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The Puzzle of Soft Law

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Abstract

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Keywords

soft law, administrative law, standard of review, constitutional law, charter, administrative discretion, rule of law, free speech, university

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Abstract

Soft law is a puzzle. It shapes a wide range of public decision making, but its contents are said to lie beyond the rule of law. This paper explores the largely uncharted terrain of soft law in Canada. It is organized in three parts. Part I examines the existing treatment of soft law in Canadian jurisprudence, including soft law's relationship with administrative law concepts such as the standard of reasonableness and the Constitution. Part II proposes the foundations of a new framework to characterize soft law, termed the "spectrum approach." This approach aims to assist courts in responding to the influence and variations of soft law in Canadian society, and to begin to assess soft law on its own terms, rather than in relation to other concepts. Finally, Part III applies the spectrum approach to a case study of Ontario university free speech policies. In sum, we argue that soft law is a powerful, practical force in Canadian society that should be subject to meaningful oversight by the courts.

"Soft law" is a puzzle. It shapes a wide range of public decision making, but its contents are said to lie beyond the rule of law. "Hard law" is legislative in nature, including regulations issued under delegated authority or other forms of delegated by-law or rule making. Soft law covers just about all the other instruments that are issued by the executive to guide its decision making, including guidelines, codes, manuals, circulars, directives, bulletins, and other forms.

Those who interpret and apply public law generally view the guidelines, codes, manuals, circulars, and other instruments that make up soft law through binary lenses. Either these instruments are "law," or they are not "law." If deemed to be "law," these instruments and their content bind public decision makers, and their contents are subject to judicial oversight. If not "law," these instruments express policy goals, guiding principles, the views and perspectives of public bodies or decision makers, and accountability over how they are used may be sought only through administrative and political avenues.

In this article, we argue that a sharp binary dichotomy between "hard law" and "soft law" may be appealing as a basis for differentiating instruments that are legislative from those that are not. However, a binary approach glosses over the reality of the multi-faceted roles played by soft law in Canadian public law.

This is not to say that distinctions between hard law and soft law do not exist, or that they do not matter. The primacy of legislative authority is a case in point. For example, soft law cannot extend beyond or contradict the statutory authority of the decision-making body or otherwise usurp the role of the legislature in setting the legal boundaries for decision making.[1]

However, beyond this point of departure within the rule of law of a democracy, soft law is a setting where legality and lived reality often diverge. For example, there are settings where a statute sets out the decision maker's scope of authority in vague ways, and it is the guidelines that flesh out that authority and indicate how decision makers will apply their authority.

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[1] For example, if a statute gives a decision maker the authority to admit refugees based on risk of persecution in their country of origin, a guideline cannot extend the decision maker's authority to admit refugees whether or not risk of persecution is apparent.

Despite the practical effects of soft law in driving public decision making, soft law is not subject to the same constitutional constraints as hard law. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* ("*Little Sisters*"), the Supreme Court of Canada held that manuals and guidebooks are not "law" and are therefore not reviewable for *Charter* compliance.[2] This categorical approach to soft law, however, overlooks its practical role in driving administrative decision making. To suggest that the statute must accord with constitutional standards, but the guideline need not, gives rise to dissonance between what matters to judges overseeing public decision making and what matters in shaping public decisions. In our view, such a divergence is neither healthy nor sustainable for a legal system, nor fair or just for those whose rights and aspirations turn on how soft law is developed and used.

Further, because soft law is not a product of legislative accountability and may lie beyond the scope of judicial oversight, it presents a compelling challenge to key public law principles, including the rule of law and the separation of powers.[3]

In recent years, courts have struggled to reconcile the "unreviewability" of soft law with its practical effect on decision making. Indeed, a decade after *Little Sisters*, the Court distanced itself from the proposition that soft law was categorically immune from *Charter* review. In *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, the Court held that a policy qualified as "law" and must therefore comply with the *Charter* ("*Greater Vancouver Transportation Authority*").[4] In the wake of these conflicting decisions, courts continue to wrestle with the uncertain status of soft law in a variety of administrative and constitutional contexts. What courts currently lack is a cohesive framework with which to characterize and respond to soft law instruments.

This issue matters because soft law, simply put, is everywhere. The number, variety, complexity, and impact of soft law dwarfs that of statutes and regulations.[5] While statutes are drafted to last years, if not decades, soft law is intended to be flexible, easily updated, and easily revised, with little to no procedural requirements for amendment.[6]

Attempting to define soft law, therefore, is perilous. While we generally refer to soft law "instruments," a focus on the source of soft law may be less helpful than a focus on the effect. As Robin Creyke and John McMillan observed, soft law takes effect through influence, not through the expression of positive law.[7] Soft law sometimes comes in the form of a guideline but may also take more informal forms. To take just one example, guidance on the interpretation of what is and

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[2] 2000 SCC 69 at para 85 [*Little Sisters*].

[3] See Greg Weeks, "Soft Law and Public Liability: Beyond the Separation of Powers?" (2018) 39 Adel L Rev 303. See generally Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart, 2016) [Weeks, *Soft Law and Public Authorities*].

[4] 2009 SCC 31 [*Greater Vancouver Transportation Authority*].

[5] See generally Robin Creyke & John McMillan, "Soft Law v Hard Law" in Linda Pearson, Carol Harlow & Michael Taggart, eds, *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 377; Richard Rawlings, "Soft Law Never Dies" in Mark Elliott & David Feldman, eds, *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 215; Lorne Sossin & Charles W Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40 Alta L Rev 867; Greg Weeks, "The Use and Enforcement of Soft Law by Australian Public Authorities" (2014) 42 Federal L Rev 181. There is a broader literature on the growth and importance of soft law in international governance, which lies beyond the focus of this study. See *e.g.* Steven L Schwarcz, "Soft Law as Governing Law" (2020) 104 Minn L Rev 2471.

[6] Even regulations, by contrast, are often issued for notice and comment, pass by a Parliamentary committee, and may be subject to debate before being issued and formally published.

[7] Creyke & McMillan, *supra* note 5 at 379.

is not a charitable entity was placed in the employee handbook of tax officials.[8] Soft law may not even always be written, and it can develop through shared practices in a decision-making body, passed on through training, mentoring, and meetings. In *Langenfeld v. TPSB* ("*Langenfeld*"),[9] for example, a "practice" instituted by the Chief of Police to search members of the public before permitting their entry into police headquarters was an unjustifiable infringement of the *Charter*.[10]

Our aim in tackling the puzzle of soft law is to develop a framework that responds to the breadth of the mechanisms for ordering public decision making that are not contained in the statutes and regulations that constitute "hard law." Too often, the vastness and variety of soft law can give rise to the view that there is no role for courts, or for the rule of law generally, in this sphere. In our view, this theoretical approach is no longer tenable (if it ever was), as it ignores the practical significance of soft law for those who make decisions and the lived reality of individuals who are affected by those decisions. Simply put, where soft law is the driver of discretionary decision making, it should be the focus of legal accountability.[11]

Our analysis considers just the tip of the soft law iceberg—the legal treatment of soft law instruments. Below the water line, there are more significant and opaque areas to explore, including how and why public authorities develop soft law, its role in how public authorities communicate and act, and what impact different sources of authority and influence have on discretionary decisions and decision makers. While these questions lie beyond the focus of this article, it would be wrong to suggest one can grapple with soft law without addressing these questions in some way if the practical influence of soft law is to align with its legal treatment.

Our goal is not to present a comprehensive theory of soft law. Rather, we seek to examine the challenges that courts encounter when engaging with soft law and the current uneven treatment of soft law in Canadian jurisprudence. We lay the groundwork for a new approach to the review of soft law, which better equips courts to move beyond formalistic labels and to respond to the influence of soft law in practice. Our proposed framework builds on the important theoretical work of others, particularly in the international law sphere, who have sought to go beyond binary understandings of hard and soft law.[12]

This article is organized in three main parts. Part I is descriptive. It examines the existing treatment of soft law in Canadian jurisprudence and the multifarious ways that soft law currently

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[8] See Lorne Sossin, "Regulating Virtue: A Purposive Approach to the Administration of Charities" in Jim Phillips, Bruce Chapman & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press, 2001) 373 at 380-82. On the proliferation of more formal soft law in the area of taxation, see generally Sas Ansari & Lorne Sossin, "Legitimate Expectations in Canada: Soft Law and Tax Administration" in Matthew Groves & Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Hart, 2017) 293.

[9] 2018 ONSC 3447 [*Langenfeld*].

[10] Justice Copeland found that this violated the applicant's section 2(b) right to attend a public Toronto Police Services Board meeting. Section 8 was not argued. See *ibid* at paras 69-70, 157.

[11] On the challenges of accountability in the context of soft law, see generally Robin Creyke, "'Soft Law' and Administrative Law: A New Challenge" (2010) 61 AIALF 15.

[12] See *e.g.* Gregory C Shaffer & Mark A Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance" (2010) 94 Minn L Rev 706 at 709; David M Trubek, Patrick Cottrell & Mark Nance, "'Soft Law', 'Hard Law' and EU Integration" in Gráinne de Búrca & Joanne Scott, eds, *Law and New Governance in the EU and the US* (Hart, 2006) 65 at 65-67. Some international law theorists, such as Shaffer and Pollack, suggest that there are two key vantages from which soft law may be viewed: *ex ante* and *ex post* (*ibid* at 715-17). From an *ex ante* perspective, the key issue is whether soft law plays a role in shaping a decision, and if so, the extent of that role. From an *ex post* perspective, the key issue for international law is whether the soft law agreement or instrument in question is "enforceable." In a domestic context, the *ex post* issue is whether soft law is subject to judicial review, and if so, to what extent and in what ways. We are interested in both of these related perspectives.

features in judicial review. We suggest that while some efforts have been made to bring soft law squarely within the scope of judicial oversight, courts currently lack a unified framework with which to capture and respond to soft law.

In Part II, we propose the foundations for a new framework to characterize soft law, termed the "spectrum approach." This approach aims to help courts to respond to the influence and variations of soft law in Canadian society and to begin to assess soft law on its own terms, rather than in relation to other concepts.

Finally, in Part III, we apply the spectrum approach to a case study involving Ontario university free speech policies. This section illustrates the utility and limits of our proposed framework.

Ultimately, we argue that despite the jurisprudential uncertainties surrounding the scope and significance of soft law, it remains a powerful, practical force in Canadian society. Accordingly, a flexible and adaptive legal framework is necessary to bring soft law out of the shadows and subject it to meaningful accountability.

I. IN SEARCH OF THE JURISPRUDENCE OF SOFT LAW

Before developing a new framework for the analysis of soft law, it is first necessary to situate soft law in the current jurisprudence. In this Part, we review the treatment of soft law under current Canadian public law.

While soft law often figures in judicial review, it does so only obliquely. Situated at the periphery of judicial oversight, soft law is typically considered in relation to *something else*—be it a specific exercise of administrative decision making or an enabling statute. While there have been some recent judicial efforts to bring soft law into sharper focus (through doctrines such as legitimate expectations and fettering discretion), courts are struggling to determine when and how soft law should be subject to judicial oversight.

Below, we summarize the variety of ways that courts currently define, assess, and respond to soft law instruments. This section begins by considering how courts define soft law. We then consider the variety of ways that soft law is implicated on review: as one factor in a particular administrative decision, as the product of an enabling statute, or, in some circumstances, as an instrument in and of itself. We then trace the development of procedural rights in relation to soft law. Finally, we provide an overview of the nebulous remedies that are available when challenging soft law through the courts.

This discussion below is divided into four broad topics: (1) definitions of soft law; (2) substantive review of soft law; (3) procedural review of soft law; and (4) remedies relating to soft law. While these categories provide a rough frame of reference for our discussion, they should not be treated as wholly separate inquiries. These topics are interrelated and inform one another in their application; for example, the manner in which soft law is defined impacts the way it is appraised on review, as well as the remedy that is ultimately selected. Because courts lack a consistent approach to these issues, soft law has a shape-shifting quality and is treated differently from one case to the next. Below is an account of the multifarious ways that soft law is currently defined, assessed, and addressed on review.

A. Defining Soft Law

There is no easily recognizable domain of Canadian public law that encompasses soft law. It is discussed in a variety of contexts: as a question of jurisdiction or justiciability; as a question of the application of judicial review or other legislation; as a question of the availability of certain

remedies; or simply as the backdrop for an analysis of other administrative or constitutional law doctrines.

Soft law can be defined in several ways. For example, positivists may deny the relevance of soft law as a legal term since law, by definition, must provide binding rules.[13] Constructivists are less interested in formalist distinctions and more interested in the effectiveness of rules in directing decisions.[14] Canadian public law reflects elements of both approaches. On the one hand, soft law often is defined by what it is not—a binding law—while on the other hand, it is defined as a series of instruments that guide or shape legal decision making.

To date, the most comprehensive overview of the meaning of soft law comes from the Federal Court of Appeal case *Thamotharem v. Canada (Minister of Citizenship and Immigration)* ("*Thamotharem*").[15] Justice Evans considered the scope of soft law in the context of a procedural guideline that applied to refugee determination proceedings. Justice Evans described soft law as a body of "non-legally binding" instruments such as "policy statements, guidelines, manuals, and handbooks," which "can assist members of the public to predict how an agency is likely to exercise its statutory discretion" and serve as a flexible tool for the decision-making body.[16]

For Justice Evans, legal rules and discretion "do not inhabit different universes but are arrayed along a continuum."[17] Soft law is situated at this juncture between legal rule making and discretionary decision making: "Although not legally binding on a decision-maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision-maker's conduct," and be employed as a technique "to achieve an acceptable level of consistency in administrative decisions."[18] Justice Evans also emphasized the limits of relying on soft law to promote consistency:

> [A] decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered.[19]

According to Justice Evans, such "a level of compliance may only be achieved through the exercise of a statutory power to make 'hard' law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure."[20]

Although courts typically draw a sharp distinction between hard law and soft law, Justice Evans recognized that there is no clear dividing line between them. For instance, Justice Evans observed that the term "guideline" may denote soft law or hard law, depending on whether the public body has express authority to issue a *binding* guideline.[21] While statutory authority is required to issue binding guidelines, soft law may generally be issued by decision-making bodies with or without express statutory authority.[22]

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[13] See Jan Klabbers, "The Undesirability of Soft Law" (1998) 67 Nordic J Intl L 381.
[14] See Trubek, Cottrell & Nance, *supra* note 12 at 70-76.
[15] 2007 FCA 198 [*Thamotharem*]. See also *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees, and Citizenship)*, 2020 FCA 196 at paras 45-49 [*CARL* FCA]. In *CARL* FCA, the Federal Court of Appeal's discussion of soft law affirmed its approach in *Thamotharem*.
[16] *Thamotharem*, *supra* note 15 at paras 55-56.
[17] *Ibid* at para 58.
[18] *Ibid* at paras 59-60.
[19] *Ibid* at para 62.
[20] *Ibid.*
[21] *Ibid* at paras 65-70.
[22] *Ibid* at para 56.

This analysis suggests that although a binary opposition between soft law and hard law is superficially appealing, on closer examination, it may not effectively capture the shifting role of soft law in shaping administrative decisions in practice. To take just one example, guidelines may sometimes represent a simplification and distillation of hard law principles. So, while such guidance may come in the form of a guideline, it reflects binding standards on decision makers.

There is a resulting difficulty in capturing the essence of a particular soft law instrument. As noted by Justice Doherty in *Ainsley Financial Corp. v. Ontario (Securities Commission)* ("*Ainsley*"), "There is no bright line which always separates a guideline from a mandatory provision having the effect of law."[23] While the complex realities of soft law suggest the need for a framework responsive to those realities, as we discuss below, courts have struggled to develop such an approach within the existing confines of Canadian public law.

Just as soft law is difficult to define, it is also difficult to analyze. Soft law currently occupies an uneasy position before the courts. While hard law can be challenged as being *ultra vires*, soft law is often challenged only as an ancillary feature of a challenge to an administrative decision. That decision may be challenged substantively, on the basis that it is an unreasonable exercise of discretion, or procedurally, on the basis of an alleged breach of the duty of fairness.

Soft law also may itself be the subject of procedural or substantive challenges; but, as discussed in the following sections, the uncertain status of soft law complicates how it may arise in the judicial review framework. As H.W.R. Wade put it, "it has no vires to be ultra."[24]

B. Substantive Review of Soft Law

Soft law is typically created by administrative decision makers, who have been delegated discretion to make decisions and issue non-legislative instruments that prescribe rules or principles of general application. Soft law therefore simultaneously resembles a quasi-legal instrument as well as an instance of delegated decision making pursuant to legislative authority. Because of soft law's position at the juncture of rule making and administrative action, an applicant who is dissatisfied with a soft law instrument has, in theory, multiple avenues for legal recourse. An aggrieved party could attack an administrative decision that relates to the soft law instrument, the soft law instrument itself, or the legislation or executive action that gives rise to the soft law instrument. The discussion below expands on each avenue of judicial review.

1. Challenging a Specific Administrative Decision That Relies on Soft Law

Courts have recognized that an administrative decision may be substantively unreasonable where a relevant soft law instrument is not followed, where a soft law instrument fetters discretion, or where a decision influenced by soft law does not reflect a proportionate balance of *Charter* protections.

The relationship between soft law and the reasonable exercise of administrative discretion is illustrated in *Baker v. Canada (Minister of Citizenship and Immigration)* ("*Baker*").[25] At issue in *Baker* was an immigration officer's denial of the applicant's permanent residence application for a lack of humanitarian and compassionate grounds.[26] A majority of the Court noted that advertence to soft law may be indicative of reasonableness:

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[23] (1994), 121 DLR (4th) 79 at 84 (Ont CA) [*Ainsley*].
[24] "Beyond the Law: A British Innovation in Judicial Review" (1991) 43 Admin L Rev 559 at 561 [*sic*].
[25] [1999] 2 SCR 187 [*Baker*].
[26] *Ibid* at para 4.

> The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives *is of great help* in assessing whether the decision was an unreasonable exercise of the H & C power.[27]

Similarly, in *Agraira v. Canada (Public Safety and Emergency Preparedness)* ("*Agraira*"), the Court noted that guidelines are "a useful indicator of what constitutes a reasonable interpretation of the…section."[28] Put simply, paying heed to a soft law instrument may be an indicator of reasonableness, just as failure to advert to an applicable guideline, as in *Baker*, may be an indicator of unreasonableness.

In *Canada (Minister of Citizenship and Immigration) v. Vavilov* ("*Vavilov*"), the majority of the Court discussed a decision maker's reliance on soft law as a means of contributing to a "harmonized decision-making culture."[29] The majority stated that

> [i]nstitutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers.…Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.[30]

According to the majority, as a general proposition, where a decision maker "departs from longstanding practices or established internal authority," they "bear the…burden of explaining" and justifying that departure in their reasons.[31] If this burden is not met, this renders the decision unreasonable.[32]

A decision may also be unreasonable where a decision maker follows the guidance of soft law without considering *Charter* values. An administrative decision must reflect a proportionate balancing of *Charter* protections (values and rights) with the decision maker's statutory mandate.[33] As stated in *Loyola High School v. Quebec (Attorney General*), to be proportionate, the decision must "[give] effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate."[34]

This approach has been applied to administrative decisions that implicate a soft law instrument. For example, in *Ewert v. Canada (Attorney General)*, the Federal Court of Appeal held that the decision by correctional authorities to deny a prisoner's grievance was unreasonable.[35] The grievance in question related to various strip searches and the prolonged detention of a prisoner during an institutional transfer. In denying the grievance, the decision maker noted that the Correctional Service of Canada (CSC) complied with the relevant internal policies and guidelines (such as the CSC's *Guidelines on Inter-Regional Transfers by Air*).[36]

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[27] *Ibid* at para 72 [emphasis added].
[28] 2013 SCC 36 at para 28, citing *Baker*, *supra* note 25 at para 72 [*Agraira*].
[29] 2019 SCC 65 at para 130 [*Vavilov*].
[30] *Ibid.*
[31] *Ibid* at para 131.
[32] *Ibid*.
[33] See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 32, 35 [*Loyola*].
[34] *Ibid* at para 39.
[35] 2018 FCA 175 [*Ewert* FCA].
[36] See *Ewert v Canada (Attorney General)*, 2018 FC 47 at para 10.

Justice Rennie, writing for the Federal Court of Appeal, held that the authorities were required to balance the protection flowing from sections 8 and 9 of the *Charter* with the relevant legislation and CSC policies.[37] In this case, Justice Rennie concluded:

> I am not satisfied that this was done. The [decision maker's] reasons for denying the appellant's grievance reflect a religious application of CSC policies. The reasons do not reveal, either explicitly or implicitly, any consideration of *Charter* values, let alone the balancing exercise which the jurisprudence requires.[38]

This failure to balance competing *Charter* values rendered an administrative decision made with reference to a soft law instrument unreasonable.

2. Challenging the Soft Law Instrument Itself

As illustrated by the previous section, legal disputes involving soft law instruments often proceed by challenging the resulting administrative decision rather than the soft law that gives rise to the decision. However, the jurisprudence reveals three sets of circumstances where the soft law instrument itself has been challenged: first, where the body issuing the soft law instrument in question exceeds its jurisdiction;[39] second, where the soft law instrument itself fetters administrative discretion; and third, where the soft law instrument violates the *Charter*.

i. Jurisdictional Challenges

Soft law has been challenged on jurisdictional grounds. In *Creelman v. Canada (Attorney General)* ("*Creelman*"), an inmate sought judicial review of the rejection of his grievance.[40] The court accepted the applicant's argument that the directive relied upon by the delegate effectively altered the regulations under the *Corrections and Conditional Release Act* (*CCRA*).[41] The court found the resulting decision to be unreasonable on this basis; however, Justice Zinn also went further by stating that a portion of the directive was "invalid" for conflicting with the *CCRA*'s regulations.[42]

A similar analysis was applied in *Ainsley.*[43] That case concerned a policy statement of the Ontario Securities Commission that applied to penny stocks.[44] A group of securities dealers challenged the policy on the basis that the Commission lacked jurisdiction to issue it.[45] The court held that the Commission had authority to implement non-statutory instruments but not mandatory requirements.[46] According to Justice Doherty, the policy in question constituted a "de facto legislative scheme" that was imposed without appropriate statutory authority.[47] The policy was therefore declared invalid.[48]

Issues of jurisdiction can also overlap with the issue of fettering discretion. In *Ishaq v. Canada (Citizenship and Immigration)* ("*Ishaq*"), the Federal Court of Canada considered a policy

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[37] See *Ewert* FCA, *supra* note 35 at paras 14, 19.
[38] *Ibid* at para 20.
[39] See *Creelman v Canada (Attorney General)*, 2018 FC 1033 [*Creelman*].
[40] *Ibid*.
[41] *Ibid* at para 32.
[42] *Ibid* at paras 27, 30, 33.
[43] *Supra* note 23.
[44] *Ibid* at 80-81.
[45] *Ibid* at 81.
[46] *Ibid* at 84.
[47] *Ibid* at 86.
[48] *Ibid*.

manual that required candidates to remove face coverings when taking their citizenship oath.[49] The court held that the policy, which was presented as mandatory, constrained a citizenship judge's scope of action in a manner contrary to the *Citizenship Regulations.*[50] The policy was therefore declared invalid.[51]

ii. Challenges for Fettering Discretion

As demonstrated in *Ishaq*, soft law can also be challenged on the basis that it fetters the exercise of administrative discretion. When public servants do not consider soft law as a tool, but rather treat it as determinative of the decision, courts have intervened to quash the resulting decision or invalidate the guideline itself.

The leading case on fettering discretion is *Kanthasamy v. Canada (Citizenship and Immigration).*[52] In that case, the Court considered guidelines developed to assist decision makers with exercising their broad discretion to exempt people from the consequences of the *Immigration and Refugee Protection Act* (*IRPA*) on humanitarian and compassionate grounds. Justice Abella, writing for the Court, acknowledged the role of guidelines in promoting reasonable administrative decision making.[53] However, she emphasized that guidelines "are 'not legally binding' and are 'not intended to be…exhaustive or restrictive.'"[54] While decision makers may consider the guidelines, "[t]hey should not fetter their discretion by treating these informal [g]uidelines as if they were mandatory requirements."[55] The Court found that the decision maker erred by treating the guidelines as a "distinct legal test,"[56] which "limit[ed] [their] ability to consider and give weight to *all* relevant…considerations in a particular case."[57] The decision was therefore unreasonable because the decision maker fettered her discretion.[58]

Not all fettering arguments are successful, however. In *Canada (Attorney General) v. Mavi*, the Court considered the validity of an Ontario policy that enforced the payment of sponsorship debts under the *IRPA*.[59] The Court held that the policy was not invalid because the procedure adopted by Ontario was compatible with the enabling statute,[60] without conflicting with the intended scope of the decision maker's discretion.[61] The importance of policy as a guide to public servants was recognized by the Court, as was the Minister's entitlement to set policy within legal limits.[62]

In *Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration)* ("*CARL* FC"), the Federal Court found that certain "jurisprudential guides" were invalid, in part, because they would have the effect of fettering discretion.[63] The Federal Court of Appeal disagreed

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[49] 2015 FC 156 [*Ishaq* FC], aff'd 2015 FCA 194 [*Ishaq* FCA].
[50] *Ibid* at paras 52-53.
[51] *Ibid* at para 57.
[52] 2015 SCC 61.
[53] *Ibid* at para 32.
[54] *Ibid*.
[55] *Ibid.*
[56] *Ibid* at para 45.
[57] *Ibid* at para 33 [emphasis in original].
[58] *Ibid* at para 45.
[59] 2011 SCC 30 at para 66.
[60] *Ibid* at para 44.
[61] *Ibid* at para 65.
[62] *Ibid* at para 66.
[63] 2019 FC 1126 at paras 171-74 [*CARL* FC].

and found the guides did not fetter discretion.[64] According to the Court of Appeal, the decision makers "should be expected to know" that soft law does not constrain their decision making:

> [I]t is worth reiterating that the word "guide" itself connotes the idea of a general norm, or a tool, not meant to determine the result of any particular case: *Thamotharem*, at para. 66.…*Moreover, and quite apart from this Policy and the various policy notes accompanying the designated JGs, Board members should be expected to know the well established legal principle that soft law tools such as guidelines are non-binding. It appears…that Board members are instructed on the appropriate use of JGs (Appeal Book, p. 1674), and the training material [includes similar] cautions.*[65]

Taken together, these decisions affirm that courts may invalidate soft law to the extent that such instruments improperly fetter discretion—in other words, where they are being treated as "hard law" to the exclusion of other relevant considerations. But where a soft law instrument is presented to decision makers as non-binding, a fettering case may be difficult to make out on the facts.

iii. *Charter* Challenges

In some circumstances, soft law has also been challenged for failing to comply with the *Charter*. The issue of *Charter* applicability to soft law is a complex one, even if the answer, at first blush, may seem obvious. Can soft law continue to guide decisions if its content constitutes a breach of the *Charter*, section 35 of the *Constitution Act, 1982*, or the division of powers under sections 91 and 92 of the *Constitution Act, 1867*? Canadian courts have struggled to find a coherent answer to this question.

a. Starting Point: *Little Sisters*

The starting point for this analysis is the Court's landmark decision, *Little Sisters.*[66] This case suggests that where an impugned instrument is not "law," then it falls outside the sphere of *Charter* scrutiny.

Little Sisters was a book shop that specialized in importing and selling LGBTQ material. In *Little Sisters*, the discretionary authority at issue was the power of customs officials to seize imported goods that met the test for obscenity under the *Criminal Code*.[67] The *Customs Act*[68] and *Customs Tariff*[69] authorized custom officials to detain and prohibit material deemed to be obscene. The application of the obscenity standard was further guided by two internal policy documents: Memorandum D9-1-1 and its companion illustrated manual.[70]

Little Sisters challenged several provisions of the *Customs Act* and *Customs Tariff* as infringing their section 2(b) and 15(1) rights under the *Charter*.[71] In the course of Justice Binnie's judgment, he noted that "[t]he evidence established that for all practical purposes Memorandum D9-1-1, and especially the companion illustrated manual, governed Customs' view of

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[64] *CARL* FCA, *supra* note 15 at para 88.
[65] *Ibid* at para 86 [emphasis added].
[66] *Little Sisters*, *supra* note 2. For a comment on this decision, see Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) 45 Can Public Administration 465 at 474-83.
[67] *Little Sisters*, *supra* note 2 at paras 16-18.
[68] RSC 1985, c 1 (2nd Supp).
[69] SC 1997, c 36.
[70] See *Little Sisters*, *supra* note 2 at para 25.
[71] *Ibid* at para 21.

obscenity."[72] Despite this, Justice Binnie concluded that the manual itself was not law and could not be subject to *Charter* scrutiny in its own right:

> [T]he trial judge put too much weight on the Memorandum, which was nothing more than an internal administrative aid to Customs inspectors. It was not law.…a defective Memorandum D9-1-1 may have directly *contributed* to a denial of constitutional rights. *It is the statutory decision, however, not the manual, that constituted the denial. It is simply not feasible for the courts to review for* Charter *compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated.*[73]

In this passage, the Court expressed an unwillingness to review soft law for *Charter* compliance because the sheer number of soft law instruments make judicial oversight impracticable. This has the effect of insulating soft law from *Charter* scrutiny by redirecting the inquiry to a specific statutory decision rather than the instrument itself.

b. Complicating the Picture: *Greater Vancouver Transportation Authority*

Since the decision in *Little Sisters*, courts have continued to grapple with the practical effects of soft law on *Charter* rights. Although *Little Sisters* expressly indicates that soft law instruments typically fall outside the scope of *Charter* review, the Court's position on this issue is complicated almost a decade later. In *Greater Vancouver Transportation Authority*, the Court held that soft law policies may qualify as "law" and must comply with the *Charter*.[74]

The applicants in that case sought to purchase advertising space for political messaging on public transit vehicles.[75] The transit authorities' advertising policy restricted this type of advertising.[76] The applicants commenced an action alleging that certain articles of the transit authorities' policies violated their right to freedom of expression under section 2(b) of the *Charter*.[77]

Justice Deschamps, writing for the majority, began her analysis by considering whether the *Charter* applied to the transportation authority pursuant to section 32 of the *Charter*. Justice Deschamps concluded that the transit authority fell within the purview of section 32, noting the dangers of creating a "*Charter*-free" zone of delegated authority:[78]

> [A] government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity.…The devolution of provincial responsibilities for public transit…cannot therefore be viewed as having created a "*Charter*-free" zone for the public transit system in Greater Vancouver.[79]

Having concluded that the decision maker fell within the purview of section 32 of the *Charter*, Justice Deschamps treated the application of the *Charter* to their advertising policies as axiomatic, writing:

> *Since I have established that, for the purposes of s. 32 of the* Charter, *the transit authorities are government entities, it follows that the* Charter *applies to all their activities*, including the operation of the buses they own.[80]

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[72] *Ibid* at para 84.
[73] *Ibid* at para 85 [emphasis added].
[74] *Greater Vancouver Transportation Authority*, *supra* note 4.
[75] *Ibid* at para 3.
[76] *Ibid* at para 4.
[77] *Ibid* at para 5.
[78] *Ibid* at para 22.
[79] *Ibid*.
[80] *Ibid* at para 25 [emphasis added].

Justice Deschamps then considered the advertising policies' compliance with section 2(b).[81] She concluded that "the transit authorities' policies limit the respondents' right to freedom of expression under s. 2(*b*)."[82] Accordingly, "the government must justify that limit under s. 1 of the *Charter*."[83]

Justice Deschamps held that the impugned policies were "prescribed by law" for the purposes of section 1 of the *Charter*. Justice Deschamps drew a distinction between rules that are legislative in nature and rules that are administrative in nature and wrote:

> Where a policy is not administrative in nature, it may be "law" [for the purposes of s. 1 of the *Charter*] provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.
>
> Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law."[84]

Justice Deschamps concluded that the transportation authorities' advertising policies are an example of rules that are legislative in nature and thus fall within the purview of section 1 of the *Charter*. According to Justice Deschamps, "Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding."[85] In her view, this was not a case of administrative policies that are "meant for internal use as an interpretive aid for 'rules' laid down in the legislative scheme."[86] Rather, the policies at issue were "*themselves* rules that establish the rights of the individuals to whom they apply," and were sufficiently "accessible and precise."[87] These guidelines therefore fell within the scope of the "prescribed by law" requirement under section 1 of the *Charter*.

In *Greater Vancouver Transportation Authority*, the majority complicates the treatment of soft law in *Little Sisters* in two ways. First, unlike *Little Sisters*, *Greater Vancouver Transportation Authority* indicates that where the body issuing soft law qualifies as "government" for the purposes of section 32 of the *Charter*, the soft law issued by that body must comply with the *Charter*.[88] Second, Justice Deschamps introduces a distinction between administrative and legislative soft law and indicates that the latter qualifies as "law," at least for the purpose of a section 1 analysis. By embedding one binary (legislative versus administrative) within another (hard law versus soft

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[81] *Ibid* at paras 26-47.
[82] *Ibid* at para 47.
[83] *Ibid*.
[84] *Ibid* at paras 64-65.
[85] *Ibid* at para 71.
[86] *Ibid* at para 72.
[87] *Ibid* at paras 72-73 [emphasis added].
[88] *Ibid* at para 16.

law), this case illustrates the elusive but unsuccessful search for clear and consistent boundaries between instruments that bind decision makers and those that do not.

c. Resulting Jurisprudential Uncertainty

On this question of the application of the *Charter* to soft law, lower courts have been left to grapple with the differing approaches in *Little Sisters* and *Greater Vancouver Transportation Authority*. In line with *Greater Vancouver Transportation Authority*, there are several cases that support the application of the *Charter* to soft law instruments. For example, in *Canada (Citizenship and Immigration) v. Kandola*, the Federal Court of Appeal suggested in the *obiter* that an operational bulletin might be susceptible to a *Charter* challenge on the basis that it calls for unequal treatment of children of Canadian parents, depending on the manner in which a child is conceived.[89]

A similar approach was applied in the Ontario Superior Court of Justice decision *Langenfeld*.[90] In *Langenfeld* (discussed in the introduction, above), the court held that a "practice" instituted by the Chief of Police to require those entering the police headquarters to submit to a search unjustifiably infringed section 2(b) of the *Charter*.[91] More recently, in *R. v. Moazami*, the British Columbia Court of Appeal adjudicated a constitutional challenge pertaining to its record and courtroom access policy.[92] The court concluded that the impugned section did not breach section 2(b) of the *Charter*.[93]

By contrast, other courts have displayed reluctance at the prospect of reviewing soft law instruments for *Charter* compliance. For example, in *Robinson v. Canada (Attorney General)*, the applicant initiated a *Charter* challenge to a fisheries licensing policy in the Nova Scotia Supreme Court.[94] The applicant argued that the policy, which limited his ability to secure a medical substitute operator authorization, infringed section 15 of the *Charter*.[95]

The primary issue in *Robinson* was one of jurisdiction. While the Nova Scotia Supreme Court can decide *Charter* challenges to federal and provincial *legislation*, the Federal Court has exclusive jurisdiction over the manner in which federal decision makers *exercise discretion*.[96] As a result, the characterization of the applicant's challenge had significant jurisdictional consequences.

Relying on *Greater Vancouver Transportation Authority*, the applicant argued that the Superior Court had jurisdiction because the policy was treated as binding and was thus akin to legislation.[97] The court rejected this argument, instead characterizing the application as a challenge to the manner in which the Minister exercised discretion.[98] In doing so, the court distanced itself

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[89] 2014 FCA 85 at paras 70, 75.
[90] *Langenfeld*, *supra* note 9.
[91] *Ibid* at para 157. However, this case has the added wrinkle of a jurisdictional issue; the court drew a distinction between a "policy" and "practice," observing that only the latter was reviewable under the *Charter* by a court of inherent jurisdiction (*ibid* at paras 35, 38). According to Justice Copeland, a "policy" would relate to an issue of the exercise of a "statutory power of decision" and would instead fall within the jurisdiction of the Ontario Divisional Court (*ibid* at paras 38, 40).
[92] 2020 BCCA 350.
[93] *Ibid* at para 118.
[94] 2018 NSSC 37 [*Robinson*].
[95] *Ibid* at para 2.
[96] *Ibid* at para 12.
[97] *Ibid* at paras 23-25.
[98] *Ibid* at paras 22-33.

from the statement in *Greater Vancouver Transportation Authority* that policies that are "legislative in nature" can attract free-standing review for compliance with the *Charter*.

Other cases have sidestepped the issue of *Charter* review entirely. In *Ishaq* (see Part I(B)(2)(i), above), the applicant challenged a mandatory policy to remove face coverings as contrary to sections 2(a) and 15 of the *Charter*.[99] Both the Federal Court of Canada and the Federal Court of Appeal invalidated the policy on jurisdictional grounds and declined to adjudicate the *Charter* issues on the basis of judicial economy.[100]

Another line of cases has linked the review of soft law to a different binary analysis—whether a challenge impugns action of a sufficiently public character to meet the threshold for judicial review established in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*.[101] In *Sprague v. Her Majesty the Queen in right of Ontario*, the Ontario Divisional Court considered a challenge to a hospital policy and related memorandum that restricted visitors during the early weeks of the COVID-19 pandemic.[102] The court held that the policy was not sufficiently public to attract judicial review for *Charter* compliance:

> Even where the decision at issue is exercised under a statutory power, the case law has established that judicial review is only available where the decision is also "the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied". In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, the Supreme Court explained the limited reach of public law and judicial review and the conjunctive two-step process as follows:
>
> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is *only available where there is an exercise of state authority and where that exercise is of a sufficiently public character*. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review: *Air Canada v Toronto Port Authority*. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority. (emphasis added)
> …
> These factors lead me to the conclusion that the Visitor Policy to restrict visitors during the COVID-19 pandemic did not involve the exercise of a statutory authority nor is it of a sufficiently "public" character (in the public law sense of the word) to meet the test for judicial review.[103]

The court reached a similar finding in relation to the impugned Chief Medical Officer of Health for Ontario (CMOH) Memorandum, stating:

> The CMOH Memorandum does not constitute an exercise or purported exercise of a statutory power. It was not issued pursuant to statutory authority, nor was such authority necessary. The CMOH Memorandum has no legal force. It does not statutorily compel any person or party to take or refrain from taking any action. The CMOH Memorandum instead merely provides the CMOH's recommendation that hospitals limit visitors to "essential visitors" in order to prevent the spread

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[99] *Ishaq* FC, *supra* note 49; *Ishaq* FCA, *supra* note 49.
[100] *Ishaq FC*, *supra* note 49 at paras 66-67; *Ishaq FCA*, *supra* note 49 at para 5.
[101] 2018 SCC 26 (in which a decision by a religious community to expel a member of the congregation was held not to be of a sufficiently public character to be eligible for judicial review).
[102] 2020 ONSC 2335.
[103] *Ibid* at paras 22, 24.

> of COVID-19. While it is expected that hospitals will follow the CMOH's recommendation, they are not statutorily compelled to do so.[104]

Taken together, these cases indicate that the application of the *Charter* to soft law instruments remains unsettled terrain.

3. Challenging the Legislation or Executive Action That Gives Rise to the Soft Law Instrument

Rather than reviewing the soft law instrument itself, courts have in some cases focused their analysis on the enabling legislation or executive action that gave rise to the soft law at issue.

In some cases, issues involving soft law have been framed as questions of statutory interpretation. In *Schmidt v. Attorney General of Canada*, the applicant sought to challenge the procedure by which the Minister of Justice would issue a report that a proposed law was inconsistent with the *Charter*.[105] The applicant submitted that the Minister had adopted too high a reporting threshold. The Federal Court of Appeal held that, in effect, this was an application for judicial review of the Minister's statutory interpretation of the reporting threshold (as set out in the *Statutory Instruments Act* and the *Department of Justice Act*).[106] The threshold adopted by the Minister was determined to be reasonable and the application was therefore dismissed.[107]

Under a legislative-based analysis, a soft law instrument is sometimes viewed as an illustration of how the *legislation itself* breaches a constitutional standard. For example, in *Canadian Civil Liberties Association v. Canada (Attorney General)*,[108] the court held that a violation of inmates' section 12 *Charter* rights did not arise from regulations, directives, and policies that provided for administrative segregation.[109] Rather, the section 12 violation arose from the lack of procedural safeguards in the *CCRA* itself.[110] While this legislative focus sometimes allows courts to address the root of a *Charter* issue, it can run the risk of allowing soft law instruments to disappear from judicial view.

Ultimately, the case law illustrates how soft law can emerge in a variety of ways on review. It can be the impetus behind an administrative decision; the product of enabling legislation; or, in some instances, the object of review in and of itself.

C. Procedural Review of Soft Law

In addition to substantive review, soft law may also attract judicial review on procedural grounds. Most often, such challenges allege that decision makers failed to follow applicable procedural guidelines.[111]

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[104] *Ibid* at para 31.
[105] 2018 FCA 55.
[106] *Ibid* at paras 19-22.
[107] *Ibid* at para 106.
[108] 2019 ONCA 243 [*Canadian Civil Liberties Association*].
[109] These are described in further detail in *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 at para 76.
[110] *Canadian Civil Liberties Association*, *supra* note 108 at paras 116-19.
[111] See generally Lorne Sossin & France Houle, "Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 Canadian Public Administration 283.

In *Agraira*,[112] for example, the Court accepted that procedural guidelines may give rise to legitimate expectations that a particular procedure will be followed by decision makers.[113] Therefore, the failure to follow a procedural guideline can give rise to a remedy, even if the guideline sets out a higher procedural standard than required under the administrative law duty of fairness.

In *Thamotharem*, in addition to the arguments on fettering discretion canvassed in Part I(A), above, the Federal Court of Appeal also examined whether the impugned guideline (which encouraged the reversal of the order of submissions before the Immigration and Refugee Board) constituted a breach of fairness.[114] The court found that the reversal of order itself was not a violation of the right to an oral hearing, though it could constitute a breach of fairness in particular cases where the circumstances require an exception to the application of the guideline.[115] Therefore, the fact that Board members were not required to follow the guideline, though expected to justify departures from it, was held to be consistent with the Board's duty of fairness.

Another basis for procedural challenges that engage soft law relates to the requirement of administrative independence by decision makers. This aspect of the duty of fairness requires that individual adjudicators be at liberty to hear and decide cases before them, without interference in the way in which a case is conducted or the manner in which a final decision is made.[116] This ground of accountability for soft law is closely related to the substantive ground of fettering discretion.

The standard for administrative independence in the context of soft law would be whether the wording of a guideline or the reliance by a decision maker on a guideline gives rise to a reasonable apprehension of bias.

In *CARL* FC (discussed in Part I(B)(2)(ii), above), the Federal Court held that a guideline may infringe the independence required of adjudicators "where an administrative guideline or other tool goes beyond simply drawing attention to factual information or encouraging Board members to take it into account, and instead requires, induces, pressures, or coerces them to make or to follow particular factual findings."[117]

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[112] *Supra* note 28 at paras 93-102.

[113] See also *Bezaire (Litigation Guardian of) v Windsor Roman Catholic Separate School Board* (1992), 94 DLR (4th) 310 (Ont Ct J).

[114] *Supra* note 15.

[115] *Ibid* at para 51.

[116] See *e.g. Beauregard v Canada*, [1986] 2 SCR 56 at 69; *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 332-35.

[117] See *CARL* FC, *supra* note 63 at para 92. After a detailed review of their content, Crampton CJ of the Federal Court held that several portions of the jurisprudential guides crossed this line. They represented findings of fact that were effectively imposed on Immigration Review Board members, and thereby infringed their independence. See *e.g. ibid* at para 140 (for his findings with respect to the jurisprudential guide (JG) for Pakistan):

> Given the foregoing, I consider that at least some Board members in a future case with facts similar to those in the Pakistan JG would not feel completely free to decide the case according to his or her own conscience. On the contrary, some Board members are likely to feel pressure to adopt as his or her own findings the factual determinations the RAD [Refugee Appeal Division] appears to have made … As a result, their discretion to make factual findings would be unlawfully fettered and their adjudicative independence would be improperly constrained or encroached upon. In brief, those Board members would not be entirely free to make determinations with respect to the facts in question, completely free and in accordance with his or her own conscience. Moreover, at least some members of the public would likely reasonably apprehend that some members of the Board would feel pressured in this way and would therefore not be entirely impartial.

The Federal Court of Appeal reversed this finding and concluded that the use of jurisprudential guides did not raise a reasonable apprehension of bias as decision makers; see *ibid* at paras 92-101.

In sum, there are a number of ways in which soft law may engage a procedural fairness analysis. Here again, however, the focus of the analysis is primarily on the question of whether the guideline is, in practice, treated as binding or non-binding.

This binary model arises again when considering the remedies available on judicial review involving soft law, to which we now turn.

D. Remedies

There is a lack of clarity as to which remedies are available when soft law is implicated on review. Moreover, at the remedial stage, the distinction between challenging an administrative decision and challenging the soft law instrument giving rise to the decision often becomes blurred.

1. Modifying or Supplementing Soft Law

Where an administrative decision made pursuant to soft law is the subject of review before the courts, an applicant may argue that the administrative decision itself is unreasonable. In such circumstances, if the judicial review succeeds, the court will typically quash the decision and remit the matter for reconsideration. In such cases, the court does not directly alter the soft law instrument linked to the decision. However, such a challenge may also highlight a reasonableness flaw in the guideline itself.

This point is illustrated in *Baker*, described in Part I(B)(1), above.[118] In that case, the Court concluded that an immigration officer's deportation decision was unreasonable for, *inter alia*, failing to take the best interests of the applicant's children into account.[119] Although the relevant Ministerial guidelines did not reference the best interests of the child as a consideration, the majority concluded that "the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred [by section 114(2) of the *Immigration Act*]."[120]

By finding the immigration officer's decision unreasonable on this basis, the Court effectively "wrote in" the best interests of a child as a consideration in humanitarian and compassionate decisions. The *Baker* decision spurred the development of an operational bulletin; this soft law instrument addressed *Baker* and altered the weight given to the best interests of the child in immigration and refugee decision making, both in and outside the humanitarian and compassionate setting.[121] By holding that a specific administrative decision was unreasonable, the Court thus effectively modified the soft law framework by which immigration officers make decisions more generally.

Baker suggests that although there is a theoretical distinction between judicially reviewing a soft law instrument or an administrative decision pursuant to that instrument, the remedial impacts of a successful application are not so easily distinguished. In practice, an application to review an administrative decision may indirectly alter the soft law framework that gave rise to the decision. In this way, when courts judicially review an administrative decision, the remedial effects of a successful application often extend beyond the scope of the specific decision on review.

To blur this distinction even further, some courts have *directly* modified a soft law instrument through judicial declarations. For example, in *Bilodeau-Masse v. Canada (Procurer*

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[118] *Supra* note 25.
[119] *Ibid* at paras 65-75.
[120] *Ibid* at para 65.
[121] Lorne Sossin, "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Hart, 2004) 87 at 118.

general) ("*Bilodeau-Masse*"), the Federal Court of Canada issued a declaratory judgment that effectively supplemented a policy manual.[122]

At issue in the *Bilodeau-Masse* case was the constitutionality of provisions of the *CCRA*, which granted the Parole Board of Canada discretion to refuse to hold an in-person hearing in certain circumstances. The applicant requested an in-person hearing because he had an intellectual disability.[123] The Board, relying in part on a policy manual, refused to hold an in-person hearing.[124] The applicant sought judicial review of the Board's decision.

The court granted declaratory relief, stating that the Board must comply with the principles of fundamental justice and hold an oral hearing in specific circumstances.[125] Justice Martineau's declaratory judgment guides how the Board should exercise discretion before refusing to hold an in-person, post-suspension meeting with the offender. This declaration, effectively, supplemented the policy manual.

In both *Baker* and *Bilodeau-Masse*, the subject matter on review was a *specific* decision—yet the ramifications of the judicial review directly supplemented soft law instruments of broader applicability. In this way, the theoretical distinction between a specific exercise of discretion and the instrument guiding that discretion often dissolves at the remedial stage.

2. Invalidating Soft Law

In addition to modifying or supplementing soft law, some courts have gone even further and held soft law to be invalid. For example, in *Creelman*,[126] the court held that an administrative decision was unreasonable because it relied upon an "invalid" directive.[127] The directive at issue, which permitted the commissioner to reject inmates' grievances if they were frivolous or vexatious, was held to be an unlawful expansion of the administrative discretion conferred by regulation.[128] In the course of making such a finding, the court stated that the paragraph of the directive giving rise to the decision was invalid.[129]

Similarly, in *Langenfeld*, Justice Copeland declared that the practice of searching members of the public in the absence of reasonable and probable grounds before permitting their entry into police headquarters was an unjustifiable infringement of the *Charter*.[130]

The declaration of invalidity was even more explicit in *Greater Vancouver Transportation Authority*, discussed in Part I(B)(2)(iii)(b), above. In that case, Court ordered that pursuant to section 52(1) of the *Constitution Act, 1982*, the transit authorities' policies were of no force and effect to the extent of their inconsistency with section 2(b) of the *Charter*.[131]

While the practical effects of soft law remedies may revise, supplement, or invalidate the guidelines involved, courts have refrained from issuing orders that compel executive bodies to develop or modify guidelines themselves. As Justice Binnie put it in *Little Sisters*, flawed soft law may represent "maladministration," but cannot in itself constitute an unlawful breach.[132] It is this

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[122] 2017 FC 604.
[123] *Ibid* at para 23.
[124] *Ibid* at para 174.
[125] *Ibid* at para 178.
[126] *Supra* note 39.
[127] *Ibid* at paras 33, 43.
[128] *Ibid* at para 15.
[129] *Ibid* at para 33.
[130] *Supra* note 9 at para 157.
[131] *Supra* note 4 at para 90.
[132] *Supra* note 2 at para 71.

premise, in our view, that has held back decision makers and courts from developing an appropriate account of the role of soft law in our legal system.

E. Conclusion

The sections above demonstrate the many ways that judges have grappled with soft law. Courts are struggling to develop a cohesive analytic framework to address accountability over how soft law is used in discretionary decision making. Without a framework to guide assessments of soft law, it is sometimes easy to revert to the default position that soft law is non-binding executive policy, and thus largely lies beyond the scope of judicial intervention.

In our view, however, judicial analysis should not simply amount to a formalist exercise of categorizing soft law. Indeed, there is a movement in the recent jurisprudence towards more nuanced assessments of soft law in context. From the emergence of the doctrine of legitimate expectations to the recent expansion of *Charter* review, courts are adopting novel approaches to respond to the influence of soft law in practice.

Building on these new jurisprudential approaches, we propose a new analytical framework to assist judges in characterizing and responding to soft law.

II. TOWARDS A FRAMEWORK FOR REVIEWING SOFT LAW

As illustrated in the preceding discussion, a dichotomy of "soft law" versus "hard law" poses theoretical challenges. Soft law is far from a monolith of non-binding policy instruments. Soft law is capable of functioning both as a binding legal instrument and as a suggestive administrative aid in the exercise of discretion. Soft law may be almost always followed, almost never followed, sometimes followed, or followed only in specific contexts. All of these different degrees and dynamics of soft law's influence ought to be taken seriously so that the instruments that *actually* shape public decision making may also shape legal accountability for that decision making.

In order to address these variations in the influence of soft law, we ought to move beyond the reductive dichotomy of hard versus soft law and begin to address soft law on its own terms. In line with this approach, we endorse recent jurisprudential efforts to bring soft law squarely within the scope of reviewability by the courts. For example, assessments of whether soft law complies with the *Charter* help to ensure that soft law does not become a back door to effect policy changes unfettered by constitutional constraints.

However, enhancing judicial oversight of soft law brings new theoretical challenges. In particular, courts currently lack a principled framework to characterize soft law and fashion a responsive remedy. To help fill this gap, we propose a new framework to assist in conceptualizing and responding to soft law in its various instantiations.

A. Characterizing Soft Law

In our view, the key to reviewing soft law is appreciating its impact, and not just its origins. All soft law instruments should be understood as falling along a "spectrum of authoritativeness." This spectrum arises not as a function of the source of soft law, but rather as a function of its influence. That is to say, a more formally issued soft law instrument that appears to guide decision making may in fact be routinely ignored, while an informal statement of policy or practice may be treated as a de facto requirement by administrative decision maker.

As to where on this spectrum a particular soft law instrument should be placed, the key question is an empirical one—how is the soft law instrument actually used? To answer this question, we propose that courts consider the extent to which the soft law shapes the discretion of

decision makers and the culture of decision making in a public body. This includes the extent to which the public body requires compliance with the guideline (for example, where training, education, or internal accountability mandates compliance), bearing in mind that soft law may harden or loosen over time.

At one of end of the spectrum are authoritative instruments, which will normally be followed unless there is a clear and justifiable exceptional reason for a departure from the policy. In the education context, one example is university codes of conduct for students, staff, and faculty. These codes reflect university values such as academic freedom and open discourse, as well as policies and procedures designed to protect community members from harm and promote the well-being of the community. They are issued broadly within the authority granted to universities by legislation. It is clear they are intended to guide conduct and give rise to consequences for non-compliance.

At the other end of the soft law spectrum are aspirational instruments that are intended to reflect or signal values and preferences, but which have little (if any) actual impact on decision makers. For example, universities have adopted policy instruments which commit them as institutions to end racism, address climate change, or pursue reconciliation, but these do not come with the same enforcement mechanisms, for example, as a code of conduct.

Ultimately, regardless of the specific public law context, a spectrum approach ensures that courts have an expansive and flexible framework to consider soft law in its various instantiations. Whether a court is reviewing soft law for exceeding jurisdiction, fettering discretion, or breaching the *Charter*, the spectrum approach equips courts with the tools to capture and assess the effects of a soft law instrument in context. This approach may have practical implications on the outcome of judicial analysis; for example, a soft law instrument that is treated as binding may produce *Charter* violations by removing administrative discretion, whereas a merely suggestive instrument would not. Under the spectrum approach, courts will have the tools to capture and assess soft law on its own terms.

B. Fashioning a Remedy

A related difficulty when assessing soft law is fashioning an appropriate judicial response. As outlined above, judges have a wide range of remedial options where a soft law instrument raises issues; these range from ordering *certiorari*, to supplementing the impugned soft law instrument, to declaring it to be invalid. At present, there is little guidance provided to courts in selecting from the menu of remedial options available.

While we have stressed the importance of subjecting soft law to meaningful judicial accountability, courts must also remain cognizant of the division of powers and respect the limits of the judiciary's function in the sphere of executive policy making. As noted in *Dunsmuir v. New Brunswick*, in the context of discussing judicial review:

> Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.[133]

To respect these principles, we propose that the selection of an appropriate remedy should be guided by three soft law factors: (1) influence; (2) legitimacy; and (3) impact on affected rights holders. In our view, highly interventionist remedies (such as declarations of invalidity) should

[133] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27.

generally be reserved for cases where a soft law is highly influential, is *ultra vires*, or has significant impacts on affected rights holders.

The first consideration, influence, is relevant at the remedial stage because it encourages courts to respond to the soft law's practical impact. Where soft law is highly influential on a decision maker, its impacts are similar to those of a formal legal instrument. In such cases, appropriate remedies may be akin to those applied to impugned laws; these include declarations of invalidity or modifications to the language used in soft law (for example, where soft law violates the *Charter* or exceeds jurisdiction). By contrast, where soft law has less influence over such decision making, appropriate remedies may align more closely with those remedies associated with specific *exercises* of discretionary decision making. These include *certiorari* (quashing a decision), or, more rarely, *mandamus* (compelling the performance of a legal duty). Rather than solely focusing on the administrative decision at issue or the legislation according administrative discretion, we suggest that the soft law itself should form part of the legal analysis and channel the focus of the resulting remedy.

The second consideration, legitimacy, relates to the jurisdictional basis for administrative acts. The rule of law dictates that *all government action* must comply with the law; as stated by the Supreme Court of Canada, "[T]he exercise of all public power must find its ultimate source in a legal rule."[134] As noted by Paul Daly, "[C]ourts have concluded [that] administrative bodies should not be able to expand the limits of their constitutional mandates by making representations that are beyond their powers."[135] To do so would be *ultra vires*, and could, in our view, warrant a declaration of invalidity. As an example, in *Creelman*, discussed in Part I(B)(2)(i), above, the court declared a Commissioner's directive to be invalid for exceeding the Commissioner's jurisdiction and conflicting with the *CCRA*'s *Regulations*.[136]

The third consideration when selecting a remedy is the impact of soft law on affected rights holders. As noted by Chief Justice McLachlin, "[A] right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[137] As guardians of the Constitution, the judiciary plays a vital role in ensuring that those rights are adequately protected.[138] Thus, where soft law infringes on constitutional rights, the judiciary must be empowered to respond in a manner that protects those rights. For example, in *Langenfeld*, a declaration of invalidity was warranted where the impugned soft law mandated searches in a manner that unjustifiably infringed on the *Charter*.[139]

These three inquiries—influence, legitimacy, and impact on rights holders—are interrelated. Soft law that is more influential will give rise to closer jurisdictional scrutiny and will often have a measurable impact on affected rights holders. By contrast, non-binding declarations of policy are less likely to threaten those legal principles. In any event, where one or more of these factors are engaged (*i.e.*, where soft law is highly influential, unlawful, or has a significant impact on rights holders), the Court's fundamental functions (safeguarding rights and promoting the rule of law) are centrally engaged, and more interventionist remedies will often be warranted.

In sum, the spectrum approach empowers courts to account for the wide variation in soft law instruments. In applying this approach, however, courts should be cognizant of the fact that

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[134] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72.
[135] Paul Daly, "A Pluralist Account of Deference and Legitimate Expectations," in Groves & Weeks, *supra* note 8 at 118.
[136] *Supra* note 39.
[137] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 20.
[138] *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 88.
[139] *Supra* note 9 at para 157.

soft law is fluid, and the very act of judicial analysis can alter its application. For example, in some cases, the very act of finding that soft law passes judicial scrutiny may prove remedial in the sense that it modifies soft law's subsequent application. To illustrate, consider an administrative policy that prescribes conditions for awarding a licence without regard to disability. The court may find that this soft law does not violate the *Charter* by noting that "nothing in this policy should be read as restricting decision makers from accommodating applicants with disabilities." This judicial statement, standing alone, may encourage administrative decision makers to direct their mind to accommodating disabilities when exercising discretion under the policy. In this way, the act of judicial analysis can perform a remedial function by shaping how administrative decision makers apply soft law in practice.

C. Conclusion

While the spectrum approach equips judges with new analytical framework to assist in reviewing soft law, there are questions that remain to be explored. When, for example, should courts review soft law for violating *Charter* rights (an approach applied to legislation) or for failing to proportionately balance *Charter* values (an approach applied to administrative decision making)? Another related inquiry is whether a remedy should be awarded under section 52 of the *Charter* instead of section 24(1).[140] While we would not go so far as to presume any definitive answers to these questions, we suggest that that courts should be guided by the authoritativeness inquiry. Soft law can take many forms, from optional policy guides to binding determinants of administrative discretion; in our view, a principled response to soft law should be informed by its effects, rather than its form.

In summary, the spectrum approach provides judges with an analytical framework to assess soft law on its own terms, rather than in relation to other concepts. To respond to the practical impacts of a soft law instrument, courts should consider its degree of authoritativeness. If the court identifies an issue with the soft law instrument, the selection of an appropriate remedy should be guided by three factors: the soft law's (1) influence; (2) legitimacy; and (3) impact on rights holders. This framework provides a foundational basis that can be expanded upon over time to assist courts in reviewing soft law instruments.

What difference would the spectrum approach make in future soft law disputes? To explore this key question, we consider the context of university free speech policies developed in response to an Ontario Government directive in 2018. This instance of soft law both reflects many of the uncertainties of the current soft law jurisprudence and demonstrates why a spectrum approach could improve the coherence of the courts' response to challenges involving soft law.

III. THE CASE STUDY OF ONTARIO'S COLLEGES AND UNIVERSITIES FREE SPEECH DIRECTIVE

This section explores the benefits of the spectrum approach through the lens of recent free speech policies developed by Ontario colleges and universities. Both the Government's initiative to compel post-secondary institutions to develop free speech policies, and the policies themselves, raise a host of issues often associated with soft law. In our view, the spectrum approach provides a clearer and more effective response than a binary framework, which would shield the initiative from judicial scrutiny.

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[140] See the discussion of this issue in *Greater Vancouver Transportation Authority, supra* note 4 at paras 81-90.

A. Overview

To understand the relationship between free speech policies and soft law principles, it is first necessary to review the unusual history of this initiative. On 30 August 2018, shortly after a new Conservative provincial government was sworn in, Ontario's Office of the Premier published a "backgrounder"[141] and explanatory "news release"[142] on the Government of Ontario's website. These two publications stipulated that publicly-funded colleges and universities must develop free speech policies by 1 January 2019 or face potential funding cuts. In addition, the backgrounder prescribed several minimum policy standards that post-secondary institutions must adopt. The backgrounder reads in part:

> The Ministry of Training, Colleges and Universities requires every publicly-assisted college and university to develop and publicly post its own free speech policy by January 1, 2019 that meets a minimum standard specified by the government.
>
> Free Speech Policy
>
> The policy must apply to faculty, students, staff, management and guests, and it must meet a minimum standard by including the following:
>
> - A definition of free speech
> - Principles based on the University of Chicago Statement on Principles of Free Expression:
>   - Universities and colleges should be places for open discussion and free inquiry.
>   - The university/college should not attempt to shield students from ideas or opinions that they disagree with or find offensive.
>   - While members of the university/college are free to criticize and contest views expressed on campus, they may not obstruct or interfere with the freedom of others to express their views.
>   - Speech that violates the law is not allowed.
> - That existing student discipline measures apply to students whose actions are contrary to the policy (e.g., ongoing disruptive protesting that significantly interferes with the ability of an event to proceed).
> - That institutions consider official student groups' compliance with the policy as a condition for ongoing financial support or recognition, and encourage student unions to adopt policies that align with the free speech policy.
> - That the college/university uses existing mechanisms to handle complaints and ensure compliance. Complaints against an institution that remain unresolved may be referred to the Ontario Ombudsman.
>
> Starting September 2019, each institution must prepare an annual report on implementation progress and a summary of its compliance, publish it online and submit it to the Higher Education Quality Council of Ontario (HEQCO).
>
> Monitoring and Compliance
>
> …
>
> If institutions fail to comply with government requirements to introduce and report on free speech policies, or if they fail to follow their own policies once implemented, the ministry may respond with reductions to their operating grant funding, proportional to the severity of non-compliance.[143]

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[141] Office of the Premier, "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [Backgrounder].

[142] Office of the Premier, News Release, "Ontario Protects Free Speech on Campuses, Mandates Universities and Colleges to Introduce Free Speech Policy by January 1, 2019" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html> ["News Release"].

[143] Backgrounder, *supra* note 141.

As this description of the initiative makes clear, a binary approach to this policy may obscure more than it reveals. On the one hand, the policy is by its own terms a "requirement" with which all post-secondary institutions are expected to comply. On the other hand, post-secondary institutions are free to ignore the policy, provided they are willing to have a reduction in operating grant funding.

Additionally, the backgrounder appears to incorporate by reference another soft law instrument, the University of Chicago Statement of Principles on Free Expression ("Chicago Principles").[144] The Chicago Principles are a set of values that intend to demonstrate a commitment to free expression in post-secondary institutions. They call for "free, robust, and uninhibited debate and deliberation among all members of the university community."[145] The Chicago Principles provide for narrow instances where the university can restrict or regulate speech; these include where the speech violates the law or where it would disrupt the ordinary activities of the university.[146] However, the Chicago Principles emphasize that "these are narrow exceptions to the general principle of freedom of expression."[147] The government's policy seeks to compel colleges and universities to develop free speech policies that incorporate the Chicago Principles, which themselves envision limited grounds upon which universities may regulate free speech.

The free speech initiative announcement sparked a range of responses from academics, students, advocacy groups, and the general public, but almost all of these concerned the substance of the announcement, not its form. Some have commended Premier Ford's initiative for promoting the free expression of ideas.[148] Others have voiced concerns that the initiative promotes the tolerance of hateful views towards marginalized groups.[149] Some argue that the government's announcement undermines the institutional autonomy of post-secondary institutions.[150] Finally, others suggest that the proposed disciplinary measures may actually inhibit free speech by dissuading students from demonstrating against controversial views.[151]

These varied responses are matched by the diverse characterizations of the Premier's initiative. Although the substance of the Premier's message is clear, the form of the announcement resists straightforward classification. Indeed, there is a lack of clarity amongst stakeholders regarding what, precisely, they have been expected to respond to. The initiative has been described

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[144] University of Chicago, "Report of the Committee on Freedom of Expression" (July 2014), online: <provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>

[145] *Ibid* at 1.

[146] *Ibid.*

[147] *Ibid.*

[148] See *e.g.* Brian Lilley, "LILLEY: Ford government's free speech policy for schools a good first step," *Toronto Sun* (22 December 2018), online: <torontosun.com/news/provincial/lilley-ford-governments-free-speech-policy-for-schools-a-good-first-step>; Postmedia News, "EDITORIAL: Campus free speech policy a necessity," *Toronto Sun* (1 January 2019), online: <torontosun.com/opinion/editorials/editorial-campus-free-speech-policy-a-necessity>; WR Laird, "Opinion: Ontario universities still don't really want free speech on campus," *National Post* (1 January 2019), online: <nationalpost.com/opinion/ontario-universities-still-dont-really-want-free-speech-on-campus>.

[149] See *e.g.* James L Turk, "A manufactured crisis: the Ford government's troubling free speech mandate" (Fall 2018), online: *Academic Matters* <academicmatters.ca/a-manufactured-crisis-the-ford-governments-troubling-free-speech-mandate>.

[150] *Ibid.*

[151] See *e.g.* The Canadian Association of University Teachers, "CAUT critical of Ontario colleges' free speech policy" (17 December 2018), online: *CAUT* <www.caut.ca/latest/2018/12/caut-critical-ontario-colleges-free-speech-policy>.

in many ways, including as a "directive,"[152] "requirement,"[153] "guidance,"[154] guideline,"[155] "government directive," and even a "policy" in and of itself.[156]

This conceptual uncertainty remains unresolved in follow-up statements from the Ontario Premier. For example, in a Twitter post dated 6 January 2019, Ford writes, "Starting this year, we have made it mandatory for Ontario universities and colleges to have a policy to protect free speech."[157] In this statement, Premier Ford sidestepped this terminological confusion by referring to the effect of his initiative, rather than its form.

The Government's "free speech" initiative demonstrates the benefits of a spectrum approach to soft law and the challenges of a traditional approach to soft law. The binary approach requires that all measures be either "law" or "policy." In effect, Ontario colleges and universities were *required* to adopt specific protections of free speech. At first glance, this appears to be an example of law. It is binding, with specific consequences for non-compliance.

However, upon closer inspection, universities are required to adopt this policy *only* as a condition of their funding. If universities and colleges are prepared to accept the funding consequences, they are free to choose not to adopt the policy. Moreover, the press release does not indicate what funding consequences would follow non-adoption. A minor financial penalty or the complete withdrawal of provincial funding could both be possible given the ambiguous language of the initiative. Further, given that free speech policies themselves are not a legislative instrument and therefore cannot legally bind university communities, they are, in effect, being required to adopt a non-binding expression of their values. Is a free speech policy of a university in some respects akin to "law"? Are the Chicago Principles, which serve as a minimum standard, themselves binding, given the fact that the principles call for balancing competing imperatives for universities? The more one wrestles with these questions under the existing soft law framework, the more slippery the initiative becomes.

Ultimately, the binary approach to "law" and policy" becomes untenable in the context of the Government's university free speech initiative. Inexorably, one is drawn to the conclusion that the free speech requirement is both binding *and* not binding and is both law *and* policy. The authoritative spectrum is ideally suited both to provide clarity to this mix, and to clarify both the Government's and the colleges and universities' accountability for their actions.

Despite the uncertainties surrounding its inception, the Premier's announcement has had a tangible impact, spurring the creation of at least eighteen free speech policies by 1 January 2019. Complicating the development of a soft law lens on the initiative is the fact that universities have

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[152] Dr. Sara Diamond, "President's Message" (9 October 2018), online: *OCAD University* <www2.ocadu.ca/internal-update/presidents-message-5>.

[153] Wilfrid Laurier University, "Freedom of Expression" (7 June 2018), online: <www.wlu.ca/about/discover-laurier/freedom-of-expression/index.html>.

[154] University of Toronto, "Frequently Asked Questions (FAQ): Free Speech," online: <freespeech.utoronto.ca/faq>.

[155] Canadian Association of University Teachers, "Ontario 'free speech' requirements for universities and colleges cause for concern" (31 August 2018), online: *CAUT* <www.caut.ca/latest/2018/08/ontario-free-speech-requirements-universities-and-colleges-cause-concern>.

[156] Turk, *supra* note 149.

[157] Doug Ford, "Starting this year, we have made it mandatory for Ontario universities and colleges to have a policy to protect free speech. I've heard from many students who believe our campuses need to be a place for respectful and open dialogue, without fear of attacks or discrimination" (6 January 2019 at 3:33), online: *Twitter* <twitter.com/fordnation/status/1082057478253142016?lang=en>.

responded in diverse ways—some enacted specific, new free speech rules, while others packaged existing policies and procedures with a statement of principles or aspirations.[158]

Twenty-four of Ontario's colleges released a joint policy statement on upholding free speech,[159] while at least seventeen universities developed separate free speech policies.[160] A small number of universities (including the University of Toronto and Ryerson University) released statements indicating that their pre-existing free speech policies conform with the Ontario Government's requirements.[161]

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[158] For a Canada-wide perspective on the state of free speech policies prior to the Ontario initiative, see Craig Forcese, "The Expressive University the Legal Foundations of Free Expression and Academic Freedom on Canada's Campuses" (2018), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3850321>.

[159] Colleges Ontario, "Policy Statement on Upholding Free Speech" (17 December 2018), online: <www.collegesontario.org/en/resources/policy-statement-on-upholding-free-speech> [Colleges Ontario].

[160] Algoma University, "Algoma University Freedom of Expression Policy" (21 December 2018), online: <employees.algomau.ca/services/wsDocuments/4158> [Algoma University]; Brock University, "Freedom of Expression Policy" (last visited 10 September 2021), online: <brocku.ca/free-speech> [Brock University]; Carleton University, "Freedom of Speech Policy" (30 November 2018), online: <carleton.ca/secretariat/wp-content/uploads/Freedom-of-Speech.pdf> [Carleton University]; Lakehead University, "Free Expression Policy" (18 December 2018), online (pdf): <www.lakeheadu.ca/sites/default/files/uploads/106/policies/Free%20Expression%20Policy.pdf> [Lakehead University]; Laurentian University, "Policy on the Freedom of Speech (Freedom of Expression)" (14 December 2018), online: <laurentian.ca/policy-freedom-of-speech> [Laurentian University]; McMaster University, "McMaster University Summary of Policy Framework: Freedom of Expression" (December 2018), online (pdf): <op.mcmaster.ca/wp-content/uploads/2018/12/FoE_Summary-of-Policy-Framework_4Dec18-3.pdf> [McMaster University]; Nipissing University, "Free Speech (Policy No. 1.10.2018.B)" (December 2018), online: <nipissingu.ca/sites/default/files/2018-12/Free%20Speech%20Policy%20-%20Dec%202018.pdf> [Nipissing University]; Ontario College of Art and Design University, "OCAD University Freedom of Expression Statement and Policies" (10 December 2018), online: <www2.ocadu.ca/internal-update/presidents-message-5> [Ontario College of Art and Design]; Queen's University, "Free Expression at Queen's University" (18 December 2018), online: <www.queensu.ca/secretariat/policies/administration-and-operations/free-expression-queens-university-policy> [Queen's University]; The University of Western Ontario, "Policy 1.54 – Freedom of Expression Policy" (Effective 29 November 2018), online (pdf): <www.uwo.ca/univsec/pdf/policies_procedures/section1/mapp154.pdf> [Western University]; Trent University, "Free Speech Policy" (30 November 2018), online (pdf): <www.trentu.ca/governance/sites/trentu.ca.governance/files/documents/Free%20Speech%20Policy%20-%20ACCESSIBLE.pdf> [Trent University]; University of Guelph, "University of Guelph Policy Statement on Freedom of Expression" (last visited 10 September 2021), online: <www.uoguelph.ca/freedom-of-expression/policy> [University of Guelph]; University of Ontario Institute of Technology, "Freedom of Expression Policy" (29 November 2018), online: <usgc.uoit.ca/policy/freedom-of-expression-policy.php> [University of Ontario Institute of Technology]; University of Ottawa, "Policy 121–Statement on Free Expression" (12 December 2018), online: <www.uottawa.ca/administration-and-governance/policy-121-statement-free-expression> [University of Ottawa]; University of Waterloo, "Draft New Policy 8 – Freedom of Speech" (last visited 10 September 2021), online: <uwaterloo.ca/secretariat/draft-new-policy-8-freedom-speech> [University of Waterloo]; University of Windsor, "Policy on Freedom of Expression" (27 November 2018), online (pdf): <www.uwindsor.ca/secretariat/sites/uwindsor.ca.secretariat/files/freedom_of_expression_policy_bg181127.pdf> [University of Windsor]; York University, "Free Speech Statement of Policy" (December 2018), online: <secretariat-policies.info.yorku.ca/policies/free-speech-statement-of-policy> [York University].

[161] Ryerson University, "Statement on Freedom of Speech" (4 May 2010), online (pdf): <www.ryerson.ca/content/dam/senate/documents/Statement_on_Freedom_of_Speech_May_04_2010.pdf>. See also Ryerson University, "Freedom of Speech Policies" (last visited 10 September 2021), online:

All of Ontario universities and colleges responded to the free speech initiative. While the resulting policies share several commonalities, there are also points of departure between them:

(1) Incorporation of the backgrounder: Some policies reproduce the principles in the Premier's announcement ad verbatim,[162] while other policies endeavour to capture the spirit of the backgrounder's principles in their own words (and sometimes through other pre-existing policies).[163]
(2) Animating policy values: Some free speech policies focus exclusively on values that pertain to free expression,[164] while other policies also refer to other institutional values, such as diversity and inclusion.[165]
(3) Protesting rights: Some policies explicitly restrict individuals' right to protest where it significantly infringes on the expression of others;[166] by contrast, other institutions affirm the right to protest as a facet of the right to free speech.[167]
(4) Application to student associations: Some institutions explicitly state that student group funding will be contingent on compliance with the institution's free speech policy.[168]
(5) Enforcement mechanisms: Most policies include general statements linking their free speech policy to pre-existing enforcement mechanisms, such as disciplinary and complaint procedures.[169] However, one policy lays the groundwork for new, policy-specific complaint procedures.[170] Further, another policy explicitly states that a student may be subject to complaint and disciplinary action for significantly interfering with the ability of others to express themselves.[171]

While the ministerial requirement has yet to be subject to judicial consideration, analogous cases have recently been considered by the courts. For example, a companion policy to Ontario's

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<www.ryerson.ca/freedom-of-speech> [Ryerson University]; University of Toronto, "Statement on Freedom of Speech, 1992" (28 May 1992), online (pdf): <www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/ppmay281992.pdf>. See also University of Toronto, "Freedom of Speech at the University of Toronto" (last visited 10 September 2021), online: <freespeech.utoronto.ca> [University of Toronto]; Wilfrid Laurier University, "Statement on Free Expression" (29 May 2018), online: <www.wlu.ca/about/discover-laurier/freedom-of-expression/statement.html>. See also Wilfrid Laurier University, "Freedom of Expression" (last visited 10 September 2021), online: <www.wlu.ca/about/discover-laurier/freedom-of-expression/index.html> [Wilfrid Laurier University].

[162] See *e.g.* Algoma University, *supra* note 160; Carleton University, *supra* note 160; Lakehead University, *supra* note 160.

[163] See *e.g.* Ryerson University, *supra* note 161; University of Toronto, *supra* note 161; Wilfrid Laurier University, *supra* note 161.

[164] See *e.g.* Algoma University, *supra* note 160; Carleton University, *supra* note 160; Lakehead University, *supra* note 160.

[165] See *e.g.* McMaster University, *supra* note 160; Nipissing University, *supra* note 160; Ontario College of Art and Design, *supra* note 160; Western University, *supra* note 160; University of Ontario Institute of Technology, *supra* note 160; University of Windsor, *supra* note 160; York University, *supra* note 160.

[166] See *e.g.* Trent University, *supra* note 160; University of Ontario Institute of Technology, *supra* note 160.

[167] See *e.g.* the University of Guelph, *supra* note 160; University of Windsor, *supra* note 160; Western University, *supra* note 160; Wilfrid Laurier University, *supra* note 160.

[168] See Colleges Ontario, *supra* note 159; *Brock University*, *supra* note 160; *Queens University*, *supra* note 160.

[169] See *e.g.* Colleges Ontario, *supra* note 159; Algoma University, *supra* note 160; Brock University, *supra* note 160; Lakehead University, *supra* note 160; Laurentian University, *supra* note 160; McMaster University, *supra* note 160; Trent University, *supra* note 160; University of Guelph, *supra* note 160; University of Ottawa, *supra* note 160; University of Waterloo, *supra* note 160; University of Windsor, *supra* note 160; York University, *supra* note 160.

[170] See the University of Ontario Institute of Technology, *supra* note 160.

[171] See Carleton University, *supra* note 160.

ministerial requirement was challenged by affected student groups in *Canadian Federation of Students v. Ontario*.[172] This policy, named the "Student Choice Initiative," was issued by cabinet order in December 2018 and altered the funding model for student unions and other fee-supported activities. In that case, the Ontario Government unsuccessfully argued that the directive in question was not subject to judicial review. Ontario's arguments could have been raised in the free speech context as well:

> Ontario says that this application is not justiciable for two reasons:
> (a) the impugned directives reflect a "core policy choice" not subject to review before the courts; and
> (b) the impugned directives are exercises of the Crown's prerogative power over spending.
> Neither argument justifies exempting the impugned directives from judicial review for legality. To hold otherwise would undercut the supremacy of the legislature and open the door for government by executive decree, a proposition repugnant to the core principles of parliamentary democracy.
>
> Although other issues have been raised in this application, we find that this case turns on whether the impugned directives are consistent with the laws that prescribe governance for colleges and universities. That is a question of legality and is clearly justiciable: indeed, it lies at the very heart of the court's public law mandate.[173]

The Divisional Court found the directive was invalid, as it was inconsistent with the statutory context governing colleges and universities, and their decision making with respect to student unions and their funding and membership in particular:

> University and college student associations are private not-for profit corporations. Ontario does not fund these associations directly or indirectly. Ontario does not control these associations directly or indirectly. There is no statutory authority authorizing Cabinet or the Minister to interfere in the internal affairs of these student associations.
>
> Universities are private, autonomous, self-governing institutions. They are "publicly assisted" but not publicly owned or operated. For more than 100 years, Ontario has had a legislated policy of non-interference in university affairs, reflected in private legislative Acts conferring on university governing councils and senates the authority and responsibility to manage university affairs. There is no statutory authority authorizing Cabinet or the Minister to interfere in the internal affairs of universities generally, or in the relations between universities and student associations specifically.[174]

In the result, the student choice initiative was quashed.

In addition to judicial review on administrative law grounds, it is increasingly clear that soft law affecting university rights holders may also give rise to *Charter* challenges. In *UAlberta Pro-Life v. Governors of the University of Alberta*,[175] a student organization challenged, *inter alia*, a university's decision to dismiss a complaint relating to a pro-life organization's protesting rights under a university policy. Justice Watson (concurring) held that a university's decision whether to permit a pro-life advocacy organization to hold an event on campus and to express its point of view was governed by section 2(b) of the *Charter*. Similarly, in *Pridgen v. University of Calgary* ("*Pridgen*"),[176] Justice Paperny (concurring) indicated that the *Charter*

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[172] 2019 ONSC 6658.
[173] *Ibid* at paras 5-6.
[174] *Ibid* at paras 7-8.
[175] 2020 ABCA 1.
[176] 2012 ABCA 139 at para 78.

applied to a university committee's decision to impose disciplinary sanctions on students for social media posts.

The case of Ontario universities' free speech policies strongly resembles the case of *Pridgen.* In *Pridgen*, the University of Calgary's review committee was delegated statutory authority to review university disciplinary decisions. Similarly, in Ontario, each institution's Board of Governors and Senate has been delegated statutory authority to issue policies that affect the functions of their respective universities. Like the review committee's decision, the Board of Governors or Senate's exercise of statutory authority would attract the application of the *Charter*.

Accepting that Ontario universities' free speech policies fall within the ambit of the *Charter*, it is possible to conceive of the application of *Charter* review on a variety of grounds (examples include sections 2(b) and 7).[177] However, the nature and success of such a challenge would depend upon the specific free speech policy at issue, as well as its position on the soft law spectrum. Certain soft law policies appear to have a high level of authoritativeness and strongly shape the University's exercise of delegated discretion. For example, Carleton University's free speech policy indicates that students whose actions violate the policy "are subject to complaint and disciplinary action pursuant to the Student Rights and Responsibilities Policy. Such violations include, but are not limited to engaging in disruption that significantly interferes with the ability of an event to proceed or the ability of others to express themselves."[178]

Other examples of authoritative policies could include those that change the funding of student unions. Where soft law is at the more authoritative end of the spectrum, the policy, guideline, or code itself may be challenged, in addition to decisions taken under it—whether on procedural or substantive grounds, or on the basis of *Charter* rights or values.

By contrast, other examples of soft law appear more permissive, aspirational, and non-authoritative. For instance, the University of Ottawa's free speech policy ("Policy 121—Statement on Free Expression") includes a number of guiding principles to promote free speech, which are less directly tied to mechanisms of enforcement.[179] As a result, these policies are more likely to be viewed as a specific *exercise* of administrative discretion.

These variations in free speech policies will also influence the selection of a remedy. For example, authoritative policies akin to Carleton University's are more influential, in the sense that they are more likely to guide student conduct. While there is no clear reason to suggest such policies are unlawful, they also have a significant impact on rights holders; for example, the threat of disciplinary action may create a chilling effect on counter-protesting and other expressive activities under section 2(b) of the *Charter*. By contrast, aspirational policies such as the University of Ottawa's are less likely to be influential, are clearly lawful, and have a limited impact on rights holders and their expressive acts.

We turn now to a consideration of how the spectrum approach we have set out might be applied in the context of the Ontario universities' free speech policies.

B. Applying the Spectrum Approach to the Review of Soft Law

The first step in the proposed analysis involves placing the soft law on a spectrum of authoritativeness.

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[177] The free speech policies outlined in the Ontario Government's initiative arguably inhibit the ability to counter-protest, which implicates s 2(b) of the *Charter.* In addition, the policies arguably interfere with the prevention of hate speech, which may engage s 7 concerns.

[178] Carleton University, *supra* note 160.

[179] University of Ottawa, *supra* note 160.

1. The Ministerial Requirement that Post-secondary Institutions Adopt Free Speech Policies

To determine how the events above fit into a soft law framework, we must first consider the nature of the free speech policy: a government press release on 30 August 2018. As noted above, the characterization of the policy shifted depending on the context. It was variously referred to as a "requirement," "directive," "guideline," and "policy." Under the spectrum approach, the source of the soft law is relevant to, but not determinative of, its legal status.

The spectrum analysis developed above helps to capture the nature of the policy initiative. Rather than examining the *form* of the initiative, the spectrum analysis focuses on its *effect*.

The ministerial announcement appears to be at the more authoritative end of the spectrum. Notwithstanding its informal character, the influence on the policy-making discretion accorded to institutions was high. It contained an explicit statement that fiscal consequences may follow in the event of non-compliance. In so doing, it resulted in every post-secondary institution developing, modifying, or adopting free speech policies. The principles articulated in the announcement have been incorporated—sometimes ad verbatim—into each institution's resultant free speech policy.[180] While the precise mechanism of enforcement is not specified, this public announcement contains clear language to signal to post-secondary institutions that they had little choice but to follow the policy.

Having characterized the free speech directive, there are a number of grounds upon which it could be subject to review by the courts. To name a few, one could argue that the Government's issuance of the directive was unreasonable; that the Government lacked jurisdiction to issue the directive; that the Government unduly fettered the discretion of colleges and universities; or that the directive was not *Charter* compliant.

With respect to the issue of unreasonableness, it would be possible to argue that the Minister did not justify the imposition of the free speech policy in a way that would meet the more exacting standards set out in *Vavilov*.[181] Although the Ministry of Training, Colleges and Universities is granted discretion to oversee many administrative functions (such as granting degrees and distributing provincial funding), it has not been granted the power to establish university policies. Instead, policy-making functions are delegated to the Board of Governors and Senate under each university's constituting statute.[182] This statutory backdrop must be considered against the directive's significant degree of authoritativeness. Taken together, one could question whether there was a clear and coherent rationale for the Minister to intervene in the post-secondary governance of free speech.

There are a number of arguments that can be made respecting the *Charter*. As a preliminary matter, one must consider whether to frame the challenge as a violation of *Charter* rights (an approach applied to legislation) or *Charter* values (an approach applied to administrative decisions). On the latter approach, the question would be whether the free speech directive interfered with the authority of colleges or universities to strike the balance between freedom of speech and protection from harm resulting from speech.[183]

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[180] See *e.g.* Algoma University, *supra* note 160; Carleton University, *supra* note 160; Lakehead University, *supra* note 160.

[181] *Supra* note 29.

[182] See *e.g. Ontario College of Art and Design University Act, 2002*, SO 2002, c 8, Sched E, s 6(1)(e); *An Act Respecting Lakehead University*, SO 1965, c 54, s 14.

[183] This a framework was applied in another educational setting by the Court in *Loyola*, *supra* note 33.

In the event that the court finds one of the above challenges to be successful, the next step is to consider the appropriate remedy. The spectrum approach dictates that the appropriate remedy should be determined with reference to three factors: (1) influence, (2) legitimacy, and (3) impact on rights holders. Each factor is briefly considered below.

(1) *Influence*: The announcement has a significant degree of influence on post-secondary institutions. As noted above, despite the informal character of the announcement, the linking of the policy to government funding of Universities and colleges led to the development of dozens of free speech policies by all affected institutions.
(2) *Legitimacy*: The announcement arguably constitutes an unlawful encroachment on each university's statutory authority to determine its own educational policies, as the policy directed the content of the University free speech protections.
(3) *Impact on rights holders*: The announcement arguably has a significant impact on rights holders. Although the announcement does not *directly* implicate students' rights (in contrast to the policy affecting the funding of student organizations), the announcement could undermine university protections surrounding hate speech. In addition, it arguably interferes with freedom of expression rights of post-secondary institutions as well as the rights of students, staff, and faculty at those institutions.

Taken together, each of these factors points to the selection of a more interventionist remedy. For example, in the context of a *Charter* challenge, remedies could involve an order modifying the policy or declaring the policy to be invalid. If the challenge were brought on *Charter* values grounds, the remedy may be to find the policy to be unreasonable.

2. The Institutions' Resulting Free Speech Policies

In addition to challenging the government's ministerial directive, one might also challenge the resulting university policies themselves.

There is not one but many answers to the question of whether the university policies are comparably authoritative to "law," which can give rise to accountability, whether on judicial review or under a *Charter* challenge. Based on the soft law spectrum discussed above, at least some of the resulting institutional free speech policies adopted in response to the ministerial directive could be vulnerable either to judicial review on administrative law grounds, under the *Charter* or by way of a *Charter* values analysis.

Given that free speech-related soft law results from discretionary choices made by universities and colleges, it is perhaps more likely that a *Charter* values analysis will apply than a *Charter* challenge, per se. Either way, if the soft law is an authoritative basis for the decisions which engage the *Charter*, it is the soft law itself which should be the focus of the analysis.

As the Ontario universities and colleges' free speech policy case study demonstrates, the diversity of soft law calls for a flexible and adaptable framework of legal accountability. The analysis must be rooted in how soft law actually shapes decision making, and not only its formal status as "law" or "policy."

IV. CONCLUSION

In this article, we have argued that soft law must be treated as a separate and distinct area of inquiry in Canadian public law, not as an ancillary issue to other questions.

The treatment of soft law in Canadian jurisprudence is an issue that warrants further exploration. If soft law is not "law," as Justice Binnie asserted in *Little Sisters*, then it falls outside the sphere governed by the Constitution. However, in *Greater Vancouver Transportation*

Authority, Justice Deschamps equated soft law with the manner in which law is exercised or applied, and therefore, just as discretionary decision making may be subject to the *Charter*, so too may soft law be subject to *Charter* scrutiny. These are two sides of the same coin. In each case, courts attempt to define soft law in relation to something else (either in opposition to hard law, or in similarity to discretionary decision making). What we lack is a framework for considering soft law on its own terms within Canadian public law.

The case study of university and college free speech policies in Ontario illustrates the importance of developing a comprehensive soft law framework to review government and administrative action. The Government of Ontario's announcement did not flow from legislation, regulation, or even contractual revisions to the funding agreements between the Government and each university. In this sense, the directive could not qualify as "hard law"; however, its terms were at the high end of the authoritative spectrum, and spawned the development of a host of free speech policies that have had tangible impacts on college and university campuses.

An authoritative spectrum of soft law allows for the public law analysis to take into account the practical significance of government initiatives and to subject them to meaningful review. Ultimately, the framework proposed in this article seeks to encourage government accountability and to uphold the rule of law by ensuring that the soft law instruments are not immune from meaningful oversight by the courts. As Greg Weeks has written, "It is because soft law means something that we care at all whether the law responds to it. Soft law means something because it is treated by the majority of those faced with it as though it does."[184]

Our hope is that, in the future, soft law will be assessed in its context and will no longer be expressed as ancillary to other concepts. In other words, our aim is not to "harden" soft law, but rather to put the focus on how soft law shapes administrative decision making, and to enhance accountability for the development and application of soft law in public decision making. In this way, we hope that soft law may finally find its place in the firmament of Canadian public law.

[184] See Weeks, *Soft Law and Public Authorities*, *supra* note 3 at 268.