

# Consistent Decision-Making – A Core Value for High Volume Jurisdiction Tribunals and Agencies?

**David J. Mullan**

*David J. Mullan, Professor Emeritus from Queen's University Law School and one of the foremost experts on Canadian Administrative Law, delivered the following paper he prepared for the WSIAT 25<sup>th</sup> Anniversary Symposium on December 14, 2010. Professor Mullan's paper addressed the issue of consistent decision-making in tribunals, with particular emphasis on the court's role in maintaining consistency.*

*In 1993, the Supreme Court decided that courts should not review tribunal decisions for consistency, in order to respect the legislative will to let tribunals develop their own jurisprudence on their statutes, and out of respect for tribunals' prerogatives, (Domtar Inc. v. Québec (Commission d'appel en matière des lésions professionnelles) [1993] 2 S.C.R. 756). To address consistency issues, the Supreme Court pointed tribunals to internal mechanisms in order for similar cases to be adjudicated alike (see IWA v. Consolidated-Bathurst Packaging Ltd. ([1990] 1 S.C.R. 282) and Tremblay v. Québec (Commission des affaires sociales) [1989] C.S.C.R. No 373). The goal was to prevent adjudicators from departing from tribunals' jurisprudence while keeping the decision-making autonomy or independence of the panel, hence achieving "adjudicative coherence" without repeating the rigid common law system of precedents of courts.*

*Examples of internal mechanisms to promote procedural consistency, as well as consistency in decisions, included designating decisions as key precedents and providing continuing education for tribunal members. Professor Mullan identified the power to reconsider decisions as a further opportunity to encourage consistent decision-making. Finally, the statutory and common law requirements (see Baker v. Canada (Minister and Citizenship and Immigration) [1999] 2 S.C.R. 817) for tribunals to provide adequate reasons for their decisions is an effective tool for the development of a coherent body of precedents. Professor Mullan noted that WSIAT already employs a number of these techniques.*

*While Professor Mullan recognized the Courts' historic reluctance to deal with inconsistency of tribunal decisions through judicial review, he suggested that there may be room for judicial review of tribunal decisions on the basis of inconsistency in certain circumstances. This should not be through characterizing intervention on the grounds of jurisdiction (Canada (Attorney General) v. Mowat (2009 CAF 309); Canada (Attorney General) v. Northrop Gruman Overseas Service Corporation (2009 SCC 50), Plourde v. Wal-Mart Canada Corporation (2009 SCC 54). Professor Mullan proposed that where reasons for a tribunal decision are inadequate to the extent that the decision maker does not address or explain deviations from other decisions, or where a tribunal has parallel or conflicting lines of jurisprudence on the same legal issue and lacks either the capacity or will to break the deadlock, the Courts should not hesitate to review on the basis of correctness.*

*David J. Mullan, professeur émérite de la Faculté de Droit de l'Université Queen, et l'un des plus grands experts en droit administratif canadien, a présenté un article préparé pour le Symposium du 25<sup>e</sup> anniversaire du TASPAAAT. L'intervention du professeur Mullan portait sur la question de l'homogénéité décisionnelle des tribunaux, et particulièrement sur le rôle des cours dans le maintien de cette homogénéité.*

*En 1993, la Cour Suprême refusa que les cours ne contrôlent l'homogénéité des décisions administratives, afin de respecter l'intention législative voulant que les tribunaux développent leur propre jurisprudence sur leurs lois habilitantes, et afin de respecter les prérogatives des tribunaux (Domtar Inc. c. Québec (Commission d'appel en matière des lésions professionnelles), ([1993] 2 S.C.R. 756)). Afin de pallier aux problèmes d'hétérogénéité jurisprudentielle, la Cour poussa les tribunaux à utiliser des mécanismes internes pour que les cas similaires soient jugés de façon semblable (voir Syndicat international des travailleurs du bois d'Amérique, section locale 2-69 c. Consolidated-Bathurst Packaging Ltd. [1990] 1 R.C.S. 282, et Tremblay c. Québec (Commission des affaires sociales) ([1989] C.S.C.R. No 373)). Le but était d'éviter que les adjudicateurs ne dévient de la jurisprudence de leurs tribunaux tout en préservant l'autonomie ou*

*l'indépendance adjudicatrice des Panels, obtenant ainsi une cohérence décisionnelle qui ne tombe pas dans le système rigide des précédents judiciaires de common law.*

*Caractériser certaines décisions comme étant des décisions-clé et fournir une formation continue aux membres d'un tribunal sont quelques exemples de mécanismes internes promouvant l'homogénéité procédurale aussi bien que décisionnelle. Le professeur Mullan considère le pouvoir du tribunal de réexaminer ses propres décisions comme une opportunité additionnelle d'encourager l'homogénéité décisionnelle. Enfin, les impératifs législatifs et de common law obligeant les tribunaux à motiver leurs décisions en fournissant des raisons suffisantes sont des outils efficaces permettant le développement d'un corpus cohérent de précédents (voir Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration) [1999] A.C.S. no 39). Le professeur Mullan remarqua que le TASPAAAT applique déjà nombre de ces techniques.*

*Bien que le professeur Mullan reconnaisse la répugnance traditionnelle des cours à s'occuper de l'hétérogénéité des décisions de tribunaux dans le cadre du contrôle judiciaire, il suggéra qu'il pourrait y avoir une place, dans certains cas, pour le contrôle judiciaire des décisions de tribunaux pour motif d'hétérogénéité. Et que cette intervention judiciaire ne devrait pas se déguiser en intervention sur la question de la compétence (Canada (Procureur Général) c. Mowat (2009 CAF 309) ; Canada (Procureur Général) c. Northrop Gruman Overseas Service Corporation (2009 SCC 50) ; Plourde c. Wal-Mart Canada Corporation (2009 SCC 54)). Le professeur Mullan suggère ainsi que, lorsque les motifs de la décision d'un tribunal sont insuffisants au point de ne pas traiter ou de ne pas expliquer ses écarts par rapport à d'autres décisions, ou lorsqu'un tribunal produit des courants jurisprudentiels parallèles ou contradictoires sur une même question juridique et ne peut ou ne veut pas traiter ce problème, les cours ne devraient pas hésiter à contrôler ces décisions sous la norme de contrôle judiciaire de la décision correcte.*

## **Consistent Decision-Making – A Core Value for High Volume Jurisdiction Tribunals and Agencies?<sup>1</sup>**

I appreciate that administrative tribunals are not governed by *stare decisis*. Indeed, some such as workers' compensation boards were deliberately set up to escape the "dead hand" of common law precedent. But a claim to consistency, to treat similar cases in a similar fashion, is a powerful human aspiration, by no means an exclusively legal concept. Is it possible that just as advances in printing made binding court precedent possible some two hundred years ago, now advances in IT will require tribunals to pay greater respect to their earlier decision[s]? For mass adjudication, multi-panel tribunals particularly, this may be quite a challenge.

Hudson Janisch, "Something Old, Something New"<sup>2</sup>

### **I. Introduction**

<sup>1</sup> In addition to the papers by Janisch and Lemieux, I am also indebted to discussions with Justice David Stratas of the Federal Court of Appeal and an oral paper delivered by Justice Kathryn Feldman of the Court of Appeal for Ontario.

<sup>2</sup> (2010), 23 *Canadian Journal of Administrative Law & Practice* 219, at 226.

Twenty-eight years ago, the McGill Law Journal published an article that I wrote in which I advocated the possibility of judicial review of tribunal decision-making on the basis of inconsistency.<sup>3</sup> My objectives were relatively modest – to argue that the courts had a role to play in the face of inconsistent decisions that were unexplained and inexplicable. Some eleven years later in 1993, I had my comeuppance from the Supreme Court of Canada, and L’Heureux-Dubé J. specifically, in *Domtar Inc. v. Québec (Commission d’appel en matière des lésions professionnelles)*.<sup>4</sup> She declared in no uncertain terms that review for inconsistency on a freestanding basis would amount to usurpation of the prerogatives of administrative tribunals and thwart the legislative intention in reposing trust in those tribunals to develop their own jurisprudence as to the meaning of their empowering statutes. It was only if the decision under review was patently unreasonable (completely divorced from any concerns about consistency) that it should be quashed in the face of a privative clause protecting a decision from judicial review.

At the time, I was prepared to take my licks and concentrate on what L’Heureux-Dubé J. clearly thought was the appropriate way in which to counter problems of inconsistency particularly on the part of high volume jurisdiction tribunals – the development of internal tribunal mechanisms to act as a check on any tendency on the part of administrative agencies to decide like cases differently. Indeed, in justification of reliance on the administrative process to itself counter the problem, L’Heureux-Dubé J. was able to deploy<sup>5</sup> the then freshly minted Supreme Court of Canada judgments in both *IWA v. Consolidated-Bathurst Packaging Ltd.*<sup>6</sup> and *Tremblay v. Québec (Commission des affaires sociales) v. Tremblay*.<sup>7</sup> There, the Supreme Court, in part out of concerns with problems of inconsistency and “adjudicative coherence”, supported, subject to reasonably stringent conditions, the practice of whole board discussion of cases coming before individual panels of the tribunal. One of the purposes of this was to allow for a full and frank discussion of particular cases in which a tribunal was contemplating the possibility of not following or adhering to a prior decision of that tribunal. The discipline of such a meeting, albeit one that had to be the independent choice of the panel, would contribute to sober review of the justifications for not following tribunal precedent but at the same time leave such matters up to the tribunal and preserve the decision-making autonomy or independence of the particular panel.

My purpose in this short paper is to both identify the evolution of this and other internal mechanisms in aid of a coherent system of tribunal precedents and also fight a rearguard action in favour of the position that I adopted in my 1982 McGill Law Journal article. I have been prompted to do this by a renewal of interest over the past couple of years in various settings in the whole question of coherent or consistent tribunal decision-making, including the Janisch article the quotation from which serves as the lesson for my paper.

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<sup>3</sup> “Natural Justice and Fairness: Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?” (1982), 27 *McGill L.J.* 250.

<sup>4</sup> [1993] 2 S.C.R. 756.

<sup>5</sup> *Id.*, at para. 90.

<sup>6</sup> [1990] 1 S.C.R. 282.

<sup>7</sup> [1992] 1 S.C.R. 952.

Let me, however, commence by asking why it is that consistency in tribunal decision-making is a value that is worth pursuing.

## II. The Case for Encouraging Consistency

In the extract from his paper, Hudson Janisch suggests that the regime of Workers' Compensation Boards came into being as a way of avoiding the "dead hand" of common law precedent. It is possible to unpackage that statement in a number of ways. The rigid regime of precedent under which the courts then operated, such as the notorious "fellow servant" rule, prevented the evolution of a common law of employer liability that reflected the reality of the workplace and justice for injured and killed workers. One way of dealing with this was the passage of legislation instituting a whole new substantive regime of compensation for those injured or killed in the workplace, and having that regime administered by a specialist tribunal other than the courts.

However, Janisch might also mean that one of the expectations of that new regime was that it would not itself replicate the system of precedent under which the common law courts then operated. That too is a perfectly defensible attitude to bring to bear to the interpretation and application of such a new regime. Obviously, there should be room for experimentation and creativity to the extent that the legislative provisions are open-ended or even trade in novel concepts or terminology. Even more importantly, once again where the language of the empowering legislation permits, evolution of concepts to adapt to rapidly changing conditions is an important value in regimes such as this, particularly where timely legislative response by way of amendments may be difficult to secure. A rigid system of precedent is anathema to all of this.

These are objectives that still commend themselves today. However, they are tempered to at least some extent by the maturation process. Once an administrative tribunal and particularly one with a high volume jurisdiction is through the initial stages of experimentation and creativity and the period of testing hypotheses of what kinds of approach and interpretation best advance the overall purpose of the legislation, the pull of consistency, of deciding like cases alike, becomes that much stronger. While slightly hyperbolic, Deschamps J. captures it strikingly in *Dunsmuir v. New Brunswick*,<sup>8</sup> when she states:

Consistency of the law is of prime societal importance.

In routine cases dependent on the same factual patterns, where there are no important general principles or rules up for reassessment or fine-tuning, the pull of consistency and the following of precedents even within tribunals is very strong. Entitlement to compensation or whatever the tribunal has to provide should generally not depend on which line of precedents the tribunal follows or whether the affected person has drawn a particular adjudicator or panel rather than another. Abiding concerns about apparent major variations in the acceptance rate of convention refugee claims depending on which

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<sup>8</sup> [2008] 1 S.C.R. 190, at para. 165.

region of the country the claim is being adjudicated speak graphically to this. Indeed, in *Domtar, L'Heureux-Dubé J.* herself expressed this concept very well:

The requirement of consistency in the application of the law is unquestionably a valid objective and so a persuasive argument. For litigants to receive diametrically opposite answers to the same question depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives including the rule of law.<sup>9</sup>

At base, it is as simple as the colloquial or commonplace proposition that, in general, like cases should be treated alike. Where, of course, the disagreement lies is about the extent to which that objective trumps others and how its achievement is best assured.

### III. Internal Consistency Promoters

As already noted, in *Domtar, L'Heureux-Dubé J.*, identifies institutional consultations as one internal mechanism for encouraging, if not compelling consistent decision-making within tribunals. Indeed, since then, the Supreme Court, in a judgment in which its members were divided sharply, has subsequently reinforced its support of such consultative practices by making it clear that the principles of deliberative secrecy applied strongly to full board consideration of cases already heard by individual panels. This was in *Ellis-Don v. Ontario (Labour Relations Board)*,<sup>10</sup> where LeBel J., over the vigorous dissent of Binnie J. (Major J. concurring),<sup>11</sup> stated that to have anything other than a strong presumption of deliberative secrecy to prevent tribunal members and others in attendance being examined on what took place at such meetings would not only be a threat to adjudicative independence but

...could also jeopardize institutionalized consultation proceedings that have become more necessary than ever to ensure the consistency and predictability of the decisions of administrative tribunals.<sup>12</sup>

In fact, along with Ron Ellis,<sup>13</sup> as I recollect it, I once advocated that the Supreme Court of Canada principles under which such consultations could take place may not have been sufficiently strong or permissive.<sup>14</sup> Why not **compulsory** full board meetings when matters of general principle are up for consideration by individual panels of high volume

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<sup>9</sup> *Supra*, note 4, at para. 56.

<sup>10</sup> [2001] 1 S.C.R. 221, 2001 SCC 4.

<sup>11</sup> Binnie and Major JJ. were concerned that the over-vigorous application of the principles of deliberative secrecy in cases such as this raised very serious concerns about the ability of affected parties to raise issues of natural justice or procedural fairness connected to the process of institutional consultations.

<sup>12</sup> *Supra*, note 10, at para. 55.

<sup>13</sup> In comments on the paper referenced in the next footnote.

<sup>14</sup> See David J. Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Developments" in *Administrative Law: Principles, Practice and Pluralism* (Special Lectures of the Law Society of Upper Canada, 1992) (Toronto: Carswell, 1993), 461, at 469-74.

jurisdiction tribunals? Why does the Court limit the legitimate impact of such meetings on panel members to **influence** and not countenance the spectre of **compulsion** or a feeling of compulsion? For many concerned about the internal independence of tribunal members, these are, however, far from being rhetorical questions and, today, other than raising the possibility, I will leave well alone!

However, what I have never troubled to find out is how often outside of labour relations board settings these types of full board consultations take place,<sup>15</sup> and, indeed, how frequently they occur even in a labour board setting. That would be an interesting piece of empirical research. However, it is not just full board meetings that the Supreme Court trio of cases countenances. Meetings and discussions with other non-panel members, either singly or in groups, are permissible as are such encounters with staff, including lawyers, and, *Tremblay* notwithstanding, presumably even the Chair.<sup>16</sup> I assume that this kind of more informal engagement is common currency in most multi-member tribunals that sit in panels, though, given the selectivity that can be involved, such discussions are probably less valuable in most instances than a meeting with the tribunal members *en banc*. The principles on which the line of authority is based also find expression in such practices as the “vetting” of draft decisions by lawyers to the tribunal, colleagues, and even the Chair, though, once again, a process that must not cross the line between influence and compulsion.

In the very next article after Hudson Janisch’s in the *Canadian Journal of Administrative Law & Practice*, Denis Lemieux expands the categories of internal practices that promote “la cohérence décisionnelle”,<sup>17</sup> and I can do no better than set out the various components of his list.

Lemieux identifies some of the more formal devices used by some tribunals for trying to encourage consistency both in terms of the substance of their decisions and the procedures followed at their hearings. Among the more prominent examples of this<sup>18</sup> were the attempts of the Chair of the Immigration and Refugee Board, relying in part on an explicit statutory power to issue guidelines to its members, to designate certain decisions of the Board as key precedents (“jurisprudential guides”) on recurring issues<sup>19</sup> and also to indicate the normal or preferred order of questioning at the hearing of a convention refugee claim.<sup>20</sup> As with the institutional consultation practices of the Ontario Labour Relations Board and the Quebec Commission des affaires sociales, these attempts attracted both concern and challenge on the basis of interference with the decision-making independence of individual members or panels of members. However, it suffices to report that the practices survived, albeit subject to conditions aimed at striking a

<sup>15</sup> Thus, for example, as I understand it, they do not take place in a formal *Consolidated-Bathurst* sense at the Workplace Safety and Insurance Appeals Tribunal.

<sup>16</sup> See e.g. *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 110 D.L.R. (4<sup>th</sup>) 260 (Ont. Div. Ct.), with respect to caucuses of members of tribunals.

<sup>17</sup> Denis Lemieux, “La Cohérence Décisionnelle” (2010), 23 *Canadian Journal of Administrative Law & Practice* 227.

<sup>18</sup> *Id.*, at 233, fn 17. The Board also engages in a range of other consistency-enhancing practices.

<sup>19</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, section 159(1)(h).

<sup>20</sup> *Ibid.*

balance between the encouragement of consistency and the preservation of decision-making independence.<sup>21</sup>

Lemieux notes that some tribunals have the capacity to sit in panels or larger panels when issues of particular significance seem likely to arise in a particular matter or group of matters and especially in instances where there may have been a previous divergence of views within the tribunal.<sup>22</sup> Even if not formally binding in future cases, a decision rendered by such an expanded panel would obviously carry great weight.

Interestingly, Lemieux does not see reconsideration powers of the type possessed by your tribunal as having the same utility in ensuring consistency of decision-making.<sup>23</sup>

However, I disagree with that assessment. Albeit that my involvement with your tribunal's reconsideration or rehearing power has been limited, I have taken away a very clear sense that, on many occasions, its exercise either reveals for the first time or brings into much sharper focus WSIAT precedents and thereby encourages consistency or, at the very least, a realization on the part of the presiding member that the precedents will have to be taken into account and dealt with in the reasons.

Lemieux also refers to whole tribunal consultations of the *Consolidated-Bathurst* variety.<sup>24</sup> In that context, it is worth recalling that Hudson Janisch was initially (and perhaps still is) sceptical about *Consolidated-Bathurst* and saw the whole board consultation as a very poor substitute for rulemaking hearings involving stakeholders, at least where such processes are provided for in the tribunal's constitutive statute.<sup>25</sup>

Beyond these more formal internal processes, Lemieux discusses "douces"<sup>26</sup> techniques for promoting consistency in decision-making. In particular, he notes the extent to which tribunals endeavour to ensure that their members are made aware of recent, significant decisions rendered by other members of the tribunal.<sup>27</sup> Indeed, this is but part of a much larger evolution discussed by Janisch in his paper: the massive strides that have been made over the past forty or so years in the systematic gathering and dissemination of tribunal decisions, an evolution aided in significant measure by the development of more and more sophisticated IT systems.<sup>28</sup> This redounds to the benefit of not only tribunal members and staff but also obviously counsel and other representatives appearing before the tribunal on behalf of clients and even non-represented parties. Through their

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<sup>21</sup> See in relation to the order of questioning guideline, *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, [2008] (2007) 1 F.C.R. 385; 2007 FCA 198 (C.A.) and jurisprudential guides *Barrantes v. Canada (Minister of Employment and Immigration)*, 2005 FC 518.

<sup>22</sup> *Supra*, note 17, at 234.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.*, at 232-33.

<sup>25</sup> See H. N. Janisch, "Consistency, Rulemaking and *Consolidated-Bathurst*" (1991), 16 *Queen's Law Journal* 95 and "The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking" in *Administrative Law: Practice, Principles and Pluralism*, *supra*, note 14, at 259.

<sup>26</sup> *Supra*, note 17, at 231.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra*, note 2, at 220-221.

advocacy, the tribunal's precedents are both exposed and pressed upon the hearing panel or member.

Linked to greater awareness of precedents through ease of access to the tribunal's decisions are the ongoing efforts that many tribunals make to ensure continuing education for their members both by way of internal meetings and training sessions and by attendance at the various seminars and programmes offered by bodies such as CCAT and SOAR.<sup>29</sup> Internally, these sessions will frequently focus on substantive and procedural issues emerging from the jurisprudence and procedures followed by the tribunal as well as the impact of judicial review or statutory appeals emanating from the court. Externally, the focus may be different but, in each instance, part of the mission is an increase in the professionalization of those participating in the administrative process, an objective that in part depends on respect for the integrity of the tribunal's processes and its responsibility for the building of body of precedent or jurisprudence on which stakeholders can rely. In this context, Lemieux also points to the valuable roles that can be played staff lawyers in their promotion of "continuing education" and in their availability for consultation and advice to members of the tribunal.<sup>30</sup>

Lemieux then concludes his paper by identifying what he regards as the most effective tool in the generation of tribunal member respect for its own precedents and indeed for the development of a coherent body of precedent: the statutory and common law requirement that has taken off so spectacularly in recent years and particularly since *Baker v. Canada (Minister and Citizenship and Immigration)*<sup>31</sup>: the obligation on the part of tribunals to provide adequate reasons for their decisions.<sup>32</sup> The impact of this requirement cannot be overestimated and Justice Laskin will be exploring the matter in greater detail in a few minutes.

#### IV. And What About Judicial Review for Inconsistency?

For the most part, the judgment of L'Heureux-Dubé in *Domtar* has continued to garner judicial acceptance. Lemieux lists some of the Quebec authorities<sup>33</sup> and McPherson J.A. of the Court of Appeal for Ontario strongly endorsed the thrust of the judgment in 2006 in a labour arbitration context in *National Steel Car Ltd. v. United Steelworkers of America, Local 7135*.<sup>34</sup>

As noted earlier, however, there has been some evidence of judicial concern about the problem of allowing inconsistent tribunal decisions to coexist, and, in particular, allowing a pattern of inconsistent decisions on the same issue of law to develop and remain impervious to judicial review. In at least two instances, Court of Appeal for Ontario judges have raised the issue of inconsistency in the context of exploring the parameters of

<sup>29</sup> *Supra*, note 17, at 232.

<sup>30</sup> *Id.*, at 231 and 233-34.

<sup>31</sup> [1999] 2 S.C.R. 817.

<sup>32</sup> *Supra*, note 17, at 234-36.

<sup>33</sup> *Id.*, at 229 and accompanying footnotes.

<sup>34</sup> (2006), 278 D.L.R. (4<sup>th</sup>) 545 (Ont. C.A.), at para. 31.

the now only deferential standard of review, that of unreasonableness: Juriansz J.A. in *Abdoulrab v. Ontario (Labour Relations Board)*<sup>35</sup> and Feldman J.A. (who had concurred with McPherson J.A. in *National Steel Car*) in *Taub v. Investment Dealers Association of Canada*.<sup>36</sup> While this issue was not critical to the decision in either case, Layden-Stevenson J.A. of the Federal Court of Appeal picked up on both of them in *Canada (Attorney General) v. Mowat*,<sup>37</sup> the appeal in which was argued in the Supreme Court of Canada yesterday,<sup>38</sup> and involving inconsistent decisions by the Canadian Human Rights Tribunal on its capacity to include a costs component in a monetary award for a human rights violation.

In *Abdoulrab*, Juriansz J.A., in an extract quoted approvingly by Feldman J.A.,<sup>39</sup> worried aloud about the issue of inconsistency in a post-*Dunsmuir* unreasonableness world:

From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.<sup>40</sup>

Layden-Stevenson J.A. in *Mowat* expressed similar sentiments:

There is much to be said for the argument that where there are two conflicting lines of authority interpreting the same statutory provision, even if each on its own could be found to be reasonable, it would not be reasonable for the court to uphold both.<sup>41</sup>

One of the rhetorical questions that LeBel J. posed as part of his ultimately successful campaign to reduce the deferential standards of judicial review from two to one was “How can you justify a system of judicial review that permits a court to say that, while a decision is unreasonable, it is not sufficiently so as to be patently unreasonable and, as a consequence, allow the impugned decision to stand?”<sup>42</sup> I want to suggest that there is equal or greater rhetorical force in the propositions tentatively advanced by Juriansz J.A. and Layden-Stevenson J.A.

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<sup>35</sup> 2009 ONCA 491.

<sup>36</sup> 2009 ONCA 628.

<sup>37</sup> 2009 FCA 309, at para. 45.

<sup>38</sup> See [2009] SCCA No. 545 (Q.L.) (*sub nom. Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*).

<sup>39</sup> *Supra*, note 36, at para 65.

<sup>40</sup> *Supra*, note 35 at para 48.

<sup>41</sup> *Supra*, note 37, at para. 45.

<sup>42</sup> See *inter alia*, his judgment in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E), Local 79*, [2003] 3 S.C.R. 77; 2003 SCC 63, at paras. 123-125.

However, I am also willing to concede that the issue of whether to allow any form of review on the basis of inconsistency without more should not depend on rhetorical devices. A completely at large capacity to hold administrative tribunals to following their own decisions would be completely inappropriate for all of the policy reasons identified by L'Heureux-Dubé J. in her judgment in *Domtar*.<sup>43</sup> Nonetheless, it is worth recollecting that it was L'Heureux-Dubé J. in *Baker*<sup>44</sup> who endorsed David Dyzenhaus's concept of "deference as respect."<sup>45</sup> As Hudson Janisch expressed it even earlier, deference should be earned.<sup>46</sup> What might that mean in the context of inconsistent decision-making? To return to the duty to give reasons, what it may speak to is a sense that reasons are inadequate to the extent that the decision-maker does not address and explain deviations from precedents. To the extent that a deviation is neither explained nor readily explicable, reviewing courts should at least be prepared to remit the matter back for reconsideration. (I should, however, add that, for these purposes, satisfactory explanation may take the form of principled or reasoned disagreement, not just distinguishing.)

Indeed, there is recognition of this need to articulate reasons for departing from prior jurisprudence to be found in the caselaw of WSIAT's predecessor, the Workers' Compensation Appeal Tribunal. In Decision No. 1004/89,<sup>47</sup> the panel stated:

[W]henever a subsequent Panel substantively departs from the reasoning of a previous decision there is an obligation to address and explain the reasons for such departure.

Beyond that, however, the courts should also have a more expansive or extensive role in cases such as *Mowat* where a tribunal<sup>48</sup> has parallel and conflicting lines of jurisprudence on the same legal issue and has either lacked the capacity or not had the inclination to break the deadlock. In those circumstances, irrespective of whether the normal standard of review would be the deferential one of unreasonableness, the reviewing court should feel empowered to resolve the problem by reviewing on the basis of correctness. To use the language of Beetz J., in an earlier leading authority on the standard of review, allowing the inconsistent lines of authority to persist on the basis that both are reasonable

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<sup>43</sup> *Supra*, note 4.

<sup>44</sup> *Supra*, note 31, at para. 65. (See also the judgment of Bastarache and LeBel JJ. in *Dunsmuir*, *supra*, note 8, at para. 48.

<sup>45</sup> David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at 286.

<sup>46</sup>

<sup>47</sup> (1990), W.C.A.T.R. 64. See also Decisions No. 85/92, No. 690/91, and particularly No. 795/94, [1994] O.W.C.A.T.D. No. 846, at paras. 24-25.

<sup>48</sup> I leave for another day the question of whether the arguments made here should apply to labour arbitrators and conflicting arbitral jurisprudence on the meaning of terms common to a range of collective agreements, the very issue that arose in *National Steel Car*, *supra*, note 34. I have recently heard Justice Katherine Swinton argue very persuasively that, as is the case with commercial arbitrations, courts should respect the objectives of labour arbitration (the speedy, authoritative and binding resolution of workplace disputes) and let any problems arising from inconsistency (as among the interpretation of the same terms in otherwise discrete collective agreements) be dealt with in the next round of collective bargaining.

is to perpetuate a “fraud on the law.”<sup>49</sup> Moreover, this objective can be accomplished by what I would regard as only a minor tweaking of the current post-*Dunsmuir* standard of review analysis. Simply add to the list of factors pointing to correctness review the failure of the tribunal to resolve the problem of conflicting lines of jurisprudence on the same legal issue. After all, it is not too far removed from the *Dunsmuir* example of jurisdictional saw-off issues as between or among different tribunals, an issue that normally attracts correctness review.<sup>50</sup>

In *Mowat*,<sup>51</sup> Layden-Stevenson J.A. finessed the issue of whether a court should be able to break the logjam caused by the existence of two possibly reasonable lines of tribunal jurisprudence by classifying the issue of costs as involving an issue of “jurisdiction.” The same can also be said of two recent judgments of the Supreme Court of Canada in which the Court was confronted by conflicting jurisprudence on an issue coming before an administrative tribunal. In *Canada (Attorney General) v. Northrop Gruman Overseas Service Corporation*,<sup>52</sup> the Court very quickly moved to a correctness standard of review of a Canadian International Trade Tribunal decision on the basis that the relevant question was one of jurisdiction. Subsequently, in *Plourde v. Wal-Mart Canada Corporation*,<sup>53</sup> the Court, while nominally adhering to a reasonableness standard of review in a Quebec labour law setting, in fact conducted review in such a way as to indicate that it was in reality resolving the jurisprudential logjam and not leaving any room for the persistence of the other possibly reasonable interpretation.

In my view, it would be far better if, in such cases, the courts, rather than manipulating and resurrecting old categories of jurisdictional error to deal with the issue of conflicting jurisprudence, should be much more direct about what they are doing: correcting a fraud on the law that the tribunal itself has not be able to resolve.

## V. Conclusions

Like the courts, mature, high volume jurisdiction tribunals should place a high value on certainty and predictability. The most appropriate way of doing that is through the dissemination of and respect (albeit frequently sceptical and always thoughtful) for the tribunal’s precedents. While tribunals should not be afraid to depart from their own precedents and while the law in general concedes them the right to do this, changes, particularly to long-standing precedents, should be attended by a significant degree of caution and deliberation. Preferably, in the case of tribunals that sit in panels, there should be some engagement on the part of the tribunal as a collectivity, and, on occasion, stakeholders, at least where rulemaking hearings are part of the armory of the tribunal.

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<sup>49</sup> In *Syndicat des employés de production du Québec et de l’Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412, at 420-421, repeated in *Union des employés de service, local 298 v. Bibeault* [1988] 2 S.C.R. 1048, at para. 115.

<sup>50</sup> *Supra*, note 8, at para. 61.

<sup>51</sup> *Supra*, note 37, at para. 42.

<sup>52</sup> [2009] 3 S.C.R. 309; 2009 SCC 50.

<sup>53</sup> [2009] 3 S.C.R. 465; 2009 SCC 54.

Beyond this, in reserve situations, there should also be a role for the courts in ensuring the “coherence” of tribunal decision-making and dealing with jurisprudential conflicts. In general, policing of the adequacy of reasons is a powerful tool particularly in situations where a tribunal has departed from precedent in an unexplained and inexplicable way. In such cases, at the very least, the courts should be prepared to remit the matter back for reasons that address the contrary precedent or precedents. More rarely, but ultimately more importantly, where a tribunal has failed to deal with a problem of conflicting lines of jurisprudence, the courts should not hesitate to see this as a situation calling for correctness review and break the deadlock.

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