

***Consistency in Tribunal Decision Making:  
What Really Goes On Behind Closed Doors...***

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**The Imperative of Consistency**

***“As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of law.”***

L’Heureux-Dube J. in *Domtar Inc. v. Quebec (Commission d’appel en matiere del lesions professionnelles)*, 1993 CanLII 106 (S.C.C.) at page19.

***“It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one.”***

Gonthier J. in *I.W.A. v. Consolidated Bathurst packaging Ltd.* 1990 CanLII 132 (S.C.C) at page 28.

### ***The Purpose of this Paper***

In this paper we have drawn on our own experiences in the administrative justice system to describe the different methods, tools and practices used to address issues of consistency within adjudicative administrative Tribunals across all Canadian jurisdictions. As there are literally hundreds of such Tribunals with adjudicator membership in the thousands (one thousand in Ontario alone), this is of necessity, an exercise of generalization.

Notwithstanding our efforts to paint all Tribunals with the same brush, the reality on the ground is that every Tribunal has its own unique features. It should be understood that there are significant variations in the extent to which any one Tribunal conforms to our overall description of trends and directions.

We have tried to reflect what we would consider to be the general “state of the nation” without necessarily identifying any particular Tribunal.

### ***The Necessity of Consistency***

The two passages from *Domtar* and *Consolidated Bathurst* above suggest that consistency in decision making before any level of Court or Tribunal is a necessary and fundamental component of the rule of law.

There is little judicial comment on the various ways in which Tribunals attempt to achieve consistency. The Supreme Court of Canada has discussed the practice of holding “Full Board” meetings to discuss the application of law and policy to Tribunal decisions (*Consolidated Bathurst* (above), *Tremblay v. Quebec (Commission des affaires sociales)* 1992

CanLII 1135 (S.C.C.) and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 CanLII 4 (S.C.C.)) The Federal Court has commented on the practice of using guidelines issued by a Tribunal Chair which govern the conduct of hearings (*Thamotharem* (2006 CanLII FC 16) and *Benitez* (2006 CanLII FC 461)).

These practices are but only two of a much broader range of Tribunal activity, undertaken in the pursuit of consistency. Within the administrative justice community, the tools used to achieve consistency are now understood to address the entire range of Tribunal management and conduct, from the appointment of adjudicators, to the case management of files and the hearing and decision making process.

### *The Notion of Consistency*

Tribunal consistency in its broadest sense means that similarly situated litigants receive similar treatment and outcomes. This in turn means that litigants with comparable disputes, experience the similar range of procedural treatment, from case management broadly, to mediation and different forms of hearing processes more specifically. It also means having matters adjudicated according to the same matrix of law and policy.

Consistency does not mean that all adjudicators in a given Tribunal share identical views and perspectives on all issues. Rather, a healthy and “consistent” Tribunal has a complement of adjudicators who within the group, represent the entirety of the diverse and varied backgrounds and perspectives that make up or are reflected in the sector or industry for which the Tribunal is responsible.

Consistency is best achieved when the Tribunal is able to consider, acknowledge and take advantage of all of the various and sometimes competing priorities and viewpoints around any given issue - and to then arrive at a consensus around the best or most advantageous set of principles to be applied in both questions of process and substance. Adjudicators within the Tribunal should complement each other so that together, all “bases are covered”.

Consistency is enhanced where:

(1) All adjudicators share a common understanding of the range of acceptable views on all significant issues of procedure, law and policy;

(2) An individual adjudicator dealing with a particular case wishes to depart from the commonly understood range of views, there is an agreed upon process that permits an opportunity for all adjudicators to discuss the departure before it occurs; and

(3) Any departure from the commonly understood range of views is thoroughly explained and justified in the reasons for the decision.

### ***Building a Culture of Consistency***

The “full board” processes discussed in *Consolidated Bathurst* and *Ellis Don* display only the tip of the iceberg in terms of what is done within Tribunals to achieve the type of consistency described here. Consistency cannot be simply obtained by requiring adjudicators to attend full board meetings. Rather, it is something that all adjudicators must voluntarily commit to. This commitment is achieved by building up over

time, an internal adjudicative culture that values consistency twinned with the free and open exchange and expression of competing views.

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### Tribunal Challenges

While the Courts have their own challenges in the pursuit of consistency, there are some common historical features of Tribunal operations that determine and shape the different ways in which Tribunals attempt to achieve consistency. In our view, there are a number of significant areas in which Tribunals differ in this way from the Courts.

#### *Skills and Experience*

Most Tribunal adjudicators have no legal training or experience. This means that adjudicators do not bring to the work of adjudication, the same set of consistent and coherent legal skills and experiences brought to the work of judging. Not only does this require significant training and guidance while in the job, but it means that there is no common set of understandings about adjudication that can be relied upon to build the Tribunal's processes.

Very often, adjudicators begin "on the job" with little or no understanding of procedure, evidence, or administrative law principles. This means that the required degree of Tribunal training and guidance is considerable for individual adjudicators at the commencement of their terms.

#### *Nature of the Appointment*

There are differences from the Courts in the nature of the appointment. Most Tribunal adjudicators are appointed on a part time basis and for a fixed term and may be regionally isolated with little or no interaction with colleagues. This means that the work of the Tribunal is not necessarily the adjudicator's first priority, either during the term of their appointment or generally as a career path step. For a part time adjudicator, the work of the Tribunal usually takes second place to a longer term career or business.

With a short fixed term appointment without an expectation of reappointment, the adjudicator will understandably be focused on maintaining links with their outside interests. Where adjudicators are regionally based and function independently, it may be difficult for them to share and discuss their experiences with others in the Tribunal.

### *Finality of Decision Making*

Tribunal decisions are for the most part, final and not easily subject to appeal or review. Some tribunals have robust privative clauses or constrained appeal provisions. Even where neither of these are present, most litigants before Tribunals are unrepresented persons with limited resources. For these parties, the expense of appeal or judicial review is prohibitive.

The consequences of adjudicator error are not easily remedied. This means that the task of getting the right outcome in the first instance, is of critical importance.

### *The Significance of Discretion*

Much of the adjudication done by Tribunals consists of exercising discretion, presumably on the basis of expertise and a particular knowledge of the industry or sector being dealt with. This means that the work is not so much determining questions of law as it is deciding how to structure and exercise broad but undefined statutory discretion. Many different and potentially competing answers to the same adjudicative questions may be permissible under governing legislation. The task of achieving consistency then is one of maintaining a line through multiple shades of gray. This is a different type of exercise than determining “questions of law”.

### *The Users and Volume of Activity*

Many Tribunals deal primarily with high volumes of applications with unrepresented parties who have time sensitive disputes that require resolution. In Ontario for example, the Tribunal that governs landlord and tenant matters is almost always dealing with unrepresented parties who require a hearing and decision within days of the filing of the application. This Tribunal deals with roughly 60,000 cases each year.

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### **Striking the Balance – Natural Justice Concerns**

Given the preoccupation with consistency within the administrative justice community, there is surprisingly little jurisprudence for guidance. As noted above, the Supreme Court of Canada in *Consolidated Bathurst, Trembley* and *Ellis Don* and the Federal Court in *Thamotharem* and *Benitez*

make it fairly clear that there are limits and constraints within which Tribunals must operate.

Essentially, Tribunal processes designed to achieve consistency must ensure and safeguard two things:

- (1) that the adjudicator who hears a matter is (and appears to be) independent and unbiased (*nemo iudex in causa sua*); and
- (2) the adjudicator who hears decides (*audi alteram partem*).

These decisions all reflect a judicial acceptance that Tribunals must adopt unique and particular practices in order to achieve a degree of quality control over their processes. It is understood that there is a dynamic tension between consistency in the application of procedure, law and policy – and the need for adjudicators to be and to be seen to be, independent and unbiased, and to be able to decide cases themselves, without institutional interference or constraint.

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#### Measures for Achieving Tribunal Consistency

Generally speaking, Tribunals achieve consistency through the creation of an internal culture which places value on both consistency and the free and unhindered expression of individual views. This culture is something which must be built up incrementally over time. It is created through a network of various practices that include particular recruitment

**processes, training, the use of rules, guidelines and directions, through case management techniques, the creation of consistent user and community expectations, internal rules around how issues are debated and discussed and how reasoning is expressed in written decisions.**

### ***Recruitment and Re-appointment***

**As noted earlier, the vast majority of Tribunal adjudicator positions are part time and candidates are predominantly lay persons without legal training. Historically, many appointments were made without regard to merit.**

**Recently, the Tribunal community has attempted to meet these challenges by working with the executive branch of government, to obtain some degree of input in or control over, the appointment process.**

**Increasingly, Tribunals in different jurisdictions are able to interview and test prospective candidates for appointments and to be able to advertise for vacancies. Through the use of written core competencies, position descriptions and competitive merit-based interviewing and screening, Tribunals are able to make appointment recommendations to the executive branch. See for example the Position Description for Vice Chairs appointed to the Human Rights Tribunal of Ontario attached as Appendix 1 to this paper.**

**Many Tribunals are also seeking a shift towards full time as opposed to part time appointments and are increasingly able to offer compensation and other conditions of employment designed to attract candidates with legal training.**

**By obtaining some degree of control over the appointment process, Tribunals are able to identify individuals who share the same set of understandings and values which in turn permit the Tribunal to achieve internal consistency. When interviewing prospective candidates, Tribunal Chairs are able to assess whether the candidate is likely to be committed to the values which will contribute to Tribunal consistency**

**Tribunals are increasingly inserting themselves into the adjudicator recruitment process for the purpose of obtaining decision makers who will adhere most readily to the Tribunal's established practices and views. This ranges from the general ability to meld with the internal culture of the Tribunal - to the degree of coherence between the candidate's understanding of particular issues of law and policy that need to be addressed in the adjudicative process.**

**The significance of this gradual change in the Tribunal's role is great. If a Tribunal can exercise control over the recruitment process then the task of achieving consistency is vastly easier than it would otherwise be.**

**As the majority of Tribunal adjudicator positions are for fixed terms, there is also the issue of re-appointment. Again, increasingly, Tribunals are being asked by the executive branch to play a role in re-appointments. This provides not only a further degree of control over the composition of the adjudicator complement, but it also underscores the significance of an adjudicator's ongoing commitment to adhere to the Tribunal's expectations around consistency during the term of an appointment.**

**Tribunals are also beginning to develop codes of conduct and performance standards which are provided to candidates in the selection**

process to signal with some clarity, the Tribunal's expectations around adjudicator behavior. These may also be used to review adjudicator performance on an ongoing basis as well as in advance of making re-appointment recommendations.

### *Training*

Like the Courts, Tribunals are increasingly placing an emphasis on both initial and ongoing training for adjudicators. This includes not only instruction about hearing processes, evidence, and principles of administrative law but extends to continuing updates on developments in law and policy within the particular Tribunal and others which perform related work either in the sector or other jurisdictions.

It is not unusual for a Tribunal to have regularly scheduled training sessions for all adjudicators, but also to have designated training officers responsible for supporting and dispensing educational material to adjudicators on a regular – even daily basis.

Increasingly, other tools might include competency based learning plans. These require regular discussions between the Chair and each adjudicator to identify a personal training and education plan linked to core competencies. These discussions provide an opportunity for the Chair and the adjudicator to clarify and acknowledge adjudicator strengths and achievements as well as weaknesses and areas for improvement.

### *Community Expectations*

The management of community expectations is a tool used by Tribunals to achieve consistency from adjudicators. If the community or sector regulated by the Tribunal has a very clear set of expectations

around process and issues of law and policy, these expectations will be expressed in the way in which cases are prepared and presented to adjudicators and will assist adjudicators in adhering to consensus views.

Community expectations are managed through written formal communications such as Rules of Practice, Notices to the Community, Information Bulletins, Guidelines and information posted on web sites.

More informally, Tribunals communicate with their user groups through regular speaking engagements and participation in Canadian Bar Association section meetings. Increasingly, Tribunals are creating Community Advisory Committees which meet regularly to permit direct discussions between users and the Tribunal around all aspects of Tribunal conduct and practice.

The fact that a Chair, or a senior Adjudicator, or Tribunal Counsel is out in the community explaining what parties can anticipate in terms of policy or procedure when they appear before the Tribunal will be known to adjudicators. This knowledge of community expectations will in turn serve to shape and contour the range of normative options around issues of law, policy and procedure.

The community should also understand how it is that differences of view within the Tribunal are resolved. There should be a high degree of transparency for example around the use of internal discussions, whether they are of the “full board” variety, or more focused discussions between the Chair and individual adjudicators. The community of users should know that all major issues of law, policy and procedure are thoroughly discussed internally as “Tribunal” issues, but that at the end of the day, each adjudicator decides these questions for themselves in the context of each matter being dealt with.

### ***Internal Discussions***

**This area is perhaps the most significant in terms of obtaining consistency in issues of law and policy. The issues of what is discussed and how matters are discussed internally have attracted the most attention in judicial oversight of Tribunal operations.**

**The rapid development of electronic document management has increased the capacity for interaction between adjudicators. As a result, the quantity and quality of discussion around issues of process, law and policy, has increased significantly over the past decade.**

**Despite the fact that tribunal adjudicators are often part time and regionally separated, there is increasingly daily discussion in electronic forums about all aspects of the ongoing day to day work of a Tribunal. Draft decisions and commentary are regularly circulated for electronic discussion on a continual basis.**

**Most Tribunals schedule regular meetings for more formal discussions and it is not unusual where adjudicators are primarily full time and based in one location for there to be weekly or in some cases, daily meetings where drafts are exchanged and where issues of process, law and policy are discussed.**

**The importance of fostering opportunities for the ongoing and casual interaction between adjudicators cannot be over-emphasized. Successful internal Tribunal cultures foster open environments where all adjudicators are free to express opinions on issues of process, law and**

policy but at the same time permit those who hear individual cases to freely decide them according to their own judgment.

The balance that must be maintained in the area of internal consistency is one where the individual who hears the case remains solely responsible for the choice of outcome, but that where an outcome may depart from the range of what might be normally anticipated, the Tribunal as a whole has an opportunity to discuss the matter internally. Consequently, where a decision departs from the accepted range of potential outcomes, the rationale for the departure should be explained in the reasons for the decision.

This culture of ongoing discussion can be described as a system of “assertive collegiality” - where there can be vigorous debate internally within the complement of adjudicators, but once the discussion is complete, the person hearing the case is free to make their own decision.

Discussions also occur regularly between Tribunal Chairs and individual adjudicators at any stage in the hearing process. For example, particular types of cases which raise significant or novel issues may be flagged at the intake stage. Once identified, they are brought to the attention of the Chair who will then choose a particular adjudicator to deal with the case. The Chair may have a discussion with the adjudicator before the assignment is made in order to canvass the procedural, law and policy issues that might be presented in the case. During the course of the hearing, the adjudicator and the Chair may continue the discussion, so that the adjudicator understands the issues in the context of the Tribunal’s institutional views. Once the hearing is completed, the Chair and the adjudicator may then continue their discussion throughout the decision writing process.

### ***Guidelines, Standard Decisions***

Internal written guidelines and standard proposed draft decisions are common features of most Tribunals. It is also now common practice for there to be some form of draft decision review. The Chair or the Chair's designate (usually counsel to the Tribunal) will review draft decisions for style and a common adherence to the same form of expression for reasoning. Decisions are not reviewed for outcome but rather to ensure that there is an adherence to format and that the reasons appropriately explain the result.

### ***Case Management***

Increasingly, Chairs and senior staff are making case management decisions about how and when mediation is offered, preliminary issues are heard or scheduled and when hearings or meetings are scheduled. These decisions are made before assignments to individual adjudicators. This permits for the streaming of different types of matters into consistent case treatment patterns with the result being an extremely high level of consistency of process. From a procedural perspective, like cases are treated similarly and the community of users develop a very well defined set of expectations as to how a case will be managed and scheduled according to type.

### ***Reconsideration and Judicial Review***

Reconsideration is used by some Tribunals as a tool for maintaining consistency. Where a Tribunal has the ability to reconsider its decisions either on its own motion or on the application of a party, a

**Tribunal may use the opportunity to correct or redirect a particular set of conclusions dealing with law and/or policy. The *Consolidated Bathurst* case illustrates this device where the Chair wrote a reconsideration decision explaining the full board discussion process in order to explain the adjudicative outcome.**

**Tribunals may also participate in judicial review proceedings in various ways to ensure consistency in the application of principles of law and policy. The degree of participation varies according to the nature of the statutory scheme and the jurisdiction of operation.**

### ***Tribunal Integration***

**Grouping together Tribunals which operate in similar sectors or industries for the purpose of sharing administrative, operational, and professional support or “clustering” is now being explored as a device to further increase consistency in law and policy in a broad area of law. This is taken a step further where there are cross appointments of Chairs, adjudicators and staff between clustered Tribunals.**

**Similarly, opportunities are being explored within Tribunal clustering environments for harmonizing common Rules of Practice and Procedure, case management processes, technology infrastructures, community interfaces and adjudicator development to further contribute to administrative, procedural and professional consistencies within a sector. See for example the Interim Report of the Cluster Facilitator attached as Appendix 2 to this paper.**

## **Summary and Inventory**

The challenges faced by Tribunals in obtaining consistency are different from those which confront the courts. This stems from a variety of reasons including their different roles in the justice system and the particular nature of Tribunal membership.

Consistency in the application of law and policy is but one aspect of a broader concern about consistency across the entire range of Tribunal activity and conduct.

Perhaps the most significant determining factor is the ability of the Tribunal to recruit members who have the skills to accomplish this goal and share a commitment to obtaining consistency as a fundamental feature of the Tribunal's core function.

Consistency is obtained by creating a common culture of 'assertive collegiality' designed to take advantage of and exploit the full range of knowledge and experience with the Tribunal.

The following is an inventory of "tools" used in the pursuit of consistency:

### **1. Recruitment and Re-appointment**

- (a) Full time versus part time appointments**
- (b) Written core competencies**

- (c) Position Descriptions**
- (d) Competitive merit based appointment practices**
- (e) Performance review in advance of re-appointment**
- (f) Improvements in compensation and length of term in order to attract legally trained adjudicators**

## **2. Training**

- (a) Training retreats or in-house sessions**
- (b) Day to day education and support**

## **3. Community Expectations**

- (a) Rules of Practice**
- (b) Information Bulletins**
- (c) Notices to the Community**
- (d) Practice Guidelines**
- (e) Speaking and meeting engagements**
- (f) Community Advisory Committee**

## **4. Internal Discussions “Assertive Collegiality”**

- (a) Regular adjudicator meetings**
- (b) Electronic circulation of drafts and commentary**
- (c) Casual opportunities (lounge or lunchroom) for interaction and discussion**
- (d) Ongoing discussions between adjudicators and Chair**
- (e) The assignment of work by the Chair**

## **5. Internal Guidelines**

- (a) Internal written protocols or policies**
- (b) Standard draft decisions**
- (c) Decision review before release**

**6. Case Management**

- (a) Chair and senior staff review for use of mediation and scheduling of mediation, preliminary issues and hearings**
- (b) Streaming of matters for similar procedural treatment based on case type**

**7. Decision and What Follows**

- (a) Written reasons**
- (b) Reconsideration**
- (c) Participation in judicial review or appeal**

**8. Structural**

- (a) Clustering of Tribunals**
- (b) Cross appointments**