Agencies' Administrative Guidelines: Legitimate Regulatory Tool or Threat to the Independence of Tribunal Decision-Making?

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Many agencies have adopted policy statements, guidelines, manuals, and handbooks. These documents, often called "soft-law" or "guidelines," are to "guide" the decision-making of staff and, in cases of formal decision-making, the decision-making of hearing panels.[1]

Guidelines, however, pose a problem in administrative law. What is their status? To what extent are they legitimate? When do they go too far?

Canadian courts are just beginning to examine these questions.[2] Given the increasing use of guidelines, these questions are certain to mount. The need for answers is now pressing. This paper offers a few possible answers.

A. Introduction

Administrative law has had difficulties in dealing with guidelines. This is because guidelines that "guide" walk a knife's edge between two unacceptable results.

"Guide" is a flexible verb, a word that can include very weak guidance (*i.e.*, effectively no persuasive effect) or strong guidance (*i.e.*, dictation). Very weak guidance does not accomplish any purpose at all and, in fact, may mislead those who plan their affairs

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[1] For the purposes of this paper, I shall call all these documents "guidelines."

[2] See most recently the thought-provoking and interesting decision of Evans J.A. in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C. 385 (C.A.), rev'g [2006] 3 F.C.R. 168 (F.C.), allowing a judicial review from [2004] R.P.D.D. No. 613 (QL). The companion case is *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C. 155 (C.A.). Owing to the unprecedented extent to which Evans J.A. in *Thamotharem* examined issues concerning administrative guidelines, *Thamotharem* will be a focus for discussion throughout this paper.

expecting that the agency will follow the guidance and rule in certain ways. Very strong guidance akin to dictation can offend notions of adjudicative independence by forcing hearing panels to rule in particular ways, by fettering their discretions. Guidance akin to dictation can also be a form of law-making, which, absent legislative authorization, is invalid or even unconstitutional.[3]

Even guidelines that guide somewhere in the middle between dictation and non-guidance may strike some to be contrary to theoretical notions of adjudicative independence.

At a theoretical level, the idea of an agency "guiding" hearing panels on what to say on issues in particular cases seems contrary to the concept of adjudicative independence. Take, for example, a hearing panel that is obligated to afford a high level of procedural fairness to parties before it. It is obligated to make findings of fact based on the evidence before it and to apply the law dispassionately, exercising whatever discretions are open to it, again dispassionately, without outside influence or submissions from third parties.

Guidelines go right against this theoretical notion of adjudicative independence. They are made, in part, in order to influence panels' discretions. They act like outside submissions from third parties, except that they have the imprimatur of official sanction through whatever approval or consultative processes were followed in making the guidelines. They are third parties' submissions that have to be respected and accorded great weight because of their provenance.

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[3] The opening words of ss. 91 and 92 of the *Constitution Act, 1867* provide that Parliament and the Legislatures have the *exclusive* power to make laws. An exception to this is the delegation of the making of regulations to others in order to flesh out standards set by law: *Hodge v. The Queen* (1883), 9 App. Cas. 117 (J.C.P.C.). See discussion in *In re Gray* (1918), 57 S.C.R. 150; *Reference re Chemicals*; [1943] S.C.R. 1; *Ontario Public School Boards' Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184 (Div. Ct.); *R. v. P.(J.)* (2003), 67 O.R. (3d) 321 (C.A.). A constitutional objection on this basis would lie if a tribunal were to enact a Guideline akin to a "law." That objection might lie even if such a Guideline were authorized by statute (as in the case of so-called "Henry VIII clauses," discussed in *Ontario Public School Boards' Ass'n, supra*.

B. The case for guidelines

(a) The administrative and regulatory context matters

The theoretical view of adjudicative independence fails to take into account the meaning of adjudicative independence in the administrative or regulatory context.

The core of adjudicative independence in the administrative or regulatory context is that the decision-maker is making the decision itself, with regard to the evidence and submissions before it, but also with an eye to administrative and regulatory policy. The theoretical view of adjudicative independence, offered above, seems more apt to a criminal court than an administrative or regulatory body that has a policy mandate to pursue.

It is the administrative and regulatory context that creates a legitimate role for the formulation and application of guidelines. Administrative tribunals and regulators have been established to pursue certain objectives. The objectives may be substantive or procedural. Substantive objectives may be to promote certain activities, or prohibit others, in accordance with the overarching purposes of the governing legislation. Procedural objectives may be to dispense with the adversarial, time-consuming and expensive mechanisms associated with court proceedings and instead adopt more inquisitorial, expeditious and cost-effective means of truth finding and adjudication.

(b) The Thamatharem case as an example of the usefulness of guidelines

The Federal Court of Appeal's decision in *Thamatharem*[4] is the most detailed and useful discussion of the role of guidelines. The Court was concerned with the validity of

[4] *Supra*, n. 2.

Guideline 7 of the *Guidelines Issued by the Chairperson of the Immigration and Refugee Board*.[5]

The power of the Board to make guidelines is found in a statute, the *Immigration and Refugee Protection Act*.[6] The power is limited to "assisting members in carrying out their duties."

Before the Chairperson issued Guideline 7, the order of questioning in hearings was within the discretion of individual members. Neither the Act, nor the *Refugee Protection Division Rules* enacted under the Act,[7] expressly addressed the issue, though the Act gives those conducting the hearing a very broad discretion.[8]

Guideline 7 offered direction on the order of questioning in hearings. It provided that "[i]n a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant,"[9] although the member of the Refugee Protection Division (RPD) hearing the claim "may vary the order of questioning in exceptional circumstances."[10]

Guideline 7 was not idly produced. It was supported by a study.[11] It was considered for at least four years.[12] The Board went beyond the required consultations under the Act

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[5] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 159(1)(h): the Chairperson of the Board can "issue guidelines . . . to assist members in carrying out their duties."
[6] *Ibid.*
[7] *Ibid.*, ss. 161(1)(a).
[8] *Ibid.*, s. 170: The hearing officer "may inquire into any matter that it considers relevant to establishing whether a claim is well-founded," "is not bound by any legal or technical rules of evidence," and "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances."
[9] *Guideline*, at para. 19.
[10] *Guideline*, at para. 23.
[11] *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, December 1993), at pp. 74-75.
[12] *Thamotharem*, *supra*, n. 2, at para. 23. Other measures taken include early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

and consulted with members of the Bar and other “stakeholders.”[13] After it came into effect, it was published.[14]

Guideline 7 was challenged on two bases:

- it denied refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel; further, it fettered the discretion of those hearing refugee protection claims to determine the appropriate order of questioning.

- the standards set out in the Guideline should have been enacted in the *Refugee Protection Division Rules*.

This last mentioned issue is of some significance in terms of accountability. Guidelines, such as Guideline 7, are made by the Chairperson but the Chairperson must consult with the Deputy Chairpersons and the Director General of the Immigration Division before making them.[15] The *Refugee Protection Division Rules*, like Guideline 7, are also made by the Chairperson subject to the same consultation requirements. However, they must be approved by the Governor in Council.[16] The Court found, as a matter of characterization, that Guideline 7 was not a rule of procedure within the meaning of the Act.

On the issue of procedural fairness and fettering discretion in *Thamotharem*, the Federal Court of Appeal recognized the special nature of the administrative hearings. They are inquisitorial in nature and designed to be expeditious. Noting the significant level of consultation and time spent in their preparation, the Court found that Guideline 7 was aimed at furthering the expeditious nature of the hearings, in a situation of systemic delay and backlog. Guideline 7 was not a mandatory rule but, instead, contained an express

[13] *Thamotharem*, *supra*, n. 2, at para. 24.
[14] *Ibid.*, para. 25.
[15] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, 159(1)(h)
[16] *Ibid.*, 161(1)(a)

discretionary element that permitted departure from the guidelines in exceptional situations in order to ensure fairness.[17] These were guidelines that furthered the objectives of the administrative system without threatening the adjudicative independence of hearing officers to ensure the fairness of proceedings before them.

The emphasis in *Thamotharem* was on analyzing the language of the guideline in order to assess whether it is an impermissible fetter on discretion.[18] This probably makes sense as a practical matter, as the Court noted,[19] since it is difficult for a Court to predict the effect of the guideline on a large number of panels sitting across the country. For that matter, it may be impossible for a Court to draw a logical inference that the guideline is fettering discretion from the statistical performance of panels under the guideline. A high rate of compliance with the guideline may prove the appropriateness of the guideline for the conduct of hearings, rather than any fettering of discretion. In the Court's view, only "clear evidence to the contrary, such as that members have routinely refused to consider whether the facts of particular cases require an exception to be made" would suffice.[20]

(c) Judicial treatment of guidelines: the virtues of guidelines recognized

For many years, Canadian courts have understood the advantages of guidelines. In 1978, the Supreme Court first viewed guidelines as legitimate tools of administration and regulation.[21] Soon afterward, the Supreme Court strongly declared their desirability[22] and affirmed that, if drafted or applied improperly, they can run afoul of the rule against

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[17] *Thamotharem, supra*, n. 2, at para. 66.
[18] *Ibid.*, at para. 73.
[19] *Ibid.*, para. 73.
[20] *Ibid.*, para. 74.
[21] *Capital Cities Communications Inc. v. Canadian Radio-television and Telecommunications Commission*, [1978] 2 S.C.R. 141.
[22] *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at 6-7: "There is nothing improper or unlawful for the Minister charged with the responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate or state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be."

"fettering" an administrative decision-maker's discretion.[23] This was the Supreme Court's first identification of the "knife's edge" that guidelines rest upon, in terms of tribunals and adjudicative independence: they may influence, sometimes strongly, but they must not "fetter".

Many cases and commentators since have highlighted the desirability of guidelines.[24] Guidelines advance several useful purposes in the administrative and regulatory context:

- *Uniformity*. Guidelines help to create uniformity of standards across the country. They help to ensure that similar situations are treated similarly. The Federal Court of Appeal in *Thamotharem* noted this virtue of guidelines and found that Guideline 7 furthered uniformity. Before Guideline 7, the order of questioning was left to individual members to decide on an ad hoc basis, with variations both among and within regions.[25] The Court stressed that "[c]laimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted."[26] This being said, there is a balance to be met, a balance "between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other."[27] Guideline 7 achieved that balance by allowing hearing officers to deviate from it when required to ensure fairness.

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[23] *Ibid.*, at 6: "The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: 'If Canadian product is not offered at the market price, a permit will *normally* be issued' does not fetter the exercise of that discretion" [emphasis added].

[24] Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rule Making" in *Special Lectures of the Law Society of Upper Canada 1992*, *Administrative Law: Principles, Practice and Pluralism*, Scarborough: Carswell, 1992, at 259; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 374-379; Craig, Paul P., *Administrative Law*, 5th ed. (London: Thomson, 2003), at 398-405, 536-540; *Capital Cities, supra*, n. 21, at 171; *Vidal v. Canada (Minister of Employment and Immigration*) (1991), 49 Admin. L.R. 118 (F.C.T.D.), at 131; *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A.) at 107-109; *Thamotharem*, *supra*, n. 2, at para. 57.

[25] *Thamotharem*, *supra*, n. 2, at paras. 19-20.

[26] *Ibid.*, at para. 20.

[27] *Ibid.*, at para. 55.

- *Efficiency in hearings.* By specifying standard procedures or rules, guidelines can create expectations and eliminate procedural debates, thereby saving time. The rules can be developed to eliminate wasteful uses of time. This was a key objective behind Guideline 7 in *Thamotharem*. Defenders of that Guideline suggested that hearings would be more "expeditious if claimants were generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel."[28] This was a key concern, as the problem of backlog and delays in hearing was severe.[29]

- *Systemic efficiency.* Through guidelines, agencies can announce the policies they are going to apply, rather than announce it through a case-by-case "common law jurisprudence" that might take years to develop.[30]

- *Predictability*. Guidelines can "assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly."[31] This is especially important for large tribunals that sit in individual, small panels.[32] It is indispensible to large government Ministries administering complex statutes and those who need to know how they will exercise their discretions.[33]

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[28] *Ibid.*, at para. 21.
[29] *Ibid.*, at para. 21: "For example, from 1997-1998 to 2001-2002 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000."
[30] *Capital Cities Communications Inc. v. Canadian Radio-television and Telecommunications Commission*, *supra*, n. 22, at 170. David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 375: "[T]he development of such policies, particularly if affected constituencies are involved in that exercise, may lead to a better framework for the exercise of that discretion in individual cases than would emerge from a gradual accretion of practice or precedent over a lengthy period."
[31] *Thamotharem*, *supra*, n. 2, at para. 55. *Capital Cities Communications Inc. v. Canadian Radio-television and Telecommunications Commission*, *supra*, n. 22, at 170 *per* Laskin C.J.C.: "there is merit in having [the policy] known in advance."
[32] *Thamotharem*, *supra*, n. 2, at para. 60.
[33] David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 376 aptly identifies the Canada Revenue Agency as an example, querying "what would happen to the effective administration of the national income tax regime and the commercial life of the country if the [Canada Revenue Agency] was no longer able to issue interpretation bulletins or to provide advance rulings."

- *Effective regulation.* Guidelines can "enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis."[34]

- *Equality.* The concept of equality before the law and equal treatment requires that similar cases receive the same treatment.[35] Guidelines can further this.

- *Ease of construction and modification*. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, "they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation."[36]

- *Education of staff and panel members.* Through guidelines, an agency "can communicate prospectively its thinking on an issue to agency members and staff" and panel members.[37] In the case of panel members, the idea of the agency assisting the members and giving them guidance on decisions is nothing new. It has long been accepted that particular panels can consult with other members of a Board or agency and receive guidance on decisions.[38]

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[34] *Thamotharem*, *supra*, n. 2, at para. 55.
[35] *Ibid.*, at para. 61, citing *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at 327: if the outcome of disputes depended only on the identity of the persons sitting on a panel, this would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one."
[36] *Thamotharem*, *supra*, n. 2, at para. 56. See also David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 376: "policies can be altered just as informally as they were created."
[37] *Thamotharem*, *supra*, n. 2, at para. 56.
[38] *IWA v. Consolidated-Bathurst Packaging Ltd.*, *supra*, n. 35. See also *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, cited in Thamotharem, para. 84. (The arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined.)

C. The case against guidelines

Despite the many advantages of guidelines, there are a number of reasons to be wary of them.

(a) In the end, guidelines may not serve the purposes they are meant to achieve

Guidelines that set out non-binding substantive standards for decision-making mean that those in administrative hearings must prepare and present two cases, one to meet the standard under the guidelines and one to meet whatever other standard is appropriate. This can lengthen hearings and increase expenses for all concerned.

(b) They affect adjudicative independence

Administrative decision makers cannot apply guidelines as if they were law.[39] But while guidelines may not fetter discretion, they can severely affect it, to the point where some might consider adjudicative independence of a hearing panel to be undercut.

The reality is that an independent panel might have decided a case one way, but guidelines influence it enough to cause it to decide a case another way. The effect of guidelines on independent adjudication cannot be denied. Critics may maintain that the notion of independence is extremely important, particularly in adjudicative settings where the stakes are very high for affected individuals. It is one thing to enact guidelines in areas where adjudications contain a significant policy element; it is quite another in areas more akin to judicial determinations.

[39] *Maple Lodge*, *supra*, n. 21, at 7; *Thamotharem*, *supra*, n. 2, at para. 62.

(c) For all practical purposes, they are binding like laws

The practical reality of guidelines is that "there will be many situations in which 'informal' policies and guidelines will achieve the status of *de facto* law." Feeding this are cases that suggest that there is nothing wrong with having a predisposition against exceptions and in favour of applying the existing policy.[40] Through the "longevity and the expectations built up" around guidelines, "they will be treated as though they were binding both by the agency responsible for promulgating them and the regulated community." It is expected that those who have "laid down policies and guidelines" have "some degree of commitment to those policies" in the context of individual cases.[41] Hearing panels know that departures from the guidelines will run against the official position of the agency and so it may be expected that there will be pressure to conform with the guidelines. Over time, they become statements of standards that are regarded by all as mandatory.

(d) Guidelines are more than guides: they can have legal effects

While policies cannot be elevated to the status of law,[42] increasingly guidelines are being given legal significance well beyond their status as "guides."

The classic legal position is that agencies that create expectations as to substantive results are not obligated to deliver those results.[43] However, there are some contrary trends in the jurisprudence. The Supreme Court has recognized that the fact that a ruling is contrary to a guideline "is of great help" in assessing whether it is substantively

[40] David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 377, citing *Capital Cities*, *supra*, n. 22, and *British Oxygen Co. v. Board of Trade*, [1971] A.C. 610 (H.L.).
[41] David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 377.
[42] *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 at 596 *per* Iacobucci J.: "However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment."
[43] *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

unreasonable in a judicial review proceeding.[44] This mirrors jurisprudence to the effect that departures from statements of intention or policy may be found to be unreasonable.[45] There are cases where words or conduct of an agency that cause a person to conduct himself or herself in a way that makes it impossible to satisfy a later requirement can create an estoppel, preventing the agency from imposing that later requirement.[46] Procedural guidelines can set the level of procedural fairness that is required by law.[47] Critics may legitimately ask whether these cases provide an incentive for tribunals to follow guidelines slavishly, thereby assuring their status as documents that have real binding effect. Increasingly, to avoid exposure in judicial review, tribunals may be forced to abide by the policies they create. Guidelines are safe; departures are not.

(e) Inappropriate law-making

Critics can also raise concerns about accountability for law-making, and the constitutional principle that only elected legislatures can make law. Critics can ask who is making the law – the democratically elected legislature, or appointees to government tribunals without authorization?

In this regard, they can point to cases where guidelines have conflicted with statutory provisions and have survived. Some courts have gone so far as to suggest that it is legitimate for agencies to cut down the discretion of hearing panels given by statute by enacting guidelines. In *Whelan v. Workplace Health, Safety and Compensation*

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[44] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 72.
[45] *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281; *Baker*, *supra*, n. 44, at para. 72.
[46] See *Aurchem Exploration Ltd. v. Canada* (1992), 7 Admin. L.R. (2d) 168 (agency could not go back on a practice of accepting non-compliant applications without giving adequate notice); *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227 (pension authorities made representations that caused Robertson not to gather evidence in support of a pension claim; this estopped the authorities from insisting that he provide evidence in support of an application in support of his pension claim; *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, [1994] 1 S.C.R. 80 (agency could not collect arrears because of its negligent inaction in collecting them led the consumer to believe they were not owing).
[47] *Baker*, *supra*, n. 44, at para. 47; *Consolidated-Bathurst*, *supra*, n. 35, *per* Gonthier J.

Commission[48] the governing Act gave panels a broad discretion regarding the calculation of benefits. However, the Commission passed a policy requiring that vacation pay should always be deducted when calculating benefits, in effect cutting down the broad discretion given by the Act. The Court held that policy-making was a central function of the Commission and so it concluded that implicit in the grant of the broad discretion in the Act was a discretion to make policies that would guide that discretion. But what cannot be denied is that the Commission effectively dictates a certain outcome concerning vacation pay when the Act suggests something quite different.

These concerns are accentuated by the fact that guidelines do not need to be authorized by legislation. An administrative agency does not require an express grant of statutory authority in order to issue guidelines to structure the exercise of its discretion or the interpretation of its enabling legislation.[49]

(f) Existing law provides no protection against undue interference with adjudicative independence

Only in cases of a totally closed mind is a person disqualified from particular proceedings in the case of bias.[50] As a result, guidelines are only invalid where they completely close the decision-makers' mind and leave him or her with no discretion – *i.e.*, where the "fetter on discretion" is complete. As noted above, the only practical test for determining whether guidelines act as a fetter on discretion is to examine how they are drafted.

Critics can suggest that this makes it easy to get around the law by drafting exceptions into guidelines, and to add words like "normally" or "usually." Courts will see those words and stand by. Everyone will wink and nod at the exceptions and discretion-bearing words, but will apply the guidelines as mandatory standards.

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[48] (1999), 181 Nfld. & P.E.I.R. 192 (Nfld. T.D.).
[49] *Thamotharem*, *supra*, n. 2, para. 56; *Ainsley Financial Corp.*, *supra*, n. 24, at 108-109.
[50] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

The extent to which the law simply requires that tribunals undergo a drafting exercise is well-illustrated by *Ainsley Financial Corporation v. Ontario Securities Commission*.[51] In that case, the policy statement was ruled invalid because it adopted wording that supported a tone of "mandatory pronouncement." In the words of the Ontario Court of Appeal, it "crossed the Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument."[52] Had the policy statement been "toned down," with words like "normally" or "usually" in it, the result would have been different.

(g) Immunity from challenge

Immunity from challenge is to be avoided.[53] However, some guidelines may be practically immune from challenge in particular situations. This creates the worst of all worlds: the creation of *de facto* law, without substantial accountability.

For example, a federal agency may make a guideline, thereby making a "decision" that directly affects a number of industry stakeholders. Under the *Federal Courts Act*, the stakeholders have only 30 days to challenge the policy[54] and, without a specific problem at that time, may decline to do so. Future challenges may be possible, but this is not assured.[55] Future collateral attacks against the policy may be barred.

Many provincial jurisdictions require that there be a statutory power of decision in order for judicial review to be available.[56] As noted above,[57] some tribunals make guidelines without any statutory authorization to do so. If guidelines are made outside of a

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[51] (1995), 21 O.R. (3d) 104 (C.A.).
[52] *Ibid.*, at 109.
[53] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.
[54] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(2).
[55] The time is extendable, but the test is demanding: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(2) and *Grewal v. M.E.I.*, [1985] 2 F.C. 263 (C.A.).
[56] See, e.g., *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1, s. 1.
[57] See text to n. 49.

statutory power of decision, they may not be reviewable, at least until they are applied in a specific decision later.

D. Assessment

In my view, this is an area where the advantages of guidelines are palpable, but many of the concerns are well-founded. The existing test in the jurisprudence – whether, looking at the wording of the guideline, the guideline leaves a bit of room for the exercise of discretion by a hearing panel – does not adequately deal with the legitimate concerns about guidelines.

The key, in my view, is to recognize, as Evans J.A. in *Thamotharem* did, that "adjudicative independence is not an all or nothing thing, but is a question of degree" and is balanced against requirements of accountability.[58] While at that portion in his reasons Evans J.A. happened to speak of accountability in the form of judicial review, the requirements of accountability are broader and include concerns about constitutionality.

In my view, it must be conceded that guidelines for practical purposes are a species of law that has some binding effect. The issue is how to ensure adequate accountability for this species of law-making and how to respect the fundamental constitutional norm that only elected bodies make laws.

In my view, a complete solution to the problem of accountability and constitutionality would require action by legislatures, administrative agencies, and courts.

Legislatures always set out in legislation the powers of agencies that they create. To the extent that they permit agencies to make guidelines, they should say so and regulate the power. Courts permit agencies to make guidelines even though statutes are silent on the

[58] *Thamotharem*, *supra*, n. 2, at para. 89.

matter.[59] This is a power that should be regulated by statute. The regulation should have more detail. Most guideline-making powers, such as those in issue in *Thamotharem*, contain only the barest detail. That detail can include procedures for the enactment of guidelines, including substantial consultation requirements, publication requirements, and the availability of judicial review.[60] In *Thamotharem*, Guideline 7 was adopted after a long consultative process with many stakeholders and it was published,[61] but neither was mandatory. Such requirements should be.

Agencies might consider "sunset clauses" or mandatory review requirements in their guidelines, so that their effects can be assessed in order to ensure that the purported advantages of guidelines are realized.

Courts and the lawyers appearing before courts should consider developing the jurisprudence in two areas, in order to ensure greater accountability and compliance with constitutional requirements.

I

The first area is in the development of a new "division of powers" analysis, where guidelines are examined in order to ensure that in pith and substance they are not "statutory law," or "regulations" that are made by the legislature or the particular regulation-maker under the statute (e.g., the Governor-in-Council).[62] Questions that might affect this characterization[63] include:

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[59] See text to n. 49, *supra*.
[60] Guidelines made as a result of consultation are more desirable: *Capital Cities*, *supra*, n. 22, at 170.
[61] See text to nn. 11-14, *supra*.
[62] See the constitutional concern mentioned at n. 3, *supra*.
[63] The process of characterization is well within the capability of the courts. Although it was not strictly-speaking necessary to his decision, LeBel J. in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 adopted at para. 37, "[a] functional and purposive approach to the nature" of the Canadian Human Rights Commission's guidelines, and found that they were "akin to regulations."

- Are the guidelines so detailed that they "read like a statute or regulation" rather than a general policy pronouncement?[64]

- Are the standards and criteria in the guidelines quite divorced from anything in the statute, such that the guidelines appear to be setting new standards and criteria (*i.e.*, "legislating" new standards), rather than fleshing out or giving voice to existing standards?

- Are the guidelines covering subject-matters that are reserved to others under the statute (e.g., subject-matters that can be covered by regulations made by the regulation-maker under the statute)?[65]

II

The second area is in the area of procedure on judicial review. There are two particular areas of concern.

- *Disclosure to litigants.* While adjudicative independence requires that litigants not be given access to the rough notes and drafts of reasons, the record that is passed on judicial review should include all submissions, informal or formal, made to the panel concerning a guideline that it is applying. For example, training documents, memoranda and other materials that affect how a panel member is to regard and apply the guidelines should from part of the record or be accessible by a litigant on judicial review. Existing law is unduly restrictive.

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[64] The Court of Appeal asked this question in *Ainsley*, *supra*, n. 24, and found that the Ontario Securities Commission's policy statement was really akin to a regulation or statute.

[65] In *Thamotharem*, *supra*, n. 2, the Federal Court of Appeal assessed whether Guideline 7 was, in fact, a rule of procedure that should have been enacted following the procedures set out in s. 161. Those procedures, as noted above (see text to n. 16), allowed for more accountability via the statutory requirement of approval by the Governor-in-Council.

- *Adequacy of reasons.* If guidelines are relevant to a case – either because the tribunal follows the guidelines or because the tribunal intends to depart from the guidelines – the reasons on this point must be adequate.[66] Adequacy is a sliding scale, largely depending on the level of procedural fairness to be accorded to the parties,[67] but governed also by the recognized purposes for the giving of reasons.[68] Where tribunals are following guidelines despite a request that the guidelines be departed from, the requirement of giving reasons should be very strict. What is needed is not a boilerplate statement that the guidelines were followed because they were appropriate.[69] There should be detailed reasons about why a departure from the guidelines was not considered appropriate, with specific reference to the relevant legislative policies, administrative policies and evidence in the case. Only that level of detail will allow a litigant to know why the guidelines were followed and to have a court examine the situation meaningfully on judicial review.[70]

These are just a few preliminary thoughts on what solutions might exist. It is time for legislators, judges and lawyers to devote more thought to this subject so that we can realize the full benefit of guidelines without encountering problems of accountability and constitutionality. Guidelines are here to stay, and it is time for our law to develop to deal with them.

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[66] *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (2006), 54 C.P.R. (4th) 15 (F.C.A.).
[67] See *Baker*, *supra*, n. 44.
[68] *R. v. Sheppard*, [2002] 1 S.C.R. 869.
[69] See *Canadian Association of Broadcasters*, *supra*, n. 65.
[70] See Baker, *supra*, n. 44, at paras. 15 and 24.