

CONSISTENCY IN TRIBUNAL DECISION-MAKING

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Why Consistency?

Consistency exists where like facts produce like results. In adjudicative decision-making, consistency is a precondition of equality before the law and a prerequisite to the Rule of Law.³ But the goal of consistency must be balanced against other prerequisites to the Rule of Law – the ideas that decisions be made on their own facts and be made by those who hear the dispute. Such balancing lies at the heart of administrative tribunal decision-making.⁴ This paper discusses means by which tribunals can achieve and enhance consistency while remaining responsive to the facts of individual cases, i.e. “consistency but not rigidity”.⁵

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³ *IWA v Consolidated Bathurst Packaging Ltd.*, [1990] 1 SCR 282, at 327 per Gonthier J. (“*Consolidated Bathurst*”):

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 contrôle de la compétence d'attribution: thèse, antithèse et synthèse* (1986), 16 *R.D.U.S.* 591, at p. 632.

See also *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, at 784 per L'Heureux-Dubé J.: “As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law” (“*Domtar*”).

⁴ See *Thamotharem v Canada (Minster of Citizenship and Immigration)*, 2007 FCA 198, para 55 per Evans JA (Décary JA concurring), leave to appeal refused 2007 SCCA No. 394 (“*Thamotharem*”). See also Kevin Whitaker, Michael Gottheil, and Michael Uhlmann, “Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors...”, paper presented at the Canadian Institute for Administrative Justice Roundtable, Vancouver, May 4, 2007, at 9 (“**Consistency in Tribunal Decision Making**”), available at <http://www.ccat-ctac.org/downloads/C-7WhitakeretalConsistency.pdf>, accessed August 26, 2012.

⁵ For simplicity of reference, this paper refers to administrative tribunals or quasi-judicial tribunals as “tribunals”.

PART I - CONSISTENCY IN THE TRIBUNAL CONTEXT

As stated above, the core of consistency is the idea that like facts produce like results. This is commonly understood to mean substantive consistency: a present case involving a particular factual matrix will lead to the same judgment as another present case or past case with the same factual matrix. It also means procedural consistency: comparable disputes are subject to a similar range of procedural treatment. In the tribunal context, it further means that decisions are made within the same range of law and policy.⁶

The need for consistency in tribunal decision-making must be balanced against two basic and related principles. First, the adjudicator must be and appear to be independent and unbiased. An overt desire for consistency can lead to suspicions of prejudging and bias. Second, the adjudicator who hears the dispute must be the one who decides the dispute (*audi alteram partem*).⁷ Attempts by people other than the tribunal member who heard the case to have a say in the ultimate decision can compromise the integrity and value of the member's determination.

The need for consistency must also be responsive to the policy-driven genesis of administrative tribunals. That genesis means that the legal parameters of the concept of consistency in the tribunal context are different from those in the judicial sphere. First, there is no rule of *res judicata* – previous decisions between the parties are not binding. This reflects the fact that policy, which guides tribunal decision-making, evolves. It also allows tribunals more

⁶ Consistency in Tribunal Decision Making, at 4; S. Ronald Ellis, QC, "Jurisprudence and Consistency", Paper to Council of Canadian Administrative Tribunals, June 2006, <http://www.ccat-ctac.org/downloads/S%20eng%20Ellis.pdf> (accessed August 26, 2012), at 3.

⁷ See *Consolidated Bathurst*, at 329-330, 335-338; *Re Sextant Capital Management Inc.* (2012), 35 OSCB 4304, para 11 (Ont Sec Comm).

flexibility to regulate effectively the dynamic and ongoing relationship between particular parties.⁸

Second, tribunals are not bound by the rule of *stare decisis*⁹ – a present tribunal is not held to the reasons that led to a prior tribunal’s decision in a like case. Of course, there are limitations and exceptions to this rule. A tribunal can rely on findings of fact made in previous proceedings between the parties.¹⁰ A tribunal should also consider sanctions in other cases when imposing present penalties.¹¹ A tribunal can consider legal analyses from previous cases. Indeed, as the Federal Court of Appeal has stated, a tribunal may be under an obligation to apply such analyses:¹²

Where general statements of principle are set forth in its decision, the [Canada Industrial Relations] Board should adhere to these principles in subsequent cases. Labour and management should be able to rely on statements of principle by the Board to know the rules of conduct applicable to their future activities.

Nor must a tribunal’s procedure be confined to the model of due process found in courts.¹³ That model may discourage innovation in procedure.¹⁴

⁸ Sara Blake, *Administrative Law in Canada*, 5th ed (Markham: LexisNexis, 2011), at 139.

⁹ *Domtar*, at 799; *J.D. Irving Ltd v International Longshoremen’s Assn.*, *Local 273* (2003), 228 DLR (4th) 620, para 34 per Rothstein JA (Malone JA concurring) (FCA), leave to appeal refused [2003] SCCA No. 393 (“*J.D. Irving*”; *Halifax Employers Assn. v International Longshoremen’s Assn.*, *Local 269* (2004), 243 DLR (4th) 101, para 82 (NS CA), leave to appeal refused [2004] SCCA No. 464. See also Blake, at 140.

¹⁰ *New Brunswick (Executive Director of Assessment) v Ganong Bros. Ltd.* (2004), 240 DLR (4th) 687, paras 44-46 (NB CA).

¹¹ See *Stevens v Law Society of Upper Canada* (1979), 55 OR (2d) 405, para 30 (Ont Div Ct); *Law Society of Upper Canada v Neinstein* (2007), 222 O.A.C. 286, para 103 (Ont Div Ct), with the reasons on this point accepted by the Court of Appeal for Ontario at (2010), 99 OR (3d) 1, para 9.

¹² *J.D. Irving*, para 37; *Canadian Union of Public Employees, Local 2745 v New Brunswick (Board of Management)* (2004), 269 NBR (2d) 141, para 23 (NB CA), leave to appeal refused [2004] SCCA No 215. See also Blake, at 140.

¹³ See *Benitez v Canada (Minister of Citizenship & Immigration)* (2007), 40 Admin LR (4th) 159, para 98, where the Court held that Parliament intended the process in refugee hearings before the Immigration and Refugee Board to be inquisitorial rather than adversarial in nature.

¹⁴ *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 FCR 377, para 56 (“*Kozak*”).

Such flexibility does not mean that tribunals are without legal fetter or that consistency is accidental. Tribunals are bound by their constating statutes. Moreover, they are bound by decisions on judicial review which hold that a particular statutory interpretation is correct, as opposed to reasonable. Courts may also guide consistency across tribunals. A party subject to conflicting obligations from two tribunals may apply to court for an order as to which tribunal obligation prevails.¹⁵

But the judicial search for consistency in tribunal decision-making is not absolute. Notwithstanding the validity of the objective, courts are slow to review tribunal decisions where the sole requested ground is inconsistency. Such reviews undermine the decision-making autonomy, the expertise, and the effectiveness of those tribunals.¹⁶ As such, a direct conflict between two tribunal decisions is insufficient reason for the judicial review and quashing of either.¹⁷ Nor is consistency to be expected in all circumstances: a number of inconsistent decisions can exist before a consensus emerges.¹⁸

PART II – TOOLS FOR ACHIEVING CONSISTENCY

The tools available to achieve and enhance consistency in tribunal decision-making are on the whole more “practical” than “legal”, in that they involve the exercise of tribunal managerial power rather than changes to the content of parties’ rights.

¹⁵ Blake, at 143.

¹⁶ *Domtar*, at 795.

¹⁷ *Domtar*, at 797, 800-801.

¹⁸ *Tremblay v Québec (Commission des affaires sociales)*, [1992] 1 SCR 952, at 974 (“*Tremblay*”).

(i)
Jurisprudence

While the doctrine of *stare decisis* does not apply, perhaps the most effective tool to achieve and enhance consistency is a tribunal jurisprudence. Such a body of decisions has ample benefits:

- Losing parties know that they have been treated the same as other previously unsuccessful parties and so are more likely to accept their loss.
- Parties can assess their likelihood of success.
- Parties can prepare a focused case. This helps to avoid unnecessary interlocutory applications and reduce postponement and adjournment requests.
- Tribunal management can assess the tribunal members' performance in achieving consistency.
- The governing ministry, law society and law associations, and society in general, can assess the tribunal's institutional performance.
- Change over time in the understanding of a statute can occur more comfortably if the bases of prior understandings were explained in those earlier decisions.
- Any judicial review will be able to review the context of the reviewed decision.

A jurisprudence is of little or no use if it is not readily accessible to actual and potential parties, tribunal members, media, the public, academics, and others. Ideally, decisions should be:

- Organized and searchable. Indeed, organization and the ability to search may be prerequisites to the existence of a jurisprudence.
- Indexed.
- Summarized, for example, in the form of headnotes.
- Published, preferably electronically.

Some tribunals publish all decisions. For example, the Ontario Information and Privacy Commissioner publishes all decisions and does so in a searchable format. These publications are

also indexed by statutory provision and subject.¹⁹ In contrast, the Canadian Human Rights Commission cites privacy legislation as the reason it does *not* publish its decisions.²⁰

Other tribunals publish only a selection of decisions, as a “jurisprudential guide”. Such guides are intended to be persuasive on matters of law or mixed fact and law.²¹ For example, some member tribunals of Ontario’s Social Justice Tribunals Cluster publish selected anonymized decisions in the Cluster’s annual report.²²

If a selection is to be published, there should be an objective process to determine which decisions are chosen. As an example, the website of the Ontario Landlord and Tenant Board states that the Board selects the decisions it does because those decisions:²³

- *Interpret or explain an area of law;*
- *provide a clear analysis of a point of law;*
- *apply or distinguish decisions of a court of competent jurisdiction, including the Divisional Court;*
- *apply an Interpretation Guideline of the Board or provide clear reasons for not applying an Interpretation Guideline; and/or*
- *raise new or interesting issues.*

(ii)
Leading Case Strategy

Closely related to the development of a tribunal’s “jurisprudence” is use of a “leading case strategy”. A “leading case strategy” is a premeditated attempt by the tribunal or its

¹⁹ See <http://www.ipc.on.ca/english/decisions-and-resolutions/>, (accessed August 26, 2012). The Alberta Labour Relations Board also publishes all its decisions: see <http://www.alrb.gov.ab.ca/decisions.html>, (accessed August 26, 2012).

²⁰ See http://www.chrc-ccdp.ca/media_room/caselaw_info_jurisprudence-eng.aspx, (accessed August 26, 2012).

²¹ *Kozak*, para 9.

²² See the 2010-2011 Annual Report of the Social Justice Tribunals Ontario, available at <http://www.sjto.gov.on.ca/english/default.html>, (accessed August 26, 2012), containing selected decisions of the Child and Family Services Review Board / Custody Review Board, the Landlord and Tenant Board, the Special Education Tribunal, and the Social Benefits Tribunal.

²³ See <http://www.ltb.gov.on.ca/en/Law/171663.html>, (accessed August 26, 2012), and see also <http://www.canlii.org/en/on/>.

administrative agency to take on, plan, and then litigate a case in a manner that results in a decision that is persuasive not only on matters of law or mixed fact and law, but also on particular matters of fact. The result may be described as a “leading case”.

In comparison, regular, unplanned and non-premeditated cases may be persuasive on matters of law or mixed fact and law, but not on matters of fact. Such “unplanned” cases may in practice become leading cases for the bar. Where a tribunal or administrative agency has identified these “unplanned” cases as persuasive on matters of law or mixed fact and law, they are described as “jurisprudential guides”.

Kozak v. Canada (Minister of Citizenship and Immigration) provides an example of the “leading case strategy” that went wrong. In this case, the Immigration and Refugee Board planned for the applicants’ case and another case to be heard in a manner which the Board anticipated would result in findings of fact on country conditions in Hungary as experienced by Roma refugees.²⁴

The Federal Court of Appeal held in *Kozak* that the particular leading cases were vitiated by bias and lack of independence. The evidence showed that the leading case strategy was not only designed to bring consistency to future decisions and to increase their accuracy, *but to reduce the number of positive refugee determinations that otherwise might be rendered* (the fatal error).²⁵

²⁴ *Kozak*, para 9.

²⁵ *Kozak*, para 61.

Interestingly, one Tribunal has referred to the Tribunal as having “matured” past the leading case strategy:²⁶

However, in recent years, as the [Ontario Workplace Safety and Insurance Appeals] Tribunal has matured, the Tribunal has not adopted a leading case strategy in any appeal. Generally, even in the case of new legal and medical issues, the Tribunal case law has developed through lines of Tribunal decisions, with each Vice-Chair or Panel addressing the facts of the individual appeal. Different Vice-Chairs or Panels may sometimes articulate different interpretations of the law. Vice-Chairs and Panels are not bound by prior decisions of the Tribunal. However, if a Vice-Chair or Panel disagrees with the view expressed in a prior Tribunal decision, it is expected that reasons will be given for that different view. In this way, different Vice-Chairs and Panel members are in a position to participate in the development of the law on a novel issue, and a wide variety of facts may be addressed. Vice-Chairs and Panels may articulate their different perspectives which, over time, results in further elucidation of the law and the maturing of the Tribunal's adjudication of the new issues.

(iii) Binding Rules

A constating or other statute may permit an agency that oversees a tribunal, or the tribunal itself, to create rules that are binding on that tribunal. If the statute grants a discretion and also an ability to introduce a rule respecting the exercise of that discretion, then the agency or tribunal can mould the exercise of the discretion in a reasonable way that is consistent with the statute.²⁷ Whether the rules are binding depends on the authorizing statute.²⁸ Such rules will be binding where the statute specifically authorizes the agency to make rules concerning the tribunal's exercise of discretion.

²⁶ See Ontario Workplace Safety and Insurance Appeals Tribunal *Decision No. 993/02IR4*, 2007 CarswellOnt 9708, 2007 ONWSIAT 1021, paras. 67-68.

²⁷ *Ainsley Financial Corp. v Ontario Securities Commission* (1994), 21 OR (3d) 104, pp 107-109 (Ont CA) (“*Ainsley*”). The Court of Appeal found that the Ontario Securities Commission policy statement at issue in *Ainsley* had crossed the line from being a guideline to containing mandatory provisions, and had done so without statutory authority. As such the policy statement was invalid. See also *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, para 17 (“*Kelly*”).

²⁸ *Kelly*, paras 18-19.

These binding rules may include Rules of Practice. Rules of Practice promote consistency in approach because all decision-makers work from a clear set of standards. In addition, they signal to parties the types of information that the tribunal requires or expects.²⁹

(iv)
Soft Law

A tribunal may issue and use policy statements, guidelines, manuals, handbooks and other similar material in order to influence the decision-making of its members. Such instruments are known in this context as “soft law” because while in form they do not bind tribunal members, in practice tribunal members tend to observe them.

These instruments enable a tribunal to deal with a widespread policy issue comprehensively and proactively, rather than on an incremental case-by-case basis.³⁰ Because these instruments can be put in place relatively easily and adjusted in the light of experience, they are usually preferable to formal rules that typically require external approval and drafting appropriate for legislation.³¹ They are also particularly helpful for large tribunals that sit as panels, where tribunal members may otherwise have their individual preferences.

Tribunal members must not slavishly follow guidelines; neither can they ignore them. A tribunal decision may be set aside if it is made solely with reference to a prescription in a

²⁹ Michael Gottheil and Doug Ewart, “Improving Access to Justice through International Dialogue: Lessons for and from Ontario’s Cluster Approach to Tribunal Efficiency and Effectiveness”, paper presented at the 2010 Australian Conference of Planning and Environmental Courts and Tribunals, at 19 (“**Improving Access to Justice**”). <http://www.sjto.gov.on.ca/stellent/groups/public/@abcs/@www/@sjc/documents/abstract/ec156836.pdf> (accessed August 26, 2012).

³⁰ *Thamorharem*, para 55. See also *Bajwa v. Canada (Minister of Citizenship & Immigration)*, 2012 FC 864, 2012 CarswellNat 2390, para 44 (July 9, 2012 per O’Keefe J.).

³¹ *Thamorharem*, para 56; *Ainsley*, pp 107-109.

guideline, and made in spite of a request to deviate from that prescription.³² On the other hand, where there are guidelines, it may be a breach of the duty of fairness for the tribunal member to ignore those guidelines without providing reasons for doing so.³³

Whether a guideline is an impermissible fetter on the decision-making authority of a tribunal member depends on many factors, including the language of the guideline, the effect of the guideline, and the needs of the particular tribunal itself. In general, the language of the guideline will be a more important factor than its effect.³⁴

In *Thamotharem v Canada (Minster of Citizenship and Immigration)*, the Federal Court of Appeal considered a guideline which provided that, apart from in exceptional circumstances, a Refugee Protection Officer was to commence the questioning of a claimant, rather than the refugee claimant's counsel. The court found that the guideline expressly permitted deviation from its terms. Further, courts should hesitate, in the absence of contrary evidence, to conclude that tribunal members did in fact consider themselves bound by the guideline.³⁵ In the result, the Court ruled that: (1) the evidence did not demonstrate that, in light of the wording of the guideline, a "reasonable person would think that [the] members' independence was unduly constrained" by the guideline; (2) there was evidence that members did deviate from the "standard practice"; and (3) there was a need for the Board, which was the largest in Canada, to obtain an acceptable level of consistency.³⁶

³² *Ainsley*, pp 107-109; *Thamotharem*, para 62; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, para 60 per Stratas JA (Noël and Trudel JJA concurring); *Maple Lodge Farms Ltd. v Government of Canada*, [1982] 2 SCR 2, at 6-7.

³³ See *Bezaire v Windsor Roman Catholic Separate School Board* (1992), 9 OR (3d) 737, paras 42, 64-66 (Ont Div Ct). See also Lorne Sossin, "Access to Administrative Justice and Other Worries", at 8, available at: http://www.law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf, (accessed August 26, 2012).

³⁴ *Thamotharem*, para 73.

³⁵ *Thamotharem*, para 73.

³⁶ *Thamotharem*, para 88.

(v)
Institutional Decision-Making Processes

A tribunal may establish internal processes whereby a group of tribunal members – often all members – will consider and comment on the draft decisions of individual members or panels in advance of the release of those decisions. One of the purposes of such processes is to ensure that “lone-ranger” tribunal members, who “conceive of themselves as occupying islands of justice within a tribunal’s office”, are not able to create a situation where the outcome of an appeal or application is different depending on which tribunal member hears it.³⁷

An example of such a process is found in the case *IWA v Consolidated Bathurst Packaging Ltd.* In this case, the Supreme Court of Canada examined the consideration by the full Board of the Ontario Labour Relations Board of a draft decision written by a panel of three, but did so before that draft decision was finalized and released. The Court held that this process did not create a reasonable apprehension of bias or lack of independence on the part of the panel. Such an institutional consultation process will not offend where it:³⁸ (1) is not imposed by a superior level but is requested by the adjudicators themselves;³⁹ (2) is limited to questions of policy and law, rather than fact or evidence; and (3) the panel members remain free to decide according to their consciences. Further, the possibility of new arguments being raised in the institutional consultation process will not offend the *audi alteram partem* rule where the parties have an opportunity to respond to any new arguments raised during that process.⁴⁰

³⁷ S. Ronald Ellis, QC, “The Corporate Responsibility of Tribunal Members”, (2009) 22 Can J Admin L & Prac 1, 17.

³⁸ *Consolidated Bathurst*, at 332-336.

³⁹ See *Tremblay*, at 975.

⁴⁰ *Consolidated Bathurst*, at 338; *Tremblay*, at 978-980; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, paras 27-33 (“*Ellis-Don*”).

Where there is such institutional review, adherence to the principle of deliberative secrecy will permit interaction between the members who have heard the case and those who have not.⁴¹ In *Ellis-Don Ltd. v Ontario (Labour Relations Board)*, the Supreme Court of Canada considered another Ontario Labour Relations Board case, but in this case the draft decision of the panel had changed after the full Board considered the draft. The applicant sought judicial review of the decision, alleging that the change made in the institutional consultation process was of a factual nature and was, therefore, improper. The Divisional Court dismissed the application, and the Court of Appeal and the Supreme Court dismissed the appeals. The Supreme Court held that the applicant was unable to prove that there had been a factual change. Although this inability existed because the principle of deliberative secrecy prevented the applicant from discovering the input of the full Board – which had not heard the case – the process remained fair. The principle of deliberative secrecy, which impinged upon the applicant’s ability to present sufficient evidence of a factual change, was necessary in the tribunal context because it allowed the Board to deliberate in secret, enabled the institutional consultative process, and therefore enhanced consistency and predictability.

(vi)
Clustering of Tribunals

The clustering of tribunals provides an excellent opportunity to harmonize Rules of Practice, technology, and case management processes. In Ontario, such clustering is made

⁴¹ *Ellis-Don*, para 53. The principle is not absolute. Secrecy may be lifted where the litigant can present valid reasons for believing that the process did not comply with the rules of nature justice: see *Tremblay*, at 965-966.

possible under s. 15 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*.⁴²

Tribunal clustering is expected to increase the subject matter effectiveness of the individual tribunals and lead to greater consistency across the clustered tribunals. First, it combats the *ad hoc* evolution of administrative tribunal systems, which can lead to a lack of consistency through “discontinuities in how individuals’ legal rights are determined” and disruption of the flow of knowledge between tribunal members themselves.⁴³ Second, cross-appointments, cross-training and co-location improve subject matter synergies, and recognize and emphasize the importance of common high standards of adjudicative practices.⁴⁴

In addition, clustering permits possible innovations that may improve the quality and consistency of decision-making on merits reviews.⁴⁵

Such changes in tribunal operation in order to improve consistency of tribunal decision-making should be careful to take into account any desire to preserve a tribunal’s distinct identity or culture.

⁴² *Adjudicative Tribunals Accountability, Governance and Appointments Act*, S.O. 2009, c. 33, Sch. 5. Section 15 (Designation of clusters) reads:

The Lieutenant Governor in Council may by regulation designate two or more adjudicative tribunals as a cluster if, in the opinion of the Lieutenant Governor in Council, the matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone.

Section 2 of Ont Reg 126/10, *Adjudicative Tribunals and Clusters*, establishes the Environment and Land Tribunals Cluster, while s. 3 establishes the Social Justice Tribunals Cluster.

⁴³ See Lorne Sossin and Jamie Baxter, “Ontario’s Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice”, at 13, paper published at <http://ssrn.com/abstract=2099751>, February 5, 2012 (accessed August 26, 2012) (forthcoming in Oxford University Commonwealth Law Journal) (“**Glass Half-Full**”).

⁴⁴ *Improving Access to Justice*, at 7.

⁴⁵ “Glass Half-Full”, at 26.

(vii)
Culture of Consistency

The creation of a culture among tribunal members which values and seeks consistency is likely the most durable while also the most difficult to create. Such a culture should both foster continuous improvement across the organization and lead tribunal members to share a common understanding of the range of acceptable views on significant issues of procedure, law and policy.⁴⁶ In keeping with most of the other tools for enhancing consistency, methods to foster a culture of consistency are, as stated, generally more “practical” than “legal”.

- **Interaction Between Members**
Open office environments encourage casual interaction and exchange of ideas. Similarly, regular meetings for geographically disparate tribunal members help establish and reinforce best practices. Tribunal chairs might have regular and informal, but also private, discussions with tribunal members.
- **New Member Recruitment**
The addition of new members is an important means to create a culture of consistency and tribunals should participate in the process of member recruitment.⁴⁷ This enables tribunals to assess the candidate’s ability to fit within the tribunal’s internal culture, and to assess how the candidate understands the relevant issues of law and policy.
- **Member Training**
Initial – and ongoing – member training is a valuable tool. A regular program of training members together will result in greater consistency.⁴⁸ Tribunal managers may also consider designated training officers, combining classroom and practical teaching, and providing ongoing guidance and support.⁴⁹

⁴⁶ Consistency in Tribunal Decision Making, p 9. The authors describe the goal of a culture of “assertive collegiality”.

⁴⁷ Section 14(4) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, S.O. 2009, c. 33, Sch. 5, provides that the chair of a tribunal subject to the Act (as listed in Sch. 1 to Ont Reg 126/10), must recommend an appointment before that appointment can be made. Ontario Regulation 88/11, s. 3 permits waiver of this requirement in the case of the reappointment of a chair.

⁴⁸ Improving Access to Justice, at 22.

⁴⁹ See Brian Goodman, “Promoting Predictability and Consistency: the IRB Experience”, Speaking Notes for Council of Canadian Administrative Tribunals, 27th Annual Conference Session on Predictability, Ottawa, June 6, 2011, at <http://www.irb-cisr.gc.ca/Eng/media/newsnouv/2011/Pages/ccat-ccta2011.aspx>, (accessed August 26, 2012); Consistency in Tribunal Decision Making, at 6.

- **Monitoring of Member Performance**
The flip-side of training members is the monitoring of their performance. The quality of decisions made by tribunal members, including their consistency with other decisions, determines and may reflect those tribunal members' overall performance. Provisions which confer on the Chair of a tribunal responsibility for supervision of performance may permit the Chair to develop codes of conduct with professional and ethical responsibilities and with performance standards.⁵⁰

- **Review by Tribunal Counsel of Draft Decisions**
Oversight of tribunal members as a means of enhancing consistency in decision-making may focus more directly on the decisions themselves rather than the members. As a tool of quality control, a tribunal may employ tribunal counsel to review draft decisions for consistency and for a proper assessment of the applicable law.⁵¹ However, care must be taken not to interfere improperly with the reasoning of non-legally trained members.

- **Decision Writing**
The development of internal writing guidelines covering style, forms of expression, and the format of reasons will help members to consider consistency when drafting their reasons. Further, the circulation by members of draft decisions and commentary for discussion will encourage and develop a culture of consistency, as will the possibility of appeal through "reconsideration".

- **Case Management and Case Treatment Patterns**
Case treatment patterns are paths by which like cases follow the same or similar process. These, and regular case management, can help to enhance consistency both directly, and indirectly by signalling to parties the tribunal's expectations for management and scheduling of types of cases.⁵²

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⁵⁰ David Mullan "Regulating the Conduct of Agency and Tribunal Members", (2009) 22 Can J Admin L & Prac 339, at 350-351. See, for example, the "member accountability framework" in s. 7 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, S.O. 2009, c. 33, Sch. 5.

⁵¹ Donald Chiasson, "Government Perspective on Administrative Tribunals", (2000-2001) 14 Can J Admin L & Prac 199, 206. Care should be taken to ensure consistency with the constating statute: see *Khan v College of Physicians and Surgeons (Ontario)* (1992), 9 OR (3d) 641 (Ont CA).

⁵² Consistency in Tribunal Decision Making, at 16.