involving formal consultations with interested parties and revision of the draft guidelines in light of these consultations. The *Equal Wages Guidelines, 1986*, SOR/86-1082, for instance, were the result of consultation with some 70 organizations, including Bell. The Commission met with all organizations who requested a meeting; and, as a direct result of the consultation process, Commission staff made changes to the draft guidelines prior to their submission to the Commission for approval.¹³⁸

Although the decision does not disclose much details as to the procedure followed for consultations, it is useful to know that the federal government has, for some time now, issued a policy by which it requires all its public institutions to pre-publish a regulatory instrument with a regulatory impact analysis statement (RIAS) and provide time for citizens to comment on the proposal. This notice and comment procedure found in the federal policy (and in s. 10 of the *Loi sur les règlements au Québec*) is an important step in providing participatory rights to citizens although they are not as extensive as in the case of a public hearing held by the CRTC. In principle, it is possible to have access to the comments filed by citizens. Occasionally, the person who filed the comment receives a direct written response and/or a modified RIAS will be published in the *Canada Gazette* reflecting the input. In the modified RIAS, the public authority can explain if it took (or not) a comment into consideration.¹³⁹

c. Participation through Informal Consultation

Participation can also take place with citizens on an informal basis. In this case, it is probable that in most cases the public authority consults only with what it considers to be its stakeholders (individuals, but also interest groups). This seems to be the procedure followed by the IRB when it issues guidelines under s. 159(1)(h) of the *Immigration and Refugee Protection Act*.

Draft guidelines for the Refugee Division are developed "after careful study of applicable jurisprudence from the Supreme Court, Federal Court, and Refugee Division; international aids to interpretation, including the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*; relevant jurisprudence from other

jurisdictions; and academic commentators and other authorities.” As for the consultation, s. 159(1)(h) states that guidelines are issued after “consulting with the Deputy Chairpersons and the and the Director General of the Immigration Division.” This is the only mandatory consultation. However, the IRB also states on its website that the draft guidelines are subject “to both an internal and external consultation process before approval by the Chairperson.”

Unfortunately, we do not know much about how guidelines are drafted within boards across Canada. The information on this question is quite scarce on public websites. For example, we do not know who is consulted, what they said and whether an administrative tribunal took into consideration the suggestions of a particular interest group and why or why not. If consultations are contemplated in the legislative mandate of a tribunal, does this create a legal obligation to disclose the content and scope of such consultations? When, if ever, should the government be informed of a tribunal’s policy shift? We know that governments are not under a constitutional or common law legal duty to consult with particular groups around legislative decision-making,¹⁴⁰ but should a similar logic hold for tribunal policy-making?

B. Discussion: Participation Rights of Citizens

Participatory rights vary depending on the type of board and the issue at stake. Sometimes, the policy-making role of tribunals is analogous to the role of judges, whose decisions often have a significant impact on government policies. In other settings, however, tribunals will be authorized to use tools to elaborate policies more directly, such as guidelines. However, while the Supreme Court has affirmed in cases such as *Ocean Port* that all administrative bodies have some policy-making role (and that this is, ultimately, what distinguishes executive decision-makers from judicial decision-makers), it is far from clear that all administrative bodies have legitimacy to fulfill a policy-making or policy-implementing role in a fair manner. This section will examine the role of policy expertise, consultations with stakeholders and resource allocations in the policy-making of tribunals.

The process of elaborating a guideline can be frustrated by the difficulties posed by the direct participation of citizens. Tribunals will often have limited capacity for public consultations and there is often a risk of the consultation process being “captured” by key stakeholder

groups. When direct participation appears to be too costly or when good accountability mechanisms seem too difficult to implement (due, for example, to lack of financial or personnel resources), we suggest that indirect participatory rights might be a next-best solution. An example of this might be where members of the public sit on committees created for the selection of board members.¹⁴¹ In this way, the policy-making function of tribunals may be expressed through practices and rules governing appointments, and the extent to which the executive branch seeks tribunals members and Chairs who reflect the policy preferences of the government of the day. Just to give an example, *Le Devoir* reported during the month of May, 2004 that the impartiality of the *Régie de l'énergie* was put into question in relation to the Suroît thermal generating station project. The principal problem was that the presiding member of the panel of the *Régie*, in charge of examining the project to construct Suroît and of advising the government on the course to follow, was the former deputy minister responsible for energy in the Natural Resources Department of the Québec provincial government. While occupying the post between 2000–2002, Bill 116 was adopted. It is this Bill that made possible the launch of the Suroît project.¹⁴² As in other areas of impartiality and independence concerns, the problem in such settings relates not to evidence of actual conflict or predisposition but the appearance of potential conflict or predisposition in the eyes of the community.¹⁴³

1. Direct Participation: Capacity and Accountability

Every decision of a tribunal, like every decision of a judge, may have a significant influence on the development and/or application of public policy. However, in addition to resolving disputes and interpreting legal standards, tribunals also function within integrated settings of government policy-making. Tribunals are said to form part of the executive branch of government.¹⁴⁴ Unlike the constitutional principle of the independence of the judiciary as a separate branch of government, there is a cabinet minister ultimately accountable for every administrative tribunal. These distinctions cast the policy-making role of tribunals in a different light than that of judges.

With respect to the policy-making capacities of tribunals, context is clearly paramount. Some large tribunals, such as in the workers' compensation or human rights fields, often have policy branches dedicated to supporting the policy-making work of the tribunal. Many

other administrative bodies lack the budget, personnel and expertise to support policy-making. For example, regulatory boards usually have large resources dedicated to this function since it is part of their legislative mandate. The IRB also dedicates significant resources when it drafts guidelines. But again, the Board has a legislative mandate to engage in the exercise of a policy-making function.

However, tribunals often will lack the expertise and resources to undertake significant consultations as part of its policy-making function. Even where such expertise and capacity exist, consultations raise the question of the policy preferences and political goals of tribunals. In other words, the policy-making mandates of tribunals will often have an impact on the allocation of scarce public resources. There is an inherently political dimension to the decision to prefer the interests of some groups over other. Where tribunals have a mandate to make decisions (or issue non-legislative rules) in the public interest, how should a tribunal decide between who will benefit and who will be burdened by its policy choices? Is it appropriate for affected groups to lobby tribunals for more favorable policy outcomes according to their perspectives? Is the legal, administrative and institutional environment of tribunals not well suited, in general, to the development and implementation of policy?

Are tribunals accountable for these choices? It is difficult to answer this question, but it is interesting to note that in the future, the Chair of the IRB, for example, will be chosen after a public recruitment and selection procedure and appointed after a positive recommendation by the Minister of Immigration. The proposed candidate will then be examined by the parliamentary Permanent Committee of Citizenship and Immigration. This announcement is part of the federal government's "democratic action plan" which has appointments reform (including reform to the appointment of Crown Corporation executives and Supreme Court Justices) as its centerpiece.

2. Indirect Participation: Independence and Appointments of Board Members

As indicated earlier, the Supreme Court stated in *Ocean Port and Bell* that all administrative tribunals, even if adjudicative in function, carry out policy-making functions. This proposition raises a host of vexing questions. Does it follow that government may choose to implement policy by appointing to tribunals individuals who share the

policy orientation and preferences of the government of the day? To what extent is (or should) the government's discretion to appoint who they wish to sit on tribunals constrained? Can a system of political appointments accommodate merit-based criteria?¹⁴⁵

We know of other policies that are not formalized and not publicly available, but they influence greatly policy-decisions made by public institutions. The policy-making function of tribunals may be expressed through practices and rules governing appointments, and the extent to which the executive branch seeks tribunal members and Chairs who reflect the policy preferences of the government of the day. For example, Professor Katherine Lippel pointed out that a very important number of decisions-makers appointed at the *Commission des lésions professionnelles* (CLP) were former employees working for the *Commission de santé et sécurité au travail* (which is the public institution from which decisions are appealed to the CLP).¹⁴⁶ This factor explains, at least in part, the decrease in benefits granted to employees under the regime. Therefore, the question of the tribunal membership's responsiveness to the policy direction of the government of the day raises central issues related to the independence and impartiality of some public institutions, namely administrative tribunals.

The Supreme Court considered the issue of ministerial discretion in relation to administrative appointments in *C.U.P.E. v. Ontario (Ministry of Labour)* (the *Retired Judges* case).¹⁴⁷ In that case, the Court quashed the appointment of retired judges to serve as chairs of hospital labour arbitration boards. The grounds of the Court for interfering with this discretion was that the *Ontario Hospital Labour Disputes Arbitration Act*¹⁴⁸ provided that, where the management and labour nominees to a board of arbitration cannot agree on the appointment of a Chair, then "the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act."¹⁴⁹ Because the Minister had no basis to conclude that the retired judges he wished to appoint were "qualified to act," the majority of the Court held that the appointments were patently unreasonable.

Binnie. J., writing for the majority, considered the cross-examinations of government officials who confirmed that the Minister did not inquire into the experience or expertise of the retired judges in the field of labour relations. For the Minister, their qualification arose simply from their judicial background and the expertise in neutral decision-making which that experience suggested. Binnie J. declared, "we look in

vain for some indication in the record that the Minister was alive to these labour relations requirements.”¹⁵⁰ Just as the Court was required to quash a decision which frustrated the objects and purposes of the minister’s statutory discretion in *Roncarelli*, so Binnie J. argued similar judicial intervention was required in this case.

For the dissenting justices, the legislative provision itself indicates that there are no obvious factors of particular relevance to the formation of the Minister’s “opinion” on who is “qualified” to act. Because there are no obvious factors implied by this broad grant of authority, there can be no “obvious” or “immediate” defect in the fact that the Minister chose one particular factor (the generalist expertise of retired judges) over another (the specialized knowledge of labour arbitrators). In such circumstances, Bastarache J. concluded the Minister’s decision cannot be characterized as “clearly irrational” or, to use the turn of phrase coined in *Ryan*, so flawed that “no degree of curial deference could allow it to stand.”¹⁵¹

While the *Retired Judges* decision suggests a court will intervene in the appointment process to ensure the executive fulfill the requisite legislative mandate, there would appear to be no generalized common law or constitutional requirement that tribunal appointments be made according to objective criteria of merit rather than subjective criteria of political desirability. Indeed, following the Court of Appeal decision in the *Retired Judges* case, a number of statutes in Ontario were amended to state clearly that appointees did not have to have any specific qualifications in order to act.¹⁵²

While it is a widely shared view that public confidence in the administrative justice system would be enhanced by a merit based system of appointments, it is not clear how this view accommodates the policy-making role of tribunals.¹⁵³ However, there seems to be some distinctions between adjudicative and non-adjudicative tribunals that need to be made in this respect, insofar as it is of interest to note that there are some changes in the selection of board members in “purely adjudicative” tribunals.¹⁵⁴

In Québec, the adoption of the *Loi sur la justice administrative* brought significant changes in this respect. With this statute, the National Assembly structured, with mandatory provisions, the selection, appointment and renewal of terms of the TAQ members (and also brought similar changes to other enabling statutes of the tribunals such as the Commission des lésions professionnelles et the Régie du logement.). As

regards TAQ, individuals can be appointed who possess the professional knowledge required by law and 10 years of relevant expertise (s. 41). For each of the tribunal's sections (there are 4), the statute specifies the types of professionals who can be appointed: lawyer or notary, doctors, psychiatrist, social workers, and "évaluateurs agréés." Board members are chosen after a procedure for recruitment and selection established by regulation is followed (s. 42). The duration of the initial term is 5 years for all board members (s. 46) and their term can be renewed for an additional 5 years (s. 48). The renewal of a term is also examined by a committee and follows a procedure established by regulation (s. 49). Since the *Barreau de Montréal* case,¹⁵⁵ the renewal committee is independent from the government. The Court of Appeal decided that it was against s. 23 of the *Québec Charter of Human Rights and Freedoms* that a member of the government or the President of the TAQ sit on the Committee.¹⁵⁶

With respect to appointments we have two main concerns. The first concern is transparency. If governments wish to use tribunals to make policy through the selection of politically desirable tribunal members, this should be stated explicitly. Where the selection criteria are stated to be objective, related to core competencies and vetted according to merit based criteria, but appointees nonetheless reflect only the prevailing policy preferences of the government, the integrity of the administrative justice system is imperiled. Our second concern is the rule of law. Administrative adjudication arguably requires a minimum degree of competence and impartiality which a purely political appointment process cannot guarantee. Where policy goals are attained through adjudicative action, competence and impartiality also should be seen as central to the policy agenda itself. Whether this logic leads to constitutionalizing minimum appointment criteria, even in the face of expressly worded statutory provisions purporting to suggest that no qualifications are required for a given adjudicative provision, remains an open and important question.

We suggest that legitimacy remains a concern in the policy-making sense even where a tribunal's policy-making clearly is valid in the legality sense. Legitimacy in the policy-making sense raises the concern of whose preferences a tribunal is acting upon in its policy-making function. Should a tribunal be implementing the preferences of the government? Can and should a tribunal be permitted to form its own institutional preferences (or the aggregate of the Chair's preference and/or the individual preferences of various tribunal members)? In adversarial

settings (from labour boards to rental housing tribunals), does the articulation of policy preferences invariably mean advantaging one stakeholder group (employers, landlords) over another (employees, tenants)?

Furthermore, tribunals have no direct accountability relationship to the public. Therefore, to the extent tribunals engage in policy-making, some would question whether it is policy-making in the shadows, removed from public scrutiny and sometimes developed on the basis of criteria which are not public. There are exceptions, however, to this logic. Municipal councils, school boards and other elected, administrative bodies enjoy a singular legitimacy to carry out platforms which received public endorsement through the electoral process. In other cases, legitimacy is a matter of the ongoing confidence of key stakeholder groups (for example, labour boards) rather than electoral victory. Still other administrative bodies may rely on their technical or scientific expertise for legitimacy in their policy-making functions (for example, the Competition Tribunal or securities' commissions). Can it be said that the policy-making role of a school board is more legitimate than the policy-making role of a securities commission as a result (or is the reverse sometimes the case)?

Conclusion

This chapter has not sought to convey a single overarching argument regarding tribunal policy-making. Rather, our goal has been to explore the tensions and dynamics to which the various and diverse policy-making mandates of tribunals give rise. Our argument is simply that administrative law in Canada has yet to account for this crucial aspect of tribunal action. It is our hope that this paper is a step toward remedying this. What is clear is that tribunals, courts and citizens view the legitimacy and capacity of tribunal policy-making from different but equally important perspectives. We have suggested that only by better understanding and critiquing those different perspectives can administrative law come to grips with the complexity and centrality of policy-making within the administrative justice system.

Endnotes

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- * A shorter version of this paper was published in 2006, see France Houle and Lorne Sossin, “Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making” (2006) 45:3 *Canadian Public Administration* 19–36.
- ** Professor, Faculty of Law, University of Montreal.
- *** Professor, Faculty of Law, University of Toronto.
- ¹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 24 [*Ocean Port*].
- ² *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 [*Consolidated-Bathurst*].
- ³ *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 [*Ellis-Don*].
- ⁴ *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 [*Bell*].
- ⁵ [1992] 1 S.C.R. 3 at 34.
- ⁶ [1978] 2 S.C.R. 141 at 149.
- ⁷ For a general study on policy-making by different public administration institutions, see France Houle, *Les règles administratives et le droit public : aux confins de la régulation juridique* (Cowansville, Qc.: Yvon Blais, 2001).
- ⁸ [2003] 1 S.C.R. 539 [*The Retired Judges Case*].
- ⁹ See France Houle, “La zone fictive de l’infra-droit : l’intégration des règles administratives dans la catégorie des textes réglementaires” (2001) 47 McGill L.J. 161; and Lorne Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2003) 45 *Canadian Public Administration* 465–89. See also David J. Mullan, *Administrative Law* (Toronto: Irwin, 2001) at 375–79; and René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., vol. 1 (Québec: Presses de l’Université Laval, 1985) at 338–39. See also Michel Filion, “Le pouvoir discrétionnaire de l’administration exercé sous forme de normes administratives : les directives” (1979) 20 C. de D. 855; Suzanne Comtois, “Les directives : un compromis entre le droit traditionnel et le règne de la discrétion,” in Association canadienne de droit comparé et Association québécoise de droit comparé, *Droit contemporain (1994)* (Cowansville, Qc.: Yvon Blais, 1995) at 804; Henry L. Molot, “The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion” (1972) 18 McGill L.J. 310. See also Daniel Mockle, “Ordre normatif interne et organisation” (1992) 33 C. de D. 965; and Pierre Issalys & Denis Lemieux, *L’action gouvernementale*, 2d ed. (Cowansville, Qc.: Yvon Blais, 2002) who included an entire chapter on guidelines. See also Daniel Mockle, *Recherches sur les pratiques administratives pararéglementaires* (Paris: L.G.D.J., 1984) at 28; and J.M. Evans, “Controlling Administrative Discretion: A Role for Rules?” in F. McArdle, ed., *The Cambridge Lectures 1991* (Cowansville, Qc.: Yvon Blais, 1991) at 209. John Mark Keyes, “Power Tools: The Form and Function

of Legal Instruments for Government Action” (1996–97) 10 Can. J. Admin. L. & Prac. 133 at 146.

- ¹⁰ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University, 1969).
- ¹¹ *Ibid.* at 3.
- ¹² *Re Hopedale Developments Ltd v. Town of Oakville* (1964), 47 D.L.R. (2d) 482 (O.C.A.), quoting William Alexander Robson, *Justice and Administrative Law*, 2d ed. (London: Stevens and Sons, 1947) at 297.
- ¹³ For more examples and detailed descriptions of different functions of guidelines, see France Houle, “La lecture des blancs dans le droit et la validité des règles administratives : essai sur deux modèles issus du positivisme juridique” in Ysolde Gendreau, ed., *Le lisible et l’illisible* (Montréal: Thémis, 2003) at 52–125.
- ¹⁴ For example, Guideline 5 – Providing the PIF and No PIF Abandonment in the Refugee Protection Division; Guideline 6 – Scheduling and Changing the Date or Time of a Proceeding in the Refugee Protection Division; and Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues. As summarized by the Board: “These Guidelines address the specific procedural issue of the designation of a representative and the more general procedural issue of the steps to be followed in processing claims by unaccompanied children. The Guidelines also address the evidentiary issues of eliciting evidence in a child’s claim and assessing that evidence.”
- ¹⁵ S.C. 2001, c. 27, s. 165: “The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.”
- ¹⁶ On line: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation_e.htm> [*Guideline 7*].
- ¹⁷ *Supra* note 15, s. 159(1): “The Chairperson is, by virtue of holding that office, a member of each Division of the board and is the chief executive officer of the Board. In that capacity, the Chairperson: (h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties.” A similar authority to issue guidelines existed under the former *Immigration Act*, R.S.C. 1985, c. I-2, as amended by S.C. 1992, c. 49, s. 65(3), 65(4).
- ¹⁸ In the “Hearing” section of the Guidelines, see paras. 19–23, *supra* note 16.
- ¹⁹ France Houle, “Le fonctionnement du régime de preuve libre dans un système non-expert : le traitement symptomatique des preuves par la Section de protection des réfugiés” (2004) 38 R.J.T 263; C. Rousseau *et al.*, “The Complexity of Determining Refugeehood” (2002) 15:1 *Journal of Refugee Studies* 43–70.

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- ²⁰ The name of these instructions are *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division* (CRDD – Instructions 96–01) and *Instructions Governing Extra-Hearing Communication Between Members of the Refugee Division and Refugee Claim Officers and Between Members of the Refugee Division and Other Employees of the Board* (CRDD – Instructions 96–02).
- ²¹ A copy of the *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division* (CRDD – Instructions 96-01) is found in the *CRDD Handbook*, Chapter 1, *Conduct of Refugee Division Proceedings*, at Appendix 1D, on line: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/handbook_e.pdf>.
- ²² For a related discussion of the role of values in administrative decision-making in this context, see Genevieve Bouchard & Barbara Wake Carroll, “Policy-Making and Administrative Discretion: The Case of Immigration in Canada” (2002) 45 *Canadian Public Administration* 239.
- ²³ This guideline is available on line: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/references/policy/guidelines/index_e.htm>. There are two other guidelines (also available on line at the same address) which fall into this category: *Guideline 1 – Civilian Non-Combatants Fearing Persecution in Civil War Situations* (as summarized by the Board “These Guidelines address issues in relation to claims made by civilian non-combatants fearing return to situations of civil war”); and *Guideline 2 – Guidelines on Detention*, which is more a mesh of several interrelated issues. (As summarized by the Board “The Guidelines deal with several topics, including long-term detention, the notion of “danger to the public,” alternatives to detention, and evidence and procedure.”)
- ²⁴ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 [*Ward*].
- ²⁵ Canada, Immigration and Refugee Board, *Convention Refugee Determination Division (CRDD) Handbook* (Ottawa: March 31, 1999), c. 18, s. 18.2.2.
- ²⁶ Davis, *supra* note 10 at 4.
- ²⁷ *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at 7–8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.
- ²⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 56 [*Baker*]. For discussion of this passage, see David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s L.J.* 445 at 491.
- ²⁹ [1978] 1 S.C.R. 118 [*Martineau No. 1*].
- ³⁰ *Ibid.* at 129.
- ³¹ [1979] 1 S.C.R. 311; see also the antecedent to this decision in the U.K. *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).
- ³² *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Ont. Div. Ct.).
- ³³ *Ibid.* at 750.

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- ³⁴ “Legitimate expectations” in Canadian law have been held to function as a part of the broader duty of fairness and may suggest, where applicable, that a greater degree of fairness will be owed than otherwise would be the case; see *Baker*, *supra* note 28 at para. 26.
- ³⁵ The relationship between policy guidelines and the *Charter* is discussed below in the context of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*].
- ³⁶ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 F.C. 16 [*Thamotharem I*]; see also *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 F.C. 461. Peter Carver, “Guides’ Honour: A Case Comment on *Thamotharem v. Canada* and *Benitez v. Canada*” (2006) 40 *Admin. L.R.* (4th) 279.
- ³⁷ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 [*Thamotharem 2*]; see also *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2007 F.C.A. 199.
- ³⁸ Brian Simpson, “The Common Law and Legal Theory” in William Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) at 8–25.
- ³⁹ *Home Services Employees International Union, loc 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 22 at 28.
- ⁴⁰ *Domtar Inc. v. Québec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 [*Domtar*].
- ⁴¹ *Consolidated-Bathurst*, *supra* note 2.
- ⁴² H. Wade MacLauchlan, “Some Problems with Judicial Review of Administrative Inconsistency” (1984) 8 *Dal. L.J.* 435 at 446.
- ⁴³ Suzanne Comtois, “Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs” (1990) 21 *R.D.U.S.* 77 at 77–78.
- ⁴⁴ *Domtar*, *supra* note 40.
- ⁴⁵ *Produits Pétro-Canada Inc. v. Moalli*, [1987] R.J.Q. 261 (C.A.).
- ⁴⁶ See for example *Hydro-Québec v. Conseil des services essentiels*, [1992] R.D.J. 171 (C.A.); *Syndicat canadien de la Fonction publique v. Commission des écoles catholiques de Québec*, J.E. 90–176 (C.A.); *Syndicat des communications graphiques, local 509M v. Auclair*, [1990] R.J.Q. 334 (C.A.).
- ⁴⁷ *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 158.
- ⁴⁸ For studies of administrative policies applicable in prisons and penitentiaries, see Lucie Lemonde, “L’évolution des normes dans l’institution carcérale” (1995) 10 *R.C.D.S.* 125; “Historique des normes juridiques dans les pénitenciers au Canada” (1995) 28 *Criminologie* 97; “L’impact de l’intervention judiciaire sur l’évolution des normes canadiennes en matière de libération conditionnelle” (1995) 40 *McGill L.J.* 581.
- ⁴⁹ On the characterization ‘sponge-like rules,’ see France Houle, “L’arrêt Baker: Le rôle des règles administratives dans la réception du droit international des droits de la personne en droit interne” (2002) 27 *Queen’s L.J.* 511–576.

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- ⁵⁰ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 32: “If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, then a greater degree of deference will be accorded.” See also *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.
- ⁵¹ David J. Mullan, “Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?” (1982) 27 McGill L.J. 250 at 285–86.
- ⁵² *Ibid.*
- ⁵³ For the TAQ, *An Act respecting administrative justice*, R.S.Q. c. J-3, s. 75: “In addition to the powers and duties that may otherwise be assigned to him, the president is charged with the administration and general management of the Tribunal. The duties of the president include 1) fostering the participation of commissioners in the formulation of guiding principles for the board so as to maintain a high level of quality and coherence of decisions.” For the CLP, *An Act respecting industrial accidents and occupational diseases*, R.S.Q. c. A-3.001, s. 418: “The duties of the president include 1) fostering the participation of members in the formulation of guiding principles for the Tribunal so as to maintain a high level of quality and coherence of decisions.”
- ⁵⁴ For TAQ, *An Act respecting administrative justice, ibid.*, s. 90: “The Tribunal shall establish a bank of jurisprudence and shall, in cooperation with the Société québécoise d’information juridique, ensure public access to all or part of the decisions made by the Tribunal.”
- ⁵⁵ For the CLP, *An Act respecting industrial accidents and occupational diseases, supra* note 53, s. 382: “The board shall establish a computerized jurisprudence database and a digitized minute book, and take all necessary steps to ensure that they are accessible to board members, assessors, conciliators and to such other members of its personnel as it designates;” and s. 383: “The board shall publish, periodically, a compilation of the decisions it has made.”
- ⁵⁶ Policy no. 2003-01, effective on March 21, 2003, on line: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/references/policy/policies/jurisguides_e.htm>.
- ⁵⁷ The decisions which have a jurisprudential value can be found on line: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/decisions/index_e.htm>. The IRB also identifies decisions which have a persuasive value. On the web site of the Board, the following distinction is drawn between decisions which have a jurisprudential value and those which have persuasive value the purpose of the Jurisprudential Guides is “to promote consistency, coherence and fairness in the adjudication of refugee protection claims by treating like cases in a similar manner. Persuasive decisions are decisions that have been identified by the Deputy Chairperson of the Refugee Protection Division as being of persuasive value in developing the jurisprudence of the Division. They are decisions which Members are encouraged to rely upon in the interests of consistency and

collegiality. The application of persuasive decisions by the Division enables the Division to move toward a consistent and transparent application of the law. It also promotes efficiency in the hearing and reasons-writing process by making use of quality work done by colleagues within the tribunal.”

⁵⁸ [2006] 4 F.C.R. 377 (C.A.).

⁵⁹ *Ibid.* at para. 65.

⁶⁰ *Ibid.* at para. 9.

⁶¹ As pointed out in *Domtar*, *supra*, note 40, the “tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise.”

⁶² See Laverne A. Jacobs, “Independence and the Information and Privacy Commission: An Empirical Study” (Paper presented to the Annual Meeting of the Canadian Association of Law Teachers, Winnipeg, June 1, 2004) [unpublished] (in which Jacobs discusses plenary meetings of information and privacy commission adjudicators as explicitly mindful of the guidelines established for such meetings by the Supreme Court’s jurisprudence).

⁶³ For a discussion of this form of executive-judicial dialogue (distinct from the more commonly discussed legislative-judicial dialogue), see Lorne Sossin, “The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion” in D. Dyzenhaus *et al.*, eds., *The Unity of Public Law* (London: Hart, 2004) at 87–112.

⁶⁴ The impoverished nature of this “binary” approach has been the subject of increasingly critical commentary. See for example J. Bruneau & S. Toope, “A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts” in Dyzenhaus *et al.*, *ibid.* For these observers, there is a rich and dynamic middle ground between binding and non-binding which remains to be explored, including approaches which develop the idea of “influential” or “persuasive” types of norms and standards.

⁶⁵ *E.A. Manning Ltd. v. Ontario Securities Comm.* (1995), 23 O.R. (3d) 257 (C.A.).

⁶⁶ *Department of Environment Act*, R.S.C. 1985, c. E-10, on line: Department of Justice Canada <<http://laws.justice.gc.ca/en/showdoc/cs/E-10///en?page=1>>.

⁶⁷ The opening paragraph of *Guideline 7*, *supra* note 16, reads in part: “The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly.”

⁶⁸ *Thamotharem 1*, *supra* note 36 at para. 135.

⁶⁹ *Thamotharem 2*, *supra* note 37 at para. 82.

⁷⁰ *Martineau and Butters v. The Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118.

⁷¹ See Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law,” *supra* note 9; Jean-Luc Bilodeau, “La régulation du marché des valeurs mobilières au moyen de normes à portée générale: les leçons de l’affaire

Ainsley” (1996) 37 C. de D. 409; Jeffrey G. Macintosh, “Securities Regulation and the Public Interest: of Politics, Procedures, and Policy Statements” (1994-95) 24 Rev. can. dr. comm. 77 (Part 1) and 287 (Part 2); *Hopedale Developments Ltd. v. Oakville (town)* (1965), 1 O.R. 259 at 263 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 6-7; *Capital Cities Communications Inc. v. Canada (CRTC)*, [1978] 2 S.C.R. 141 at 170; *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 596; Law Reform Commission of Canada, *Report on Independent Administrative Agencies: Framework for Decision Making, Report 26* (1985) at 29–31; and *Little Sisters*, supra note 35.

⁷² (1992, c. 20), s. 151.

⁷³ There exist two other guidelines: *Civilian Non-Combatants Fearing Persecution In Civil War Situations* (March 7, 1996); and *Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996).

⁷⁴ The Federal Court has indicated its support for the Chairperson’s Guidelines in a number of cases. In *Fouchong, Donna Hazel v. Canada (Secretary of State)* (18 November 1994), IMM-7603-93, MacKay J. (F.C.T.D.), the Court stated: “The Guidelines are not law, but they are authorized under s. 65(3) of the Act. They are not binding but they are intended to be considered by members of the tribunal in appropriate cases.” In *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 (T.D.), the Court reiterated: “While the guidelines are not law, they are authorized by subsection 65(3) of the Act, and intended to be followed unless circumstances are such that a different analysis is appropriate.” *Contra Hazarat, Ghulam v. S.S.C.* (25 November 1994), IMM-5496-93, MacKay J. (F.C.T.D.), the Court expressed surprise that, in the circumstances of this case, the panel made no reference in its reasons to the Chairperson’s Guidelines entitled *Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993). However, the Court noted that there is no legal requirement that the panel do so. The Court was not persuaded that the panel erred in law in the method it followed to assess the evidence presented in this case.

⁷⁵ 18.2.2 Nature of the Guidelines, in *CRDD Handbook*, supra note 21.

⁷⁶ *Supra* note 71 at 171.

⁷⁷ Hudson N. Janisch, “The Choice of Decision-Making Method: Adjudication, Policies and Rulemaking” (1992) Spec. Lect. L.S.U.C. 259. See also Hudson N. Janisch, “Further Developments with Respect to Rulemaking by Administrative Agencies” (1995–1996) 9 Can. J. Admin. L. & Prac. 1.; and Hudson N. Janisch, “Consistency, Rulemaking and Consolidated-Bathurst” (1991) 16 Queen’s L.J. 95.

⁷⁸ R.S.C. 1985, c. S-22.

⁷⁹ R.S.Q. c. R-18.1.

⁸⁰ *Bell*, supra note 4. For further discussion of this case and its implications, see Lorne Sossin, “Developments in Administrative Law: the 2002–2003 Term” (2003) 22 Sup. Ct. L. Rev. (2d) 21.

⁸¹ R.S.C. 1985, c. H-6.

⁸² *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

⁸³ *Ibid* at 34.

⁸⁴ A classic statement of this ideal was set out in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 38 where the Court stated: “Parliament’s task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister’s task is to make a decision that conforms to Parliament’s criteria and procedures as well as the Constitution. The court’s task, if called upon to review the Minister’s decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament’s legislation and the Constitution.”

⁸⁵ See Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields and Discretionary Justice in Social Welfare” (2004) 42 Osgoode Hall L.J. 363; see also Laura Pottie & Lorne Sossin, “Demystifying the Boundaries of Public Law: Discretion, Policy and Social Welfare” (2005) 38 U.B.C. L. Rev. 147.

⁸⁶ Mullan, *supra* note 51 at 376.

⁸⁷ *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118. In *Martineau* the issue was whether a directive concerning the discipline of inmates, authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, was “law” within the wording of s. 28 of the *Federal Court Act*, S.C. 1970–71–72, c. 1, and thus gave the Federal Court jurisdiction to review a disciplinary order made by the Board. This Court, by majority, held that the directive was not “law” within s. 28, Pigeon J. noting at 129: “It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment.” [Emphasis added.]

⁸⁸ [1982] 2 S.C.R. 2.

⁸⁹ Its effect is thus described by Dussault & Borgeat, *supra* note 9.

⁹⁰ *Supra* note 26 at para. 54.

⁹¹ *Ibid.*

⁹² *Ibid.* at para. 72.

⁹³ *Ibid.* at para. 16.

⁹⁴ In *Baker*, *supra* note 28, the Court held that the decision of an immigration officer was unreasonable. One of the factors considered by the Court in this analysis was the fact that the officer failed to observe the ministry guidelines.

⁹⁵ *Ibid.* at paras. 67, 72.

⁹⁶ *Ibid.* at paras. 74–75.

⁹⁷ See, for discussion, France Houle, “L’arrêt Baker: Le rôle des règles administratives dans la réception du droit international des droits de la

personne en droit interne” (2002) 27 Queen’s L.J. 511; France Houle, “La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien” (2004) 45 C. de D. 295–326.

⁹⁸ *Baker*, *supra* note 28 at para. 72.

⁹⁹ *Supra* note 35. For a broader discussion of the significance of *Little Sisters*, *supra* note 35, see Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law,” *supra* note 9. See also Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability” (2003) 41 Osgoode Hall L.J. 1 and B. Ryder, “Case Comment on *Little Sisters*” (2001) 39 Osgoode Hall L.J. 207.

¹⁰⁰ [1992] 1 S.C.R. 452.

¹⁰¹ *Ibid.* at para. 85.

¹⁰² [1997] 3 S.C.R. 624.

¹⁰³ *Ibid.* at paras. 22–29.

¹⁰⁴ *Ibid.* at para. 21.

¹⁰⁵ [1999] N.S.J. No. 256 (N.S.S.C.) (QL).

¹⁰⁶ S.N.S. 1993, c. 5.

¹⁰⁷ *Glasgow v. Nova Scotia*, *supra* note 105 at paras. 24–35. The policy was invalidated by the Court on other grounds, namely that by placing a direct obligation on applicants, the policy went beyond that which is properly the subject of a guideline as opposed to legislation or regulations, and in authorizing the Department to gather information irrelevant to a determination of eligibility (such as employee work habits, behaviour as a tenant, or health information), the policy was invalid as a breach of procedural fairness.

¹⁰⁸ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

¹⁰⁹ R.S.N.B. 1973, c. L-2.

¹¹⁰ *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, *supra* note 108 at para. 102.

¹¹¹ [2003] 2 S.C.R. 585.

¹¹² *Ibid.* at para 30. In French, the text reads as follows: “Certes, dans le domaine administratif, la ligne de démarcation entre la fonction juridictionnelle et la fonction législative est parfois floue. Pensons aux tribunaux administratifs, tels le Tribunal de la concurrence et les commissions des valeurs mobilières provinciales, qui établissent et mettent en oeuvre des politiques au moment de trancher des litiges. En fait, la jurisprudence de notre Cour portant sur la norme de contrôle tient compte de la déférence qui peut s’imposer dans le cas où un tribunal administratif spécialisé exerce simultanément une fonction juridictionnelle et une fonction d’établissement de politiques pouvant parfois être perçue comme une fonction législative : *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, 2001 CSC 36, par. 28; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [1998] 1 R.C.S. 982, par. 48. Il faut cependant établir une

distinction cruciale entre un organisme administratif habilité par une loi valide à établir des politiques dans un domaine relevant de la compétence du législateur et un organisme administratif provincial appelé, dans l'accomplissement de sa mission, à trancher accessoirement une question de droit constitutionnel ou de droit fédéral. Personne n'a laissé entendre que la Constitution permet à la législature d'habiliter un organisme administratif à trancher des questions de droit autochtone en fonction de considérations de politique favorables à la province."

¹¹³ Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 U.T.L.J. 217 at 218.

¹¹⁴ See generally Christopher Berzins, "Policy Development by Labour Relations Boards in Canada. Is There a Case for Rulemaking?" (2000) 25 Queen's L.J. 479.

¹¹⁵ *Supra* note 2. For discussion, see Janisch, *supra*, note 73. See for a subsequent treatment of this issue by the Court, *Quebec (Commission des affaires sociales) v. Tremblay*, [1992] 1 S.C.R. 952.

¹¹⁶ *Supra*, note 3.

¹¹⁷ [1992] O.L.R.B. Rep. 147 (Board member Trim dissenting).

¹¹⁸ An important subsidiary issue was raised as to whether panel members or Labour Board executives could be compelled to give evidence about what was discussed or decided during the full-board meeting. Prior to the hearing of the application for judicial review, Ellis Don had obtained an order requiring the Chair of the Labour Board, the Vice-Chair of the Board who had presided over the panel, and the Registrar of the Board to give evidence with respect to the full-board meeting. This order was reversed on appeal to the Divisional Court, based upon a finding of statutory testimonial immunity. See (1994), 16 O.R. (3d) 698 (Div. Ct.), relying on s. 111 of the *Labour Relations Act*, R.S.O. 1990, c. L.2 (now s. 117). The Court of Appeal affirmed the decision. The Supreme Court, in a prior ruling, denied leave to appeal from this reversal of the interlocutory order.

¹¹⁹ (1995), 89 O.A.C. 45 (Div. Ct.)

¹²⁰ (1998), 38 O.R. (3d) 737.

¹²¹ *Ibid.* at para. 42.

¹²² For a broader discussion of *Ellis-Don*, *supra* note 3, see Lorne Sossin, "Developments in Administrative Law: the 2001–2002 Term" (2002) 18 Sup. Ct. L. Rev. (2d) 41.

¹²³ [1971] A.C. 610.

¹²⁴ *Ibid.* at 625; in Patrice Garant, *Droit administratif*, 2d ed. (Montreal: Yvon Blais, 1985), the Professor states at 792–93: [TRANSLATION] It seems to be well established that a policy or guidelines previously adopted by a tribunal do not give rise to a reasonable apprehension of bias, if the tribunal respects the audi alteram partem rule, even if the decision to intervene is in accordance with the policy or guidelines. See also Dussault & Borgeat, *supra* note 9 at 423, and Gilles Pépin & Yves Ouellette, *Principes de contentieux administratif*, 2d ed. (Cowansville, Qc.: Yvon Blais, 1982) at 269.

¹²⁵ *Baker, supra* note 28 at para. 22; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682.

¹²⁶ *Baker, ibid.* at para. 23: “In *Knight, supra*, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.” The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l’Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 896, *per Sopinka J.*”

¹²⁷ *Ibid.* at para. 24: “The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7–66 to 7–67.”

¹²⁸ *Ibid.* at para. 25. “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113.”

¹²⁹ *Ibid.* at para. 26.

¹³⁰ *Ibid.* at para. 27.

¹³¹ *Ibid.* at para. 30.

¹³² In *Consolidated-Bathurst, supra* note 2, another comment from de Smith is found in the section on the right to a hearing, at p. 182, note 92: “Whilst it would be going too far to assert that in all circumstances there is an implied right to be apprised of and to argue against policy proposals, there are some indications pointing in this direction: see for example, *British Oxygen Co. Ltd. v. Board of Trade* [1971] A.C. 610, 625, 631 (desirable that notice be given to applicants for industrial grants of any rule or policy generally followed by the Department, and an opportunity for the applicants to make representations on the soundness or applicability of the policy or rule: this would make applications more effective and prevent the Department from fettering its statutory discretion)...”

¹³³ *Canadian Radio-television and Telecommunications Commission Act*, R.C.S. 1985, c. C-22, ss. 10–11.

¹³⁴ *Ibid.*, s. 6.

¹³⁵ *Ibid.*, s. 18(3).

¹³⁶ *Supra* note 28.

¹³⁷ SOR/86-1082.

¹³⁸ *Bell*, *supra*, note 4 at para. 37, McLachlin C.J. and Bastarache J. elaborate: “While it may have been more felicitous for Parliament to have called the Commission’s power a power to make “regulations” rather than a power to make “guidelines,” the legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is “*ordonnance*” which leaves no doubt that the guidelines are a form of law.”

¹³⁹ For further information on the use of a RIAS, see France Houle, “Regulatory History Material as an Extrinsic Aid to Interpretation: An Empirical Study on the Use of RIAS by the Federal Court of Canada” (2006) 19 *Can. J. Admin. L. & Prac.* 151–189.

¹⁴⁰ See *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Native Women’s Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; and Cartier, *supra* note 113.

¹⁴¹ In Ontario, the Administrative Justice Working Group has submitted a discussion paper to the Attorney General’s office advocating a nominating committee for adjudicative tribunal appointments based solely on merit criteria with participation from the public, modeled on the Judicial Advisory Committee for the appointment of provincial judges. This is discussed in Lorne Sossin, “The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law” in G. Huscroft and M. Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) at 50–80.

¹⁴² Louis-Gilles Francoeur, “Suroît: la Régie est-elle impartiale? L’ex-sous-ministre responsable de l’électricité préside les travaux” *Le Devoir* (12 May 2004).

¹⁴³ For a discussion of tribunal independence and impartiality see Laverne Jacobs, “Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel*—A Call for Empirical Analysis” in this volume at 3.

¹⁴⁴ See *Ocean Port*, *supra* note 1 at para. 24.

¹⁴⁵ At least some observers would view these two dimensions of appointments as complementary. Jodi White, for example, asserted that “While governments should have the right to appoint people who reflect the governing party’s values and support its platform, greater consideration must be given to the skills needed by the organization and to ensuring that appointments reflect Canada’s diverse population.” Jodi White, “How to restore credibility to Crown Corporations” *Globe and Mail* (10 March 2004) A21.

¹⁴⁶ K. Lippel made this comment to the Commission des institutions of the Quebec National Assembly during the hearings on Bill 103 – An Act modifying the Administrative Justice Act, 1st session, 37th legislature, 2003 that were held in 2005. K. Lippel is a very prolific scholar. Among her many

works is her latest book, Katherine Lippel & Marie-Claire Lefebvre, *La réparation des lésions professionnelles: analyse jurisprudentielle*, (Cowansville, Qc: Yvon Blais Ed., 2005).

¹⁴⁷ *Supra* note 8.

¹⁴⁸ *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14.

¹⁴⁹ *Ibid.* at s. 6(5).

¹⁵⁰ The *Retired Judges Case*, *supra* note 8 at para. 181.

¹⁵¹ *Ibid.* at para. 36.

¹⁵² See Laverne A. Jacobs & Thomas S. Kuttner “The Expert Tribunal,” in this volume at 67, citing among other examples the *Back to School Act (Toronto and Windsor) 2001*, S.O. 2001, c. 1, ss. 11(4), 11(5).

¹⁵³ For discussion, see Peter Aucoin & Elizabeth Goodyear-Grant, “Designing a Merit-Based Process for Appointing Boards of ABCs: Lessons from the Nova Scotia Reform Experience” (2002) 45 *Canadian Public Administration* 301.

¹⁵⁴ In British Columbia, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 renders mandatory the selection and appointment presidents and Board members of administrative tribunals in this province on the sole merit basis.

¹⁵⁵ *Québec (Procureure générale) v. Barreau de Montréal*, [2001] R.J.Q. 2058 (C.A.).

¹⁵⁶ For further discussion on appointments procedures and constitutional organisation of purely adjudicative administrative tribunals, see France Houle, “Constructing the Fourth Branch of Government for Administrative Tribunals” (2007) 37 *Sup. Ct. L. Rev.* 117–137.