

How do I foster and measure adjudicative quality in Tribunals?

1. What is quality in the context of Access to Justice (A2J)?

Administrative Tribunals are by their nature specialist boards with an institutional obligation to promote quality and to deliver consistency, predictability and accessibility.¹ The common law, through *Consolidated Bathurst*² and subsequent jurisprudence, and in the case of some tribunals' statutory provisions, provide explicit support that allow tribunals to engage in institutional approaches to adjudication that promote quality and consistency.

While *Consolidated-Bathurst* is the point of departure in matters of institutional approaches to adjudication, it only considered one approach, the discussion by members of a draft decision. The Immigration and Refugee Board³ has a much broader range of initiatives, all of which ensure the basic norms of a fair and transparent adjudicative processes and impartial adjudication by independent decision makers. Not all initiatives may fit with each tribunal's mandate or resources, but this paper provides an overview of some of the quality initiatives that the IRB has pursued over recent years.

2. How are tribunals improving quality?

The IRB's Quality Assurance Framework (QAF) provides a transparent overview of the various activities, processes, strategies and structures that contribute to quality decision-making across the IRB.

The Framework has guided the Board in building a systemic approach to quality, one that delivers continuous improvements in adjudicative quality while also shoring up public confidence in the system. The Board's framework was itself subjected to a third-party review by Professor Paul Daly earlier this year. Professor Daly is Chair in Administrative Law and Governance at the University of Ottawa. According to Professor Daly the IRB's Framework "is robust when measured against national and international standards and I ... would have no hesitation in recommending that other administrative tribunals in Canada and further afield use the IRB's QAF as a model to optimize their own processes."⁴

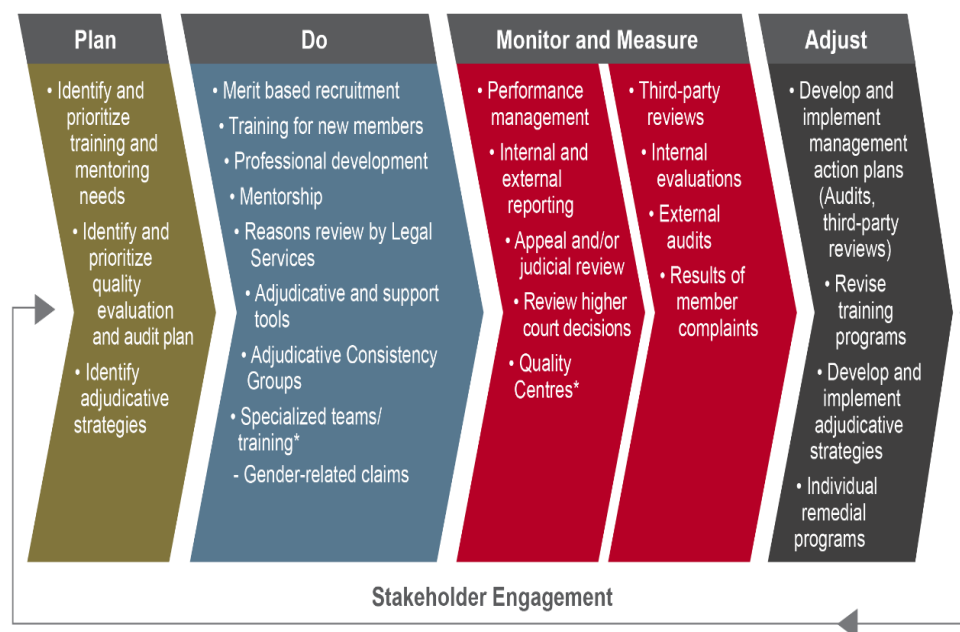
The activities outlined in the IRB framework create a cyclical path for the Board to follow towards its strategic objective of enhanced quality and consistency in decision-making. With the framework the IRB is integrating a "program integrity" approach to quality. Over time we look to mature each of the key quality initiatives as a corporate priority so that over a number of years, each of the initiatives is further developed and strengthened such that the entire system of quality management is matured on an ongoing basis. Nor is the framework exhaustive. Members, staff and managers are encouraged to come up with new and complementary initiatives or strategies to reinforce and grow the impact of the framework over time.

¹ [TheCorporateResponsibilityofTribunalMembers.pdf \(ccat-ctac.org\)](#)

² [1990 CanLII 132 \(SCC\) | Iwa v. Consolidated-Bathurst Packaging Ltd. | CanLII](#)

³ The Immigration and Refugee Board of Canada (IRB) is a large federal tribunal with four separate Divisions or tribunals. The IRB has several offices across Canada. Members at the Refugee Protection Division (RPD) and Immigration Division (ID) are public servants. Refugee Appeal (RAD) and Immigration Appeal Division (IAD) members are appointed by the governor in counsel.

⁴ [Independent review of Quality Assurance Framework - Immigration and Refugee Board of Canada \(irb.gc.ca\)](#)



3. Adjudicative Quality and Member Independence

Broadly speaking, member independence relates to being free from improper influence such that members may decide all adjudicative matters before them according to their conscience, including matters related to the merits of a case, evidence, and procedure.

Tribunals must balance competing interests, namely the public interest in quality and consistency in decision-making with the need to respect natural justice and member independence. The Federal Court of Appeal supported this balancing exercise when it stated that “*the independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions*”...⁵

4. Specific Quality Initiatives

There are many quality-related initiatives at the IRB and this short paper doesn’t attempt to describe them all. The first four initiatives are mentioned only briefly; while they are foundational elements of the IRB’s quality framework, they are largely self-explanatory. Any of the initiatives can be discussed or examined in more detail at the workshop.

Performance management, targets and evaluations: all IRB adjudicators receive regular performance appraisals. Members who fail to meet quality or productivity objectives are performance managed (public servants) or are not recommended for reappointment (GICs).

Legal Review: new members have their draft reasons reviewed by in-house counsel for the first several months of their tenure. All members can ask our internal legal services counsel to review their reasons at any time.⁶

Training and Professional Development: the IRB invests heavily in upfront new member training (this training can take 2-3 months) as well as monthly half day PD sessions. This includes a substantial focus on point-first and plain language writing and active adjudication in the hearing room.

⁵ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at par. 89.

⁶ [Reasons Review Policy - Immigration and Refugee Board of Canada \(irb-cisr.gc.ca\)](https://www.irb-cisr.gc.ca/Reasons-Review-Policy-Immigration-and-Refugee-Board-of-Canada)

Mentoring: new members and members who are struggling with quality or productivity issues are assigned an experienced member as a mentor.

Chairperson's Guidelines, Jurisprudential Guides, and other policy instruments

The volume of cases at the IRB means that the Board cannot rely solely on the guidance that legislation and judicial decisions provide. Judicial guidance is also limited. The IRB tries to fill this gap, when appropriate, through policymaking designed to improve the quality of our work.

Unlike many other tribunals the IRB Chairperson has statutory authority to promote an institutional approach to quality, through Guidelines and Jurisprudential Guides and other tools. This authority is explicitly provided in its enabling legislation.⁷ However, even tribunals without express statutory authority can create their own instruments. The Federal Court of Appeal in *Thamotharem*⁸ explained that even in the absence of explicit statutory authority tribunals can issue guidelines and other soft law policies to structure the interpretation of its enabling legislation.

At the IRB, Chairperson's guidelines⁹ provide guiding principles for adjudicating and managing cases. The IRB's Guideline on Detention¹⁰ is an example of how the Board responded to shortcomings identified in a 2018 audit of long-term detention reviews at the IRB. The Guideline clarified expectations of members to ensure that quality and fairness are at the heart of detention review decision-making.

The Chairperson also has the power to issue Jurisprudential Guides (JG). JGs are decisions that are well-written, detailed, and contain persuasive reasoning. The identification of jurisprudential guides facilitates fair decision-making consistent with the IRB's statutory obligation to deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. For

⁷ *Immigration and Refugee Protection Act*, paragraph 159 (1)(h) provides "The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson... (h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons, to assist members in carrying out their duties"

⁸ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198. *Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of ad hoc discretion. Through the use of "soft law" (policy statements, guidelines, manuals and handbooks), an agency can communicate prospectively its thinking on an issue to agency members and staff as well as to the public at large and to the agency's "stakeholders" in particular. An administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation. Although not legally binding on a decision maker, guidelines may validly influence a decision maker's conduct. The use of guidelines and other "soft law" techniques to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.*

See also *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 para. 67: *These considerations apply with equal force in the context of the IRB. Just like the Ontario Labour Relations Board, the IRB is a high-volume tribunal that annually receives and decides thousands of claims and appeals. There are hundreds of decision-makers across various regions of the country. Moreover, judicial review is subject to leave from the Federal Court. In that context, the need for consistency is even more obvious, and as this Court recognized in Thamotharem, the use of guidelines and other soft law techniques to achieve an acceptable level of consistency is particularly important for large tribunals exercising discretion such as the IRB.*

⁹ [Chairperson's guidelines - Immigration and Refugee Board of Canada \(irb.gc.ca\)](https://www.irb.gc.ca/eng/Chairperson's-guidelines-immigration-and-refugee-board-of-canada)

¹⁰ [Chairperson Guideline 2: Detention - Immigration and Refugee Board of Canada \(irb.gc.ca\)](https://www.irb.gc.ca/eng/Chairperson-Guideline-2-Detention-immigration-and-refugee-board-of-canada)

example, a recent Jurisprudential Guide confirms the preferred interpretation of whether a refugee claimant is excluded from refugee protection.¹¹

Members are encouraged to apply a Guideline or JG, or distinguish their appeal given the facts in the case before them. According to a Federal Court of Appeal, “I am of the view that the impugned JGs do not unlawfully fetter the Board members’ independence. They simply put claimants on notice that the existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing particularly circumstances.”¹²

Drawbacks to policy guidance like IRB Chairperson’s Guidelines is that they tend to be labour intensive to prepare and require extensive consultation with stakeholders and staff. They can take months or years to efforts to prepare. Jurisprudential Guides are nimbler. While articulating the perspective of the Board on a given factual or legal issue, they can be issued and revoked relatively quickly as required. Both Guidelines and JGs are frequently subject to litigation at the IRB, but that is likely a reflection of the nature of the IRB’s mandate and our external stakeholders rather than the nature of the tools themselves.

Quality Centres

In 2021 the IRB established quality centres at two Divisions. The centres are small, dedicated teams led by a member manager. The centres serve as focal point for issues related to quality within the Division. The quality centre at the appeal division monitors and analyses trends in Federal Court and divisional decisions and, in response, recommends and/or develops initiatives, tools, and mechanisms that improve adjudicative quality, such as improved training, mentorship, performance management, and adjudicative strategies like jurisprudential guides or reasons of Interest.

As an example, the IRB Chairperson will issue updated Guidelines on gender related cases in the winter of 2021/22. The QC will first select one or more decision(s) from the Refugee Appeal Division that will model a strong framework or approach for applying the new Guideline and recommend that those decisions be identified as a Jurisprudential Guide or a reason of interest. Second, the QC will monitor the application of the Guideline over the coming months and, if required, initiate professional development sessions to address gaps, or identify other RAD decisions as jurisprudential guides to assist members.

Specialized Member Teams

In 2020 a Gender Related Task Force (GRTF) was established to ensure that all gender-related refugee claims are adjudicated in a respectful and trauma-informed manner and that the impact of trauma is considered in the decision-making process.

A working group created the curriculum for the GRTF. Courses are given by leading Canadian subject matter experts on trauma informed practice, intersectionality, and trauma informed adjudication. The training has now been offered to four successive cohorts of members across the country. The reactions to the GRTF from the stakeholder community has been positive.

¹¹ [Policy note for identification of MB8-00025 as a Refugee Appeal Division Jurisprudential Guide - Immigration and Refugee Board of Canada \(irb.gc.ca\)](#)

¹² [2020 FCA 196 \(CanLII\) | Canadian Association of Refugee Lawyers v. Canada \(Immigration, Refugees and Citizenship\) | CanLII](#) para 88.

From a lesson learned perspective, early triage of cases is necessary to identify those with a gender-based principal claim, or with a secondary gender-related component to ensure early identification of GRTF files and efficient processing, scheduling, and distribution over regions.

Adjudicative Consistency Groups

Refugee related decision-making at two of the IRB's divisions depends on staying current with political and human rights related developments around the world. Members often adjudicate claims from certain countries.

Members meet in adjudicative consistency groups (ACGs) to discuss adjudicative trends and developments related to emerging country conditions, claim type analysis, case law, etc., in an effort to improve adjudicative quality and consistency in divisional decision-making.

ACG meetings are Consolidated-Bathurst type discussions led by a member. These meetings typically last about two hours and occur once a month. They are designed to enhance the consistency and quality of the decision-making. ACG meetings allow all members adjudicating the same countries to have plenary discussions on issues of prevailing country conditions, policies, procedures and law, while respecting the adjudicative independence of the participating members. Members discuss these issues amongst themselves, share their experiences and ask questions of their colleagues.

ACG meetings are not meant to be prescriptive about what decisions members should make in their hearings. ACG meetings help to address matters of intra-team variance related to both decision-making and the efficient use of hearing room time.

Adjudicative Tools

Working with the IRB's legal services we have also been focussed on providing members with easy-to-reference tools and frameworks that are meant to help foster quality – both in terms of hearings and rendering bench oral decisions.

One IRB division is piloting a Knowledge Management Tool (KMT) which is an electronic application allowing members to access information such as country documents and jurisprudence in one place. It also integrates templates. The template guides the member's decision making in a way that does not infringe on their adjudicative independence.

The IRB's Legal Services also issues comprehensive reference papers for all four of its divisions as an aid to members. To promote access to justice, the IRB makes most of these papers available on its website.¹³

¹³ See, for example, [Weighing Evidence - Immigration and Refugee Board of Canada \(December, 2020\)](#) and [Interpretation of the Convention Refugee Definition in the Case Law - Immigration and Refugee Board of Canada \(March 2019\)](#)

Recruitment and Equity

Impartiality is a core feature of adjudicative quality. There is a recognition in the justice system that impartiality entails having some understanding of others' experiences, and the way to get there is by having a truly representative body of adjudicators. The benefits of having a pro-active focus on hiring adjudicators that reflect Canada's population go far beyond equity and inclusion. Individuals appearing before adjudicators will have greater confidence in the system if they see themselves in the tribunal – quality justice is representative justice.

Since July 2021 one of our divisions staffed with public servant adjudicators hired nearly 60 new decision-makers, over half of whom are racialized or people with disabilities as well as two trans members. A similar recruitment campaign for Adjudicative Claims Officers, a career progression position to a decision-maker role, yielded eight new racialized employees out of a total of 13 hired.

For our staffing efforts on the adjudicator side, we reached out to key external stakeholders and NGOs such as the Black Lawyers Association, Black Lives Matters organizations and legal clinics for names of potential candidates. We offered interviews to these individuals without having them apply through the formal public service staffing process.

For the other public servant positions staffed through an internal process, all successful EE candidates were offered positions before offering positions to non-EE staff.

Finally, members in all Divisions, public servant and Governor in Counsel-staffed, go through a rigorous merit-based recruitment process.

Access to Colleagues' Decisions and Expertise

To foster consistency tribunals must ensure that members can talk to each other, access each other's decisions and easily share best practices and approaches. It's also important that members engage with a variety of members, not just the same colleagues in their own personal adjudicative echo chambers. The following initiatives attempt to address this issue.

Curated Jurisprudence

Identifying decisions of note or interest¹⁴ and making them easily accessible to all members is particularly helpful for large volume tribunals. Having a go to database of strong decisions helps adjudicators, appellants and counsel alike. These decisions need not be ground-breaking, nor do they typically address novel areas of the law. They model a good approach to a particular case type or are a solid example of point first writing.

Adjudicators themselves can submit reasons for inclusion in the curated reasons database and all proposals are considered by the adjudicative strategy committee¹⁵ prior to being identified as a reason of interest.

¹⁴ [Decisions - Immigration and Refugee Board of Canada \(irb.gc.ca\)](https://www.irb.gc.ca/decisions)

¹⁵ The Divisional Adjudication Strategy Committee is composed of 7-10 members from all regions as well as a member manager. The Committee reviews and recommends to management decisions that should be considered as a JG or a

Reasons of interest are available in both official languages, are sanitized and are available on CanLii and on the IRB website.

Identifying decisions as being of interest is not labour intensive. The primary challenge with this initiative has been developing an intuitive and easily searchable database. Another obstacle has been resistance to identifying a decision as being of interest if the decision is not entirely perfect. Few decisions in high volume tribunals are so exquisitely crafted as to be considered perfect by a discerning reader. We mitigate this concern by including a short preamble to the identification of the decision where we identify which aspect or which paragraphs of the decisions are of interest.

Virtual Collaborative Space

Members working remotely face challenges in engaging with colleagues. Virtual collaborative workspaces are areas where members can drop in any time to ask questions of colleagues, chat with members who happen to be online at the same time or to search old posts. Members can also share draft reasons and invite comments. It's important to note that these are member only spaces, staff and legal counsel do not have access. We interpret them to be a modern version of *Consolidated Bathurst* discussions – online instead of in a room.

We first established a virtual collaborative space several years ago on a SharePoint Platform. It worked well, but we are in the process of developing more niche or targeted collaborative spaces on Microsoft Teams, using dedicated channels for particular subjects, i.e. training, discussion on a new decision from the Federal Court, a novel decision from a colleague, etc.

We also use Yammer, an app within Teams (it's called Communities within Teams). Yammer/Communities looks and feels like Facebook. Its intuitive to use and more engaging and versatile than Teams' channel chats. Conversations in both Yammer and specific Teams channels are searchable, it is easy to do snap polls and solicit input from users on various topics. Again, these collaborative spaces are open to members only.

A key to success for virtual collaborative spaces is to identify "influencers," members who are eager to use the platform and seed conversations and engagement. We've seen that virtual collaboration brings members together where they typically would not have engaged. Members get to know each other, their reasons, and their perspectives on a variety of subjects.

Member Writing Workshops

Members are invited to participate in several one-hour sessions over the course of 3 to 4 weeks. Participation is voluntary. Each session has different areas of focus for discussion, for instance, point-first writing. Members can also select a few files to work on during the workshop period and discuss case challenges, issues that arise in appeals, habits related to focus and approaches to writing on specific issues. The workshops are meant to be a support for members and a new way to meet and connect with colleagues.

These workshops started as a pilot in late 2020 and continue today with several self-initiated teams meeting for 30 minutes three days a week to brainstorm on cases they are working on. The workshops have been

reason of interest. We also have professional development committees that make recommendations to management on the Divisions' training and professional development plans.

tremendously well received by members. Member managers have seen struggling members make significant strides – members are more confident in their approach having brainstormed with colleagues, they finalize decisions more quickly after learning of time saving techniques from colleagues. They rely on colleague’s decisions more often.

5. Third Party Reviews

Third-party reviews refer to quality measurement initiatives and external evaluations. Third-party reviews of IRB programs, processes and procedures help to identify strengths and areas for improvement by measuring the quality of initiatives that support decision-making, and also help to measure the quality of decision-making itself.

Every other year the IRB hires a third-party expert to review a representative sample of the decisions of its adjudicators. Strengths and areas for improvement are identified in the final report and recommendations are made. Management prepares a Management Action Plan to respond to the recommendations for improvement from the report.

The independent reviewer examines all evidentiary and administrative materials on the file, listens to the complete audio recording of the hearing and assesses against qualitative indicators. In a recent QMI¹⁶ the reviewer assessed thirty indicators across six performance categories:

1. Timely and complete pre-proceeding readiness
2. Fair and respectful proceedings
3. Focused proceedings
4. Reasons state conclusions on all determinative issues
5. Decisions provide findings and analysis necessary to justify conclusions
6. Reasons are transparent and intelligible

6. Where to start...and where to go after that?

Developing a quality assurance program or framework most importantly requires focused leadership and commitment, as well as the engagement of the entire senior management team.

Procedurally there are multiple approaches to establish a Quality Assurance Framework (QAF), however the IRB approach was to:

- Identify our champion (In this case the Chairperson).
- Identify our objective(s) – develop a QAF that supports well-reasoned decisions, efficiently, fairly and in accordance with the law.
- Define what quality means. Quality is what you determine it to be, and it can evolve. The IRB defines quality decisions as those which can be shown to be transparent, intelligible and justified.
- Identify Stakeholders
 - Internal and external
 - Identify key contributors

¹⁶ [Quality Performance in the Refugee Protection Division 2019-20 - Immigration and Refugee Board of Canada \(irb-cisr.gc.ca\)](https://www.irb-cisr.gc.ca/Quality-Performance-in-the-Refugee-Protection-Division-2019-20-Immigration-and-Refugee-Board-of-Canada)

- Define guiding principles with stakeholders
- With Stakeholders identify
 - Challenges
 - Needs
 - Best practices
- Communicate – promote buy-in and culture change with a change management plan.