2019

The Spousal Support Advisory Guidelines, Soft Law, and the Procedural Rule of Law

Jodi Lazare

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By Jodi Lazare*

Introduction

Since their first release in 2005, the *Spousal Support Advisory Guidelines* have become a basic element of the practice of Canadian family law.[1] Using one of two formulas, the *Advisory Guidelines* produce ranges of both amount and duration of support.

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[1] Family, Children and Youth Section, Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, Canada, 2008): <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> [*Advisory Guidelines*].

Importantly, they do not replace the exercise of judicial discretion; judges must still select from the ranges, in addition to determining whether they are applicable at all.[2] Although they have no formal legal status — they are neither legislated nor referred to in the relevant legislation — lawyers and judges regularly look to them for guidance in structuring spousal support claims and awards following the breakdown of a family.[3] Further, while the *Advisory Guidelines* were commissioned by the federal Department of Justice, they do not stem from government; they were devised by two family law professors, in consultation with a committee of experts.

Despite their unofficial status, the popularity of the *Advisory Guidelines* among legal actors is evidenced in their endorsement by several of the country's courts of appeal; British Columbia, Manitoba, Saskatchewan, Ontario, New Brunswick, PEI, and Newfoundland and Labrador have, to varying degrees, approved of their content and utility in assisting with complex discretionary determinations.[4] Other jurisdictions, however, have

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[2] The *Advisory Guidelines* set out one formula for situations where there is a concurrent child support obligation and one for situations of spousal support alone. Further, they contain a list of exceptional situations, in which departing from the formulas is recommended.

[3] The broad statutory grant of discretion in awarding spousal support is contained in the *Divorce Act*, RSC 1985, c 3 (2d Supp), ss 15.2(4)(6) [*Divorce Act*].

[4] See e.g. *Yemchuk v Yemchuk*, 2005 BCCA 406; *Scott v Scott*, 2011 MBCA 21; *Linn v Frank*, 2014 SKCA 87 [*Linn v Frank*]; *Fisher v Fisher*, 2008 ONCA 11 [*Fisher*]; *JDM v*

not demonstrated the same openness to the *Advisory Guidelines*. Judges in Quebec, Alberta, and Nova Scotia ground their resistance to the *Advisory Guidelines* in their informal, unofficial, and non-binding nature.[5] In those provinces, litigants continue to endure disparate treatment in the face of similar facts. As a result, the unpredictability and sense of injustice that provided the impetus for the creation of the *Advisory Guidelines* continue to undermine the family law system.[6] This article responds to that resistance.

Part 1 introduces the *Advisory Guidelines*. It briefly explains the reasons for looking to guidelines in an area of law characterized by a broad grant of judicial discretion and details the process of their creation. That process underlies the subsequent argument that judicial reliance on the *Advisory Guidelines* might be understood as corresponding with constitutional principles. Part 1 also sets out the theoretical framework embedded in the *Advisory Guidelines*, suggesting that by incorporating a relational approach to marriage and its breakdown, as set out by the Supreme Court interpreting the relevant legislation, they may be viewed as an important tool in the pursuit of substantive gender equality.

KDM, 2015 PECA 16; *SC v JC*, 2006 NBCA 46 [*SC v JC*]; *Broaders v Boland Broaders*, 2017 NLCA 2.

[5] See *Neighbour v Neighbour*, 2014 ABCA 62 [*Neighbour*]; *Sawatzky v Sawatzky*, 2008 ABCA 355 [*Sawatsky*]; *Strecko v Strecko*, 2014 NSCA 66 [*Strecko*]; *MacDonald v MacDonald*, 2017 NSCA 18 [*MacDonald*]; *Droit de la famille — 14165*, 2014 QCCS 402 [*DF — 14165*].

[6] See Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 Canadian Family Law Quarterly 185 [Rogerson, "Post-Bracklow"].

Part 2 draws on administrative law scholarship to characterize the *Advisory Guidelines* as an instrument of soft law, akin to the guidelines and policy instrument regularly relied on to structure discretion, within government and beyond. Drawing on the relevant case law, it then sets out the judicial objection to reliance on the *Advisory Guidelines* when disputes reach the courtroom. With this background in mind, Part 2 suggests that much like attitudes toward administrative soft law, resistance to the *Advisory Guidelines* is rooted in constitutional concerns related to the separation of powers and the principle of the rule of law. In unpacking judicial objections to the *Advisory Guidelines* and connecting them with concerns about the rule of law, Part 2 responds to the call to "[bring] soft law out of the constitutional shadows."[7]

Part 3 offers a response to the rule of law concerns raised by judicial reliance on the *Advisory Guidelines*. It suggests that opposition grounded in legitimacy concerns is rooted in a thin, formal conception of the constitutional principle. It argues that recognition of the normative force of the *Advisory Guidelines*, and novel regulatory tools like them, might correspond with a richer, procedural conception of the rule of law, according to which, legitimacy stems not from the form or source of a particular regulatory instrument, but rather, from the procedure followed in its creation. This part thus challenges the idea that constitutionally legitimate regulatory techniques can only stem from the legislature. Instead, it posits that the *Advisory Guidelines*, and soft law tools like them, offer alternative ways of promoting meaningful participation and democracy.

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[7] Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) 45:4 Canadian Public Administration 465 at 465 [Sossin, "Discretion Unbound"].

1. Introducing the Advisory Guidelines

This part briefly develops the historical context that gave rise to a perceived need for the *Advisory Guidelines*, as well as the process of their creation, as that process informs this paper's response to concerns about the legitimacy of judicial reliance on them. It also sets out the theoretical framework underlying the *Advisory Guidelines*, in order to suggest that they function as a tool to promote substantive gender equality.

1.1. Remedying inconsistency in spousal support "from the ground up"

The *Advisory Guidelines* were created in an attempt to remedy the inconsistent and unpredictable nature of spousal support awards, granted through the exercise of broad judicial discretion. In 1992, the Supreme Court, interpreting the relevant provisions of the *Divorce Act*, set out a compensatory model of spousal support, according to which support is an earned entitlement for spouses, typically women, who sacrificed economic prospects for the sake of their families.[8] Seven years later, the Court confirmed the existence of a competing approach to the remedy — non-compensatory, or needs-based support, even in the absence of a compensatory claim.[9] Because of their combined effect of broadening entitlement to spousal support, the two decisions constituted a victory for women, who were recognized as enduring harsh and gendered financial effects upon divorce.[10] But the existence of competing approaches to support, coupled with the broad grant of judicial discretion in the *Divorce Act*, meant that the remedy was not living up to its potential to

[8] See *Moge v Moge*, [1992] 3 SCR 813 [*Moge*].

[9] See *Bracklow v Bracklow*, [1999] 1 SCR 420 [*Bracklow*].

[10] See *Moge*, *supra* note 8.

improve the fate of divorcing women. Instead, spousal support law was characterized by inconsistency, unpredictability, and a resulting sense or arbitrariness.[11]

The 2008 release of the final version of the *Advisory Guidelines* was preceded by seven years of consultations with the family law bar and judiciary across Canada.[12] Building "from the ground up," the authors worked with "an advisory group of family lawyers, judges, and mediators who drew upon their experience of spousal support outcomes in negotiations, mediations, and settlement conferences."[13] The advisory group was composed of 15 individuals, from eight provinces, whose experiences ranged from

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[11] See Rogerson, "Post-Bracklow", *supra* note 6; Carol Rogerson, "The Canadian Law of Spousal Support" (2004) 38:1 Family Law Quarterly 69. See also Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Canadian Journal of Family Law 15 (on the general harms of judicial discretion in determining spousal support).

[12] See Carol Rogerson & Rollie Thompson, "The Canadian Experiment with Spousal Support Guidelines" (2011) 45:2 Family Law Quarterly 241 at 250 [Rogerson & Thompson, "Canadian Experiment"]. Note that the push for spousal support guidelines dates further back than 2001. As early as 1992, Carol Rogerson wrote about the evidentiary difficulties inherent in spousal support determinations and the need for guidelines to help mitigate those difficulties. See "Evidentiary Issues in Spousal Support Cases", in Special Lectures of Law Society of Upper Canada, 1991, *Applying the Law of Evidence: Tactics and Techniques for the Nineties* (Toronto: Carswell, 1992) 219.

[13] Rogerson & Thompson, *supra* note 12 at 250.

private family law practice, the non-profit sector, professional leadership roles, and the bench.[14] The group met several times during the lead-up to the release of the *Advisory Guidelines* in draft form, with a view to securing consensus on all aspects of the project. Moreover, it was essential that the authors of the *Advisory Guidelines* hear the input and diverse voices of those with "on-the-ground experience" with spousal support.[15]

The release of the first draft of the *Advisory Guidelines* was followed by a second stage of "discussion, experimentation, feedback and revision."[16] This stage included cross-country tours, during which the authors spoke with groups of lawyers and judges, and sought feedback through focused discussions with small groups of stakeholders.[17] They also received written comments from the public, individual lawyers, and bar associations.[18] The advisory group also continued to meet and reflect on the project during this stage.[19] Thus, the *Advisory Guidelines* offer a unique example of a tool developed outside of government, but aimed at facilitating the statutorily mandated granting of the spousal support remedy.

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[14] *Advisory Guidelines*, *supra* note 1 at 157.

[15] *Ibid* at 17.

[16] *Ibid* at 18.

[17] *Ibid* at 19-20.

[18] *Ibid* at 20.

[19] *Ibid* at 20.

1.2. The Advisory Guidelines *and substantive gender equality*

This article is anchored in the feminist legal pursuit of substantive economic gender equality, as it is premised on the belief that judicial consideration of the *Advisory Guidelines* helps promote the objective of economic equality, as set out in the relevant provisions of the *Divorce Act*.[20] This is so with respect to both the procedure and substance of the spousal support remedy. Where procedure is concerned, Carol Rogerson, co-author of the *Advisory Guidelines*, explains that they were meant to respond to the atmosphere of uncertainty surrounding discretionary spousal support determinations. Prior to their release, "[lawyers] had difficulty predicting outcomes, thus impeding their ability to advise legal clients and to engage in cost-effective settlement negotiations. And for [individuals] without legal representation or in weak bargaining positions, support claims were often simply not pursued."[21] As women earn less than their male partners,[22] they make up the

[20] *Supra* note 3.

[21] Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard, eds, *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015) 51 at 62 [Rogerson, "Access to Justice"].

[22] See Vanier Institute of the Family, "Families Count: Profiling Canada's Families" at 102-103 (in 2007, women were primary earners in only 28 per cent of dual-income couples).

majority of spousal support claimants.[23] Thus, in fostering predictability and creating a baseline for spousal support negotiations,[24] the *Advisory Guidelines* may function as a tool for more women to access economic justice following family breakdown.[25]

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[23] See Canada, Department of Finance Canada, *Equality and Growth: A Strong Middle Class*, (Ottawa: Department of Finance, 27 February 2018) at 274 (the majority of family support recipients are women).

[24] See Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale Law Journal 950; Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56:1 University of Toronto Faculty of Law Review 135.

[25] In characterizing the spousal support remedy as feminist in nature, this paper acknowledges that that view is not without its detractors, many of whom suggest that the privatization of ongoing financial obligations to former spouses risks reinforcing and perpetuating women's economic dependence on men. See e.g. Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons From Moge" (1995) 12:2 Can J Fam L 238; Beverley Baines, "But Was She a Feminist Judge?" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 345; Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169. This paper is premised on the idea that conceiving of spousal support from a relational perspective,

With respect to their content, or substance, the *Advisory Guidelines* can be read as promoting substantive equality. Scholars have written that Canada's spousal support law is grounded in a relational theory of marriage and marriage breakdown — one that recognizes that people are inherently social.[26] Enmeshed as we are in social connections and relationships — especially those as intimate as marriage — the law recognizes that these connections might give rise to "nonconsensual" obligations.[27] The spousal support remedy set out by the Supreme Court of Canada, by sanctioning the subsistence of mutual obligations between spouses beyond the breakdown of a marriage, reflects that relational thinking.[28] A remedy that recognizes and responds to the fact that spouses shape their relationship and its economic consequences together, both exercising autonomy as

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as a natural consequence to the inevitable interdependencies of marriage, may provide a counterpoint to this critique.

[26] See e.g. Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:2 Osgoode Hall Law Journal 1 [Leckey, "Relational Contract"]; Lucy-Ann Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada" (2015) 29:2 Canadian Journal of Family Law 251.

[27] Milton C Regan, *Alone Together* (USA: Oxford University Press, 2999): <http://www.myilibrary.com?ID=45328> at 166.

[28] See *Moge supra* note 8; *Bracklow*, *supra* note 9; Leckey, "Relational Contract", *supra* note 26.

influenced by the relationship,[29] is most likely to treat the spouses as equals upon marriage breakdown and to divide the economic losses due to marriage breakdown accordingly.

The *Advisory Guidelines* encompass the relational approach to marriage and spousal support. This is clear from the "merger over time" theory that grounds their "without child support" formula.[30] Indeed, it reflects the relational idea that the spouses' economic identities merge over time: "the longer they are married, the more their human capital should be seen as intertwined rather than affixed to the individual spouse in whose body it resides."[31] The theory of merger over time recognizes that "the longer the marriage,

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[29] See Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale Journal of Law & Feminism 7.

[30] The *Advisory Guidelines*, in addition to setting out the theory underlying the Canadian law of spousal support, provide two mathematical formulas (primarily based on the spouses' incomes) meant to assist with calculating fitting awards – one for situations with a concurrent child support obligation and one for situations without child support. For a description of the "without child support" formula and the concept of merger over time, see the *Advisory Guidelines*, *supra* note 1 at ch 7.

[31] Stephen D Sugarman, "Dividing Financial Interests on Divorce" in Stephen D Sugarman & Herma Hill Kay, eds, *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1990) 130 at 159, cited in Department of Justice Canada, Developing Spousal Support Guidelines in Canada: Beginning the Discussion, Background Paper by Professor Carol Rogerson (Ottawa: Department of Justice Canada, 2002) at 28 ["SSAG Background Paper"].

the longer the spouse in a dependent role has likely submerged her or his independent identity and earning capacity into the marital collective,"[32] thus reflecting the relational principle that autonomy is exercised and identity constructed through our relationships.[33]

A spousal support theory grounded in relationships rather than individuals is more likely to address spouses' genuine experiences with family breakdown. In recognizing that the marriage relationship usually gives rise to continuing economic obligations, the remedy should ensure not that spouses are treated identically by the law, but instead, that they experience the law in genuinely equal ways.[34] In offering arguments in support of judicial

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[32] Sugarman, *supra* note 31 at 160.

[33] See Nedelsky, *supra* note 29; Jonathan Herring, *Relational Autonomy and Family Law* (Oxford, UK: Springer, 2014).

[34] The emphasis on spouses' experience of the law, rather than their treatment by it, aims to capture the idea that the spousal support remedy, as interpreted by the Supreme Court, is anchored in a substantive, rather than formal, approach to gender equality. As such, the required analysis does not look at whether a law treats people in equal ways, but instead, at the "outcomes of a … law or action" and at the "social and economic context" of a particular claim. See Hon Lynn Smith & William Black, "The Equality Rights" (2013) 62 Supreme Court Law Review (2d) 301 at 303. Applied to spousal support, see e.g. Susan B Boyd & Claire FL Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42:4 Osgoode Hall Law Journal 545 (in *Moge*, the Court implicitly acknowledged that the "spousal support provisions must be interpreted and applied in a manner consistent with constitutional equality standards" — that is, in line with the

reliance on the *Advisory Guidelines* — a tool for promoting substantive equality through a relational approach to marriage breakdown — this paper aligns with the broader feminist pursuit of economic gender equality.[35]

2. Judicial scepticism, the Advisory Guidelines*, and soft law*

The judicial objection to reliance on the *Advisory Guidelines* seems to be based primarily on their non-legislated character and the idea that they do not represent the will

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"*Charter* guarantees of gender equality, interpreted as substantive equality" at 557) [Boyd & Young, "Feminism"].

[35] It is worth noting that certain developments in Canadian matrimonial law, such as the legalization of same-sex marriage, have been viewed some as eroding earlier feminist progress in family law. See e.g. Claire Young & Susan Boyd, "Losing the Feminist Voice? Debates on The Legal Recognition of Same Sex Partnerships in Canada" (2006) 14:2 Feminist Legal Studies 213. The gender-neutral language of the *Advisory Guidelines* (as well as the *Divorce Act*), might give rise to a similar difficulty, particularly given the broad basis for entitlement for spousal support following *Bracklow* and the increased potential for orders against high-earning women, simply on the basis of income disparity and without a proper inquiry into entitlement. See e.g. Rogerson, "Post-Bracklow", *supra* note 6 (on the broad basis for entitlement to support). While that is a real possibility that may unfairly affect some women, this article nevertheless maintains that as the majority of spousal support claimants are women in vulnerable economic positions, as a tool that brings some certainty to a previously unpredictable area of law meant to remedy that position, the *Advisory Guidelines*, on balance, benefit women.

of our democratically elected and politically accountable representatives.[36] Before responding to that objection, this Part suggests that the *Advisory Guidelines* are best described as an instrument of soft law. It then sets out the critiques of the *Advisory Guidelines*, which echo typical critiques of soft law in the administrative context. Last it unpacks the objection as grounded in a concern about the constitutional legitimacy of judicial reliance on an informal, non-legislated tool.

2.1. Soft law outside the administrative context

The *Advisory Guidelines* may be best characterized as an instrument of soft law. In the administrative context, the use of soft law is widespread, although to date, the practice has not been the subject of much scholarly attention.[37] Where it has been considered in the

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[36] Note that in Quebec, the objection also relates to the content of the *Advisory Guidelines* and the application of federal legislation in a civil law jurisdiction. See e.g. Jocelyn Jarry et al, "Lignes directrices facultatives en matière de penions alimentaires pour époux — Pertinence de leur application au Québec?" (2016) 31:2 Canadian Journal of Law & Society 243. Specifically, Quebec authorities have taken issue with the fact that *Advisory Guidelines* typically place a term on support awards, a practice Quebec courts have not historically followed. As this paper deals with the constitutional objection premised on the informal nature of the *Advisory Guidelines* — that is, the objection more clearly emanating from common law courts — it will not weigh in on the substantive objection in Quebec. I anticipate addressing the Quebec question in future work.

[37] But see Lorne Sossin, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40:3 Alberta Law Review

Canadian context, soft law, at its most general, is typically understood as a tool for "guidance as to how to exercise broad discretionary authority."[38] Lorne Sossin writes, "[soft] law encompasses non-legislative instruments such as policy guidelines, technical manuals, rules, codes, operational memoranda, training materials, [and] interpretive bulletins…."[39] Daniel Mockle adds strategic plans, user guides, standards, and codes of conduct.[40] As with the *Advisory Guidelines*, administrative soft law "[typically … takes] a statutory power or powers as a point of departure and [elaborates] how that discretion should be exercised in different factual settings."[41] Significantly, given its informal nature, administrative soft law, "cannot in theory bind decision-makers…."[42] As with the *Advisory*

867 [Sossin, "Hard Choices"]; Sossin, "Discretion Unbound" *supra* note 7; Angela Campbell & Kathleen Cranley Glass, "The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46:2 McGill Law Journal 473; France Houle, "La zone fictive de l'infra-droit : l'intégration des règles administratives dans la catégorie des textes réglementaires" (2001) 47:1 McGill Law Journal 161; Anna di Robilant, "Genealogies of Soft Law" (2006) 54:3 American Journal of Comparative Law 499.

[38] Sossin, "Discretion Unbound", *supra* note 7 at 466.

[39] *Ibid* 466-67.

[40] Daniel Mockle, *La gouvernance, le droit et l'État : La question du droit dans la gouvernance publique* (Brussells: Bruylant, 2007) at 108.

[41] Sossin, "Hard Choices", *supra* note 37 at 868-69.

[42] *Ibid* at 869.

Guidelines in certain jurisdictions, however, this fact has not inhibited the influence of non-binding guidelines: "… in practice [soft law] often has as much or more influence than legislative standards."[43]

The increasing influence of soft law, both in Canada and abroad might be attributed to the growth of the administrative state and the rise of administrative agencies — that is, the rise of ministerial decision-making, outside of the courts.[44] Whereas courts, as a general matter, rely on statutes — both primary legislation and regulations — the growth of administrative decision-making has brought with it the "increasing practice of regulation by administrative rather than statutory rules."[45] Thus, many "regulatory regimes … rely heavily on codes of practice, guidance, and circulars, which are often of indeterminate legal status."[46] The unofficial nature of the *Advisory Guidelines* might be understood as placing them in the same "indeterminate" category.

The parallels between administrative soft law and the *Advisory Guidelines* are many. Importantly, both "may be seen as a bridge spanning the divide between statutory authority, on the one hand, and discretionary judgement, on the other."[47] Both "[implicate]

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[43] *Ibid*.

[44] See Christopher McCrudden, "Regulations and Thatcherism: Some British Observations on Instrument Choice and Administrative Law" (1990) 40:3 University of Toronto Law Journal 542.

[45] *Ibid* at 546.

[46] *Ibid*.

[47] Sossin, "Discretion Unbound", *supra* note 7 at 474.

some form of normative commitment, [but] do not rely on binding rules or on a regime of formal sanctions."[48] Similar as they are, however, a crucial distinction — one that might form the basis of judicial resistance to the *Advisory Guidelines* — merits mention. While administrative guidelines and policies are "not laws passed by the legislature," they nevertheless typically have their source in government.[49] Unlike the *Advisory Guidelines*, administrative soft law is often issued by government departments, ministries and "public-sector institutions" to guide decision-making in those places.[50] In other words, administrative soft law is "developed by and applicable to unelected officials exercising public authority."[51] Conversely, the *Advisory Guidelines* do not stem from government. They were written by two family law professors, under the aegis of the federal Department of Justice, in consultation with a committee of family law practitioners and judges. Further, unlike administrative guidelines, which guide the decisions of bureaucrats acting on behalf of the executive branch, the *Advisory Guidelines* are designed to guide judges, as well as lawyers and litigants, in determining spousal support pursuant to a broad statutory grant of discretion.

While the distinctions between administrative soft law and the *Advisory Guidelines* might appear significant, they should not be overstated. In truth, their parallels are stronger than their differences. While Sossin's work focuses on the administrative state and the

[48] di Robilant, *supra* note 37 at 499.

[49] Sossin, "Hard Choices", *supra* note 37 at 868.

[50] *Ibid*.

[51] *Ibid*.

decision-making powers of the executive, there is no reason to limit the practice of administrative reliance on similar policies and internal guidelines to state actors. Non-legislated instruments aimed at guiding the exercise of discretion are created and used outside of government as well. In the Canadian healthcare context, for example, conduct is often guided by soft law.[52] In the medical context, soft law has been defined as "[standards] that are not enacted in law or regulation," which lack a "definitive legal status," and which "affect the behaviour of health care professionals."[53] Given its non-legislated character, this form of soft law may likewise be disregarded by a court, although in practice judges lacking expertise in medical fields will often defer to its contents.[54]

Outside of Canada, examples and definitions of soft law are even broader. In the United States, judges regularly rely on the non-legislated American Law Institute Restatements.[55] Much like the *Advisory Guidelines*, ALI Restatements "are not law, but they are influential."[56] Created by a committee of "prominent judges, attorneys, and law professors," ALI Restatements have been produced since 1923, with the goal of responding

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[52] See Campbell & Cranley Glass, *supra* note 37.

[53] *Ibid* at 475.

[54] *Ibid* at 476.

[55] See e.g. American Law Institute, *Restatement of the Law, Second: Torts* (St Paul, Minn: American Law Institute Publishers, 1979); American Law Institute, *Restatement of the Law, Third: Agency* (St Paul, Minn: American Law Institute Publishers, 2006).

[56] Shawn G Nevers, "Restatements: An Influential Secondary Source" (2013) 42:2 Student Lawyer 19 at 19.

to the perceived "uncertainty and complexity" of American law — defects understood to have "produced a general dissatisfaction with the administration of justice."[57] They cover an array of subjects, such as torts, contracts, and employment law.[58] The ALI Restatements are considered "persuasive authority by many courts,"[59] in spite of not being legislated.[60]

In the European Union context, Anna di Robilant describes academics taking the lead in the development of soft law.[61] She describes soft law initiatives as a "decentralized" process of governance, "yielding voluntary guidelines and standards rather than

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[57] Kristen David Adams, "The Folly of Uniformity?" Lessons from the Restatement Movement" (2004) 33:2 Hofstra Law Review 423 at 432-433.

[58] See "Restatements of the Law", *American Law Institute*: <https://www.ali.org/publications/#publication-type-restatements>.

[59] Meg Kribble, "Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises", *Harvard Law School Library*: <https://guides.library.harvard.edu/c.php?g=309942&p=2070280>.

[60] But see: Kristen David Adams, "Blaming the Mirror: The Restatements and the Common Law" (2007) 40:2 Indiana Law Review 205 (setting out some common critiques of the Restatements and suggesting that such "criticisms … should be more accurately presented as critiques of the common-law court system" at 207).

[61] See di Robilant, *supra* note 37 at 500. See also Vanitha Sundra-Karean, "In Defense of Soft Law and Public-Private Initiatives: A Means to an End? — The Malaysian Case" (2011) 12:2 Theoretical Inquiries in Law 465.

compulsory regulation."[62] In France, non-legislated guidelines structure discretion in areas as diverse as parental contributions to a child's education and maintenance upon divorce and the portion of the cost of public housing for the elderly to be paid by a resident's family.[63] Despite their creation outside of government, the *Advisory Guidelines* are accordingly best characterized as an instrument of soft law, albeit a unique one in Canada, where soft law tools are for the most part limited to the administrative context, whether emanating from the state or some other policy-making body.

2.2. Judicial objections to the Advisory Guidelines

Judicial objections to reliance on the *Advisory Guidelines* express a specific set of concerns, similar to those raised by decision-making based on administrative soft law. The most vocal objections to the *Advisory Guidelines* have come from Quebec, where trial judges' approaches to them have ranged from doubt to hostility. In 2005, they were described as "mere commentary," a clear indication of judicial attitudes to come.[64] One year later, they were rejected on the basis that the court is not a "research laboratory" or "testing ground," again an allusion to their unofficial character.[65] Despite a strong

[62] di Robilant, *supra* note 37 at 504.

[63] See Alice Gouttefangeas, "Des barèmes de calcul de la participation des familles au financement de l'hébergement des personnes âgées en institution" in Isabelle Sayn, ed, *Le droit mis en barèmes?* (Paris: Dalloz, 2014) 37.

[64] *MF v NC*, 2005 CanLII 13719 (QC CS).

[65] *BD v SDu*, 2006 QCCS 1033 at para 20.

endorsement of the *Advisory Guidelines* by the Quebec Court of Appeal in 2011,[66] attitudes among trial judges remained unchanged. Quebec trial judges have consistently reminded us that the *Advisory Guidelines* are not law and that reliance on them would constitute an unacceptable shortcut, akin to illegitimately circumventing the statutory analysis set out in the *Divorce Act*.[67]

Alberta's courts, while not as strident in their critique as some Quebec judges, have expressed similar reservations about the *Advisory Guidelines*. Unlike neighbouring British Columbia, where they have been analogized to authority,[68] judges in Alberta appear firmly of the view that courts are under no obligation to justify a decision to depart from the *Advisory Guidelines*, because they are not law,[69] and continue to emphasize that they "cannot be used as a formula or software tool."[70] In 2014, a unanimous Alberta Court of Appeal accepted the use of the *Advisory Guidelines* as a "useful 'cross-check' or 'starting point' for spousal support, that might increase the consistency and predictability of awards."[71] But, referring to the rejection, in *Moge*, of a "magic recipe" for determining support, it would not rely on them to avoid the "difficult analysis [required by] the *Divorce*

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[66] *Droit de la famille — 112606*, 2011 QCCA 1554.

[67] *DF — 14165*, *supra* note 5, citing *DS v MSc.*, 2006 QCCS 334.

[68] See *Redpath v Redpath*, 2006 BCCA 338 [*Redpath*]. Also see *Fisher*, *supra* note 4 (adopting the reasoning in *Redpath* for the province of Ontario).

[69] *RMQ v JAQ*, 2014 ABQB 620; *RMQ v JAQ* 2015 ABQB 392.

[70] *Sawatzky*, *supra* note 5 at para 17.

[71] *Ibid*.

Act."[72] In Alberta, then, the *Advisory Guidelines* are understood as neither mandatory, nor having force of law: "They are a useful tool … [but] do not and should not truly fetter a trial judge's discretion."[73] Moreover, their utility might be more pronounced outside of the courtroom, where they may "encourage settlement and allow parties to 'anticipate their support responsibilities at the time of separation.'"[74]

The same is true in Nova Scotia, where, despite their slow integration by trial judges, the consistent message from the Court of the Appeal is that "[since] the law does not oblige the judge to apply the [*Advisory Guidelines*]," there is no error in law in a trial judge choosing not to use them.[75] That statement is in stark contrast with the British Columbia Court of Appeal's reasoning that failure to consider the *Advisory Guidelines* or justify departing from them when they are argued may constitute an error in law.[76] More recent cases in Nova Scotia have emphasized the non-binding nature of the *Advisory Guidelines* and referred to them as a "reference" for courts.[77]

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[72] *Sawatsky*, *supra* note 5 at para 15, referring to *GV v CG*, 2006 QCCA 763.

[73] *Neighbour*, *supra* note 5 at para 15 citing *ibid* at para 16.

[74] *Sawatsky*, *supra* note 5 at para 17, citing *SC v JC*, *supra* note 4 (note, however, that courts in New Brunswick, adopting the British Columbia approach, has been much more open to the *Advisory Guidelines* than in Alberta).

[75] *Strecko*, *supra* note 5 at para 50. See also *MacDonald supra* note 5.

[76] *Redpath*, *supra* note 68.

[77] *Darlington v Moore*, 2014 NSSC 358 at para 163. Note that the parties in this case were not married and therefore not subject to the *Divorce Act*. Nevertheless, the Court is

These examples illustrate that the judicial refusal to rely on the *Advisory Guidelines* appears grounded, for the most part, in their unofficial and non-binding status. Given the unique nature of the *Advisory Guidelines* as an unofficial tool meant to guide judicial determinations, the status-based objection is not unreasonable. The *Advisory Guidelines* constitute a novel approach to structuring or curtailing statutorily mandated judicial discretion and, as such, they should be approached with care. But a nuanced or careful approach need not mean closed-mindedness to new regulatory techniques, given the proliferation of similar alternatives to legislation throughout the legal and political system.[78] Of course, any understanding of the motives for judicial resistance to the *Advisory Guidelines* will be limited by the content of judicial pronouncements concerning them. Moreover, it is possible that resistance might be rooted in judicial attitudes relative to the function of the spousal support remedy itself; it may not be a coincidence that prior to the creation of the *Advisory Guidelines*, spousal support awards in Nova Scotia and

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firmly of the view that even were they married, "the Spousal Support Guidelines would not be binding" [emphasis in original]. See also *Breed v Breed*, 2016 NSSC 42 (finding the *Advisory Guidelines* "neither instructive nor constructive" at para 78).

[78] See Mockle, *supra* note 40 at ch 1. See also Bridget Hutter, "Risk Management and Governance" in Pearl Eliadis, Margaret M Hill & Michael Patrick Howlett, *Designing Government: From Instruments to Governance* Montreal & Kingston: McGill-Queen's University Press, 2005) 303 at 303.

Alberta seemed to place more weight on the goal of self-sufficiency,[79] with the result that judges were more likely to award support for shorter durations than their counterparts in other provinces.[80] Nevertheless, a response to judicial attitudes can only answer to they way are expressed — here, as objecting to the illegitimacy of judicial reliance on the informal and non-binding *Advisory Guidelines*.

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[79] The promotion of self-sufficiency is one of the four objectives of a spousal support award, pursuant to the *Divorce Act*. The others are to "(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage." Importantly, the objective of promoting self-sufficiency is the only one of these objectives tempered by the caveat, "in so far as practicable." This caveat has been interpreted to mean that self-sufficiency cannot be the sole or paramount objective of a spousal support award. See *Divorce Act*, *supra* note 3, s 15.2(6); *Moge*, *supra* note 8 at 853.

[80] See Rogerson, "Post-*Bracklow*", *supra* note 6 at 264. This observation has its limits, however. Prior to the creation of the *Advisory Guidelines*, Rogerson placed Saskatchewan in the same category as Alberta and Nova Scotia, whereas Saskatchewan has since demonstrated more openness to the *Advisory Guidelines* than the former two provinces, evidenced by *Linn v Frank*, *supra* note 4.

2.3. Unpacking the objection

Given the similarity between the *Advisory Guidelines* and administrative soft law, it is not surprising that objections to deferential approaches to the latter tend to echo judicial objections to the *Advisory Guidelines*. Sossin captures the objection when he writes:

> Legislation and Regulations are subject to Parliamentary accountability and procedural formality…. Soft law is subject to no such criteria. Courts cannot treat guidelines as law because to do so would recognize that public administration is subject to laws of its own design, which would offend Canada's constitutional separation of powers.[81]

Granted, the objection, as Sossin describes it, applies to reliance on soft law by the executive branch of government, in administering government programs. But it is rooted in the same concern as judicial objections to the non-legislated status of the *Advisory Guidelines* — they are not law and reliance on them defies the unwritten constitutional principle of the separation of powers.

The separation of powers is a "defining feature" of Canada's Constitution.[82] Whereas "the role of the judiciary is … to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy."[83] Moreover, the separation of powers is inherent in the Canadian constitutional principle of Parliamentary democracy — that is,

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[81] Sossin, "Hard Choices", *supra* note 37 at 887 [references omitted].

[82] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 10.

[83] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 470, cited in *ibid* at para 10.

the "ultimate truth … that fundamental matters of political choice are left to the legislature…."[84] Objections to the application of the *Advisory Guidelines* on the basis that they are not legislated are thus ostensibly rooted in the principle that legislative policy should emanate from democratically elected lawmakers, and nowhere else.

Resistance to soft law reflects two related concerns. First, as seen, a concern for respect for the foundational constitutional principle of the rule of law and the requirement "that the exercise of all public power must find its ultimate source in a legal rule."[85] At stake, then, for judges whose refusal to apply the *Advisory Guidelines* based on their informal nature, is a potential affront to the rule of law, and the requirement that all government action comply with the law.[86] As the judiciary is a branch of Canadian government, the objection implies that it would be contrary to constitutional principles for courts to rely on normative instruments that do not conform to rule of law, "the root of our system of government."[87] As discussed below, however, the rule of law may be understood as something broader than these narrow judicial statements suggest.

The second difficulty with judicial deference to soft law instruments has not been explicitly addressed by judges approaching the *Advisory Guidelines*, but it is grounded in similar concerns about constitutional legitimacy. Because administrative soft law is, as a

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[84] *Ibid* at para 23.

[85] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para 10 [*Remuneration*].

[86] See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Secession*].

[87] *Ibid* at para 70.

general matter, both "developed and applied by the bureaucracy, it is not subject to the accountability measures applicable to legislation and regulations."[88] Legislation — both primary statutes and the regulations adopted under them — may be subjected to judicial review and evaluated for *Charter* compliance. Indeed, "they must be enacted or issued in a particular fashion, published in a particular form, vetted for compliance with constitutional strictures, and are subject to Parliamentary debate."[89] Soft law, however, which "[elaborates] the legal standards and political values underlying bureaucratic decision-making,"[90] with potentially serious impacts on the individuals subject to it, is not subject to the same constraints.[91] Indeed, the absence of "requirements governing [its] content and the process by which [it is] developed and disseminated" might seriously undermine its legitimacy as the basis for determining outcomes.[92]

As a tool for guiding discretionary determinations, the *Advisory Guidelines*, like administrative soft law, are thought to "enhance coherence and accountability."[93] By providing a clearer structure for spousal support determinations, the *Advisory Guidelines*

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[88] Sossin, "Hard Choices", *supra* note 37 at 870. See also Sossin, "Discretion Unbound", *supra* note 7.

[89] Sossin, "Hard Choices", *supra* note 37 at 887. See also McCrudden, *supra* 44 at 547.

[90] Sossin, "Hard Choices", *supra* note 37 at 871.

[91] *Ibid* at 887.

[92] *Ibid* at 892.

[93] *Ibid* at 888.

"[make] the basis for discretionary decisions more transparent."[94] And by requiring judges to justify departures from the formulas, they create a sense of accountability on the part of decision-makers.[95] However, the same absence of procedural and constitutional constraints on administrative soft law might be seen as effectively allowing "public authority to be exercised according to internal and sometimes secret principles and policies, not subject to a fair and accountable process of development or meaningful forms of public review."[96] Indeed, where soft law materials are reviewed by courts — typically in the administrative context — they are normally not scrutinized for *Charter* compliance.[97] Accordingly, just as judicial reliance on a non-legislated regulatory instrument might be understood as threatening basic constitutional principles, the absence of procedural accountability might likewise "[undermine] both the integrity of public administration and the rule of law."[98]

The rule of law is a foundational element of Canada's political and legal system and regulatory tools must conform to it. As seen, however, using alternatives to legislation is routine, both within the regulatory state and in the context of dispute resolution.[99] Accordingly, rather than resistance, what is needed is a means of viewing soft law as

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[94] Rogerson, "Access to Justice", *supra* note 21 at 66.

[95] See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 108.

[96] Sossin, "Hard Choices", *supra* note 37 at 887.

[97] See Sossin, "Discretion Unbound", *supra* note 7.

[98] Sossin, "Hard Choices", *supra* note 37 at 887.

[99] Mockle, *supra* note 40 at 37.

respecting constitutional requirements.[100] In the case of spousal support, the question thus becomes whether there is merit to judicial objections to the *Advisory Guidelines* based on their unofficial status or whether, instead, it is possible to understand reliance on this kind of instrument as adhering to the rule of law. The next Part suggests that it is.

3. Thick constitutionalism: the procedural rule of law and democratic legitimacy

Resistance to the *Advisory Guidelines* based on the idea that judicial reliance on them offends the separation of powers is rooted in a thin understanding of the Constitution. The objection outlined above regards the Constitution as "rule-based" and "takes [the] principal site of operation [of constitutions] to be the constitutional or highest court."[101] The narrow, or formal, understanding of the rule of law, as set out by the Supreme Court, consists of three basic elements. First, the supremacy of the law over government and citizens;[102] second, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative

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[100] See *ibid* at 40.

[101] Robert Leckey, "Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights" (2009) 40:2 Columbia Human Rights Law Review 425 at 437 [Leckey, "Thick Instrumentalism"]. Note that Leckey's work calls for a thick approach to legal scholarship and does not espouse a political theory. This work draws merely on the notion that constitutional principles might be viewed from both thin and thick perspectives.

[102] *Secession*, *supra* note 86 at para 71.

order;"[103] and, third, as seen, any exercise of state power must be grounded in a legal rule.[104] Grounded, as it is, in their non-legislated form, the critique of the *Advisory Guidelines* reflects a view of law as "exclusively the product of a hierarchical relationship between the legislative, executive, and judicial mechanisms of the state," and represents a reductionist view of law.[105] In doing so, it ignores a richer, or thicker understanding of constitutions, one which "[understands] legality to be sustained not 'solely by the formal law of the Constitution, legislative statutes [or] court decisions,'" but as something "embedded in and [which] emerges out of daily activities."[106]

Instead of limiting understanding of a particular instrument to the narrow formalities associated with a thin conception of the rule of law, thick constitutionalism enables the incorporation of pluralistic understandings of law and legality. Whereas the thin conception of the principle insists on grounding legality in rules and precedent, and thus responds only slowly to changing social needs and circumstances,[107] thick

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[103] *Ibid* at para 71, citing *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 749.

[104] See *Secession*, *supra* note 86 at para 71, citing *Remuneration*, *supra* note 85 at para 10.

[105] Houle, *supra* note 37 at 163 [translated by author].

[106] Leckey, "Thick Instrumentalism", *supra* 101 at 438, citing Patrick Ewick & Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: Chicago University Press, 1998) [references omitted].

[107] See Robert Baldwin & Keith Hawkins, "Discretionary Justice: Davis Reconsidered" (1984) Winter, Public Law 570 at 587.

constitutionalism is released from formal constraints and accepting of novel approaches to legal problems. Importantly, a thick understanding of the Constitution "may reject a strict division between legislation and interpretation…."[108] Such an understanding would have important implications on the normative force of a soft law instrument like the *Advisory Guidelines*, the purpose of which is to aid in interpreting the legislation on spousal support. A thick understanding of constitutional requirements is not distracted by the formal features of soft law. It thus creates space for inquiry beyond form, and opens avenues to explore more meaningful questions, such as the distributive or discriminatory effects of a particular regulatory scheme or instrument.[109]

The thick conception of the rule of law is not without controversy. Indeed, the narrower conception is regularly espoused by courts and constitutional scholars. Peter Hogg writes, "[the] most obvious feature of a democracy is that the laws are made by legislatures whose members are elected."[110] As "an ideal of constitutional legality," the rule of law requires "open, stable, clear, and general rules, even-handed enforcement of those laws [and] the independence of the judiciary."[111] Instruments that flout these requirements cannot be seen as constitutionally legitimate. The narrow conception of the

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[108] Leckey, "Thick Instrumentalism", *supra* note 101 at 437.

[109] See di Robilant, *supra* note 37 at 554.

[110] Peter W Hogg, "Judicial Review in Canada: How Much Do We Need It?" (1974) 26:3 Administrative Law Review 337 at 344.

[111] Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 University of Toronto Law Journal 715 at 717.

rule of law, however, has also been described as "an emotion, an aspiration, an ideal," lacking a foothold in reality, where it has been consistently rejected by "all governments of the world."[112] It is a version, in other words, abstracted from its social, political and historical contexts.

This Part suggests that viewing the *Advisory Guidelines* from the thicker, procedural rule of law perspective enables the acceptance of judicial reliance on the *Advisory Guidelines* as a legitimate means of furthering the objectives of the *Divorce Act*, without compromising Canada's constitutional structure. It first sets out the procedural conception of the rule of law, according to which validity depends not solely on an instrument's form, but on the procedure leading up to its creation. It then suggests that judicial reliance on the *Advisory Guidelines* might fulfill the promise of the procedural rule of law. The analysis contained here is not limited to the *Advisory Guidelines*; importantly, the lessons about the democratic nature of recognizing the normative force of certain non-legislated instruments might be adapted to other novel forms of soft law, aimed at remedying interpretive difficulties and advancing rights, provided that those instruments meet the requirements of the procedural rule of law.

3.1. The rule of law as a rule of procedure

Looking beyond thin constitutionalism means conceiving of the principle of the rule of law as something more than a requirement of form and authorship. Even staunch defenders of parliamentary supremacy and the constitutional principle of the separation of

[112] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 33.

powers will admit that the rule of law is about more than predictability.[113] Jeremy Waldron writes that the rule of law encompasses procedural elements that might be in tension with "the ideal of formal predictability."[114] According to this broader conception of the rule of law, the principle implies a certain procedure, or "mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power."[115] For Waldron, then, adherence to the rule of law depends on the democratic procedures underlying normative instruments; the rule of law is respected when policy making and public administration include "opportunities for active engagement."[116]

The procedural conception of the rule of law connects legitimacy with a belief in the democratic character of certain processes. Under this model, a regulatory tool will conform to the constitutional principle as long as a designated person, or group of people, participate in its creation, and provided they follow pre-established processes.[117] In Waldron's model, that group of people is the elected legislature.[118] More specifically, it is

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[113] See Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Georgia Law Review 1 at 5.

[114] *Ibid* at 8.

[115] *Ibid*.

[116] *Ibid* at 9.

[117] See Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale Law Journal 1346 at 1372 [Waldron, "Against Judicial Review"].

[118] See *ibid*; Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13:1 Oxford Journal of Legal Studies 18 [Waldron, "Rights-Based Critique"]; Jeremy

the legislature, engaging in "principled dialogue," on behalf of the citizenry.[119] The procedural view of the rule of law does not depend on the substance, or content, of a normative instrument. Provided it was arrived at through a specific process, proponents of this view will accept the fairness of a decision, or policy choice, even where they disagree with its content or outcome. That "process-based response," which accepts decisions independent of their outcome, "is the theory of political legitimacy."[120] Legitimacy, then, depends on legislative procedures.

The legitimacy of legislation is rooted not only in its representative nature, but also in the deliberative and participatory processes associated with democratic debate. Thus arguments in favour of legislative supremacy are based on the "quality of public deliberation."[121] Participation is seen as "valuable because of the importance of assembling diverse perspectives and experiences" in public decision-making, and "because the sheer experience of arguing in circumstances of human plurality helps us develop more interesting and probably more valid opinions than we could manufacture on our own."[122] Thus, underlying the authority of legislation "is a sense that discussion and validation by a large assembly of representatives is indispensable to the recognition of a general measure

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Waldron, "The Dignity of Legislation" (1995) 54:2 Maryland Law Review 633 [Waldron, "Dignity of Legislation"].

[119] See Waldron, "Rights-Based Critique", *supra* note 118 at 38.

[120] Waldron, "Against Judicial Review", *supra* note 117 at 1387.

[121] Waldron, "Rights-Based Critique", *supra* note 118 at 37.

[122] *Ibid*.

of principle or policy as law."[123] As legislators participate in that discussion in place of their constituents, the procedural conception of the rule of law promotes "respect for the freedom and dignity of each person as an active intelligence."[124]

Otherwise conceived of, the procedural understanding of the rule of law grounds legitimacy in representative democracy and the collective deliberation of elected representatives. Similar to the Habermasian notion of deliberative democracy, legitimacy derives from the fact that those who exercise legislative power "do so on the presumption that their decisions represent an impartial standpoint that is equally in the interest of all."[125] That presumption rests on the idea that "decisions [are] the result of appropriate public processes of deliberation," wherein individual participate and question equally and may raise arguments about both the substance of a decision, as well as the procedures of decision-making.[126] Under this model, legitimacy, in the context of "collective decision making processes in a polity," is conditional on the fact that "the institutions of this polity are so arranged that what is considered in the common interest of all results from processes

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[123] Waldron, "Dignity of Legislation", *supra* note 118 at 642.

[124] Professor Jeremy Waldron, "Thoughtfulness and the Rule of Law" (2011) 18 British Academy Review 1 at 8 [Waldron, "Thoughtfulness"]. See also Hoi L Kong, "Deliberative Constitutional Amendments" (2015) 41:1 Queen's Law Journal 105 (on popular participation in deliberative process as respecting fundamental rights).

[125] Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" (1999) 66:3 Social Research 745 at 747.

[126] *Ibid*.

of collective deliberation conducted rationally and fairly among free and equal individuals."[127] Procedural rule of law, then, presumes the legitimacy of legislative instruments as resulting from the participation, in their creation, of representatives of the diverse citizenry. Moreover, legislatures debate questions from the broadest of perspectives. The diversity and representative nature of legislative assemblies means that lawmakers are meant to be able to take multiple and diverging views into account when interpreting rights and determining their content.[128] In consequence, regulatory tools that, like the *Advisory Guidelines*, do not result from the legislative process fail to promote the freedom and dignity of the people subject to them; judicial reliance on them constitutes an affront to the procedural rule of law.

The procedural rule of law represents a broader conception of the principle than that espoused by Canadian courts and seemingly at the root of the judicial objection to the *Advisory Guidelines*. But it is still grounded in a strict separation of powers, which understands constitutional legitimacy as connected in part with legislative supremacy. Where spousal support is concerned, however, the legislative process has undermined rather than furthered the rule of law; the diversity of judicial interpretations of the statutory

[127] *Ibid* at 746-747, citing Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy", in Seyla Benhabib, ed, *Democracy and Difference: Contesting Boundaries of the Political* (Princeton: Princeton University Press, 1996) 67 at 69.

[128] See Jeremy Waldron, "Judges as Moral Reasoners" (2009) 7:2 International Journal of Constitutional Law 2; Waldon, "Against Judicial Review", *supra* note 117.

remedy created confusion and uncertainty.[129] The spousal support provisions of the *Divorce Act* set out four objectives that an award might aim to achieve. The first three might be understood as recognizing and remedying economic advantages and disadvantages resulting from the roles of the spouses during the marriage, and their resulting economic positions upon marriage breakdown.[130] The fourth, referenced above, paints spousal support as a tool for promoting self-sufficiency on the part of each spouse.[131] Aside from the tempered nature of the goal of self-sufficiency, however, the legislation does little to guide judges in selecting among the different objectives to craft an appropriate award. In other words, the legislative process that led to the adoption of the spousal support provisions of the *Divorce Act* did not result in a clear endorsement of a particular conception of a right — here, the right to equality[132] — as legislatures are said to do.[133]

In light of the contradictory and confusing nature of the remedy prior to the release of the *Advisory Guidelines*, Canadian spousal support law might be described as self-defeating, from a systemic perspective. Indeed, the legislation fulfills Cass Sunstein's

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[129] See Rogerson, "Post-Bracklow", *supra* note 6; "SSAG Background Paper", *supra* note 31.

[130] See *Divorce Act*, *supra* note 3, s 15.2(6).

[131] *Ibid*.

[132] See Boyd & Young, "Feminism", *supra* note 34 (on the equality-based objectives of the spousal support provision of the *Divorce Act*).

[133] See Waldron, "Rights-Based Critique", *supra* note 118; Waldron, "Against Judicial Review", *supra* note 117.

description of a "regulatory paradox" — that is, a "self-defeating regulatory [strategy that achieves] an end precisely opposite to the one intended."[134] While the spousal support provisions adopted in 1985 might have been an improvement over their predecessors — providing, as they do, minimal guidance to judges determining support — it cannot be said that they were very successful at remedying the devastating economic consequences of marriage breakdown on many women. As seen, in the absence of the *Advisory Guidelines*, the discretionary awarding of spousal support often resulted in disproportionately negative economic effects on divorcing women, attributable to the sense of inconsistency and unpredictability of the remedy.

That the spousal support provisions of the *Divorce Act* should constitute a regulatory paradox is unsurprising; similar broad and heavily fact-dependent discretionary grants have likewise been known to undermine their objectives. Determining the "best interests of the child" in custody cases, for example, is understood by some to constitute a disservice to children "because of the enormous time spent in resolving the complicated factual question."[135] Particularly significant is the belief that legislation invoking principles of formal equality in family law matters might produce "less rather than more in the way

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[134] Cass R Sunstein, "Paradoxes of the Regulatory State" (1990) 57:2 University of Chicago Law Review 407 at 407.

[135] *Ibid* at 428 [references omitted]. See also Juliet Behrens, "*U v U*: The High Court on Relocation" (2003) 27:2 Melbourne UL Rev 572 (arguing against broad grants of judicial discretion in family matters).

of real equality between men and women."[136] Indeed, "a formal constitutional guarantee of equality does not go very far toward achieving justice."[137]

The *Divorce Act* directs judges to look at the details of a couple's relationship when determining support. But the legislation is gender neutral, and it was not until the Supreme Court set out the compensatory approach to spousal support in *Moge v Moge* that trial judges awarding support began to systemically consider the demonstrated socio-economic impacts of family breakdown on women.[138] The Court thus recognized that "[when] two groups are differently situated, a legal requirement that they be treated the same seems a

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[136] Sunstein, *supra* note 134 at 429 [references omitted]. See also Susan Engel, "Compensatory Support in Moge v. Moge and the Individual Model of Responsibility: Are We Headed in the Right Direction?" (1993) 57:2 Saskatchewan Law Review 397; E Diane Pask, "Canadian Family Law and Social Policy: A New Generation" (1994) 31:2 Houston Law Review 499; Claire L'Heureux-Dubé, "Making Equality Work in Family Law" (1997) 14:2 Can J Fam L 103; Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" (2006) 33 Supreme Court Law Review (2d) 291 (all dealing with the harms of formal equality for women in the context of family law).

[137] The Honorable Claire L'Heureux-Dubé, "It Takes a Vision: The Constitutionalization of Equality in Canada" (2002) 14:2 Yale Journal of Law & Feminism 363 at 374 [L'Heureux-Dubé, "Vision"].

[138] See *supra* note 8.

perverse method of promoting equality between them."[139] Specifically, it found that judges, in order to be responsive to the "equality implications of their interpretation of the relevant provision … may need to examine the factual social and economic context in which a particular piece of legislation operates."[140] In short, it confirmed that a formal approach to gender equality will often have the effect of further disadvantaging women. Further, while the Supreme Court, in *Moge*, interpreted the remedy in the spirit of substantive equality, later interpretations resulted in confusion and unpredictability. Thus, the Canadian legislation on spousal support is characteristic of a regulatory paradox, where "legal controls have been self-defeating."[141]

Thickening the principle of the rule of law to take into account the procedures underlying legislation does not provide a satisfactory answer to the problem of legislative or regulatory paradoxes, which, while perhaps procedurally sound, defeat rather than promote their objectives. In the case of spousal support, the relevant provisions of the *Divorce Act* may have been properly adopted by the legislature, but their competing objectives and factors, prior to the advent of the *Advisory Guidelines*, did little to improve the fate of divorcing women. As the following section suggests, however, the procedural conception of the rule of law might still hold promise for recognizing the normative force

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[139] Sunstein, *supra* note 134 at 429. See also L'Heureux-Dubé, "Vision", *supra* note 137; Boyd & Young, "Feminism", *supra* note 34.

[140] L'Heureux-Dubé, "Vision", *supra* note 137 at 372 n 38.

[141] Sunstein, *supra* note 134 at 429.

of the *Advisory Guidelines*, and for similar soft law tools, provided their creation respects the tenets of the constitutional principle.

3.2. Can the Advisory Guidelines *further the procedural rule of law?*

The *Advisory Guidelines* are one example of where recognizing the normative force of soft law might be understood as respecting the procedural rule of law. Indeed, the creation of the *Advisory Guidelines*, relying on the input of various actors and stakeholders representing different factions of society, suggest that the pillars of deliberative democracy may be better upheld in the non-legislative context. Procedural legitimacy, in other words, may not lie exclusively in legislated instruments.

One of the principal critiques of political decision-making and legislating is that favouring interest groups and concentrating power in to the "hands of a few" effectively "[locks citizens] out of the key decision-making structures."[142] Democracy is said to suffer as a result.[143] Even Waldron admits that "both representative authority and judicial authority involve the exercise of political power at some remove from the participation of ordinary citizens."[144] Moreover, political decision-making often fails to adhere to the "four pillars of deliberation" — that is, to the "four consistently articulated criteria for a

[142] Robert P Shepherd, Book Review of *Power: Where Is It?* by Donald J Savoie, (2011) 54:2 Canadian Public Administration 308 at 309.

[143] *Ibid* at 309.

[144] Jeremy Waldron, "Representative Lawmaking" (2009) 89:2 Boston University Law Review 335 at 348.

discussion to be considered fully deliberative."[145] These are: consensus; reason, or an "orientation to the public good … [taking] into account in a fundamental way the perspective of others;" rational discussion; and equality of participation, unconstrained by the existing distribution of social resources.[146] That failure to align with these "standards against which a decision-making process can be measured to determine that process's legitimacy…"[147] undermines the legitimacy of political decision-making from a procedural rule of law perspective.[148] As seen earlier, however, these standards were respected in the creation of the *Advisory Guidelines*.

If reason and thoughtfulness are understood to be the hallmarks of the procedural rule of law,[149] it is difficult to impugn an instrument of soft law, the creation of which appears to better fulfill the pillars of deliberative democracy than the Canadian legislative system. Indeed, the process of creating the *Advisory Guidelines* embodied the markers of procedural legitimacy. The authors sought consensus on the different aspects of the project; the process took fundamental account of the diverse perspectives involved; the authors engaged in rational discussions with the advisory group and other interested parties; and equality of participation, unconstrained by social resources, seems to have been inherent

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[145] Alice Woolley, "Legitimating Public Policy" (2008) 58:2 University of Toronto Law Journal 153 at 170.

[146] *Ibid* at 170-171.

[147] *Ibid* at 172.

[148] See *ibid* at 169.

[149] See Waldron, "Thoughtfulness", *supra* note 124.

in the authors' travels throughout the country: instead of waiting for those with the resources to reach out to them, the authors actively sought out the views of different voices. Moreover, unlike the legislative process,[150] their process of creation suggested openness to change and continuous revision, until all participants agreed that the *Advisory Guidelines* constituted a proper reflection of the case law, taking into account regional and cultural differences across geographic lines. All of this supports the idea that procedural legitimacy — that is, respect for the procedural conception of the rule of law — might well lie in informal tools like the *Advisory Guidelines*.

The imperfect nature of the legislative system,[151] together with the demonstrated defects with judicial discretion in the spousal support context,[152] illustrate that the relevant

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[150] See Mouffe, *supra* note 125 at 163; Barber B Conable, Jr, "Our Limits Are Real" (1973) 11 Foreign Policy 73; Ian Vallance, "Interest Groups and the Process of Legislative Reform Bill C-15 - A Case Study" (1998) 13:1 Queen's Law Journal 159 at 165.

[151] Political scientists and scholars of public choice theory have long understood that the sort of representative and participatory deliberation envisioned by Waldron — the features of legislation that enable it to conform to the procedural vision of rule of law — is but a fiction. See Frickey & Farber, *Law and Public Choice* (Chicago: University of Chicago Press, 1991); Mouffe, *supra* note 125; *ibid*; Donald Savoie, *What is Government Good At? A Canadian Answer* (Montreal & Kingston, McGill-Queen's University Press, 2015).

[152] See Bala, *supra* note 11.

provisions of the *Divorce Act* may not adhere to the procedural conception of the rule of law. Informed by the reasoning underlying the procedural conception, that failure might be described as a lack of democratic accountability with respect to the law of spousal support. The *Advisory Guidelines*, however, might represent a means of restoring that accountability. In the administrative context, Sossin writes that "better statutory guidance in crafting discretionary powers is desirable from the standpoint of democratic accountability."[153] Although they are not a legislative creation, or even statutorily mandated, the *Advisory Guidelines* relieve some of the demonstrated problems with the spousal support remedy, while their creation adhered to democratic and deliberative principles. Thus, the *Advisory Guidelines* respond to the process-based critique of soft law set out above.[154] In this sense, the *Advisory Guidelines* might be likened to the American ALI Restatements, the normative force of which has been attributed to the "fair, deliberative, and democratic" nature of the process of their creation and review.[155] Moreover, given the "chaotic" nature of family law[156] — what Rogerson describes as "the fragmentation of the modern family law system" — it is easy to understand how this kind

[153] Sossin, "Discretion Unbound", *supra* note 7 at 478.

[154] See Sossin, "Hard Choices", *supra* note 37.

[155] Victor E Schwartz, "The Restatement (Third) of Torts: Products Liability — The American Law Institute's Process of Democracy and Deliberation" (1998) 26:3 Hofstra Law Review 743 at 759.

[156] See John Dewar, "The Normal Chaos of Family Law" (1998) 61:4 Modern Law Review 467.

of normative instrument might be better "generated by various legal actors, not only by legislators…."[157] In the administrative context, decisions taken under a statutory grant of discretion are regularly based on soft law. Provided these tools correspond with constitutional values — for example, by incorporating an equality-based analysis grounded in the *Charter* and being the subject of meaningful deliberation about their content — reliance on them by judges need not be viewed as a threat to the rule of law.

Acknowledging the legitimacy, from a procedural rule of law perspective, of judicial reliance on soft law may thus serve to refute the rule of law objection to the *Advisory Guidelines*. While they are not legislated, reliance on the *Advisory Guidelines* may still be seen as fulfilling the requirements of a thicker understanding of the rule of law. Proceduralists concerned about the creation of normative instruments might look at the "input legitimacy" of the *Advisory Guidelines*.[158] As seen, their creation used mechanisms normally associated with successful deliberation, such as leadership and stakes in the outcome.[159] Moreover, as in the administrative context, as an instrument "forged through a process of hearings or negotiation involving all relevant interests," the *Advisory Guidelines* have a "strong claim to legitimacy" from the procedural point of view.[160]

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[157] Rogerson, "Access to Justice", *supra* note 21.

[158] di Robilant, *supra* note 37.

[159] David M Ryfe, "Does Deliberative Democracy Work?" (2005) 8 Annual Review of Political Science 49.

[160] See David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 378, referring to *Capital Cities Comm v CRTC*, [1978] 2 SCR 141. Note that *Capital Cities* dealt with

Indeed, as predicted by Rogerson,[161] the type of participation by interested stakeholders in the creation of the *Advisory Guidelines* is understood to create a better framework for decision-making than what would emerge from the common law process of the lengthy and gradual accretion of precedent.[162] As far as the procedural conception of the rule of law is concerned, there may by little merit in impugning judicial reliance on the *Advisory Guidelines* simply because they are not legislated. Thus, a thicker conception of the constitutional principle — one grounded in procedure — might make space for informal normative instruments and has the potential to facilitate the pursuit of equality that underlies the spousal support remedy.

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administrative soft law, and the creation of policies and guidelines pursuant to a statutory grant of ministerial discretion. The statement is nevertheless relevant insofar as it implies that the legitimacy of a soft law instrument may depend less on its source (legislative, academic, or bureaucratic) and more on the process of its creation, including the scope of consultation, and the identity of contributing voices: ("In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act … it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions" at 171).

[161] See "SSAG Background Paper", *supra* note 31.

[162] Mullan, *supra* note 160 at 375.

Conclusion

This article does not purport to settle the meaning of the rule of law. Its much more limited aim is to suggest that to reduce the constitutional principle to the formal understanding expressed by the Supreme Court is to ignore the richness of the concept, and its potential fruitfulness for examining the use of novel regulatory instruments such as soft law. It also does not endorse any particular conception of the rule of law; attempts to answer the question that has occupied scholars of jurisprudence for centuries would go far beyond its scope. Instead, it seeks to demonstrate that contrary to the judicial objection expressed in some provinces, pursuant to at least one conception of the rule of law, judicial reliance on the *Advisory Guideline* might be understood as upholding, rather than offending, the foundational constitutional principle.[163] Approaching the *Advisory Guidelines* from the

[163] Engagement with the procedural conception of the rule of law should not be understood as accepting that recognition of the normative force of the *Advisory Guidelines* cannot be viewed as conforming to other visions of the constitutional principle. Indeed, it might be argued that judicial reliance on the *Advisory Guidelines* also corresponds with the narrower formal view of the rule of law, which prizes the public nature of normative instruments and the consequent predictability of legal decisions, as well as a substantive conception, grounded in reason, justification and respect for rights. See e.g. Jackson et al, "Financial Support on Divorce: The Right Mixture of Rules and Discretion?" (1993) 7:2 International Journal of Law and the Family 230 ("The Rule of Law dictates that like cases should be treated alike and that the law should be predictable so that individuals are able to foresee the legal consequences of their actions and plan

perspective of the procedural rule of law might thus help to achieve the equality-based objectives of the *Divorce Act*.

Scholarship on the *Advisory Guidelines* is scant. Their authors have written about them for both international and Canadian audiences,[164] and others have joined them in addressing practical issues with respect to their use.[165] Few, however, have examined them,

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their conduct accordingly" at 233). Moreover, that this paper does not deal with substantive conceptions of constitutionalism, and the relationship between the rule of law and respect for rights, should not be read as rejecting such understandings of the constitutional principle. See e.g. Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22:5 Law & Philosophy 451 (on the importance of outcomes over process); Hoi Kong, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15:2 Review of Constitutional Studies 249 (on the relationship between the rule of law and respect for individual rights).

[164] See e.g. Rogerson Thompson, "Canadian Experiment", *supra* note 12; Carol Rogerson, "Child Support, Spousal Support and the Turn to Guidelines" in John Eekelaar & Rob George, eds. *Routledge Handbook of Family Law and Policy* (Routledge, 2014) 153; Rogerson, "Access to Justice", *supra* note 21; Rollie Thompson, "Following *Fisher*: Ontario Spousal Support Trends 2008-09" (2009) 28:3 Can Fam LQ 241; Carol Rogerson & Rollie Thompson, "Complex Issues Bring Us Back to Basics: The SSAG Year in Review in B.C." (2009) 28:3 Can Fam LQ 263.

[165] See e.g. Scott Booth, "The Spousal Support Advisory Guidelines: Avoiding Errors and Unsophisticated Use" (2009) 28:3 Can Fam LQ 339; Lonny L Balbi QC, "Steps To

from a theoretical perspective, with respect to their function or legitimacy.[166] This paper maintains that the *Advisory Guidelines* demonstrate the potential of soft law to fill gaps in the law where statutes complicate rather than clarify, or fail to live up to their aspirations of substantive equality, and the legislature is slow to respond. They provide a concrete example of the idea that legislative reform is not the only way that guidelines, meant to assist judges, lawyers, and laypeople alike, may be introduced.[167] Further, viewing reliance on the *Advisory Guidelines* as a constitutionally sound normative approach responds to the call by family law scholars for "communicative and regulatory techniques that speak more directly to the parties themselves" than legislation, which speaks primarily to lawyers and courts.[168] Those working outside of family law have posited a similar need for bottom-up,

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Using The Spousal Support Advisory Guidelines: With Child Support Formula" (2009) 28:3 Can Fam LQ 359; Lonny L Balbi QC, "Steps To Using The Spousal Support Advisory Guidelines: Without Child Support Formula" (2009) 28:3 Can Fam LQ 365.

[166] But see Michel Tétrault, *Droit de la famille : L'obligation alimentaire*, vol 2 (Cowansville: Éditions Yvon Blais, 2010) at 493-519; Jocelyn Jarry et al, *supra* note 36 (both on the utility and applicability of the *Advisory Guidelines* in Quebec).

[167] See Rogerson, "Access to Justice", *supra* note 21.

[168] John Dewar, "Can the Centre hold? Reflections on Two Decades of Family Law Reform in Australia" (2010) 22:4 Child and Family Law Quarterly 377 at 385. Note that the *Advisory Guidelines* are freely available on the federal Department of Justice website. Also, one family law software provider has made a simplified version of the formulas available for free online. See See "My Support Calculator":

or "organic," non-legislative development of the law, in order to avoid the instability of the legislative approach [169] — the same instability that characterized spousal support determinations pursuant to the broad legislative grant of discretion in the *Divorce Act*. Moreover, viewing the *Advisory Guidelines* as a legitimate normative source would align with the legal pluralist perspective, which sees guidelines and soft law not as contradictory to legal activities as traditionally understood, but as an integrated part of those activities.[170]

A unique soft law tool in Canada, the *Advisory Guidelines* may do more than advance the objectives of the spousal support provisions of the *Divorce Act*. Like similar tools used abroad, they force a re-questioning of traditional conceptions of law and justice.[171] In doing so, they open up new understandings of legitimacy and expand the existing pool of sources of normativity. With respect to spousal support, they may help facilitate the pursuit of substantive economic equality across gender lines. In times of rapid social and technological change, formal law will often be disconnected from social reality. As it does in the context of spousal support, soft law can bridge the gap between formal legislation and the lived reality of legal subjects, thus ensuring that the law promotes the

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http://www.mysupportcalculator.ca/Welcome.aspx, cited in *ibid* at n 60. The free calculator is funded by lawyer advertising on the website.

[169] See Serge Gaudet, "Le rôle de l'État et les modifications apporteés aux principes généraux du droit" (1993) 34:3 Cahiers de Droit 817.

[170] Isabelle Sayn, "Les barèmes dans le fonctionnement du droit et de la justice" in Sayn, *supra* note 63, 1 at 11.

[171] *Ibid* at 10-11.

rights and principles that underlie the Canadian justice system. But spousal support is just one example of a place where soft law may help to promote respect for the rule of law. Further research might reveal other areas where similar instruments might play an important role in the lives of both jurists and ordinary citizens. Once it is accepted, as this article has attempted to illustrate, that reliance on non-legislated guidelines, created by parties other than government, does not inevitably undermine foundational constitutional principles, the potential of soft law to contribute to the existing cache of normative instruments is limited only by our creativity.