Council of Canadian Administrative Tribunals
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"JURISPRUDENCE AND CONSISTENCY"

The Panel's topic focuses one's attention, at the outset, on the indispensable connection between a helpful and reliable tribunal jurisprudence, and consistency in a tribunal's decision-making in individual cases. But the topic also evokes a range of other issues.

I will begin with the very idea of a tribunal *having* a jurisprudence. Obviously, having a jurisdiction is not a difficult concept to grasp; we are all intimately familiar with the concept when it comes to the courts. But not all tribunals have a jurisprudence. Many Ontario tribunals, even major ones, do not. I believe, for example, that neither the *Ontario Social Benefits Tribunal* nor the *Ontario Rental Housing Tribunal* currently have what could be said to be a jurisprudence.

So, for tribunals, having a jurisprudence would appear not to be an inevitable thing. However, inevitable or not, viewed from a justice perspective, in my opinion, having a jurisprudence is essential for any tribunal.

I will address in a moment the reasons why having a tribunal jurisprudence is essential, but, first, let us consider what a jurisprudence is.

Jurisprudence in this context means "a body of law" produced by a tribunal. And, of course, at its most basic level, it is a collection of the tribunal's decisions. However, a mere collection of decisions does not a jurisprudence make.

To constitute a viable jurisprudence, the decisions that are collected must, first and foremost, be fully and competently reasoned, and, ideally, well written. But it is not sufficient that individual decisions be competently reasoned; when compared one to the other, they must also be *coherent*. I will come back to the subject of coherency in a moment.

Secondly, for a collection of decisions to constitute a jurisprudence, the decisions must not only be competent and coherent, they must also be readily accessible – to both potential and actual parties and their counsel, to academic researchers, to the public and the press, as well as to each of the members of the tribunal in question and to the government, etc.

To be accessible to that wide audience, they must, of course, be published, if only electronically – that is, they must be made available on a medium that allows anyone to look at them at their convenience.

But to be accessible, the decisions must not only be available to be *read* by anyone at their convenience, they must also be organized in a manner that allows them to be readily searched for the answers to particular questions. No one can afford the time to read a large volume of decisions sequentially in the hope of finding a decision that is relevant to one's question, and no one can assert that a tribunal's jurisprudence stands for anything in particular, without being able to reference all of the tribunal's decisions on the point.

So, for a collection of decisions to constitute a jurisprudence, the collection must be intelligently indexed against all the potentially relevant topics.

Moreover, for the indexing function to be exercised effectively, and to provide for ready access to the full-text of a decision – for recognizing quickly whether this is a decision one wants to spend time reading or not – a viable jurisprudence must also have, for each of the collected decisions, a reliable summary. In the courts' jurisprudence, we call them "head notes"; but whatever one calls them, they are indispensable to effective access.

Thus, a jurisprudence is a published, well-indexed and head-noted collection of the full-text of a tribunal's fully and well reasoned, coherent decisions.

And, of course, creating and maintaining an effective jurisprudence is not inexpensive. In addition to what it takes in budget terms from an institutional perspective to *produce* competent, well-reasoned, coherent decisions in the first

place, one also needs competent professionals to do the indexing and summarizing and to organize and administer the publishing in whatever form it takes.

Where the volume of decisions is very high, one can help manage the expense by not publishing all of a tribunal's decisions, but then there is an issue as to an appropriately objective process for selecting the decisions that are to become part of the jurisprudence.

So what is the justification for spending money on the creation and maintenance of a tribunal jurisprudence – that is, why do I say that from a justice perspective a tribunal having a jurisprudence is essential?

Here is a list of reasons that does not pretend to be nearly complete.

First, the principle that like cases should receive like treatment is one of the most fundamental principles of any liberal theory of justice – indeed, some philosophers are of the view that it is *the* most fundamental principle. And, without a jurisprudence, it is completely impossible for that principle to be respected. Without a jurisprudence, losing parties do not know and cannot find out if other parties with like cases have received the same treatment. Moreover, the tribunal members themselves cannot find out if their planned decision in a particular case is in conformance with that principle, since they too cannot access the like cases which their colleagues have previously decided.

And, without a jurisprudence, neither the tribunal's management nor the Minister to whom the tribunal reports or the legislature can know to what extent the "like cases" principle is being respected.

Second, without a jurisprudence, a tribunal simply cannot be held accountable for the quality of its decision-making. For without a jurisprudence, outside critics, the advocacy community, legislative counsel, the press, the host Ministry's staff, can only evaluate the tribunal's performance one decision at a time, whereas it is the overall quality of the *body* of decisions and the relationship of each decision to the others that tells the tale as far as the tribunal's institutional performance is concerned.

Three: Without a jurisprudence, there is no possibility of the tribunal's understanding of its constituent statue evolving in the common-law manner over the course of a series of decisions dealing with related issues. In short, there is no possibility of achieving coherency in a tribunal's body of decisions. If it is not part of a jurisprudence, every decision becomes a one-off event except for whatever anecdotal knowledge of the decision that might come to the attention of another decision-maker or parties in other cases in an informal and random way.

Four: Of course, the existence of a tribunal jurisprudence allows potential parties and/or their counsel to evaluate the likelihood of success if they decide to take their case to the tribunal, and thus discourages applications that an examination of a jurisprudence would show to be problematic.

Five: A jurisprudence allows parties and/or their counsel who do decide to apply to the tribunal to discover the issues they are likely to face and the law which the tribunal applies and thus gives them a fair opportunity to prepare an informed and intelligently focused and argued case. This in turn helps the tribunal panel to make an informed and intelligent decision.

Six: Finally, without a jurisprudence, the courts are prevented, on judicial review, from considering a tribunal decision in the context provided by other tribunal decisions on related issues. The absence of a jurisprudence, therefore, undermines the Court's chance of rendering a contextually sensible decision.

One need only consider for a moment these reasons for *having* a jurisprudence to recognize the wisdom of the Supreme Court of Canada's observation in *Consolidated Bathurst* that with respect to important generic issues there is a "necessity" - the Court's word – to maintain a "high degree of quality and coherence" in a tribunal's decisions.[1] Obviously, the jurisprudence is not useful if the decisions are not competent or, when compared one to the other, not coherent.

[1] Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69, [1990] 1 S.C.R 282, at 324

That reference to *Consolidated Bathurst* prompts me to speak more generally of the jurisprudence that authorizes – and puts limits on – the kinds of things that a tribunal may do to institutionalize its decisions – which is to say: what a tribunal may do to ensure that decisions made by its members conform with the *tribunal's* standards of decision-making.

Obviously, when one speaks of jurisprudence and consistency, one evokes the age-old question of how one squares a tribunal's institutional need for decisions that conform to its institutional standards of consistency and coherency, with the traditional independence and autonomy of the decision-making of individual tribunal adjudicators.

The leading decision on how one may do that - on how a tribunal may legitimately *institutionalize* its members' decision-making – is *Consolidated Bathurst*, a 1990 decision of the Supreme Court of Canada.[2] The principles governing the institutionalizing of tribunal decision-making laid down in that decision were subsequently confirmed and/or clarified by the Supreme Court in two later decisions: *Tremblay* in 1992[3] and *Ellis-Don* in 2001[4]. In Ontario we also have the 1992 decision of the Ontario Court of Appeal in *Khan*.[5]

These are the decisions that laid down the legal foundations for institutionalized decision-making – authorizing tribunal management to devise procedural structures and strategies designed to influence the decision-making of individual tribunal members towards a consistent, high quality and coherent body of tribunal decisions.

The principles established by this jurisprudence have proven to constitute an enduring legal matrix against which the appropriateness of particular institutionalizing processes continues to be measured.

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[2]. Id.

[3] *Quebec (Commission des affaires sociales)* c. *Tremblay*, [1992] 1 S.C.R. 952

[4] *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board*), [2001] 1 S.C.R. 221.

[5] *Khan* v. *College of Physicians & Surgeons* (Ontario) (1992), 9 O.R. (3d) 641 (C. A.)

Of course, there continue to be issues as to whether a particular institutionalizing strategy is or is not consistent with these principles. As we have heard in previous sessions of this Conference, the IRB is in the midst of some litigation on that question as it relates to certain of its current decision-institutionalizing strategies. However, the validity of what we have come to refer to generically as the *Consolidated Bathurst* principles is now seen to be largely settled.

This workshop's topic: "jurisprudence and consistency", rather suggests that "consistency" is the signal requirement of a jurisprudence. And, obviously, it *is* true that consistency is an important criterion for a useful jurisprudence. But in *Consolidated Bathurst* the Supreme Court referred to the importance of both consistency and coherency and, of course, they are not the same thing.

One has consistency when cases with like facts in point of fact produce like results. One has coherency, on the other hand, when cases with unlike facts produce decisions that are not discordant with other tribunal decisions; where the principles or theories identified and applied in decisions dealing with different facts are seen to be logically harmonious one with the other.

And, one can also have coherency – can require coherency – even when one has inconsistent decisions on undistinguishable facts. The Supreme Court of Canada recognized in *Tremblay* that consistency of decisions is not *always* to be expected – that "ordinarily, precedent is developed by the actual decision-makers over a series of decisions" and that "a tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges". [6]

Moreover, the Supreme Court has subsequently confirmed (in *Domtar*) that the fact that one of a tribunal's decisions conflicts directly with another of that same tribunal's decisions is not a reason for quashing either decision.[7]

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[6] Tremblay, at 974

[7] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at para. 93

Inconsistent decisions would be coherent if the reasons given for the subsequent decision explicitly identified what it was about the earlier decision that the subsequent decision-maker did not accept and stated why he or she thought that the decision to be wrong. Then a third decision-maker faced with the same undistinguishable facts would have to choose between the two previous and conflicting decisions, or to choose a path of his or her own, and as long as he or she also detailed the argument which led to whatever choice he or she made, the *coherency* of those three decisions would be assured. They would not be consistent but they would be coherent.

It is not, however, only about consistency and coherency; those are two criteria of good quality decisions but only two. And, once a tribunal begins to concern itself with the consistency and coherency of its jurisprudence it is logically unavoidable that it also then must concern itself with other criteria of decision quality. Every one will have their own list of the characteristics of a good decision. My own list is virtually identical to the well-known WSIAT Hallmarks of Decision Quality, and would read as follows:

1. A good decision does not ignore or overlook relevant issues fairly raised by the facts.
2. It makes the evidence base for the decision clear.
3. On issues of law or on generic technical issues, the decision does not conflict with previous tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.
4. The decision makes the decision-maker's reasoning clear.
5. The decision meets reasonable standards of readability.
6. It also conforms reasonably with the tribunal's standard decision formats.
7. The decision's technical and legal terminology is consistent with that used by the tribunal's other decision makers, and the use of unnecessary jargon is carefully avoided.

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

9. The decision does not support permanent conflicting tribunal positions on clear issues of law or on clear generic technical issues. Such conflicts may occur while a tribunal position on new issues is being developed, but they cannot be a permanent feature of the Tribunal'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 the tribunal's body of decisions that must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for respecting effectively the important principle that like cases should receive like treatment.

One of the things about this list – and, indeed, about anyone's list of what it takes to make a good decision – is that it does not reflect only the interests of the parties to a particular case, nor just the interests of the member who happens to be the decision-maker on that case, it also reflects in important measure the *tribunal's* institutional interests – that is, the fact that decisions produced by tribunal members are *tribunal* decisions – they are made by individual tribunal members, but those members are typically performing a tribunal function, not an individual function.

It follows that if the decision-making of a particular member does not satisfy a tribunal's institutional criteria and standards of quality, then the tribunal's corporate management – typically the chair – has an obligation to fix that problem. And, usually, the chair's strategy is to establish procedures and processes that are effective in influencing the decision-makers to comply with the tribunal's criteria of quality in the first place.

The famous example of such procedures and process is, of course, the Ontario Labour Relations Board's consideration of draft decisions at "full board

meetings”; which is what was challenged – unsuccessfully – in both *Consolidated Bathurst* and *Ellis-Don*.

But every tribunal has its own strategies for institutionalizing its decisions. And my panel colleagues will, I understand, be speaking more about that.

As background for that discussion, I propose to close by describing the *Consolidated Bathurst Principles*. This is the legal framework within which the institutionalizing of Tribunal decisions must fit.

For each of the following principles there is full support in the *Consolidated Bathurst* line of cases, to which I referred above. The order in which they appear in the following list is an order of my choosing not that of the Court’s.

1. The rules of natural justice must take into account the institutional constraints faced by an administrative tribunal.[8]

2. With respect to important generic issues there is a "necessity" to maintain "a high degree of quality and coherence" in a tribunal’s decisions.[9]

3. The coherence and quality of the decisions of a tribunal’s decision-makers must be "fostered by the Tribunal".[10] – i.e., it is not optional.

4. The importance of adjudicative coherence amongst the body of tribunal decisions is a relevant criterion for individual tribunal adjudicators even when they are not bound by any *stare decisis* rule, and adjudicators may properly allow themselves to be influenced by the opinion of colleagues in the interest of such coherence.[11]

5. A situation in which the outcome of an appeal or application will be different depending only on which members of a tribunal happened to be assigned to the case "will be difficult to reconcile with the notion of

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[8] *Consolidated Bathurst*, at 323.

[9] Id., at 324.

[10] Id., at 327.

[11] Id., at 333.

equality before the law", which, the court commented, "is one of the main corollaries of the rule of law, and perhaps also the most intelligible".[12]

6. As mentioned previously above, consistency of decisions is not, however, always to be expected. The courts recognize, as I have said, that "ordinarily, precedent is developed by the actual decision-makers over a series of decisions" and that "a tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges".[13] The corollary to that, however, a tribunal that it may not continue to render contradictory judgments beyond that point.

7. The "institutionalizing" of decisions exists in our law. The problem is not whether such decisions should be sanctioned, but to organize the process in such a way as to limit its dangers.[14]

8. A tribunal's institutional processes for fostering coherence may include processes to which the parties or their representatives do not have access and which are openly designed to influence -- but not constrain -- individual adjudicators' decision-making on generic questions of law or policy.[15]

9. "… the relevant issue" the Court has said … "is not whether [the institutionalizing process] can cause panel members to change their minds but whether [it] impinges on the ability of panel members to decide according to their opinions."[16] That is to say, the internal institutionalizing process may influence a tribunal member's decision-making – indeed, it is specifically designed to influence that decision-making – but, as indicated in 8 above, it must not *constrain*, nor may it give the appearance of constraining, the decision-making of its members.

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[12] Yves-Marie Morissette, "*Le controle de la competence d'attribution: these, antithese et synthese* (1986), 16 R.D.U.S. 591, cited with obvious approval in *Consolidated-Bathurst*, at 327.

[13] See supra, f.n. 4.

[14] *Consolidated Bathurst*, at 340.

[15] Id.

[16] From the majority judgment in *Consolidated-Bathurst*, quoted with approval in Tremblay, at 970.

10. "Institutionalizing [the decision-making of an adjudicative tribunal] provides important advantages and the threat to the independence of individual decision-makers inherent in institutionalizing processes must be weighed in light of these advantages."[17]

11. Participation in institutionalizing processes by individual tribunal decision-makers must not be mandatory.[18]

12. Findings of fact should not be the focus of institutionalizing processes.[19]

13. If an institutionalizing process [such as the OLRB's full-board meetings] leads to the identification of an issue in the case that the parties to the original hearing have not had an opportunity to address, the parties must be apprised of that issue and given an opportunity to respond to it.[20]

It is these principles against which the lawfulness of a tribunal's efforts to influence its members' decision-making so as to allow the tribunal to create and maintain a viable jurisprudence – amongst other things – must be judged.

Of course, in addition to effective decision-institutionalizing strategies, the creation and maintenance of a viable and useful tribunal jurisprudence also depends, realistically speaking, on a number of other important matters. These include the following:

- Appropriate limitations on the use and deployment of part-time members;
- Member qualifications that are relevant and rigorous;
- A merit-based and competitive appointments process;
- Competitive compensation levels;

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[17] *Consolidated Bathurst*, at 328.

[18] Although, this author has often wondered why it would not be appropriate to expect a tribunal member to participate in the tribunal's institutionalizing processes providing that they were not of a nature that constrained his or her own decision in the final instance.

[19] See particularly, Ellis-Don.

[20] Consolidated Bathurst.

- Effective member training and CLE programs;
- Appropriate member performance evaluation programs;
- An objective and fair re-appointments process; and
- Structural independence for both tribunals and their members.

But, of course, those are issues for other days in other forums.

Thank you for the courtesy of your attention.

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