Tribunals – Reasons, and Reasons for Reasons

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1. INTRODUCTION

This note evolved from a workshop on the "Policy of Reasons" held in two sessions at the first Conference of Ontario Boards and Agencies on November 24, 1989, at Toronto, Ontario. The workshop sessions were organized and presented by the authors of this note: Ron Ellis, Chairman of the Ontario Workers' Compensation Appeals Tribunal, who chaired the workshop; Frederika Rotter, Vice-Chair of the Ontario Social Assistance Review Board; and Carole Trethewey, Counsel to the Chairman of the Workers' Compensation Appeals Tribunal, who participated as panel members.

Each session was attended by approximately 40 participants who were either adjudicators or senior staff members of a cross-section of Ontario boards and agencies. This note reflects the views of its authors as influenced by the workshop discussions.

The workshop Panel identified three general topics for discussion:

1. reasons for reasons;
2. quality of reasons; and
3. consistency of reasons.

The level of discussion at both sessions indicated that these subjects are of special interest to members of boards, agencies and commissions.

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2. THE NATURE OF REASONS

At the outset of the workshop discussions, the Panel clarified that the type of reasons with which it was concerned were those which explained *why* a tribunal (agency, board or commission) reached a particular decision. Reasons which are merely pro forma are not, properly speaking, reasons at all.

A pro forma set of reasons describes, perhaps at some length, the events at the hearing: what evidence was submitted, what testimony was heard and what submissions were made by the parties. It then tells the reader what the adjudicator has decided.

The bridge between the evidence and submissions on the one hand, and the decision on the other – that is, the reasoning that led the adjudicator to make this decision instead of some other decision – is either entirely missing or is represented by a paragraph so brief and general that it provides no enlightenment on the adjudicator's thoughts.

Both the Social Assistance Review Board and the Workers' Compensation Appeal Board (the predecessor of the present Appeals Tribunal) are examples of tribunals which in the past routinely issued pro forma reasons. The Workers' Compensation Appeal Board's decisions typically took the following form:

> A hearing was held on _____ date. The worker was present and represented by _____. The employer was present and represented by _____.
>
> The worker testified and said x. The employer testified and said y.
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> The worker's representative made submissions ABC. The employer's representative made submissions EFG.
>
> The worker is (or is not) entitled to benefits. The appeal is allowed (denied).

The workshop was concerned – and this note is concerned – only with reasons that explain *why* a particular decision is made.

While there has been some recent academic discussion of the nature and function of reasons, academics tend to approach the matter from a different perspective.[1] They have the luxury of considering whether the requirement to give reasons is theoretically valid in all

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1 See, for example, R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990) 3 C.J.A.L.P. 123.

cases; they are not faced with the problem of communicating a complicated legal, medical and/or policy analysis to a variety of audiences.

Reasons are a means of communication, and one cannot communicate effectively without being sensitive to the quality and consistency of the communication and conscious of the various audiences for whom the communication is intended. How do adjudicators determine who their audiences are and whether their reasons are communicating effectively with them?

This note reflects the authors' conviction that each tribunal needs a carefully considered policy on reasons. Such a policy should embrace standards of quality and consistency and take account of the various audiences the tribunal hopes to reach, as well as the functions which its reasons are intended to serve.

3. REASONS FOR REASONS

Why should a tribunal write reasons?

(a) The Legal Requirement

The short answer, at one level, is that very frequently the tribunal's governing statute requires it. This is true of the Workers' Compensation Appeals Tribunal and of many other tribunals.

For tribunals (such as the Social Assistance Review Board) which are subject to the *Statutory Powers Procedures Act*,[2] section 17 requires that reasons be given when they are requested by one of the parties. Ontario's Macaulay Report[3] recommends that reasons be mandatory for all tribunals.

Statutes which create an obligation to give reasons do not generally provide much guidance on what constitutes "reasons". Nor does anything specific appear in the Ontario *Statutory Powers Procedure Act*. It is interesting to note, however, that at one point,

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2 R.S.O. 1980, c. 484.

3 R.W. Macaulay, *Directions: Review of Ontario's Regulatory Agencies: Report* (Queens' Printer for Ontario, 1989) at 9-52 – 9-53.

Ontario draft legislation[4] proposed the following:

> 14(1) The final decision of a tribunal including the reasons therefore shall be in writing.
> (2) The reasons for the final decision shall contain,
> (a) the findings of fact on the evidence and any information or knowledge used in reaching the decision;
> (b) any agreed findings of fact; and
> (c) the conclusions of law based on the findings mentioned in clauses (a) and (b).

In Alberta, the *Administrative Procedures Act*[5] requires a tribunal to furnish a written statement of its decision setting out:

1. the findings of fact upon which it based its decision; and

2. the reasons for its decision.

However, this obligation applies only where a decision adversely affects the rights of a party and the decision-maker is exercising a statutory power (as defined in the Alberta Act) and has been specifically designated by an order in council. The Ontario requirement, while less precise, applies to a broader range of tribunals and situations.

The Alberta requirement was considered by the Supreme Court of Canada in *Re Northwestern Utilities Ltd. and City of Edmonton.*[6] The Court made clear that pro forma reasons which revealed "only conclusions without any hint of the reasoning process which led thereto" did not satisfy the statutory obligation to give reasons.[7] The failure to set out the factual findings on which the decision was based meant that the reviewing court could not determine whether the administrative tribunal had exceeded its jurisdiction. Accordingly, the case was remitted for further consideration and determination.

Re DiNardo and Liquor Licence Board (Ontario)[8] is another one of the few court decisions to comment on what a basic set of reasons should contain:

> At a minimum, the Board should have furnished a document which indicated that it was concerned with the renewal application and contained what the Board conceived to be relevant findings related to the applicable statutory

4 Bill 130, Leg. Ontario, 1968-69.
5 R.S.A. 1980, c. A-Z.
6 (1978), [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161.
7 Ibid. at 176 (D.L.R.) per Estey J.
8 (1974), 5 O.R. (2d) 124 (H.C.).

standards bearing on this application.[9]

Elsewhere in *DiNardo*, the Court commented that it would be reasonable to expect some degree of specificity in the reasons relating to relevant times and to the actual legislative provisions breached.

Perhaps more importantly, *DiNardo* indicates that where there is a statutory obligation to give reasons, and the reasons given are clear on their face, the Court will accept them at face value. It will not go beyond them to speculate on what the Board might have "really meant". Thus, where the Board appeared to rely on the cumulative effect of three grounds for its decision, two of which it was not authorized to consider, the Court declined to speculate on what the Board might have decided if it had addressed only the relevant issue.

(b) The Audiences for a Tribunal's Reasons

The authors' thesis is that beyond the bare minimum which *DiNardo* indicates is necessary, the nature of each tribunal's reasons must be determined by reference to the needs and expectations of the audiences for those reasons, as well as by other policy considerations.

The workshop sessions began their discussion of the policy of reasons by identifying the various audiences whom tribunals might want or need to address in their reasons. The audiences will vary from tribunal to tribunal, but a number of important audiences are common to all.

Most obvious, of course, are the parties to the proceedings and, as noted by Mr. Justice Reid in his address to the plenary session of the Conference, most particularly the losing party.

It is the loser and his representative, colleagues, friends and relatives who must be especially assisted in understanding the basis for the tribunal's conclusion. Failure to provide an adequate explanation of the tribunal's reasons can only leave an impression of arbitrariness and unfairness and a legacy of bitterness and alienation. If such failure becomes a routine feature of a particular tribunal's approach to reasons, that approach may be expected ultimately to

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9 Ibid. at 134 per Morden J.

alienate the tribunal from the communities of interest which it was created to serve.

The Workers' Compensation Appeal Board provided pro forma reasons only. That Board was replaced in 1985 by the Appeals Tribunal. While the reasons for that event are complex, there seems little doubt that the Appeal Board's general practice of providing pro forma reasons contributed significantly to the failure of the public's confidence in the Appeal Board's decision-making.

In the past, the Social Assistance Review Board also provided only pro forma reasons. That Board has been substantially reorganized over the past 2 years. Again, while the reasons for that reorganization are many and varied, the Board's past failure to provide understandable explanations for its decisions may be seen to have contributed significantly to the perceived need for reorganization.

The parties, therefore, and especially the losers, are a particularly important audience for any tribunal to have in mind in considering its reasons policy.

There are, however, a number of other almost equally important audiences which any adjudicative tribunal must consider when it is developing a policy on reasons and which adjudicators should also have in view when they are writing reasons in particular cases.

One such audience is the court which hears applications for judicial review of a tribunal's decision – in Ontario, the Divisional Court.

It was recognized in the workshop discussions that, in practice, tribunal members cannot write each decision on the assumption that it will be challenged in the courts. Nor should they do so, since such a practice would waste time and resources and lead to needlessly complex decisions.

On the other hand, decisions concerning issues of inherent controversy and of special significance to the work of a tribunal stand a good chance of being subjected to court challenge. Very often such decisions will have been uniquely influenced by the expert understanding and the sophisticated perspective which a specialized tribunal brings to its field of administrative activity.

If this perspective and experience have not been articulated in the reasons for decision in a way that is understandable to the court,

the court may well decide the case without the benefit of that experience and perspective. The applicant in the court proceedings will have no interest in presenting the tribunal's point of view; nor can the respondent effectively represent the tribunal's understanding and concerns. In light of the Supreme Court of Canada's decisions limiting the right of tribunals to be represented in court proceedings in defence of their decisions on their merits, the absence of persuasive and understandable reasons may lead to court decisions that are unresponsive to the underlying realities.

Another important audience for a tribunal's reasons is the Ombudsman. This audience may not be as critical for Ontario tribunals in the future as it has been in the past. A recent legislative initiative proposes to remove from the Ontario Ombudsman's jurisdiction the substantive merits of adjudicative tribunal decisions.[10] But in other jurisdictions, and in Ontario with respect to the reasonableness and fairness of a tribunal's procedures and process, it is helpful to both the Ombudsman and the tribunal if the reasons for a decision that is the subject of a complaint are as clear as possible on the face of the decision.

Some tribunals perform an adjudicative or appeal function for other decision-makers. Those initial decision-makers are a key audience for the appellate tribunal's reasons. If the other institution is required to make adjustments in its administration of its statute, the reasons for the different result must be clear. For example, the Workers' Compensation Appeals Tribunal must bear in mind that the reasons for its decisions must be understandable to the Workers' Compensation Board administrators, who implement them, and must also be understandable at a more general level to the WCB's Board of Directors when it is deciding whether to revise its existing policies or to exercise its power to review the Appeals Tribunal's decisions. Similarly, the Social Assistance Review Board's decisions must be clear and understandable to social assistance and welfare administrators, who are bound by them.

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10 Bill 80, *An Act to amend the Ombudsman Act and the Child and Family Services Act, 1984*, 2d Session, 34th Leg. Ontario, 1987-88-89 (1st reading, 21 November 1989).

Another tribunal audience which from a longer-term, systemic perspective will frequently be very important, is that comprised of the various players in the law reform or law development process. Members of the Legislature, responsible Ministers and their Ministry staffs, lobbyists for various client groups, the community of professional representatives in their role as law reform advocates – all of these are influenced and assisted by the information provided in a tribunal's reasons. This is especially true for decisions which deliver results that are required by statute but which are unpalatable from other perspectives. Clear reasons serve to deflect disapproval from the tribunal itself and to focus it where it belongs, on the law. They can also help to provide the basis for an adequately informed law reform process.

Of course, the government – the responsible Minister or Ministers and their respective administrations – is an especially important audience from another perspective as well. Agencies, boards and commissions are engaged in the resolution of conflicts that arise out of government policy or programs. They are dependent, however, on the government's goodwill and confidence. They look to the government for adequate and timely support services, sufficient resources and the like. It is, therefore, essential that tribunals retain the confidence of the government. However, every tribunal must also periodically make decisions which will be unpopular with the government. In those circumstances, reasons that are understandable and worthy of respect become the tribunal's indispensable means for maintaining the government's confidence while standing on its foot.

This logic also applies to the audiences found within a tribunal's "client" groups – groups whose general confidence the tribunal must maintain if its public acceptability is not to be lost. In the case of the Workers' Compensation Appeals Tribunal, this audience includes, among others, the employer and worker communities and the medical community. In the case of the Social Assistance Review Board, the relevant groups include the community of social-assistance advocates and lobby groups on the one hand, and the inherently sceptical general public on the other.

Another audience of critical importance for any policy concerning reasons is the prospective parties to similar proceedings, and

their professional representatives. Fully reasoned decisions enable prospective parties to understand the issues they must confront, appreciate the kind of evidence the tribunal will want to hear, and develop grounds for arguing for different results in apparently similar cases, based on distinguishable features.

Reasons also permit prospective participants to make informed judgments as to their chances of success and thus discourage inappropriate applications.

In addition, adequate reasons provide future participants with the means for invoking the principle of relative fairness – that is to say, the principle that like cases should lead to like results.

From a broader perspective, fully reasoned decisions educate the communities of professional representatives about the principles and issues of importance to the tribunal's field of activity. Thus, they equip representatives to provide an informed and focused advocacy. This, in turn, will assist the tribunal in the ongoing process of refining and correcting its perspective and understanding.

Still another audience of critical importance is the decision-maker's colleagues within the tribunal. Written reasons are the means for developing a tribunal's perspective on and understanding of the issues and principles with which it, as an organization, is concerned. Reasons are the medium through which individual adjudicators educate and challenge their colleagues and are, in turn, educated and challenged. They identify divergent points of view within the tribunal and are the vehicle for ultimately reconciling such differences. They are also, of course, what makes feasible the tribunal's own practical compliance with the principle that like cases should receive like treatment.

Finally, the workshop sessions identified the media as a potential audience which decision-makers need to keep in view. If one is writing a decision of inherently large public interest, a set of reasons that facilitates the media's understanding of the decision is obviously a desirable goal. At the same time, contemplation of the media's attraction to the flamboyant or dramatic may also be constructive in shaping one's reasons.

The workshop discussions recognized that every tribunal has its own special audiences as well as its own unique relationships to

the audiences mentioned above. What all tribunals have in common, however, is the need to shape their written reasons with reference to their various audiences.

(c) Other Reasons for Writing Reasons

When the concrete question "Why write reasons?" is put, a number of answers arise that are not connected with audiences.

One of these, which the workshop sessions identified as particularly important, is the integral role of decision *writing* in the decision-*making* process.

At both the Social Assistance Review Board and the Workers' Compensation Appeals Tribunal, the reasons for a decision are drafted by an adjudicator who has heard the case. This may be contrasted with the practice in some tribunals where staff draft the reasons based on instructions from the adjudicator. While that practice was recently upheld by a majority of the Ontario Divisional Court in *Spring v. Law Society of Upper Canada*,[11] the Court by no means embraced the practice. Even one of the majority justices "deplored" it. The dissent held that the process of organizing the evidence to reach certain conclusions must be done by the adjudicator, at least in draft form, so that a comparison can easily be made to ascertain that "the reasons in essence are the reasons that appear above the signature of the committee chairman."[12]

The *Spring* case addressed the administrative law question of how one can be sure that reasons which are communicated orally to a third party who records them are, in fact, the reasons of the adjudicator. A less technical but, in the authors' respectful view, more important question is whether the adjudicator's decision would have been the same if he had been required to write down the reasons for it in the first place.

It is a common human experience that the process of writing causes one to think more clearly and to analyze more carefully. Most adjudicators find that this is particularly true when drafting reasons in contemplation of publication.

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11 (1988), 64 O.R. (2d) 719, 30 Admin. L.R. 151.
12 Ibid. at 728 (O.R.) per Trainor J., dissenting in part.

The discussion in the workshop sessions indicated that adjudicators who are doing their own writing share the experience of finding that decisions reached as a result of discussions or deliberation immediately following a hearing are not uncommonly shown to be insupportable once the disciplined process of writing full reasons is begun.

The influence on decision-making of the process of writing was thought to be so important that it was suggested at one workshop session that an adjudicator's decisions should be developed in the first instance *only* by the adjudicator writing a reasoned analysis. The final decision should always be the end-point of the writing process and never the starting point. The writing should not be a description of what has already happened, but a record of the thinking process as it occurs, and as it is influenced by the discipline of writing the thought process down.

While the authors would agree that it is generally desirable for conclusions to be reached in the course of a written analysis, it is difficult for a multi-member panel to do this. The Workers' Compensation Appeals Tribunal, for instance, decides cases with panels of three. Such a panel must think together. As a practical matter, this can only be done in the initial stages by discussion.

Nevertheless, the Workers' Compensation Appeals Tribunal has recognized the weight of the foregoing concern by an explicit institutional understanding that decisions made through caucus discussion are regarded as tentative decisions only, subject to being revisited as a result of obstacles identified through the writing process. In especially complicated cases it sometimes happens that the panel is unable to reach even a tentative decision through discussion. At that point, the process moves to a written analysis (usually prepared by the panel chair) which focuses subsequent discussions. These discussions are followed by more writing, and so on, until a unanimous decision is reached or until the panel members have determined that a disagreement on a point of substance is involved. At this stage, the dissenting member will prepare his own reasons.

In addition to improving the quality of decision-making, full written reasons provide a means of reviewing the decision-making at a later date. Many tribunals now have the power to reconsider and

the Macaulay Report recommends that all Ontario tribunals ought to have this power.[13] If a tribunal is to exercise a power of reconsideration responsibly and fairly, a full understanding of the reasons for the original decision is essential.

Similarly, if a party has a right of appeal to either another tribunal or to a court, the existence of a fully reasoned, written decision gives substantive content to that appeal right.

4. QUALITY OF REASONS

The workshop sessions also considered the question of the quality of reasons – the criteria for judging quality and the institutional means for ensuring quality.

(a) The Criteria of Quality

How do you judge the quality of a decision? The Worker's Compensation Appeals Tribunal has tried to answer this question by identifying the hallmarks of quality which it sees as appropriate to the types of issues it decides and its role in the workers' compensation system.

In 1988, the Workers' Compensation Appeals Tribunal officially adopted a Statement of Mission, Goals and Commitments, which set out the Tribunal's view of its mandate following 3 years of operation. The Statement included the following list of hallmarks of decision quality which the Appeals Tribunal was committed to pursuing:

1. The decision does not ignore or overlook relevant issues fairly raised by the facts.

2. The decision makes the evidence base for the panel's decision clear.

3. On issues of law or on generic medical issues, the decision does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the dis-

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13 Macaulay Report, above, note 3 at 9-63ff.

agreement with the previous decision or decisions are specified.

4. The decision makes the panel's reasoning clear and understandable.

5. The decision meets reasonable standards of readability.

6. The decision conforms reasonably with Tribunal standard decision formats.

7. From decision to decision the technical and legal terminology is consistent.

8. The decision contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.

9. The decision does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribinal's body of decisions over the long term.

10. The decision conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.

11. The decision forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.[14]

Every tribunal will have criteria which are appropriate to its own circumstances. However, identifying criteria of quality to which all members of an agency subscribe is an important strategy for any tribunal in achieving minimum, tribunal-wide standards of decision quality.

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14 Workers' Compensation Appeals Tribunal, *Third Report (1987-1988)* Appendix A, para. vi.

(b) Standard Formats

Another useful strategy is the adoption of standard decision formats. Both the Social Assistance Review Board and the Workers' Compensation Appeals Tribunal have developed such formats. These ensure that all decisions have the same basic structure. This is of assistance to people who deal regularly with the tribunal's decisions; it also helps to ensure that adjudicators provide the information that is commonly required and address issues that typically arise. Standard decision formats also assist adjudicators in organizing their reasoning and thus contribute to the efficiency of the decision-writing process.

(c) Review of Decisions at the Draft Stage

Both the Workers' Compensation Appeals Tribunal and the Social Assistance Review Board have developed standard procedures for central, institutional review of *draft* decisions. The draft review helps adjudicators develop their writing skills and acts as an institutional check on the quality of decisions. In the Appeals Tribunal's case, the purpose of the review is also to advise adjudicators where draft decisions appear to be departing from the Tribunal's accepted criteria of quality decisions.

The draft review may bring to an adjudicator's attention issues that seem fairly raised by the described facts but which are not addressed. The review may also identify draft decisions that appear inconsistent with previous decisions, and do not acknowledge and give reasons for that inconsistency. A variety of other problems may be brought to light, such as the use of inconsistent terminology; problems of readability; internal inconsistencies in the reasoning; and factual findings not shown in the draft to be supported by evidence or analysis.

It is, of course, an essential feature of this process that the adjudicators remain autonomous and independent. The final decision and the shape and nature of the reasons are, ultimately, only the business of the adjudicators.

Another essential feature is that significant issues which adjudicators identify as being necessary to address as a result of the

draft review must be referred back to the parties for submissions.[15]

(d) Full Board Meetings

The Ontario Labour Relations Board has had a long-established practice of reviewing draft decisions at full board meetings. A majority of the Ontario Divisional Court held in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*[16] that this practice violated principles of natural justice. This finding was reversed by a majority of the Ontario Court of Appeal. Many tribunals have been awaiting the Supreme Court of Canada's decision on the validity of full board meetings prior to considering a similar procedure.

On March 15, 1990, the Supreme Court of Canada released its decision. Mr. Justice Gonthier, writing for the majority, upheld the Board's practice.[17]

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15 The Ontario Court of Appeal enunciated this principle succinctly in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69* (1986), 56 O.R. (2d) 513 at 517, 21 Admin. L.R. 180 (C.A.):
"As in any judicial or *quasi*-judicial proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice there can be no participation by other members of the Board in the final decision."

16 (1985), 51 O.R. (2d) 481 (Div. Ct.), rev'd (1986), 56 O.R. (2d) 513 (C.A.).

17 (15 March 1990), 20114 (S.C.C.). The following description by Chairman Adams of the Ontario Labour Relations Board was reproduced at 12:
"After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These 'Full Board' meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion at a 'Full Board' meeting is limited to the policy implications of a draft decision. The draft decision of a panel is placed before those attending the meeting by the panel and is explained by the panel members. The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus. The meetings invariably conclude with the

After noting the importance of the policy issues and the necessity of maintaining a high level of consistency and coherence in the Board's decisions, the majority of the Supreme Court of Canada found that the full board meetings did not violate natural justice principles if certain conditions were observed: the hearing panel's factual findings must be accepted; the parties must be provided with an opportunity to make submissions on any new points; and the ultimate decision must be left to the hearing panel.

In addition to upholding the particular practice followed by the Ontario Labour Relations Board, *Consolidated-Bathurst* is of general interest to administrative tribunals seeking to develop a policy on reasons. The majority decision recognizes the difficulties faced by administrative tribunals in seeking to produce consistent, high-quality decisions and holds that the rules of natural justice must have the flexibility to take into account the institutional pressures faced by modern administrative tribunals.

(e) Other Strategies

It is obviously important to train adjudicators in the writing of reasons. New adjudicators can be asked to write mock decisions and submit them for review to experienced adjudicators, counsel or teachers of writing skills. Periodic writing workshops can be held for all adjudicators.

In some tribunals, adjudicators are also assisted in their appreciation of the issues raised in a case by the pre-hearing preparation of the case by the tribunal's counsel and/or by the tribunal's counsel's submissions at the hearing.

It remains true, however, that the most fundamental means of ensuring good quality reasons is to make sure that the people responsible for writing them are individuals with the ability to analyze and write clearly and the commitment to do so.

Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel's final decision whatever it might be. No minutes are kept of such meetings nor is actual attendance recorded."

5. CONSISTENCY IN REASONS

Finally, the workshops addressed the problem of achieving consistency in decision-making.

It was accepted by both workshops that institution-wide consistency in decision-making is a self-evident first principle of fairness. A party's rights cannot be left to turn on the luck of the draw in the panel assignment. This view has subsequently received explicit approval from the majority of the Supreme Court in *Consolidated-Bathurst.*[18]

Nevertheless, as the Workers' Compensation Appeals Tribunal has recognized in its list of hallmarks of good quality decisions, consistency cannot be an absolute commitment. Given the autonomy of individual adjudicators, and the need for the institutional understanding of a contentious issue to develop through a series of decisions, it is not possible or desirable to avoid conflicting decisions when a complex issue is first identified. However, it is essential that adjudicators who issue conflicting decisions accept the responsibility for publicly acknowledging the conflict and providing reasons that justify the departure from the earlier decisions. This commitment is an essential feature of the Appeals Tribunal's approach to decision-writing.

Making fully reasoned decisions in all cases available to the parties, to the adjudicator's colleagues and to the public is the single most important factor in ensuring consistency in a tribunal's decisions. It provides the means for challenging decisions on the grounds of inconsistency. It effectively prevents a tribunal from reaching decisions arbitrarily or without reference to its governing legislation.

The use of the tribunal's own powers of reconsideration is another strategy for ensuring consistency in decisions. A challenge to a decision by a dissatisfied party on the grounds that the decision is inconsistent with and indistinguishable from a previous decision might justify a tribunal exercising its power to reconsider.

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18 Ibid. per Gonthier J. at 19-20:
"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 '(TRANSLATION) 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': Morissette, Le controle de la competence d'attribution: these, antithese et synthese (1986), 16 RDUS 591."

The workshop discussions also considered whether the institution's identification of an inconsistency might justify a reconsideration on the tribunal's own initiative. This is not a step that could be lightly taken. The tribunal's jurisdiction would also have to be carefully considered in light of the wording of the particular statutory reconsideration power. Still, if the jurisdiction were there, this is a remedy that would provide a multi-adjudicator tribunal with the means for directly influencing the consistency of decisions.

In any event, a reconsideration power would have to be exercised in accordance with the rules of natural justice. A tribunal contemplating the reopening of a decision, whether on its own initiative or in response to a request for reconsideration, must provide the parties to the case, particularly the party benefiting from the existing decision, an opportunity to make submissions on the preliminary issue of whether it is appropriate to reopen the matter.[19]

The various strategies discussed above for improving the quality of decisions will also have an important influence on maintaining the consistency of decisions. As well, informed advocacy – which becomes possible when full reasons are published – will strongly influence a tribunal towards consistency in decision-making. Adjudicators deciding against a claim which appears justified on the basis of existing decisions will have to provide an explanation to the parties.

It is also useful for tribunals to provide ongoing education to their adjudicators about emerging issues. A decision on such an issue can, of course, only be made by an individual adjudicator in the context of a case which raises the issue. However, the adjudicator's understanding of that issue can be advanced by institution-wide education. After all, boards and agencies are supposed to be specialized – which is to say, well-informed – tribunals.

The random assignment of adjudicators to panels is another important contributor to the consistency of decision-making. The random selection of panel members allows for dissemination of the institution's day-to-day adjudicative experiences.

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19 See *Tremblay v. Workers' Compensation Board (Ontario)* (18 June 1985), (Ont. Div. Ct.) [unreported].

Some tribunals have the power to state a case to a court for resolution of a contentious legal issue. The Macaulay Report recommends that all tribunals be given that discretion.[20] This would be another means of obtaining consistency on contentious matters. The workshop discussions made it clear, however, that, before stating a case, a tribunal would have to be satisfied that the issue was one that it was appropriate for the specialized tribunal to delegate to the unspecialized court.

The strategy of creating "leading", influential cases which thoroughly canvas complicated issues and provide a basis for other adjudicators was also discussed. The Workers' Compensation Appeals Tribunal has resorted to this technique on a few occasions with respect to particularly important and contentious issues of a generic nature.

The Appeals Tribunal's leading-case strategy involves the Tribunal selecting a case which clearly presents the issue in question. The case is assigned to a panel of adjudicators in which the Tribunal's other adjudicators may be expected to have confidence. Intervenors from interested client communities are invited to participate in the hearing.

If the resulting decision is well-written and persuasive, it may well be accepted by other adjudicators as a suitable guide for dealing with the same issue in subsequent cases. At a minimum, the leading case should provide an informed and common base from which future adjudicators may begin their analysis.

6. POSTSCRIPT

In preparing and presenting the workshop sessions, the authors were struck by the number of reasons for writing reasons. They were also impressed by the interest of the workshop participants in exploring the topic. Producing reasons is a fundamental task for all adjudicators, but it is one which adjudicators rarely have an opportunity to consider from a policy perspective.

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20 Above, note 3 at 9-31ff.