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Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making

Abstract: The objective of this paper is to address two questions: why do administrative tribunals such as the Immigration Refugee Board resort to developing guidelines, and what are the principles and values which legitimize these initiatives? The role of tribunals in policy-making and/or policy-implementing raises important questions. For example, to whom are tribunals accountable for the development and application of guidelines where the functions of a tribunal – especially the adjudicative functions – are intended to be independent of government?

The authors seek to understand better the dynamics of tribunals' role in the policy process. They propose a classification of guidelines based on the function they perform in administrative proceedings and provide an analysis of the normative framework underlying guidelines. The authors explore how a legal analysis of guidelines might shed on the theory and practice of public administration. The authors conclude that in the absence of a nuanced understanding of the legal status of guidelines, the relationship between administrative practice and the rule of law remains uncertain and unstable.

Sommaire : Cet article cherche à répondre à deux questions : pourquoi les tribunaux administratifs comme la Commission de l'immigration et du statut de réfugié ont-ils recours à l'élaboration de directives? Et quels sont les principes et les valeurs qui justifient ces initiatives? Le rôle des tribunaux dans l'élaboration et/ou la mise en œuvre des politiques soulève des questions importantes. Par exemple, à qui les tribunaux doivent-ils rendre compte en ce qui concerne l'élaboration et l'application de directives lorsque les fonctions d'un tribunal - en particulier les fonctions juridictionnelles - sont supposées être indépendantes du gouvernement?

Les auteurs cherchent à mieux comprendre la dynamique du rôle des tribunaux dans le processus d'élaboration de politiques. Ils proposent une classification des directives d'après la fonction qu'elles jouent dans les procédures administratives et ils fournissent une analyse du cadre normatif sous-tendant ces directives. Les auteurs étudient comment une analyse juridique des directives pourrait éclairer la théorie et la pratique de l'administration publique. Ils concluent qu'en l'absence d'une compréhension nuancée du statut légal des directives, la relation entre la pratique administrative et la primauté du droit demeure incertaine et instable.

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Introduction

The objective of this paper is to address two questions: why do administrative tribunals resort to guidelines and what are the principles and values of the legal order which can legitimize these initiatives? In *Ocean Port*,[1] the Supreme Court of Canada affirmed that all administrative bodies have some policy-implementing and/or policy-making role. This is indeed the distinguishing characteristic of all administrative tribunals on the one hand, and all courts on the other hand.

Many different types of policies are created and formalized by administrative tribunals, boards, and agencies across Canada. The policies they create may be explained partly by the autonomy these public institutions have gained over decades and partly by the incapacity of legislatures to resolve quickly the problems they encounter. These problems include long delays, obvious and unjustified inconsistency in decisions, obstacles to access, and possible violation of constitutional rights and freedoms. Yet, after their creation, public institutions are more or less left to govern themselves. Sometimes Parliament provided them with the legal powers they need – such as the ability to issue binding rules and policies and to fix problems arising within their own governance – but sometimes it did not. However, whether or not a public institution has such legal powers does not prevent administrative tribunals from acting.

Policies may take a variety of forms, including guidelines, directives, codes, rulebooks or manuals of some other kind which may be published or unpublished. In this text, we will focus our analysis on guidelines. While issuing guidelines is not the only way in which policy is made, it is arguably the clearest and most revealing form of policy-making.

The dominant view on the purpose of guidelines can be found in *Discretionary Justice*, the landmark study of K.C. Davis on administrative discretion. Davis advocated rule-making as an important tool both for confining and structuring discretionary power.[2] His main concern was countering the potential for arbitrary or oppressive uses of administrative discretion. For him plans, rules, findings, reasons, precedents, and a fair informal procedure were all variations on the same theme of greater fairness in its many facets, such as predictability and consistency in the legal order. He was also of the opinion that guidelines could increase accountability and transparency. Thus, guidelines could perform several different and important roles in the policy-making process, including shaping the interpretation of legal provisions in a tribunal's empowering statute, constraining the exercise of

broad discretion or establishing procedures.[3] In sum, Davis envisioned a spectrum of governance measures applicable to discretionary authority, with policy statements shading into interpretive rules and interpretive rules shading into legislative elaboration. His bottom-up view of norm-production is illuminating for it is a phenomenon that is increasingly apparent in the functioning of today's administrative tribunals.

Davis's theory significantly influenced Canadian courts, which have integrated the idea that guidelines exist for the purpose of limiting and regulating an institution's own discretion.[4] However, this general perspective on guidelines can be criticized on two accounts. First, it is too vague and amorphous a claim to explain the use of guidelines in administrative proceedings. Therefore, in the first part of this paper we will propose a more refined classification of guidelines based on the function they perform in administrative proceedings. We will focus on the role of guidelines in administrative tribunals performing adjudicative functions[5] (as opposed to administrative or regulatory functions) because it is in such settings that this type of tool is the least understood and the most controversial.

Second, courts' perspective on guidelines does not do justice to their normative force. Guidelines, in our view, serve to regulate decision-making and behaviour, but in ways that are not subject to the ordinary mechanisms of political accountability in a democratic system and are not subject to the ordinary mechanisms of legal accountability through judicial review. For this reason, they merit closer scrutiny. Of course, one might raise the question of what light a legal analysis of guidelines might shed on the theory and practice of public administration. We suggest that such a legal analysis is precisely what has been lacking. In the absence of a nuanced understanding of the legal status of guidelines, the relationship between administrative practice and the rule of law will remain uncertain and unstable. In writing this paper, our hope is to trigger discussions on some legal issues which are raised by the use of guidelines by administrative tribunals.

A functional classification of guidelines

Refining the use of guidelines according to functional classifications provides a useful methodology attuned to the tribunal's perspective on decision-making. This insider look is crucial to understanding the many reasons underlying a tribunal's decision to issue a particular guideline and the variety of purposes for which they are created. Thus, it broadens the inquiry into this phenomenon for it aims to provide answers to two questions: What roles do tribunal policies play and, in particular, to what problem or concern is a particular policy addressed? And why are policies created by a tribunal at a given time of its history?

Too often, these are questions left unanswered and often unasked in the literature on administrative tribunals. In order to remedy this gap, we will

examine a sample of policies created by the Immigration and Refugee Board (IRB) with a focus on exploring the problems faced by one of its divisions, the Refugee Protection Division (RPD), in its daily operations which led to the issuance of a guideline. The sole legal mandate of the RPD is to inquire and determine refugee claims made in Canada. Guidelines are used in the RPD's decision-making process in three categories: to complete the legal order governing the tribunal's jurisdiction; to develop its legal order; and to remodel its legal order.[6] Each will be discussed in turn.

Completing the legal order

The legislative mandate given to many tribunals through their empowering statute can be left intentionally broad. This may occur, for example, when Parliament believes that a particular discretion or authority delegated to a tribunal should be open-ended and that the tribunal should seek further guidance in the common law. However, because common law principles are designed to apply to different types of situations, it is not always clear how an administrative tribunal can apply these principles in its particular decision-making process. In this situation and others, a tribunal may provide its board members with clearer guidance adapted to the exercise of their specific legislative powers. One of the reasons why a tribunal will issue such guidelines will often be to provide their board members (who are often not trained in law) with quick and easy access to sound legal practices.

It is in this sense only that we are speaking of a tribunal completing (or filling in the gap) of its legal order by issuing guidelines. In other words, it is important to note that this type of guideline does not seek to go beyond accepted principles that were established by common law, but simply to clarify their meaning, scope, and relevancy in the decision-making process of a given tribunal. At the RPD, there are a few examples of such guidelines, particularly with respect to procedures and evidence. We will describe two sets of guidelines that are related to the setting of procedural boundaries relevant to the exercise of the power to conduct inquiries attributed to board members under section 165 of the Immigration and Refugee Protection Act.[7]

The first guideline examined is *Guideline No. 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*.[8] It was issued in accordance with the legislative authority conferred to the chairperson of the IRB by section 159 of the Immigration and Refugee Protection Act to "issue guidelines in writing ... to assist members in carrying out their duties."[9] Guideline No. 7 circumscribes inquiry powers of board members so they can limit the scope of an 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. Its main thrust is to empower board members to change "the order of questioning by having the Refugee Protection Division leading the inquiry in the hearing room. The purpose of this change is to allow Board

members to make the best use of its expertise as a specialist tribunal by focusing on the issues which it has identified as determinative."[10]

At the RPD, it was particularly important to clarify this 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, at least in an adversarial context, is that it is individuals who are asking for some benefit, right or status from the state who should present their case first, before being questioned by the opposite party. Therefore, board members needed to know whether they had the authority to proceed this way in an inquisitorial context. Indeed, claims for refugee status are not characterized as adversarial disputes. An individual asks the Canadian state to recognize their status based on an evaluation of criteria set by the legislation. The minister of citizenship and immigration almost never contests a claim and as a result is usually not present during a hearing. In Canada and other common law jurisdictions, it is not usual to find decision-making processes based on the inquisitorial model. As a result, common law principles circumscribing the parameters of an inquisitorial process are not abundant. In order to provide more specific guidance to RPD members with respect to the scope of their inquiry powers, the chairperson used his legal authority to issue a guideline.

The exercise of this policy-making power was also informed by the context in which the IRB operates. It receives approximately 35,000 claims for refugee status every year, with frequent backlogs. The availability of hearing-room time is limited. Therefore, a clear opinion needed to be stated as to whether board members can ensure the speediest resolution of a claim by setting boundaries as to which issues are to be resolved during the hearing in order to make a reasonable determination of a claim. This, too, is controversial for it may prevent a claimant from introducing relevant evidence circumstantial to the core issue as framed by a board member in charge of a case.[11] The guideline, importantly, provides that "in exceptional circumstances," a board member may exercise discretion to have the claimant be examined by her or his counsel first. The judicial treatment of this guideline will be further discussed in part two of this article.

The second set of guidelines is called *Instructions for the Acquisition and Disclosure of Information*. These Instructions aim to preserve fairness of the process in an inquisitorial setting. Indeed, an inquisitorial procedure entitles board members to find all relevant information upon which to make a determination. Contrary to a court's procedure, however, board members can seek the information they need either before, during or after the hearing. In a refugee determination process, it is crucial that board members be entitled to exercise these inquiry powers because the only facts available to them are those presented by the claimant and, in most cases, their task is to determine whether the claim is based on credible and trustworthy evidence. In order to

ensure that board members have the necessary information to check the credibility and trustworthiness of the facts offered as evidence by the claimant, they must inquire beyond facts presented at the hearing. Hence, board members 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 decision issued as a result of this process can be invalidated for violation of the principles of natural justice.[12] To avoid this outcome, the IRB issued the Instructions in 1996 in accordance with subsection 58(3) of the Immigration Act, which stated that the chairperson of the IRB 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 new act.[13] The Instructions explain, 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 it "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." These Instructions also specify how communications outside of the hearing room should be conducted by setting precise procedures that must be followed by board members when they gather information without prior knowledge of the claimant.

In sum, Guideline No. 7 and the Instructions settle the legal boundaries of the inquiry powers conferred by the Immigration and Refugee Protection Act. These legal boundaries are set within the general common law principles but, in addition to these principles, the guidelines provide more specific guidance to board members acting as decision-makers at the RPD. The purpose of these guidelines could thus be said to be the completion of the legal order as established by Parliament.

Developing the legal order

In addition to legislative gaps which tribunals address through policy development, there are other legislative provisions 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, and sometimes doing so with the express authorization of Parliament. In this role, tribunals are also more likely to engage the advocacy of affected parties.

One example of a tribunal developing its legal order is the first version of the IRB's guideline concerning *Women Refugee Claimants Fearing Gender-Related Persecution*.[14] Briefly, the legal 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 pro-

vided 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. One event was the outbreak of civil war in Bosnia-Herzegovina. Rape of Muslim and Croat women figured prominently amongst the strategies of ethnic purification used by the Serb army. Before this guideline was created, board 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 as a "social group." At that time, there were an important number of board members who rejected the idea that there existed such a link between the two concepts. These members were joined by a cross-section of advocates, which included lawyers and legal organizations, public interest organizations, and civil servants within the ministry.[15]

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 to a particular social group" and proposed that a "social group" can be defined by an "innate or unchangeable characteristic." The construction of the expression "social group" proposed by the board allowed members to not only adjust to a new social context where there was a clear and important increase of refugee claims based on gender, but also to a new set of values relating to the rights of women that were rapidly growing since the 1980s, 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.[16]

Fairness and consistency appear to be the two central values that triggered this initiative at that time. Today, the IRB precisely refers to consistency and fairness to justify its guidelines in its handbook for board 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."[17]

Remodelling the legal order

Here, the IRB goes much further than in the two other cases. It does not seek to complete or develop the formal legal order, but to remedy the defects of the legislative framework: the legal framework thought out by the legislator is inefficient and simply does not function. Once again, the IRB provides an example of a tribunal which has remodelled the legal order.

In 1989 a new refugee determination process was created and, for a variety of reasons, was quickly incapable of processing the number of rapidly growing refugee claimants in the 1990s. The number of claims evolved from a low of between 20,000 to 25,000 claims, increasing up to almost 40,000 claims per year. Hence, the average time for the treatment of a claim rapidly went from a few months to a year and more. And, of course, the list of claimants waiting for a determination was getting longer and longer. Something needed to be done.

In 1990 the IRB implemented a pilot-project called the "expedited process," which aimed to improve the celerity of the treatment of a claim. This process worked (and is still working but is nowadays called *Policy on the Expedited Process*) as follows: A civil servant (refugee protecting officer, or RPO) studies the personal information form (PIF) of the claimant, which contains the detailed facts of the claim. If on the basis of the PIF, a claim that, in the opinion of the RPO, appears to be grounded on a well-founded fear of persecution, he or she will hold it back for an accelerated examination. Then another RPO will meet the claimant and his legal counsel for an interview. After this informal inquiry, if the RPO is of the opinion that the claim can be granted, he or she makes a favourable recommendation to a board member. These recommendations are accepted in most cases. When the RPO makes a negative recommendation, the claim is heard according to the procedure that is set out in the Immigration and Refugee Protection Act.

This broader formulation of the limits of discretionary power gives rise to new questions for adjudicative tribunals: Can the legal margin of manoeuvre which is at the disposal of an administrative tribunal be used by this tribunal to interpret the scope of its powers? If a tribunal may legitimately use its guideline-making authority in this fashion, can it extend or modify its powers without compromising fairness values?

This guideline appeared to violate the Immigration Act as it was then constituted. Indeed, the statute stated that all claims for refugee status had to be determined after a formal hearing in front of two board members. In addition, the statute was silent on this issue of whether RPOs had the power to call and question witnesses. The board could not then justify transferring the power to assess the credibility of the evidence to a civil servant, when the statute prescribed that it was a board member who should fulfill this task.

Because this guideline appeared incompatible with the then Immigration Act, the board asked the minister of citizenship and immigration to propose modifications to the act to cabinet. Bill C-86 was enacted in 1993 and it

essentially codified the expedited process. However, between 1990 and 1993 there was a period of about two years where there was a rupture between the action of the board and the legislative scheme it was charged with interpreting and applying. This problem is reflected in the approach the board used to justify the existence of the policy. The IRB takes into account the context to interpret the signification of legal text. It does not look for this meaning in the intent of the legislation, but rather in the efficient functioning of the institution. What counts is that "it must work" in order that the raison d'être of the refugee determination process be fulfilled: speedy decisions that do not imperil the fairness of the procedure.

Fairness as a legitimating value

The types of guidelines discussed above are based on two explicit legislative powers conferred on the IRB. The *Instructions for the Acquisition and Disclosure of Information* are based on supervisory powers of the chairperson, as was the *Policy on the Expedited Process* when first issued, that is before the statute was modified and conferred the power to the IRB to proceed without a hearing. Guideline No. 7 and the guidelines concerning Women Refugee Claimants are based on the power of the chairperson to issue guidelines to assist board members in carrying out their duties. These are broad powers which give a significant amount of discretion to the chairperson to deal with different problems arising out of the daily functioning of the IRB.

We now discuss how fairness has emerged as the key principle used to legitimate the chairperson's discretion and a tribunal's policy-making through guidelines. Can the tribunals' use of guidelines be viewed, at least in part, as an integration of the courts' discourse on the values shaping the Canadian administrative law system, and particularly its emphasis on fairness in the decision-making process? Indeed, when guidelines are considered to be creatures born out of the exercise of discretionary powers, values of the legal system are often the only parameter indicating the scope and the limit a public authority has when exercising such powers. Often, the legislative provisions establishing discretionary powers do not give much indication as to what criteria a tribunal should use in exercising that discretion.

Therefore, starting from the premise of Davis that all guidelines derive from discretionary powers conferred upon tribunals by the statute, 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."[18] In the case law, there exist broad principles limiting the exercise of discretion by public decision-makers. Beside bad faith, discretion cannot be exercised for purposes improper in view of the statutory mandate or by taking into consideration irrelevant factors or values in the course of the decision-making process.[19]

These traditional grounds for challenging misuse of discretion were arguably expanded in *Baker* where the Supreme Court held that "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."[20] This broader formulation of the limits of discretionary power gives rise to new questions for adjudicative tribunals: Can the legal margin of manoeuvre which is at the disposal of an administrative tribunal be used by this tribunal to interpret the scope of its powers? If a tribunal may legitimately use its guideline-making authority in this fashion, can it extend or modify its powers without compromising fairness values? We will explore three such fairness values which are implicated by tribunal uses of guidelines, again taking the IRB's guidelines as a case study: fairness and procedural predictability (Guidelines No. 7 and Instructions); fairness and substantive consistency (Guidelines on Women); and fairness and efficiency (Policy on the Expedited Process).

Fairness and procedural 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. However, courts still approach the question of whether procedural guidelines can be binding on board members with ambivalence.

The first Supreme Court case to consider the status of such procedural policy guidelines was *Martineau v. Matsqui Institution*,[21] in which an inmate of a federal penitentiary appealed against a disciplinary order issued by the commissioner for penitentiaries. The guidelines at issue in this case concerned procedural rights for an inmate at a hearing on disciplinary infractions. The guidelines had not been followed by the commissioner. Therefore, one of the issues that were raised before the court was whether these guidelines gave rise to legal rights. The majority of justices held that the guidelines were merely administrative norms and thus could not bind the board. The minority held that the guidelines gave rise to procedural obligations since they were authorized by the act and they affected the rights of an individual.

The narrow issue in *Martineau* as to whether guidelines can give rise to procedural obligations was resolved shortly after the decision in *Nicholson v. Haldimond-Norfolk (Regional Municipality) Commissioners of Police*.[22] In this case, the court held, led by the dissenting justices from *Martineau*, that guidelines could give rise to procedural obligations, although this was not necessarily the same as their being treated as law (i.e. regulations or some

other forms of subordinate legislation). More recently, the Ontario Divisional Court considered the status of ministry guidelines in *Bezaire v. Windsor Roman Catholic Separate School Board*. These guidelines were calling on school boards to develop closure policies which provided for input from affected communities. The court held that it was clear from the "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 to the guidelines."[23] Without accepting that the guidelines constituted some form of subordinate legislation, the court nonetheless recognized a legal duty based on the procedural norms contained in the guidelines. In the result, the school closure decision was held to be 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.

Although the court's dichotomous understanding of "hard" law (regulations and other forms of subordinate legislation) on the one hand, and "soft" law (such as guidelines) on the other, has waxed and waned over the years, this distinction still dominates the judicial treatment of guidelines. However, why should the availability of a procedural remedy turn on whether the source of the procedural protection is a common law principle articulated by a court, or a principle articulated by the board itself through procedural guidelines?

The ambivalence of tribunals towards applying their own "jurisprudence" continues to shape this issue in a very loose fashion and very often board 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

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In fact, it seems to us that when facing a procedural guideline, two scenarios can be distinguished. The first is when a procedural guideline responds to an individual's rights to a fair procedure. When a guideline clearly reflects the common law discourse pertaining to procedural fairness, this may easily be integrated into a legal analysis. If a guideline responds to an issue that is not addressed by administrative law jurisprudence but its thrust is nonetheless in accordance with the principles of procedural fairness, two solutions may be open: the courts could play an active role and integrate the guideline into the legal system; or the courts could state that a particular guideline gives rise to legitimate expectations that a certain procedure

should be followed by the tribunal and impose a duty to provide additional fairness where a tribunal deviates from the procedure at issue.[24]

The second scenario is when a procedural guideline imperils an individual's rights to a fair procedure. For example, if it were proven that Guideline no. 7 seriously impairs the right to be heard by refugee claimants and has an impact on the fairness of the hearing process has a whole, it should be possible to challenge its validity either on a constitutional ground, a violation of the duty to be fair, or on the ground of abuse of discretion. Indeed, such an issue was recently argued in front of the Federal Court.

In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, Guideline No. 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. It 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 No. 7 does not violate the board's duty of fairness, the court nullified the denial of refugee status in the case on the basis that the Board had fettered its discretion by operating as if it were bound by the guideline. The guideline begins with the following passage:

> 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.
>
> Generally speaking, the RPD will make allowances for unrepresented claimants who are unfamiliar with the Division's processes and rules. Claimants identified as particularly vulnerable will be treated with special sensitivity.[25]

In the eyes of the court, the fact that the guideline indicated deviation from reverse-order questioning was only justified in "exceptional circumstances" and reinforced the conclusion that this was being treated, in fact, as a mandatory provision of the board's process. In *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.*, the Ontario Court of Appeal held that an administrative tribunal can use guidelines to fulfill its mandate but that there are limits on the use of those instruments, including: (1) a non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation; (2) a non-statutory instrument cannot pre-empt the exercise of a regulator's discretion in a particular case; and (3) a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines.

Based on the latter principle, the court in *Thamotharem* held that Guideline No. 7 was not a valid guideline for the board to have issued. This ruling, even though appealed, has significant implications, both for present and

future refugee hearings as well as for past hearings conducted pursuant to the guideline.

Fairness and substantive 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 board members. The ambivalence of tribunals towards applying their own "jurisprudence" continues to shape this issue in a very loose fashion and very often board 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. 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.[27] As far as administrative tribunals are concerned, this idea is even more contemporary.

Until the Supreme Court decision in *Consolidated-Bathurst*, the dominant view on this issue was that decisions of a particular quorum of board members of an administrative tribunal cannot be used as a precedent by another quorum of this tribunal.[28] However, this view was particularly artificial, for the practice of many tribunals was to rely on their own former decisions to justify the outcome of the case. Thus, in *Consolidated-Bathurst*, the majority of the court took the opportunity to make a statement on the principle of consistency: it is a valuable goal to reach for an administrative tribunal.[29] This statement had a profound impact on many tribunals for it gave them stronger authority to resort to guidelines or other means to enhance consistency of their decisions.

However, the question of how much consistency a court or a tribunal should foster and to which extent the incremental technique is appropriate to reach this goal are questions that are still very much debated. In 1991, Baudouin J. of the Québec Court of appeal recalled in *Lefebvre* a few reasons why the principle regarding the application of precedent should no longer have the same rigidity as in the past. First, just because an error is repeated does not make it the right path to follow. Second, complexity makes it more difficult to have a good understanding of a particular system of rules. Third, the fast pace with which ideologies evolve obliges decision-makers to revisit many legal perspectives that were defended in the past but are no longer sustainable in contemporary times. Our evolving understanding of the implications of race, sex, sexual orientation, and disability are examples of why consistency could have a regressive effect if adopted narrowly. Baudouin J. encapsulated the dilemma courts and tribunals are facing when fostering the idea of consistency: "law must evolve with thoughts, mentalities and social context in the same time as conserving a reasonable degree of certainty and predictability."[30]

In the context of administrative tribunals, the proper balance between ensuring evolution of the law at the pace of societal change 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.

The starting point of the discussion on judicial review on inconsistency is the decision of the Supreme Court in *Domtar*.[31] The court decided that a tribunal's decision could be quashed only when the tribunal made a patently unreasonable error (a clearly irrational error) in making this decision. From the court's perspective, the problem of consistency was framed around the question of who is in the best position to rule on the impugned decision. As a general statement, the Supreme Court stated that it was the tribunal. Indeed, if courts were to determine that inconsistencies are theirs to resolve, they would, in fact, apply a lower standard to review tribunals' decisions. This would soon lead courts to examine the merits of the decision, while the purpose of judicial review is to examine only the legal validity of administrative tribunals' decisions.

In sum, in much Canadian jurisprudence, the issue is whether a decision is patently unreasonable in the sense that no rational interpretation of the decision-maker's power could result in a particular decision. This being said, one must be cautious when applying the standard of patent unreasonableness for two reasons. The first one is that L'Heureux-Dubé J. also said in *Domtar* that to limit judicial review to cases only presenting "serious and unquestionable jurisprudential conflicts would not, by itself, remove all difficulty."[32] As a result, she would apply the correctness standard to these cases. Presumably, inconsistency in decisions implying Charter rights were the types of cases she had in mind and from this point of view, one can see the importance for the IRB to issue the guideline on Women Refugee Claimants.

The second reason is that *Domtar* was decided before the court carved out an intermediary ground of reasonableness review in the mid-1990s in *Pezim*.[33] This third standard, which is called *reasonableness simpliciter*, lies between correctness and patent unreasonableness on the spectrum of deference accorded to tribunals' decisions. In light of this intermediary test, it is conceivable that some jurisprudential conflicts could nowadays be subjected to this reasonableness standard of review. Indeed, the question of whether the degree of consistency required from tribunals could vary depending,

among other things, on the type of legislative mandate of a tribunal that is not yet resolved.

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!" However, as he also observed, administrative bodies do "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."[34] To this end, we will distinguish between three types of decision-making which may be undertaken by tribunals: administrative, adjudicative, and regulatory.

Administrative decision-making

Tribunals which perform administrative decision-making functions are legislatively conferred the power to exercise broad discretionary power, such as the power to make decisions to ensure the safety of the public or to further the public interest. Parole boards are a good example of this type of tribunal. They are conferred with a broad discretionary power for two reasons: to empower board members to treat each case in and of itself, being careful not to cause any prejudice to an individual because of a violation to the principles of natural justice; and to ensure that decisions can evolve with time.

For these two reasons, parole boards should be entitled to a greater degree of deference because inconsistency in the decision-making process is inevitable insofar as, from an external point of view, two apparently similar situations will appear to be treated very differently. In such a legislative setting there is a "real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions," to quote L'Heureux-Dubé J. in *Domtar*. 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 a parole board's decision was based. Parole boards do not have to explain or justify inconsistencies and, therefore, review for inconsistency can simply not be a ground of review.

This solution better accords with the legislative setting of the tribunal and also justifies a greater use of substantive mandatory guidelines aiming to set relevant and irrelevant purposes, criteria, and factors to be used as an analytical framework to make decisions. However, it should be noted that, as a matter of fairness, board members should give an opportunity to claimants eligible for parole to argue whether or not a specific guideline applies in his or her case. In addition, board members should explain in their reasons for decisions whether the argument of the applicant was rejected (or accepted if needed). Finally, it should be noted that in judicial review proceedings, the debate would focus on the question of whether board members rationally

explained the reasons why the argument of the claimant asking for a particular guideline to apply or not in his or her case was rejected.[53]

Adjudicative decision-making

Tribunals which perform adjudicative decision-making functions are legislatively conferred the power to make individual decisions, which must be based on strict criteria. Usually they have no broad discretionary powers. The Immigration and Refugee Board, the Tribunal administratif du Québec (TAQ), and the Commission des lésions professionnelles (CLP) are examples of this kind of tribunal. Because they are the closest to the idea of a court of justice, it would be possible to argue, as a general principle, that consistency should be fostered to its highest degree. Therefore these tribunals should be subjected to the reasonableness standard of review when substantive inconsistency is the heart of the matter put before the court for judicial review.

Indeed, when no broad discretionary powers are conferred on a tribunal it can be presumed that the question of whether its decisions should be in tune with social changes is not for the tribunal alone to decide. The responsibility regarding the final determination on a forward-looking interpretation of a particular statute may be shared between tribunals and courts, the courts' role being to check whether the position taken by the tribunal was reasonable.

The legislative scheme of a tribunal may provide some indication to courts that deference is warranted. This would be the case, for example, when administrative tribunals are appellate jurisdictions. Then first-instance tribunals or front-line decision-makers would rely on the case law of these appeal tribunals to guide their decisions. It would also be the case when the provisions in a statute state how far Parliament intends the tribunal to go in fostering consistency. For example, chairs of both the TAQ and the CLP were given the power to formulate guidelines "to maintain a high level of quality and coherence of decisions." They also have to maintain a "bank of jurisprudence."[35] Further, in the case of the CLP, the statute distinguishes between the jurisprudence of the tribunal (s. 382) and its ordinary decision (s. 383).[36] The idea of recognizing some "jurisprudential value" to decisions of tribunals 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*[37] which governs "the exercise of the Chairperson's authority to identify a decision as a jurisprudential guide" by IRB members. The tribunal also identifies decisions which have a persuasive value. The distinction drawn between decisions which have a *jurisprudential* value and those having a *persuasive* value[38] lies in the degree of their "bindingness" on board members.[39]

This last example brings us to discuss the reluctance of some board mem-

bers to recognize a binding force of jurisprudential guidelines. They see them as an illegitimate attempt to influence their independence and impartiality as decision-makers. They justify their point of view by equating their functions to judicial functions. Although this issue would merit closer scrutiny, there is one argument which, in our view, militates in favour of giving additional weight and influence to this type of guidelines.

There is a very simple reason for why guidelines are not necessary in courts, but often are in an administrative tribunal setting. Normally, courts have general competence to hear and decide a large variety of legal issues arising out of the interpretation of numerous statutes. In one single year, a judge will rarely have to make a determination on an identical legal issue. Therefore, the risks of legal uncertainty linked to inconsistency are very low in a judicial setting. However, when such a situation occurs, it is relatively easy for a judge to find former decisions of the court on the same issue. Thereafter, they can decide to follow these cases or not. In a judicial setting, the freedom of judges to decide according to their conscience is preserved, but this does not mean that their freedom is not constrained.

> *[C]oupling efficiency with fairness, in its procedural sense, is part of Canadian administrative law. Judges and legislators often refer to the balancing of fairness and efficiency. In the context of enhancing the speed of the decision-making process, the balancing of these two values is encompassed in the idea of "justice delayed, justice denied"*

Indeed, it is trite to say that judges belonging to a same-level court are not bound by the decisions of their fellow colleagues, but there are explicit and implicit constraints on their freedom to abide to the principle of consistency. Implicit constraints relate to their obligation to explain the reasons why they depart from former decisions. Unexplained or inexplicable inconsistencies will not only be reviewed by an appellate court, but may also be very detrimental to the credibility and legitimacy of a judge to disregard outcomes reached by fellow judges in similar cases without reasons. As a consequence, judges self-constrain their freedom to decide solely according to their own conscience and their views are very much influenced by the thinking of their fellow colleagues. Thus, when a judge decides to go against the dominant view of her peers, she will carefully motivate her decision, for she knows that it will likely be appealed. If a judge calls for diverging views to be resolved by an appellate court, the objective is to convince the appellate court's judges that the decision should be followed. If successful, the law

will be changed and the new rule will be followed in future cases because it becomes a precedent. Thus, coherence in case law is maintained.

Adjudication in administrative tribunals is different. For one thing, due to the specialized jurisdiction of a tribunal, the same issues are decided over and over again, not only by one member, but by all the members of the tribunal and sometimes every day of the year. The IRB is one of the clearest examples of this dynamic, and in such mass-adjudication tribunals, the task of keeping track of similar decisions is daunting. It is obvious that the risks of legal uncertainty linked to inconsistency are very high in such administrative tribunals, yet the means available to them to maintain an adequate degree of coherence are uncertain at best. Indeed, board members do not necessarily apply self-constraints to their freedom to decide according to their conscience, due in great part to historical reasons. For a long period the dominant view was that administrative tribunals' decisions-makers had one sole function which was to find facts, but nowadays, this view cannot be sustained, especially in tribunals such as the IRB, TAQ, and CLP. There are also no explicit institutional constraints on the freedom to decide according to one's own conscience, in the sense that there is generally no appeal. With respect to maintaining a good degree of substantive consistency within an administrative tribunal, judicial review of decisions is not a viable route to reach this goal. Therefore, unlike the courts, each individual board member often cannot effectively exercise self-constraints on his freedom to decide according to his own conscience.

In fact, the only effective institutional mean that received the blessing of the Supreme Court is plenary meetings, as decided in the *Consolidated-Bathurst* case. But several practical reasons can prevent a tribunal from using this technique. A tribunal may be composed of a large number of full-time members, it may sit in many regions across the country, it may be organized in a particular way. For example, the CLP in Quebec is a "tribunal paritaire" (three-member panel: the decision-maker and a representative of the union and the employer). Therefore, sometimes the best workable solution within a tribunal is to resort to guidelines as a tool to enhance consistency. However, substantive guidelines cannot be worded in such a way as to prevent board members from exercising their judgment (or their freedom of conscience). It cannot impose a solution; it can only state the framework for reasoning on a particular legal issue. It will seek to provide general legal parameters and guidance to think through legal problems and to find sound legal solutions regarding the proper interpretation of a statute. To a certain extent, this type of guideline could resemble a judgment of a court reviewing a tribunal's decision.

Regulatory decision-making

Tribunals which perform regulatory decision-making functions are legislatively conferred the competence to establish general norms to be applied in

particular cases. The CRTC, the National Energy Board, and the Industrial Relations Board are examples. General norms can be created with different instruments, authorized by law, such as formal regulations and guidelines. It can also be done incrementally, through decision-making. This choice of the regulatory instrument was recognized by the Supreme Court in *Capital Cities Communications*,[40] and Hudson Janisch wrote extensively on this issue.[41] Therefore, whether the tribunal decides to resolve the problem of inconsistency relatively quickly in issuing a guideline, or by having a plenary meeting with board members, or not to resolve it and leave law to settle itself through an incremental development of individual decisions is for the board to decide. Courts should not interfere with this process. As said by Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*,[42] courts are ill equipped to interfere with the decisions made by these particular tribunals in which the highest degree of expertise is usually found.

Therefore, the standard of review of patent unreasonableness would apply to unexplained and inexplicable inconsistencies, but not as an autonomous ground of review. Indeed, what would appear to litigants or judges as being patently unreasonable inconsistencies may well reflect a tribunal's own evolution along a particular interpretive or policy-making path. If a litigant is of the opinion that the inconsistency is the result of an error that the board overlooked, it would be more appropriate in some circumstances to ask the board to reconsider its own decision.

In fact, in our view, the central question for courts to consider – whether a guideline is or is not an issue at bar – would be the extent to which individuals were entitled to participatory rights. In cases where there is some evidence that the decision-maker violated natural justice, either because the respondent was not given the chance to participate in the elaboration or modification of the policy or was not heard on an issue during the decision-making process which can have an effect on the direction of the agency's regulations, it would be sufficient grounds for courts to intervene. Canadian jurisprudence on participatory rights of interveners in proceedings before administrative tribunals, and especially regulatory agencies as well as the case law on the use of plenary meetings provide solid grounds to argue in favour of participatory rights.[43]

Fairness and efficiency

As said before, coupling efficiency with fairness, in its procedural sense, is part of Canadian administrative law. Judges and legislators often refer to the balancing of fairness and efficiency. In the context of enhancing the speed of the decision-making process, the balancing of these two values is encompassed in the idea of "justice delayed, justice denied." However, as much as a speedy decision is warranted, it should not be reached at the expense of fairness.[44] For this reason, when a tribunal fails to achieve a proper balance

between efficiency and fairness, lawyers can challenge the validity of administrative tribunals' decisions in arguing two distinct grounds: the Charter and the duty to be fair.

Delay and the Charter

Concerns with delay as a possible Charter ground of review in Canadian law started in the context of criminal law. In *R. v. Askov*, the Supreme Court considered the issue of what constitutes an unreasonable delay of the trial of a person charged with an offence, contrary to paragraph 11(b) of the Charter. Cory J., for the majority concurring opinion, set out the factors to be considered in determining whether or not there has been an infringement of the paragraph 11(b) right to be tried within a reasonable time.[45] In the administrative law context, however, the Supreme Court decided in *Pearlman* that paragraph 11(b) of the Charter cannot be the basis of an argument on unreasonable delay taken by a professional board, on a disciplinary matter of a regulatory nature which does not have real penal consequences.[46]

If paragraph 11(b) of the Charter cannot be argued, can section 7 be a basis for constitutional review of an unreasonable delay taken by a tribunal to come to a decision? In *Motorways Direct Transport Ltd. v. Canada (Human Rights Commission)*,[47] the Trial Division of the Federal Court made a negative decision. The idea that undue delay in itself confers prejudice in administrative law, as in the *Askov* case, was rejected. However, in *Akthar v. Canada (Minister of Employment and Immigration)*, the Federal Court of Appeal opened the door to such a challenge. While the court stated that a claimant for refugee status is not in the same legal position as an accused person, it nonetheless said that "any claim in a non-criminal case to Charter breach based on delay must be supported either by evidence or, at the very least, by some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay."[48]

As noted by Robertson J. of the Federal Court of Appeal in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, since *Akthar*, "the 'unreasonable delay' argument will rarely, if ever, be successfully invoked to quash decisions of administrative tribunals."[49] Indeed, in *Cortez*, the Federal Court set aside the finding of a violation of section 7 by the IRB, stating that the "mere fact of a delay is not enough to establish a violation of section 7 in civil proceedings."[50] In the case at bar, the court determined that the rights of the respondent under section 7 of the Charter were not violated, even though five to six years elapsed between the initial determination that Cortez was a refugee and the minister's application to the board asking to reconsider and vacate its determination that the respondent was a convention refugee. Finally, in *Blencoe* the court stated there are "appropriate remedies available in administrative law context to deal with state-caused delay in human rights proceedings."[51]

Delay and the duty to be fair

Delay and fairness have been linked in a number of recent cases. This point was reinforced in subsequent decisions such as *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, a unanimous decision of the Federal Court of Appeal. In this case, it was argued that the Canadian Human Rights Commission "had breached its duty of fairness toward the applicant in that its delay in proceeding with the complaint was unreasonable and that it resulted in prejudice to Canadians." In *Canadian Airlines*, Décary J.A. relied on the decision of the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* to support his view.[52]

However, the burden of demonstrating that a breach to fairness occurred is very high to meet. In *Blencoe*, the Supreme Court cited with approval *Nisbett*, which stated that the "question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing," and *Canadian Airlines*, in which the Federal Court of Appeal concluded that the prejudice must be such "as to deprive a party of his right to a full and complete defence." This high standard was applied in *Cortez*. Although an abuse of process was successfully argued before the IRB, the Federal Court set aside the decision because it was of the opinion that the claimant had not demonstrated with evidence that the prejudice was of sufficient magnitude to impact on the fairness of the hearing.

It is useful to describe the facts of this case in detail, for it shows how difficult it is to meet this burden of proof. Indeed, the record in *Cortez* reports disturbing facts, but there were nonetheless viewed as insufficient by the court. In 1991, Cortez, a citizen of El Salvador, arrived in Canada and initiated his refugee claim. He was determined to be a Convention refugee in 1992, although there was some evidence available at that time showing that Cortez was charged with a hit-and-run offence causing damage to property in 1989 in California. In 1997 the minister sought leave to make an application to reconsider and vacate of the IRB's determination that Cortez was a Convention refugee. In December 1998 the IRB rejected the minister's application. This decision was based on two grounds. First, the board granted Cortez's motion not to admit into evidence the material filed by the intervention officer of the Immigration and Citizenship Department. The panel found that the material filed by the officer to support the minister's application was dated. Indeed, it went back to 1991-92 and therefore it was already available at the time the claimant initiated his refugee claim. In addition, the IRB found that the minister did not provide a reasonable explanation for the delay ("six and a half years at worst, or some five years in the best light") to file his application.

The IRB was of the opinion that the respondent suffered unfair delay amounting to an abuse of process affecting his security of person. More particularly, the board inferred that, "given the evidence at the original hearing of his psychological problems and the circumstances of the delay, the respondent was prejudiced and his rights were affected."[53] Despite this apparently strong evidence, the court found that the prejudice caused to Cortez was of insufficient magnitude to impact on the fairness of the hearing. This case begs the questions: What does sufficient magnitude mean? What kind of evidence is needed to prove sufficient magnitude?

In sum, under section 7 of the Charter, one cannot challenge the validity of a decision taken by an administrative tribunal simply on the basis of long delays in coming to a decision. A claim based on delay must be supported either by evidence or, at the very least, by some inference from the surrounding circumstances that the claimant had in fact suffered prejudice or unfairness because of the delay. If a claimant succeeds to prove a violation to section 7, the state must show that the violation can be justified in a free and democratic society under section 1 of the Charter. Given that under the duty of fairness, the burden of proof is extremely difficult to meet, one can safely argue that the evidence required from the state under section 1 of the Charter will be as easy to meet as it is hard for a claimant to prove a breach of the duty of fairness. Despite this case law, one may nonetheless argue that administrative tribunals have cause for concern which may justify their issuance of guidelines to expedite their decision-making processes. This may partially explain, for example, the IRB Policy on the Expedited Process.

Turning now to the specific issue of guidelines created to enhance the speediness of the process, this jurisprudence raises other questions. When one looks at delays, not from the lens of their length, but their shortness, one issue could be raised: Is it possible to challenge initiatives taken by administrative tribunals to reduce delays, when this reduction is proven to be unreasonable? For example, if a safety and health board were to reduce delay to hear a case with a guideline (from two years to one year), and that this delay was too short to really give the applicants and respondents time to see the normal evolution of an illness (especially when it gets worse for an applicant), why would it not be possible to challenge the guideline because the reduction of the delay may cause prejudice and constitutes an abuse of process? Would it also be necessary to demonstrate a prejudice of sufficient magnitude or would a lesser burden of proof apply in this situation? What could be the reasons to justify a different burden of proof?

Another issue can also be raised regarding negative inferences which can flow from the very existence of a guideline aimed at enhancing the efficiency of the process. For the sake of argument, if it were proven (or could be reasonably inferred) that the Policy on the Expedited Process creates an appearance of institutional bias, could a court declare the scheme invalid under section 7 of the Charter? Indeed, if one could show that when board members hear claims from claimants who were excluded from the expedited pro-

cess because these claimants' stories raised credibility issues, they had already formed preconceived negative opinions on these claims for refugee status, would this evidence be sufficient to invalidate a guideline such as the Policy on the Expedited Process? The aim here is not to make a judgment on whether or not it is legitimate for a tribunal to make such use of guidelines, but to show that in some cases it could be worthwhile to look behind the purpose of the guideline to have a better understanding of its effects to the overall process. In particular, one important question is whether this type of guideline creates further negative distortions in the decision-making process of the tribunal.

Conclusion

In light of the significant amount of policy-making which many tribunals undertake, we assert that the policy-making role of tribunals merits greater scrutiny than it has traditionally received. Further, this inquiry into the comprehension of tribunal policy-making should not be divorced from a broader understanding of legal norms in shaping the role of the state in social and economic spheres of society. The crisis of the welfare state had a profound impact on the restructuring of legal governance by western states and led to new types of regulatory experiments, such as resorting to a greater use of guidelines by public administration institutions.[54]

There is no doubt that we are living in a new model of governance, and greater knowledge of its legal consequences will help develop richer and more nuanced analyses on the multifaceted policy-making roles undertaken by the various bodies in the administrative state. In particular, the increasing autonomy and self-reliance of administrative tribunals in the Canadian administrative state affect their relationship with citizens and courts in many ways that remain to be better understood. This understanding is important to ensure that the allocation of rights and responsibilities between the state and those affected by its decisions be properly balanced in order to maintain a sense of justice that is compatible with the values and promises of a democratic state. Indeed, relegating guidelines to the fringe of the legal order, or completely outside of it, may inadvertently give significant power to non-elected individuals, unconstrained by any meaningful measure of accountability. While the goal of our analysis is not to further legalize or judicialize the development and application of guidelines, we do wish to see courts and legal observers engage more broadly and more deeply with the policy-making role of tribunals. We hope that this analysis contributes to that goal.

Notes

1 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] SCR 781 at para. 24.

2 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, Louisiana: Louisiana University Press, 1969), p. 4.

3 France Houle, "La zone fictive de l'infra-droit: l'intégration des règles administratives dans la catégorie des textes réglementaires," *McGill Law Journal* 47 (2001), pp. 161–94; L. Pottie and Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare," *University of British Columbia Law Review* 38 (2005), pp. 147.

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

5 By adjudicative, we refer to settings where an administrative body is empowered to function as a court-like body, hearing evidence, finding facts, applying legal standards, and imposing legal penalties. It is worth noting that Davis examined guidelines for the most part in law enforcement settings. For a discussion of the implications of guidelines in non-adjudicative settings in Canada, see Pottie and Sossin, "Demystifying the Boundaries." See also Lorne Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law," CANADIAN PUBLIC ADMINISTRATION 45, no. 4 (2003), pp. 465–89, and "The Politics of Soft Law: How Judicial Review Influences Bureaucratic Decision-Making in Canada," in S. Halliday and M. Hertogh, eds., *Judicial Review and Bureaucratic Impact: International and Inter-disciplinary Perspectives* (London: Cambridge University Press, 2004), pp. 129–60.

6 On this classification, 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 Y. Gendreau, ed., *Le lisible et l'illisible* (Montréal: Éd. Thémis, 2003), pp. 52–125.

7 Immigration and Refugee Protection Act, 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."

8 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 : http://www.cisr-irb.gc.ca/en/about/tribunals/rpd/handbook.

9 Immigration and Refugee Protection Act, S.C. 2001, c. 27, 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 under sections 65(3) and (4) of the Immigration Act, R.S.C. 1985, c. I-2, as amended by S.C. 1992, c. 49.

10 In the "Hearing" section of the *Handbook*, at paras. 19–23.

11 In fact, there are several problems with the RPD assessment of evidence. See 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," *Revue Jurique Thémis* 38 (2004), pp. 263–358.

12 It is also important to mention that the values and predispositions of IRB decision-makers are critical to the outcome of these hearings. See, for a related discussion of the role of values in administrative decision-making in this context, G. Bouchard and B. Wake Carroll, "Policy-Making and Administrative Discretion: The Case of Immigration in Canada," CANADIAN PUBLIC ADMINISTRATION 45, no. 2 (2002), p. 239.

13 Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 159(1).

14 See the website of the IRB at http://www.cisr-irb.gc.ca/en/about/guidelines/women_e.htm.

15 We are grateful to Audrey Macklin for highlighting the diverse nature of this coalition which cut across several communities of interest in the refugee process.

16 *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.
17 See Ottawa, Immigration and Refugee Board, CRDD *Handbook*, 31 March 1999, c. 18, ss. 18.2.2 at http://www.cisr-irb.gc.ca/en/about/tribunals/rpd/handbook. Some might argue that the chairperson took advantage of statutory criteria which were open to interpretation to establish a meaning of this provision which reflected her policy preference and the preference of those advocates who pressed for the change. To be sure, controlling the issuing of guidelines is an instrument for controlling policy. This is precisely why questions of legitimacy arise in this context.
18 Davis, *Discretionary Justice*, p. 4.
19 See, e.g., *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.
20 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 56 (J. L'Heureux-Dubé).
21 *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118.
22 *Nicholson v. Haldimond-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311. See also the antecedent to this decision in the United Kingdom: *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).
23 *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Div. Ct.).
24 The concept of 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 v. Canada (Minister of Citizenship and Immigration)*, para. 26. Two appeal courts in Canada have decided that procedural guidelines can give rise to legitimate expectations: *British Columbia (Securities Commission) v. Pacific International Securities Inc.*, [2002] 8 W.W.R. 116 (B.C.A.C.); and *Pulp, Paper & Woodworkers of Canada Local 8 et al v. Canada (Minister of Agriculture)* (1994), 174 N.R. 37. In one decision of the Quebec Appeal Court, judges were of the opinion that a guideline did not raise legitimate expectations in the particular case at bar, but judges did not reject the argument: *Bachand et al* v. *C.S.S.T*, (2004) J.Q. no 13311 (not published). See also : *Brunico communications Inc. v. Canada (Attorney-General)*, [2004] 252 F.T.R. 14; *Zaheri v. Canada (Minister of Citizenship and Immigration)* (2004), 35 Imm. L.R. (3rd) 252.; *Apotex Inc. v. Ontario (Minister of Heath and Long-Term Care)*, (2004) O.J. no. 1728 (OSC) (not published).
25 *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C. 16, para. 94.
26 (1994), 21 O.R. (3d) 104 (C.A.).
27 For an historical account on the development of the use of precedents by common law courts, see Brian Simpson, "The Common Law and Legal Theory," in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986), pp. 8–25.
28 As Reid J. said in *Home Services Employees International Union, loc 204 v. Broadway Manor Nursing Home* (1984), 48 O.R. (2d) 22: "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."
29 *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282. This view is shared by scholars, such as H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency," *Dalhousie Law Journal* 8 (1984), p. 446; Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs," *Revue de droit de l'Université Sherbrooke* 21 (1990), pp. 77–78.
30 *Lefebvre v. Québec (C.A.S.)*, [1991] R.J.Q. 1864 at 1877 (our translation).

31 *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.
32 Ibid., at 797.
33 *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.
34 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 158.
35 An Act respecting administrative justice, R.S.Q., c. J-3, ss. 75, 90.
36 See *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 s. 382.
37 On the website of the IRB at http://www.irb-cisr.gc.ca/en, see Policy no. 2003–01, Effective Date: March 21, 2003.
38 See the IRB site: http://www.irb-cisr.gc.ca/en/decisions/persuasive/about_e.htm. "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."
39 The IRB website cited in note 38 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."
40 *Capital Cities Communications Inc. c. CRTC*, [1978] 2 S.C.R. 141 at 171.
41 See, for example, Hudson N. Janisch, "Consistency, Rulemaking and *Consolidated-Bathurst*," *Queen's Law Journal* 16 (1991).
42 *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336.
43 See *American Airlines Inc. v. Canada (Competition Tribunal)*, [1989] 2 C.F. 88 (F.C.A.)., *Manitoba (Attorney General) v. Canada (National Energy Board*, [1974] 2 F.C. 502 (F.C. – Trial Div.); *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221.
44 For example, s. 162(2) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 159(1) explicitly states this principle.
45 *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1231-1232.
46 *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.
47 *Motorways Direct Transport Ltd. v. Canada (Human Rights Commission)*, (1991) 43 F.T.R. 211.
48 *Akthar v. Canada (Minister of Employment and Immigration)* (1991), 129 N.R. 71 at 76.
49 *Hernandez v. Canada (Minister of Citizenship and Immigration)* (1993), 154 N.R. 231 at 233.
50 *Canada (Minister of Citizenship and Immigration) v. Cortez*, (2000) 181 F.T.R. 96, para. 17.
51 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 17.
52 *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638 (C.A.); *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 at 756–757 (Man. C.A.).
53 *Canada (Minister of Citizenship and Immigration) v. Cortez*, (2000) 181 F.T.R. 96 at para. 4.
54 For a broader discussion on other types of state regulatory experiments and guidelines, see France Houle, *Les règles administratives et le droit public : aux confins de la régulation juridique* (Cowansville, Qué.: Yvon Blais, 2001).