

## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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### Waiting for Godot

How can a regulator ensure that its tribunals deliver reasons for their decisions on a timely basis? Delayed reasons are the bane of adjudicative bodies everywhere, including full-time paid professionals (e.g., courts). Delivering prompt reasons is even more challenging for volunteer adjudicators, particularly those who are practising or otherwise working as well.

Delayed reasons are frustrating for the parties. They leave the public unprotected (where findings have been made). Delays make it more difficult for remediation orders to effectively change behaviour. Public confidence in the process is affected. Plus the quality of the decision and reasons tend to deteriorate the longer the time from when the evidence was heard.

Below are twelve steps that may help regulators address this perennial problem.

1. **Set benchmarks.** Articulating expectations sets a goal for adjudicators. The benchmark will vary with the organization and context, but for most tribunals it would be between 30 and 90 days. There could be intermediate

benchmarks prior to the ultimate one (e.g., deliberations completed within two weeks, first draft within another two weeks, comments by other panel members a week later, legal advice within a further two weeks, final draft returned in one more week, and one last week for editing and signing).

2. **Follow up.** Whenever a benchmark is missed support staff would provide a gentle reminder to the responsible person. If after two reminders the benchmark is not met, the chair of the tribunal would follow up personally.
3. **Performance measures.** Circulating each tribunal member's scorecard as to speedy and not so speedy completion of reasons reward diligent tribunal members and provide an incentive to those with long outstanding reasons. Some would even go so far as to "shame" tribunal members by reviewing the scorecard at each full meeting of the tribunal, although many would view this tactic as counter-productive.
4. **Workload modification.** Tribunal members who have long overdue reasons should not be assigned new cases until they have caught up. This is one of the recommendations of Mr.

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### FOR MORE INFORMATION

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Justice LeSage in his recent report for a prominent Ontario regulator.

5. **Training.** A plausible explanation for the delay by some tribunal members is their undeveloped skills in this area. Writing reasons is not intuitive for most people and extensive training, particularly workshop-type preparation, can assist greatly.

However, as in many areas, designing the system can often be as important as motivating and supporting the individuals involved. For example:

6. **Scheduling hearings.** Writing reasons is very difficult when a hearing is extended, with long gaps, over many months or even years. By scheduling hearings (particularly where they have been closely case managed) so that they are completed soon after the hearing starts, eases the task exponentially.
7. **Scheduling deliberations.** Planning an extra day for the tribunal (or ensuring that the tribunal members can all stay late at the last day of hearing) can ensure that the deliberations are started (and completed) while the evidence and issues are fresh in everyone's mind.
8. **Deliberations process.** Using a systematic deliberations process in which key words are jotted down provides an invaluable resource to the reason writer. For example, a process that involves listing all of the evidence / arguments for a finding and then listing all of the evidence / arguments against a finding followed by choosing which of the listed items

are most persuasive, can be particularly effective.

9. **Scheduling reason writing.** Planning an extra day for reason writing within a week of the hearing being completed permits the writer to do the hard work with the evidence, arguments and deliberations fresh in mind.
10. **Reason writing process.** There is no single right process for writing reasons. However, some approaches tend to work better than others. Many tribunals find that assigning one panel member to write the first draft, after the whole panel has articulated the main points to be made during the deliberations, is often best. Not only is it efficient, it tends to result in a consistent structure and style to the ultimate document.
11. **Use templates.** It is permissible for staff to prepare a neutral template that sets out the structure of the reasons. For example, the template could include the title of proceedings, a list of the parties present, the chronology of hearing events, the statement of allegations and the usual headings for the remainder of the document. The panel member can then focus on the substantive portions of the reasons.
12. **Assign a manager.** While it is important that the reasons belong to the tribunal, managing the process can be done by other neutral parties (typically a staff person). If the staff person has the right personality and organizational skills, he or she can encourage and cajole the person forming the current bottleneck in the process. The manager can ensure that the writer has everything he or she needs (e.g., all exhibits). The manager

can also line up the next person in the process (e.g., advising the other panel members and tribunal counsel when to expect a draft for review). If the writer is stuck on a point, the manager can help problem solve the issue (e.g., arranging for another panel member to discuss the roadblock with the writer).

While human nature can defeat the best system designs, planning for prompt delivery of reasons can facilitate success and promote high quality reasons for tribunal decisions.