"The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion"

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Introduction

Much of this book investigates the impact of the Supreme Court's decision in Baker v. Canada (Minister of Citizenship and Immigration)[1]. Implicitly or explicitly, most of us have an idea of what we mean by impact, whether this relates to a shift in the jurisprudence on reasons, or standard of review or a new approach to the role of international law norms in public law litigation. I consider the question from a different and often neglected public law perspective. I attempt to assess the impact of the Supreme Court's decision in Baker on bureaucratic discretion. How did Baker alter the legal and administrative landscape of "humanitarian and compassionate" grounds decision-making, if at all? How broadly and how deeply has Baker affected discretionary decision-making outside the immigration context? When assessing the impact of judicial review, whose point of view should we be adopting? Are long term effects of judicial review more significant than short term effects, and can either empirically

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1 [1999] 2 S.C.R. 817 ["*Baker*"]

be measured? Which norms or criteria allow us to distinguish desirable from undesirable impact? These questions raise a more fundamental one: what ought to be the role for courts in the administrative process?

There is remarkably little literature in Canada addressing the impact of judicial decisions on bureaucratic discretion. Since the enactment of Canada's Charter of Rights and Freedoms in 1982, scholarly interest has concerned primarily the influence of the Charter on the policy-making process (notably the rise in importance of the federal and provincial justice ministries),[2] and the legislative process,[3] rather than the impact of judicial decisions on the exercise of administrative discretion. For most observers, it is as if the Court's decision is the end of the story of a legal challenge to government action, rather than the beginning of a complex, new chapter.[4] I aim to shift the focus of the analysis to the process by which judicial decisions influence the exercise of discretionary authority by front-line decision-makers.

There is good cause to be suspicious of the assumption that once a court has issued a ruling, public officials simply comply with it, and if

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[2] See E. Shilton, "Charter Litigation and the Policy Processes of Government: A Public Interest Accoun" in P. Monahan and M. Finkelstein (eds.), *The Impact of the Charter on the Public Policy Process* (North York, On.: York University Centre for Public Law and Public Policy, 1993); and J. Kelly, "Bureaucratic Activism and the *Charter of Rights*: The Department of Justice and its entry into the centre of government" (1999) 39 Canadian Public Administration.

[3] See P. Hogg & A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75. See also K. Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481. For an earlier approach, see J. Hiebert, Determining the Limits of Charter Rights: How Much Discretion do Governments Retain (Toronto: Ph.D. Dissertation, 1991).

[4] There is a growing literature, however, in the United States, Europe and Australia on judicial impact on administrative decision-making on which this study builds. See, for example, S. Halliday, "The Influence of Judicial Review on Bureaucratic Decision-Making" [2000] Public Law 110; G. Richardson and D. Machin, "Judicial Review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal" [2000] Public Law 494; M. Sunkin and K. Pick, "The Changing Impact of Judicial Review" [2001] Public Law 736; R. Creyke and J. MacMillan, "The External Review Project" (2002) 9 Australian Journal of Administrative Law 163; and B. Canon & C. Johnson, *Judicial Policies: Implementation and Impact*, 2nd ed. (Washington: CQ Press, 1999).

they do not, further litigation (or the threat of it) serves as a adequate regulatory remedy. Front-line discretionary decision-makers typically will not have the time, expertise or the inclination to read and digest case law, even when judicial orders or reasons directly relate to their decision-making. The remoteness of the judicial action, and the difficulty in accessing judicial reasoning, are accentuated when the decision at issue is general in nature, dealing with broad principles of statutory interpretation rather than a particular factual circumstance. In such circumstances, it may be possible to construe a court's findings in broad or narrow terms, with significant or trivial consequences for administrative decision-makers. The task of interpreting judicial standards often resides with government lawyers, but the task of disseminating those standards usually falls to the policy-making apparatus of government. Neither of these groups, however, can guarantee how these standards ultimately will be received and applied by front-line decision-makers.

Principally, judicial standards are disseminated to front-line decision-makers through a variety of informal guidelines, circulars, operational memoranda, directives, codes and oral instructions which, collectively, may be characterized as "soft law."[5] Soft law is distinct and broader than the power afforded some administrative bodies to issue delegated legislation or quasi-legislation,"[6] As employed here, the term

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[5] The term "soft law" is one of several terms adopted to convey a range of non-legislative guidelines, rules and administrative policies. It was adopted in the context of codes of ethics in Angela Campbell and Kathleen C. Glass, "The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46 *McGill Law Journal* 473-489. I have examined dimension of soft law in two other papers related to this research: L. Sossin & C. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40 Alberta Law Review 867; and L. Sossin, "Discretion Unbound: Reconciling Soft Law and the *Charter*" (2002) 45 Canadian Public Administration (forthcoming). Soft law should not be confused with binding guidelines or with binding rules. Occasionally, a statute will delegate to an administrative body the authority to issue guidelines or rules which may bind decision-makers (see for example, s.27(2) of the *Canadian Human Rights Act*, which confers this authority on the Canadian Human Rights Commission). On this distinction, see generally D. Mullan, *Administrative Law* (Toronto: Irwin, 2001), pp. 375-79; and F. Houle, "La zone fictive de l'infra-droit: l'integration des regles administratives dans la categorie des texts reglementaires" (2001) 47 McGill L.J. 161.

[6] See G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987) pp.16-22.

encompasses the full range of influences over discretionary authority, including both formal instruments and ingrained administrative practices.[7] While soft law reflects a diverse set of legal and policy constraints operating on decision-makers, these constraints must be seen in a contextual light. Determining the impact of judicial decisions through soft law requires due attention to the dynamics of administrative culture, institutional relations as well as the predilections and convictions of individual decision-makers.[8]

The complexity and centrality of soft law in the administrative process is a key feature of the Supreme Court's decision in Baker[9] in two distinct but related ways. First, the Court looked to the immigration policy guidelines as a constraint on the reasonableness of the immigration officer's reasons. Given that non-legislative guidelines conventionally are understood as incapable of binding administrative decision-makers, this aspect of Baker highlights a tension in administrative law jurisprudence as to the legal status of soft law. Second, the judicially determined standards for a Humanitarian and Compassionate (H&C) decision in Baker were communicated to front line decision-makers through soft law instruments, principally an operational memorandum discussed below. In a very real sense, from the perspective of immigration decision-makers and those affected by their decisions, what the guidelines say about the Court's judgment in Baker becomes far more important than what the Court may have actually said or intended to say. Indeed, that the task of implementing the Court's decision is left to the losing party in judicial review litigation may well give rise to conflicts and tensions both within bureaucratic settings (for example, between Department of Justice litigators, immigration policy-makers and decision-makers, who each

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7 For a discussion of the proper classification of various non-legislative instruments, see R. Baldwin and J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1985) Public Law 239-84. See also Houle, *supra* note 5, at 180-85.

8 Simon Halliday refers to these as "non-legal" influences which "co-exist" with concerns of legality in the decision-making process and include, "professional intuition, systemic suspicion, bureaucratic expediency, judgments about the moral deserts of applicants, inter-office relations, financial constraint and other values and pressures all played a part in how judicial review impacted upon decision-making…" Halliday, *supra* note 4 at 117.

9 *Supra* note 1.

might view the case differently) as well as between courts and executive bodies more broadly.

While such concerns should not be lightly discarded, the process of policy-makers interpreting judicial reasons, like the process of courts educating themselves about bureaucratic contexts to determine standards of deference and reasonableness, also provides for unique opportunities both to exchange and refine judicial and executive perspectives on discretionary authority. Based on a consideration of these dimensions of Baker, I argue that soft law may serve as an important conduit for judicial-executive dialogue on discretionary authority. To fulfill this potential, however, the form and content of the soft law must reflect an authentic attempt to engage with the judicial reasons and rulings.[10] While it may be impossible fully to measure bureaucratic compliance with judicial standards, it is in my view desirable that the process of interpreting those standards be as transparent as possible, and that this process be capable of justification on normative as well as pragmatic grounds.[11] The rule of law, in other words, must extend to the rules of policy, and by so doing, the danger that broad statutory discretion will conceal unprincipled, inconsistent and unjust decision-making may be meaningfully diminished.

This analysis is divided into three sections. The first section outlines the role of soft law both in informing judicial standards regarding discretionary decision-making and in disseminating new or modified judicial standards to front-line decision-makers. The second section examines the role soft law played in the Baker decision, and its role in communicating the Court's reasons to front-line decision-makers. Finally, in the third section, I suggest a framework for better ascertaining and evaluating the impact of judicial review on bureaucratic decision-making. I conclude that the form of judicial review's impact on bureaucratic action

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[10] For a discussion of "authenticity" in the context of bureaucratic discourse, see Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986). This is a theme also pursued in slightly different terms in J. Mashaw, *Due Process in the Administrative State* (New Haven, Conn.: Yale University Press, 1985), pp.87-93.

[11] This procedural emphasis is consistent with a broader movement in Canadian administrative law, and beyond, toward transparency in discretionary decision-making. For a discussion of this emerging "culture of justification", see David Dyzenhaus, Murray Hunt, and Michael Taggart, "The Principle of Legality in Administrative Law: Internationalization as Constitutionalization" in (2001) 1 Oxford University Commonwealth Law Journal 5.

may be as important as the content. In short, where judicial standards are communicated transparently through instruments of soft law, and the interpretation of those standards by policy-makers and front-line decision-makers is made equally transparent, greater coherence and accountability over discretionary decision-making may follow.

Part 1: Soft Law as Executive-Judicial Dialogue

Soft law is a particularly significant window into the relationship between judicial and bureaucratic decision-making. Non-legislative instruments embody the policy choices of decision-making bodies, including the interpretation and application of new judicial standards. Such discretionary standards and guidelines, in turn, are considered as part of the decision-maker's "expertise", which attracts deference from the Court when discretionary decisions are challenged. While Courts have been willing to look to soft law as part of the administrative context of decision-making, they have been reluctant to see these instruments as part of the legal framework of decision-making.[12] The Court's dichotomous understanding of hard law and soft law has waxed and waned over the years.[13] It has enjoyed a resurgence as a result of the Supreme Court's judgment in Little Sisters Book and Art Emporium v. Canada (Minister of

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[12] The first Supreme Court case to consider the status of soft law was *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118, in which a narrow majority of the Court held that directive issued to guide a Parole Board 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. Pidgeon J., writing for the majority, concluded that, "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."

[13] The narrow issue in *Martineau* as to whether guidelines can give rise to procedural obligations was resolved shortly after that decision in *Nicholson v. Haldimond-Norfolk (Regional Municipality) Commissioners of Police*. [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.)).

Justice).[14] In Little Sisters, the Court was asked to respond to the argument that a Customs Operational Manual (Memorandum D9-1-1), developed to guide Customs officers in exercising their statutory discretion to identify and seize obscene material being imported into Canada, was the source of discriminatory seizures targeting a bookstore featuring gay and lesbian oriented publications. The Court had already concluded that the impugned provision of the Customs Act, which simply afforded officials a discretion to seize material deemed to be "obscene" was not unconstitutional.

Justice Binnie, writing for the majority, characterized the administration of this authority under the Customs Act as "oppressive",[15] and concluded that its effect — whether intended or not — was to isolate and disparage Little Sisters on the basis of sexual orientation. Binnie J. took note of the general bureaucratic culture as well. Officials were chosen to screen imported material for obscenity as a means of "paying their dues" or as a form of informal punishment. The officials were overburdened and under-resourced which meant having too little time to judge the artistic merit of a work. Often this resulted in officials skipping to the allegedly obscene sections and comparing them to the examples of obscenity set out in the manual. The Court recognized that a source of the targeting of Little Sisters lay in Memorandum D9-1-1. To take but one example, the Manual suggested that all acts of anal penetration violated the obscenity standard in direct contradiction to the standard set out in the previous Butler decision, and affirmed by directives from the Department of Justice.[16] Notwithstanding the evidence that Customs officers followed

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[14] [2000] 2 S.C.R. 1120. The analysis of soft law in this case is discussed in more detail in L. Sossin, "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" Paper presented to the Tilburg Workshop on *Judicial Review and Bureaucratic Impact*, November 8, 2002.

[15] *Ibid*. at para. 40.

[16] In *R. v. Butler*, [1992] 1 S.C.R. 452, the Supreme Court had linked the concept of obscenity to the threat of harm to which depictions of sex and violence gives rise. Based on this standard, the mere depiction of acts of homosexual intercourse could not be considered obscene. Binnie J. found that, "The evidence established that for all practical purposes Memorandum D9-1-1, and especially the companion illustrated manual, governed Customs' view of obscenity. The Customs' view was occasionally intransigent. Reference has already been made to the opinion from the Department of Justice that depiction of anal intercourse was not as such obscene. That opinion was ignored for at least two years while imported materials depicting anal intercourse

the Manual in most if not all instances, however, Binnie J. was unwilling to subject this non-legislative instrument to Charter scrutiny. He explained this conclusion in the following terms:

> 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. It is simply not feasible for the courts to review for Charter compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated.[17] (Emphasis added.)

The Court's distinction between statutes and guidebooks, of course, is not really one of feasibility (there is a similarly vast array of Regulations prepared by the public service but these are all subject to judicial scrutiny if impugned under the Charter) so much as one of legitimacy. Legislation and Regulations are subject to Parliamentary accountability and procedural formality (they must be enacted or issued in

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continued to be prohibited on the basis of the outdated D9-1-1 Memorandum." (*ibid.* at para. 85)

[17] *Ibid*. at para. 85.

a particular fashion, subject to the Statutory Instruments Act,[18] published in a particular form, vetted for compliance with constitutional strictures, and are subject to Parliamentary debate). Soft law is subject to no such criteria, and can be modified or discarded at will by administrative units on any policy grounds, with or without express statutory authority to do so. The case law on non-legislative guidelines[19] leads to a circular rationale to justify why soft law is considered "policy" and not "law". Because soft law is not subject to any internal oversight (e.g. vetting by Department of Justice for compliance with the Constitution), external review (e.g. by courts, boards or tribunals), or procedural standards in its development, modification or application, courts have treated soft law as inappropriate to bind decision-makers. Because courts have held soft law not to be binding, in turn, the development, modification and application of these instruments has been treated as beyond the reach of internal oversight, external review and procedural standards.

The distinction between hard law and soft law is formal rather than functional in origin. By this I mean the distinction is driven not by an empirical understanding of how soft law actually is utilized in a particular setting (i.e. does the instrument in question have a substantial role in shaping or constraining the exercise of discretion) but rather by a categorical approach rooted in the separation of powers (i.e. is the instrument in question a law or a policy). In other words, courts do not treat guidelines as "law" because to do so would recognize that public administration is subject to laws of its own design rather than subordinate to the will of Parliament.[20] Thus, if guidelines or practices formally are

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[18] See R.S.C. 1985, c.S-22. For a discussion of this *Act* and its significance, see Houle, *supra* note 5.

[19] See *Ainsley Financial Corporation v. Ontario Securities Commission* (1995), 21 O.R. (3d) 104 (C.A.) at 108-109: *Hopedale Developments Ltd. v. Oakville (town*), [1965] 1 O.R. 259 at 263 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 6-7; *Capital Cities*, (1978), 81 D.L.R. (3d) 609 (S.C.C.); *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 35; *Pezim v. B.C. (Superintendant of Brokers)*, [1994] 2 S.C.R. 557 at 596; Law Reform Commission of Canada Report 26, *Report on Independent Administrative Agencies: Framework for Decision Making* (1985) at 29-31.

[20] For a review of the separation of powers doctrine in Canada, see L. Sossin & M. Bryant, *Public Law* (Toronto: Carswell, 2002) at pp.98-111. In the context of discretionary authority, the Supreme Court recently deployed the separation of powers doctrine to justify curial deference to ministerial decision-making. In *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, which concerned

treated as "binding", this will be held to constitute an unlawful fettering of administrative discretion.[21] However, by the same token, given the clear reliance on soft law in a variety of decision-making settings, and the desirability of such reliance to ensure coherent and consistent exercises of discretion, courts have been unwilling to turn a blind eye to deviations from soft law standards. Courts often have reconciled this dilemma by recourse to familiar administrative law doctrines. If a decision-maker ignores a policy guideline without explanation, as in Baker, courts have held that this may be an indication that the administrative decision-maker acted unreasonably.[22] If a decision-maker departs from its own guidelines in circumstances where affected parties would have had a legitimate expectation that they be followed, this may be considered a breach of the duty of fairness.[23] Thus, while soft law may not be "law", it does appear to give rise to important legal duties and obligations on the part of decision-makers.[24] Elsewhere, I have suggested that the solution to this conundrum

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the discretion to deport a suspected terrorist, the Court observed that (at para. 38) "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. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold her decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion."

21 See *Ainsley*, *supra* note 19, where the Ontario Court of Appeal referred to the "Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect of a statutory instrument." (at 109).

22 See the discussion of *Baker* below. This aspect of reasonableness may be seen as a Canadian variation on substantive legitimate expectations doctrine developed in the U.K. in cases such as *R. v. Secretary of State for Education and Employment, ex p. Begbie*, [2000] 1 WLR 1115. For a discussion of this doctrine in the context of Baker, see T.R.S. Allan, "Common Law Reason and the Limits of Judicial Deference" in this volume.

23 See *Bezaire v. Windsor Roman Catholic Separate School Board* (1992) 9 O.R. (3d) 737 (Div. Ct.) (in which a school board's decision to close nine schools was quashed because neither ministerial nor school board policy guidelines, which called for consultations with affected parties, were followed). See also *Hammond v. Assn. Of British Columbia Profession Foresters* (1991), 47 Admin. L.R. 20 (B.C.S.C.).

24 Paradoxically, one of those duties may well be not to treat guidelines as binding. Often, guidelines, such as those discussed below in the context of the *Baker* case,

is to subject the development and application of soft law to minimal procedural and substantive standards.[25] However, this proposed solution is not without its risks. If the development, modification and application of soft law becomes more procedurally onerous, it may undermine the flexibility needed to adapt to rapidly changing policy environments, and add yet another layer of formalism to the judicial-executive dialogue over discretionary authority.[26] It would render the constitutional distinction between regulations and guidelines difficult to justify on principled grounds. Yet, to maintain the status quo, in my view, carries with it even more serious risks. To permit crucially important forms of public authority to be exercised according to internal and unaccountable principles and policies, not subject to meaningful forms of public review, undermines the integrity of public administration and the constitutional principle of the rule of law.[27]

Even in the midst of its uncertain legal status, or perhaps because of this, soft law represents a potentially flexible and effective mechanism for disseminating judicial standards to decision-makers. Soft law instruments can adapt diffuse or abstract judicial commentaries into usable, relevant decision-making criteria. Depending on the context, a

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will include a provision which prohibits a decision-maker from restricting herself to following the guidelines irrespective of other factors.

[25] See L. Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law", *supra* note 5.

[26] See D. Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445 at 471-80.

[27] This concern dovetails with the caution raised by Lamer C.J. (writing for himself in a concurring decision) in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 13, in relation to administrative tribunals having the jurisdiction to apply the *Charter*. In arguing that only courts should have *Charter* jurisdiction, Lamer CJ stated, "The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task." (Emphasis in original) See also the discussion of the rule of law concept in this context, see H. Richardson, "Administrative Policy-Making: Rule of Law or Bureaucracy?" in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999).

judicial standard may be presented to decision-makers as a checklist of relevant factors, a commentary on what principles, rules or exceptions should guide a decision, or as a fact based illustration of how to apply a standard from which decision-makers may reason from analogy. A further, potential benefit to soft law as a means of disseminating judicial standards is that most guidelines and directives are now available to the public, or easily can be made public, either through ministry websites or by responses to freedom of information requests. Since decision-makers in high-volume discretionary settings rarely have the resources to issue detailed written reasons for their determinations, publicly available guidelines which incorporate relevant judicial standards may provide an important (and, often, the only) window to affected parties about how a particular discretionary decision was reached, and what basis may be available to challenge it.[28]

Whereas statutes and regulations are meant to define the boundaries and mandates of public authority, soft law is intended to ensure coherence and consistency in the implementation of those mandates. In his landmark study of administrative discretion, K.C. Davis advocated for rule-making as an important tool both for confining discretionary power and for structuring it.[29] 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 transparency and accountability. This democratic justification for clear standard-setting has served as a

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[28] Of equal importance is the fact that guidelines may sometimes reflect input and negotiations between affected parties and decision-makers. For example, in *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission*, *supra* note 19, the Supreme Court held that, while existing regulations would prevail against policy statements, 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, noting, that "the guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions."

[29] K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University, 1969).

touchstone for much administrative law scholarship on discretionary authority,[30] and has met with some judicial favour in Canada.[31]

The dilemma in using soft law instruments such as guidelines and manuals to convey judicial standards is that, as indicated above, such instruments, by definition, cannot purport to be legally binding. Judicially determined decision-making standards, by contrast, are binding, in the sense that once a judicial standard has been articulated, it is not open to an executive decision-maker to adopt a different standard. That inherently non-binding instruments are employed to convey inherently binding standards is clearly a dilemma. This dilemma is yet another reason to prefer forms of soft law which convey judicial standards in a clear and transparent fashion, so that judicial standards can be disaggregated from policy preferences expressed through soft law. This dilemma may be overcome if we abandon the binding/non-binding dichotomy and focus the analysis of soft law instead on the extent to which its content should influence decision-makers.[32] Of course, this distinction is not always so clear either. Because judicial standards themselves are subject to interpretation and may not apply in the same way to different legal and factual contexts, it may well be open to a decision-maker legitimately to disagree with the communication of a judicial standard in a guideline and to approach that standard unfettered by the guideline. In this sense, while the underlying judicial standard must be treated as governing, the manner in which policy-makers conclude that standard should affect decision-

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30 See the discussion of Davis' influence in D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), p.170-77; and K. Hawkins, "The Uses of Legal Discretion: Perspectives from Law and Social Science" in K. Hawkins (ed.), *The Uses of Discretion* (Oxford: Clarendon Press, 1992), pp.16-7.

31 See, for example, *Re Hopedale Developments Ltd* v. *Town of Oakville* (1964) 47 D.L.R. (2d) 482.

32 Mayo Moran's contribution to this volume, "Authority, Influence and Persuasion: *Baker*, *Charter* Values and the Puzzle of Method" explores "influential authority" as a way of mediating and overcoming the traditional duality between binding authority on the one hand and mere persuasive authority on the other in the context of international law (which, in terms of its domestic application, has been treated as a another form of soft law by Canadian courts). Moran's focus on justification strikes me as particularly crucial to this project. See also Houle, *supra* note 5; and H. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule-Making" in *Administrative Law: Principles, Practices and Pluralism*, Special Lectures of the Law Society of Upper Canada (Scarborough, Ont.: Carswell, 1992).

makers will be a matter for interpretation, just as the manner in which decision-makers apply that standard to individual cases and circumstances, will be a matter for its discretion. It is in this interpretive domain that reasons and justification emerge as a paramount concern. If judicial standards are disseminated by policy makers to decision-makers as a mere checklist, without explanation or elaboration, neither decision-makers nor affected parties will know the basis for the interpretive choices of the policy-makers, and whether such choices were reasonable and made in good faith. Similarly, if a denial of a discretionary benefit is not accompanied by reasons, affected parties will not know whether the discretion was based on relevant or irrelevant factors. At the end of the day, the form and content of soft law cannot be so easily disentangled. To express a principled preference for guidelines which elaborate both the relevant judicial standards, and the interpretation of those standards, reflects the importance both of form and content in the development and dissemination of soft law. This is analogous, in my view, to the relationship between the administrative law duty to provide reasons for a decision, and the correlative requirement that the decision be reasonable.[33]

To conclude, while soft law has the potential to serve as a conduit between the executive and judiciary for exchanging knowledge about legal and administrative aspects of discretionary authority, the ambiguity surrounding the legal status of soft law has impaired the fulfilment of this potential. It has also meant that the development and application of soft law is subject to little or no accountability, with little or no guarantee of consistency. Interviews with legal, policy and operational staff in several different ministry settings reveal that, while the importance of soft law to the discretionary process is universally recognized, standards for its use simply do not exist. Guidelines, manuals and directives may be designed in an ad hoc or well planned manner, they may be disclosed to the public or kept secret, they may be vetted by lawyers or not, and they may be based on the input of affected parties or drafted behind closed doors. To the extent soft law serves as a vehicle for communicating judicial decisions to front-line decision-makers, no supervisory process exists to

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[33] On this relationship between reasons and reasonableness in administrative law, see the discussion of *Baker* in D. Dyzenhaus and E. Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker* v. *Canada*" (2001) 51 University of Toronto Law Journal 193. On the broader relationship between the rule of law and judicial scrutiny of administrative policies, see T.R.S. Allan, "Common Law Reason and the Limits of Judicial Deference" in this volume.

ensure that this is done in an effective and expeditious fashion or to ensure that it captures the spirit as well as the letter of the judicial determination (except, of course, by way of further litigation).

In the following section, I explore the potential and limitations of soft law through a more detailed examination of the Baker decision and its aftermath. Baker suggests that the distinction between "law" and "policy" often is invoked strategically, by courts and administrative decision-makers, in order to support desired outcomes in particular cases. The result is that a courtroom victory, elusive as this often may be, can turn bittersweet as litigants witness administrative decision-makers respond to judicial orders with defiance, confusion or indifference. It remains to be seen, however, whether this instrumental approach to soft law can be supplanted by a transparent and constructive exchange of perspectives between courts, policy-makers and decision-makers. Baker provides both a basis for optimism and a measure of caution in addressing these possibilities.

Part 2: Soft Law and Discretion: Baker v. Canada

It is difficult to think of a decision-making context in which discretion plays a larger role than the immigration and refugee process. As Bouchard and Carroll recently observed in their study of administrative discretion in the immigration selection process,

> In complex policy areas that are characterized by high and emotive content like immigration, politicians, policy analysts, and the general public are less inclined to engage in policy debates which might challenge the broader framework of accepted social values. As a result, decisions that may have major public policy implications can be made by default by bureaucrats exercising their powers of discretion. These decisions, or policy outcomes, can have serious unintended consequences for the broader society.[34]

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[34] Genevieve Bouchard and Barbara Wake Carroll, "Policy-Making and Administrative Discretion: The Case of Immigration in Canada" (2002) 45 Canadian Public Administration 239 at 239-40. On the problems of accountability in the context of discretionary decision-makers generally, see M. Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980).

Arguably, within immigration decision-making, the broadest statutory discretion afforded is the "humanitarian and compassionate" exemption under the Canadian Immigration Act.[35] This statutory provision contained no criteria for the determination of humanitarian and compassionate grounds. The Regulation issued pursuant to this provision was similarly broad and undefined.[36] Guidelines were issued as part of the Inland Processing Manual No.5 ("IP5"). These guidelines were intended to structure the exercise of this broad discretion.[37] Nonetheless, the essence of the determination of "humanitarian and compassionate" grounds ultimately rests with the subjective conclusions of individual immigration officers as vividly illustrated in Baker v. Canada (Minister of Immigration and Citizenship)[38].

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[35] Section 114(2) of the *Immigration Act* read "The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations." This section was amended by the *Immigration and Refugee Protection Act*, 2002, in part as a consequence of the *Baker* decision and now reads: "25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."

[36] Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44, 2.1 "The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations."

[37] *Immigration Manual: Examination and Enforcement*, ch. 9. Apart from integrating interpretive principles from case law, as discussed further below, this manual also served to transmit the decisions and interpretations of the immigration and refugee board, which unlike judicial decisions, are not binding apart from the particular case at issue before the board. For a discussion of this "cohering" function of guidelines, see Houle, *supra* note 5, at 183-5.

[38] *Supra* note 1.

While the facts of this case are no doubt by now notorious, they are important to understanding the nature and scope of the discretion exercised in this case. 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 following passage from those reasons illustrates the complex mix of personal judgments, objective evidence and immigration policy which figured in the determination:

> PC is unemployed — on Welfare. No income shown — no assets. Has four Cdn.— born children — four other children in Jamaica — HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [sic] other two). There is nothing for her in Jamaica — hasn't been there in a long time — no longer close to her children there — no jobs there — she has no skills other than as a domestic — children would suffer — can't take them with her and can't leave them with anyone here. ... Lawyer says PS [sic] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc. This case is a catastrophy [sic]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE! The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I

> recommend refusal but you may wish to clear this with someone at Region. There is also a potential for violence — see charge of "assault with a weapon"[Capitalization in original.] [39]

The decision of the officer was quashed by the Supreme Court on the basis of bias and on the grounds that it was an unreasonable exercise of discretion. In the second part of the decision, the Court considered the ministry guidelines which officers were supposed to rely upon. Guideline 9.05,[40] for example, directed officers to carefully consider all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated. According to the Court, the guidelines also set out two bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised: public policy considerations and humanitarian and compassionate grounds. Public policy reasons included marriage to a Canadian resident, the fact that the person has lived in Canada, has become "established", and has become an "illegal de facto resident", or the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. The guideline further provided that humanitarian and compassionate grounds included whether unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada. Finally, and most importantly for the Court, the guideline made specific reference to the consideration of familial issues in determining whether grounds for an H&C exemption were present.

L'Heureux-Dubé J., writing for the Court in Baker, characterized the Minister's guidelines as of "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."[41] At another point in the judgment, she acknowledged that these guidelines "constitute instructions to immigration

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39 *Ibid.* at para. 5.

40 *Supra* note 35.

41 *Supra* note 1 at para. 72.

officers about how to exercise the discretion delegated to them,"[42] and set out the criteria on which discretion should be exercised. In general, the Court's approach in Baker suggests that soft law may serve to delineate the scope of what will be accepted by a court as a reasonable exercise of discretion.[43] That the decision taken in Baker was at odds with the guidelines was a primary ground cited by the Supreme Court for quashing the decision as an unreasonable exercise of discretion.[44] Can this finding be reconciled with the Court's earlier position that guidelines cannot be construed as binding? At first glance, L'Heureux-Dubé J. appears to treat guidelines not as law but as a reflection of Canada's "compassionate and humanitarian values".[45] However, by linking the finding of unreasonableness directly to the inconsistency between the reasons of the immigration officer and the guidelines, L'Heureux-Dubé J. appears to treat the guidelines themselves as part of the legally enforceable constraints on the exercise of the statutory discretion. L'Heureux-Dubé J.'s ambivalence, in my view, stems from a conflict between her desire for a functional, contextual approach to supervising discretionary authority, and her commitment to a rule of law based approach under which all legislative grants of discretion must contain legally cognizable limits — or to use Rand J.'s phrase from Roncarelli v. Duplesis,[46] no discretion may be untrammeled.

The statutory discretion at issue in Baker, however, was entirely subjective. France Houle characterized it as sponge-like because it would absorb all the values, assumptions or policy preferences to which it is exposed.[47] While we may agree on what are relevant or irrelevant factors for the granting of a liquor license, would we expect a similar consensus

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42 *Ibid.* at para. 16.

43 *Ibid.* at para. 67, 72.

44 *Ibid*. at para. 74-75.

45 *Ibid*.

46 [1959] S.C.R. 121.

47 F. Houle, "L'arrêt Baker : Le rôle des règles administratives dans la réception du droit international des droits de la personne en droit interne" (2002) 28 Queen's L. J. 511 at 516.

on the factors relevant to a determination of compassion?[48] Can the reasonableness of compassion truly be ascertained by a court? The policy guidelines in this statutory setting do not elaborate a legal standard; they are the legal standard. Or, more precisely, since the discretionary exercise of this authority by immigration officials is the only expression of law that matters, guidelines provide the only meaningful constraint on this statutory discretion. What L'Heureux-Dubé J. appeared to recognize but was unwilling to address in Baker, is that the rule of law in settings of broad discretion and minimal supervision becomes the rules of policy.

The guidelines in Baker served as more than a check on arbitrary state authority. They communicated political preferences and policy choices and incorporated legal sources other than the legislation. Specifically, as I outline below, they incorporated judicial standards for the application of discretionary authority. As Houle explores in her assessment of Baker, guidelines may also incorporate international law norms.[49] Indeed, revisions to the guidelines for H&C decisions in 1999 (which counsel for Baker and the interveners unsuccessfully attempted to introduce before the Supreme Court during the hearing of the appeal) made specific reference to the International Covenant on Rights of the Child. Houle concludes that soft law may prove a more hospitable forum for harmonizing governmental action with Canada's international obligations than more cumbersome forms of legislative implementation.[50]

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[48] This point was demonstrated in an innovative ministry of citizenship and immigration initiative on administrative ethics, which involved consultations with all ministry staff, and led to the publication in December of 1998 of the "Ethical Compass". This publication was a compendium of complex, hypothetical case studies which engage the values and judgment of immigration and refugee officials in applying the statutory authority, rules and guidelines to particular circumstances. Each hypothetical scenario was presented to a focus group of immigration officers who were asked how they would resolve the ethical dilemma. A consensus emerged in all but one example, which dealt with the role of compassion in the exercise of ministerial powers. See Citizenship and Immigration Canada, *The Ethical Compass* (March 1998), at http://www.cic.gc.ca/english/pub/values%2De.html#case4 (Accessed May 13th, 2002).

[49] *Ibid*. at 538.

[50] On this point, however, courts have differed on the legality of guidelines which purport to impose international law norms on domestic decision-makers. In *Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCA 323, the Federal Court of Appeal held that it was not open to the Minister to exercise his discretion to revoke an organization's charitable status based on an internal policy which stated that organizations operating to assist Israeli

Thus, when L'Heureux-Dubé J. views reasonableness in Baker through the prism of policy guidelines, administrative and judicial considerations on the proper scope of "humanitarian and compassionate" grounds merge and interact. The judicial reasons which resulted from this intermingling led to a variety of challenges for policy-makers and decision-makers in the Ministry. It is to the place of soft law in the aftermath of Baker that I now turn.

Soft Law and the Aftermath of Baker

The aftermath of Baker can be approached from different vantages in determining the judicial impact on bureaucratic discretion. For Mavis Baker, the impact of the judgment was clear and profound. While the remedy granted by the Court was a rehearing before a different immigration officer, the result of this process appeared a foregone conclusion given the tenor of the Court's treatment of her case. Finally, in December of 2001, after her application was granted, Baker received her official status as a permanent resident. The Court's judgment led to macro change as well. In the legislative amendments accompanying the new immigration statute, the humanitarian and compassionate grounds exemption was modified, inter alia, expressly to mandate consideration of the best interests of any children directly affected by an application.[51] The Baker judgment also set in motion a number of administrative and policy changes relating to the exercise of discretion under the Act.

Following the decision in Baker, H&C determinations (particularly those involving children) were left in a state of temporary limbo while policy-makers determined the impact of the Court's ruling and its reasons. This is telling because, in normal circumstances, policy staff would have begun working on contingency arrangements and policy options in the

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settlements in the West Bank could not hold charitable status because Canada supported U.N. resolutions which called on Israel to withdraw from the occupied territories. The Court concluded that only Parliament or the Governor in Council, not an internal policy directive, could direct that the discretion to revoke charitable status be circumscribed in this fashion. On the complexities which arise in the use of international law norms in the interpretation or application of domestic statutory duties, see J. Brunee and S. Toope, "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in this volume.

[51] See the new statutory language, *supra* note 35.

event of an adverse judicial ruling early on in the litigation process.[52] In this case, it took a year from the time of the Court's judgment before the Ministry published an "operational memorandum" on Baker and its implications for future decision-making.[53] This memorandum was divided into separate sections on "case details", "court's reasons for deciding to return for redetermination", "summary of issues and impact on CIC [the ministry]", and "conclusion [which included a web link to the full text of the decision]" The memorandum points out those policies and practices which the Court affirmed as legally sufficient (for example, the Court's finding that note-taking met the legal requirement for "reasons") as well as those which the Court held to be legally deficient (for example, the failure to take proper consideration of the best interests of the children). The memorandum concludes with a passage on "why the Baker decision was not upheld". In this section, the memorandum details the basis for the Court's ruling that the decision-maker's exercise of discretion was both unreasonable and biased.[54] The memorandum employs a mixture of summary, paraphrasing, quoting and analyzing of the Supreme Court reasons, in order to remain faithful to the text but also to be clear about the broader relevance of the judgment for discretionary decision-making.

The memorandum, however, also engages in an interpretation of the Supreme Court's reasons. For example, under the heading "Consideration of the Children's Interests", the memorandum states that the impact of Baker for decision-makers will be as follows:

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[52] Interview with CIC policy official, July 16, 2002. The cause of delay was characterized first as "a breakdown in communications" and later, as "bureaucratic drift".

[53] See Operational Memorandum on *Baker* – "Issues Addressed and Impact on Citizenship and Immigration Canada" www.cic.gc.ca/manuals-guides/english/om-web/2000/ip/ip00-08e.html. (Issued July 10, 2000, OM #00-08) (Accessed May 13th, 2002). Approximately three to four cases each year are the subject of operational memoranda. These are subsequently incorporated into revised Manuals. Most memoranda are issued following significant Supreme Court decisions but they may follow lower court rulings as well. Some are issued as "one-time instruction only" while others are eventually incorporated into the text of the manual. Based on interviews with ministry staff, the decision when to issue a memorandum, and what content the memorandum should contain, are subject to no general standards, and appears to be policy judgments made collectively by the legal services and policy branches of the ministry, often but not always on the advice of the litigation team who argued the case.

[54] *Ibid*. at p.4.

> While the best interests of children must always be taken into account as an important factor that is given substantial weight, this does not mean that they will outweigh other factors of the case. There may be grounds for refusing an H&C application even after considering the best interests of children.[55]

This approach to disseminating a new judicial standard highlights the potential of soft law to facilitate judicial-executive dialogue. Of course, simply providing a useful summary of a case is not in and of itself likely to have a significant impact on bureaucratic action. After all, the "biased and unreasonable" views at issue in Baker were not exceptional — they were drafted in a shorthand fashion between a junior and senior immigration official which suggested shared assumptions about the immigration system, an impression confirmed by the fact that the reasons were not only accepted by the senior immigration officer, but also deemed appropriate to provide to the applicant.[56] Rather than serve as a clarion call to immigration decision-makers, the judgment in Baker may just as easily serve as a "roadmap" showing how decision-makers can phrase "reasons" in order to avoid successful judicial review in the future.

Perhaps with such concerns in mind, the ministry undertook an unusual pilot project in February of 2001 in the Toronto region. With the assistance of York University's Centre for Practical Ethics, the ministry organized a day of workshops and lectures on the Supreme Court's judgment, entitled "Baker and Beyond." Approximately one-hundred front line decision-makers from the Toronto region attended the event, and heard from academics, lawyers and ministry staff on the significance of the decision. More importantly, those attending had an opportunity in workshops and "breakout session" to discuss the case and hypothetical

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[55] *Ibid*. at p.3. This "impact" statement closely paraphrases para. 75 of the *Baker* judgment, but with subtle modifications. For example, while the judgment states that it is not the position of the Court that the best interests of children "must always" outweigh other factors, the memorandum states that it is not the position of the Court that the children's best interests "will" outweigh other factors.

[56] This impression is further supported by Bouchard and Carroll's study which found the view that Canada's immigration system has become too lax and easy to manipulate is widely held both within and outside the ministry of citizenship and immigration. *Supra* note 34 at 244-5.

scenarios raising similar issues.[57] The discussion at these small group meetings was revealing. Decision-makers disclosed that they sometimes viewed their own government lawyers as adversaries, and offered anecdotes about how judicial reviews of their decisions succeeded only because they were not permitted by government lawyers to put the "real story" before the court. A number of decision-makers emphasized that the guidelines, even when conveying judicial standards, were simply a reference tool, and that their decisions were a product of individual judgment based on the evidence and could not be fettered by blind adherence to guidelines. A lawyer involved in the case later mentioned, as an aside, that in her experience, the independence of decision-makers typically is raised at the moment the accountability of decision-makers is at issue.[58]

The impact of judicial review on bureaucratic discretion in the "humanitarian and compassionate" setting as a result of Baker has been, at first glance, dramatic. Procedurally, applicants are now routinely entitled to written reasons for decisions (although, importantly, only if written reasons are formally requested). Substantively, many applicants with children have had more favourable "humanitarian and compassionate" determinations as a result of the Court's direction. However, it is more difficult to discern whether the values displayed in the officer's reasons at issue in Baker have been affected by the Court's intervention.

One of the central difficulties in coming to terms with the impact of Baker on front-line decision-making is that the Court left many of the key question for decision-makers inadequately resolved — a fact not remedied by the operational memorandum which adopted much of the Court's language. After canvassing conflicting jurisprudence on the precise standards the Court imposed on decision-makers through Baker, Nadon J. noted in Legault v. Canada (Minister of Citizenship and Immigration),[59]

> One of the difficulties arising from L'Heureux-Dubé J.'s decision is what does proper consideration of the children's

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[57] I should disclose that I participated in the "Baker and Beyond" retreat, giving a lecture on the "reasons" requirement arising out of the Supreme Court decision.

[58] Interview with lawyer involved in *Baker*, July 9, 2002.

[59] [2001] 3 F.C. 277.

> interests mean. What does it mean, in fact, to be alert, alive and sensitive to the children's interests? Because there is no easy answer to these questions, either on a factual basis or on a principled basis, immigration officers and judges of this Court have struggled whenever confronted with these questions…
>
> In my respectful view, the difficulty which immigration officers are now confronted with stems in part from the Supreme Court's failure-by reason of its conclusions that there was a reasonable apprehension of bias and that the officer had not considered the children's best interests-to address the real issue in Baker, supra. That issue was whether the fact that Ms. Baker would be a burden on taxpayers was a consideration which could outweigh the children's best interests. Could the officer in Baker, supra, give importance to, inter alia, the fact that Ms. Baker had remained illegally in this country for over ten years? [footnotes omitted][60]

On appeal, the Federal Court of Appeal upheld Nadon J's ruling,[61] which was to dismiss an application for judicial review of a denial under s.114(2) of the Act, where Canadian born children were affected. The Federal Court of Appeal affirmed that "public policy" grounds could outweigh the best interests of the children, without offending the standard established in Baker.[62] Thus, we are left to question what really will change when the "best interests of the children" migrate from the policy guideline to the statutory grant of discretion itself.

While it is in the nature of significant judgments such as Baker to gloss over the minutiae of implementation, the lack of precision with

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[60] *Ibid*. at paras. 58, 62.

[61] 2002 FCA 125.

[62] As to the nature of these "public policy" grounds, the Federal Court of Appeal looked, once again, to the policy guidelines. However, while devoting a substantial portion of the judgment to a consideration of the guidelines, Decary J.A. observes that the guidelines cannot fetter ministry decision-makers. *Baker* was relied upon solely for the proposition that the guidelines are "of great assistance." See *ibid*. para. 20.

respect to the Court's standards for the discretionary authority in Baker complicates the question of the impact of the Court's decision. For example, as lower courts whittle away at the scope of Baker and, significantly, as the Supreme Court itself comes to read Baker in narrower terms, [63] should this interpretive evolution be reflected by modifying policy guideline dealing with this discretion? To the extent that concerns arise as to whether policy-makers and front line decision-makers are complying sufficiently or genuinely with the standards in Baker, these concerns must be contingent on the extent to which there is any consensus on precisely what standards the Court in Baker actually conveyed. Or, as Trevor Allan has characterized it, the continuing judicial refinement of standards defines the 'discretionary area of judgment' within which decision-makers may manoeuvre.[64]

At a minimum, however, by choosing to engage with the Baker case directly in the operational memorandum, and through subsequent training workshops, both policy-makers and decision-makers have been able to participate in a meaningful dialogue with each other (and with the courts as revised guidelines and novel decisions are judicially reviewed) regarding the scope and content of their discretionary authority. This, in my view, is a significant and necessary first step towards constructive judicial impact in settings of discretionary decision-making.

Part 3: The Impact of Judicial Review and the Rule of Policy

Socio-legal approaches both to judicial review and bureaucratic decision-making begin from the premise that neither judicial nor bureaucratic statements should be taken as self-evident or straightforward. The exercise of administrative discretion constitutes both a complex social process,[65] and a "collective enterprise,"[66] which neither a particular

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63 The Supreme Court took the opportunity in *Suresh*, *supra* note 20, of clarifying that *Baker* was an exceptional case of judicial intervention (in part, because of the issue of the departure from the ministry guidelines) and that normally, a higher degree of deference should be shown discretionary decision-making. See especially para. 36. This narrowing of Baker's scope is discussed in David Mullan's contribution to this volume, "Deference from *Baker* to *Suresh* – Interpreting the Conflicting Signals"

64 Allan, *supra* note 22, at p.2.

65 For a discussion of discretion as a dialogic relationship, see J. Handler, "Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community"

judicial decision or policy guideline can control. However, both judicial review and administrative policy provide a valuable measure of accountability for discretionary decision-making — in some cases, the only such measure — and for this reason merit deeper scrutiny. Judicial review presents an opportunity not only to prevent abuse but also to shed light on the proper scope and purpose of discretionary authority.[67] As Baker illustrates, soft law serves as a site of interpretation and contestation over the meaning of discretionary authority, and by extension, as a forum for administrative bodies both to inform courts and respond to them regarding the proper criteria for decision-making.

Prevailing wisdom holds that judicial review is not an effective means of changing bureaucratic action, and that its utility, if any, lies in focusing public attention on particularly oppressive or discriminatory decision-making settings.[68] However, it is worth observing that the reverse may sometimes be true as well — in certain discretionary settings, judicial review is welcomed as an easy crutch to avoid the difficult and sometimes unpopular work of policy-making. For example, the determination of eligibility for charitable status in Canada under the Income Tax Act is a highly discretionary process which invites policy-makers and decision-makers to craft a principled approach to defining the scope of what

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(1988) 35 U.C.L.A. L. Rev. 999. See also L. Sossin, "Law and Intimacy in the Bureaucrat-Citizen Relationship" in N. des Rosiers (ed.), *No Person is an Island: Personal Relationships of Dependence and Independence* (Vancouver: University of British Columbia Press, 2002) pp.120-54.

66 This characterization of administrative discretion is borrowed from Hawkins, *supra* note 29, at p. 27.

67 For a broader discussion of the relationship between law and discretion in the Canadian context, see N. des Rosier & B. Feldthussen, "Discretion in Social Assistance Legislation" (1992) Journal of Law & Social Policy 204; L. Sossin, "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1992) 36 Canadian Public Administration 364; and L. Sossin, "Redistributing Democracy: Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L.R. 1.

68 See P. Robson, "Judicial Review and Social Security" in T. Buck (ed.), *Judicial Review and Social Welfare* (London: Pinter, 1998), p.105; also see generally, See L. Bridges, G. Meszaros and M. Sunkin, *Judicial Review in Perspective* (London: Cavendish, 1995).

constitutes a "charity". [69] Rather than take up this challenge, officials have simply deferred to the Courts, and in so doing, transformed judicially developed principles intended to guide administrative decision-making into rigid, legal requirements.[70] Neither indifference nor blind obedience to courts is likely to improve the quality and coherence of discretionary decision-making.

Not only is it difficult to agree on what we mean by the "impact" of judicial review on bureaucratic decision-making, and more difficult still to assess it, but even if we assume that we can overcome these conceptual challenges, a further hurdle is encountered in ascertaining whether greater or lesser impact is desirable. Notwithstanding chronic problems of delay, cost and access associated with litigation, judicial review continues to hold promise as a means of constructive influence on bureaucratic decision-making. By clarifying criteria for the reasonable exercise of discretion judicial review may serve as a catalyst, as in Baker, for reflection by policy-makers and decision-makers about the principles which ought to underlie the exercise of discretion.

While a detailed discussion of the proper conceptual framework to guide an understanding of the impact of judicial review is beyond the scope of this chapter, it would seem valuable as a preliminary step to such a framework to distinguish between different types of judicial influence, different methods of judicial influence and finally, different degrees of judicial influence.

Judicial review appears to influence bureaucratic decision-making in at least three discrete ways. First, judicial review may serve an individual dispute resolution role — a judicial order may uphold, modify or quash a particular administrative decision, and may apply directly to others in the same position. For example, it is certainly a relevant impact that Mavis Baker herself was granted permanent residency status once her application was reheard in light of the Court's decision. In this way,

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[69] For an analysis of administrative decision-making in this area, see L. Sossin, "Regulating Virtue: A Purposive Approach to the Administration of Charities in Canada", in J. Phillips, et al., eds., *Charities: Between State and Market* (Kingston: McGill-Queen's Press, 2001), pp. 373-406.

[70] Those standards are conveyed to decision-makers using yet another form of "soft law" — a set of guidelines contained as part of an "Employees Handbook", which summarize the judicial case law in the field of charitable eligibility, discussed in *ibid*.

judicial review maps the boundaries of administrative discretion in individual cases or classes of cases. Second, judicial reasons may offer a new, changed or definitive interpretation of a legal standard which has broader implications for bureaucratic decision-making. Here, the reach of the judicial decision may extend far beyond the particular dispute. Baker's reach extended beyond the case of Mavis Baker in a number of ways. Procedurally, it altered the standard of issuing written reasons in decision-making throughout immigration and refugee settings and beyond. Substantively, it altered the weight given to certain factors such as the best interests of the child in immigration and refugee decision-making (both within and outside the H&C setting), while clarifying that other factors would be irrelevant to these determinations. In this fashion, judicial review influences the direction of administrative policy. Finally, judicial review may also influence bureaucratic practices. Bureaucrats may attempt to avoid judicial review in the future by complying with established judicial standards, whether this compliance is cosmetic (for example, issuing reasons calculated to comply with the Baker standard rather than the candid disclosure of motivations and values which characterized the reasons actually at issue in Baker) or reflects a genuine change of heart, respect for the authority of the courts, or some combination of the above.

Classifying various kinds of influence, however, does not shed light on the method of the influence. Developing a framework for understanding how judicial review influence bureaucratic decision-making requires an examination of at least three sequential aspects of the administrative process.[71] First, a policy decision is made as to whether any soft law instruments require revision in light of a particular case, and if so, what the content and degree of the revision should be. While judicial review may be pursued with adversarial zeal by government lawyers, those same lawyers generally work to ensure bureaucratic compliance with judicial decisions.[72] Second, a further policy decision is made as to the form of the revision. Based on my interviews, this determination appears to be made most often on institutional and situational grounds — the consensus is that, due to bureaucratic inertia, revisions to guidelines

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[71] This sequential — or serial — view of discretion builds on the approach to discretion which views each exercise of discretionary authority as part of a sequence of decisions occurring in a network of legal relationships. For discussion of this "holistic" view, see Hawkins, *supra* note 29, at 28-32.

[72] See Hammond, "Judicial Review: the continuing interplay between law and policy", [1998] Public Law 34 at 40-41.

tend to follow the same form as predecessors. In other words, policy-makers do not tend to consider afresh the question of whether to present a judicial standard in the form of a checklist, a set of principles or a detailed commentary but rather follow their own precedent as to how like standards were conveyed in the past. Finally, the third aspect of the administrative process which must be considered is the reception of policy change by front-line decision-makers. The frequency of post-Baker judicial reviews of negative H&C applications where applicants argued that the best interests of children were disregarded by immigration officers,[73] may attest to bureaucratic resistance to the Baker standards, or may simply attest to Baker providing a credible basis to challenge almost any negative determination of an H&C application where children are involved.

Alternatively, one could look at different methods of judicial influence from the standpoint of the judicial rather than the administrative process. In sketching what such a framework might include, Maurice Sunkin has distinguished between the impact of the process of judicial review litigation (this would include the discovery process, the publicity and public validation of claims against bureaucratic decision-making, the cost to government to defend against litigation), the impact of judgments in particular cases (this would include differentiating between the impact of successful challenges and the impact of unsuccessful ones) and the impact of the principles or values enshrined in judicial review.[74]

The third consideration is one of degree. While it is difficult to reach any conclusion regarding the extent of judicial impact,[75] which may turn on the perspectives of individual decision-makers across diverse settings, the aftermath of Baker suggests that front-line discretion was influenced by the Court's judgment, but as in many other cases, this has

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[73] A search through Quicklaw yielded 20 such challenges which reached the Federal Court between January 2001 and November of 2002.

[74] Maurice Sunkin, "Methodological and Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies" Paper presented to Tilburg Workshop on Judicial Review and Bureaucratic Impact, November 7, 2002.

[75] Bradley Canon suggests four degrees of response: (1) defiant non compliance, (2) evasion or avoidance, (3) cosmetic acceptance and (4) full compliance. See B. Canon, "Studying Bureaucratic Implementation of Judicial Policies: Conceptual Approaches" Paper presented to Tilburg Workshop on *Judicial Review and Bureaucratic Impact*, November 7, 2002).

not occurred as quickly, comprehensively or coherently as the litigants (especially the interveners with broader policy interests) and the Court might have wished.

A conceptual framework of the impact of judicial review on bureaucratic discretion must also address the question: judicial impact on what? Bureaucracy is not a monolith and discretionary decision-making must never be seen as static. Judicial influence may also be classified according to different types of discretion. Bouchard and Carroll, for example, distinguish between procedural discretion, discretion as to criteria for substantive determinations and discretion as to outcome, and argue that different considerations may pertain to each.[76] Baker arguably had significant but different consequences for all three kinds of discretion. Alternatively, one could look at judicial impact from the broader standpoint of discretion over institutional design and structures. Again, in the context of Baker, this focus might lead to an analysis of the new procedures and resources required in order to comply with the expanded requirement of written reasons.

As Halliday has cautioned, one cannot approach the judicial-executive relationship as a linear cause-and-effect interaction. Rather, this relationship should be conceived as fluid, organic and unstable. Baldwin and Hawkins saw it as "a subtle and shifting affair which is a matter of seemingly endless human interpretive work".[77] As government lawyers devise particular litigation strategies, or decide which cases to appeal or settle, as policy-makers interpret judgments through various instruments of soft law, and as decision-makers reinterpret those standards through their own social and personal rubric of values, the impact of judicial review mutates.[78] Moreover, as decisions are challenged, and courts defer to administrative expertise in discretionary settings, the relationship doubles back, with policy choices and bureaucratic practices influencing the nature and scope of judicial intervention.

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[76] *Supra* note 34, at 248-253. Intriguingly, Bouchard and Carroll also attempt to distinguish between "professional" and "personal" discretion based on whether discretionary judgments are guided by institutional values or ones held by individuals.

[77] Baldwin and Hawkins (1984), p.581.

[78] S. Halliday, "Researching the Impact of Judicial Review on Routine Administrative Decision-Making" in D. Cowan ed. Housing, Participation, Exclusion (1998), p.196.

As a result of the fluid and mutually reinforcing nature of the judicial-executive relationship, a framework for understanding judicial impact on bureaucratic discretion cannot be divorced from historical contexts. Such a framework must take into consideration short and long term consequences as well as grapple with the fact that it may not be possible to know in advance whether a particular change, which is welcomed at the time, will be experienced as desirable in the long run or vice versa.[79]

Notwithstanding the complexity and uncertainty of judicial impact on bureaucratic discretion, there is good cause to advocate greater transparency and justification on the part of both administrative and judicial actors in relation to discretionary authority. Courts should provide clear and specific standards when responding to judicial challenges involving discretionary authority. Policy-makers should ensure that guidelines or other soft law instruments engage with judicial reasons as well as simply conveying the ruling. Where policy-makers interpret those standards, the rationale for their interpretation should be clear. Finally, decision-makers should specify when and why they have decided to depart from standards set out in guidelines. On this measure, Baker reflects some of the promise of soft law but also some of its dangers. If, as I have argued, soft law reflects a delicate and shifting balance between rules and discretion, law and policy, and offers a window into the dynamic relationship between front-line decision-makers, policy-makers and courts, then the ambiguity regarding the legal status of soft law reflected in Baker, and the absence of any accountability over its development, modification and application, is particularly troubling.

It is apparent that the binding/non-binding framework is too one-dimensional to account for the complex and symbiotic relationship between soft law and discretion. Soft law must be taken seriously as an integral aspect of the exercise of public authority, a domain in which judicial standards and executive preferences commingle, interact and

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[79] To take but one example, the attempt to reign in discretionary authority in the context of social welfare in the 1960s (in order to counter the arbitrary and discriminatory standards used to determine eligibility), brought about in large measure as a response to vigorous "welfare rights" litigation and new judicially crafted procedural standards, contributed to a "clericalization" of the welfare bureaucracy and sharp increase in complexity and delay in processing applications. On this phenomenon, see W. Simon, "Legality, Bureaucracy and Class in the Welfare System" (1983) 92 Yale L.J. 1198.

inform one another. Soft law should be approached by courts from a contextual and realistic vantage, balancing the need for flexibility and judgment with the imperatives of accountability, transparency and justification. The sharp distinction drawn by Binnie J. in Little Sisters between the "legality of decisions" and the "quality of the guidebook" cannot be sustained in discretionary settings where law and policy are inextricably intertwined. Baker stands for the enduring proposition that judicial review over administrative discretion provides a crucial check against arbitrary, discriminatory and unfair state action; however, until courts are prepared to engage in a coherent and sustained way with the rules of policy in discretionary settings, this check may prove illusory and the rule of law will remain an elusive ideal.