

***Administrative Decision-Making  
and the Duty to Give Reasons:  
Can and Must Dissenters Explain Themselves?***

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## I INTRODUCTION

The ability of a judge to openly disagree with his or her colleagues by publishing a dissenting opinion is a tradition that is taken for granted in most common law jurisdictions.<sup>1</sup> There is a common assumption that judges have the “right” to dissent, and this is seldom challenged.<sup>2</sup> Justice Brennan even went so far as describing the “right”<sup>3</sup> as “one of the great and cherished freedoms that we enjoy”,<sup>4</sup> and Justice Kirby similarly declared that it was “[o]ne of the most distinctive features of the common law judicial system”.<sup>5</sup>

In actual fact, the history of the dissenting judicial opinion is distinctly at odds with this account.<sup>6</sup> It reveals little evidence that the dissenting opinion was consciously planned or adopted,<sup>7</sup> and instead suggests that it was simply the logical consequence of the seriatim practice of judgment delivery in the English courts.<sup>8</sup> From there, the practice simply spread, “as a matter of course”, to other jurisdictions which were founded on the Anglo-Saxon legal tradition.<sup>9</sup>

The dissenting opinion, as a product of historical accident, is therefore a more fragile incident of judicial life than one might imagine. Dissent may be allowed by most courts as a matter of custom,<sup>10</sup> but this does not guarantee judges the right to dissent.<sup>11</sup> Dissent, after all, could not be expressed by the Privy Council until

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<sup>1</sup> Lynch, “Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia” (2003) 27 MULR 724, 767.

<sup>2</sup> Nadelmann, “The Judicial Dissent: Public v. Secrecy” (1959) 8 Am. J. Comp. L. 415, 418.

<sup>3</sup> Brennan, “In Defense of Dissents” (1986) 37 Hastings L. J. 427, 437.

<sup>4</sup> *Ibid* 438.

<sup>5</sup> Kirby, “Law at Century’s End” (2001) 1 Macquarie Law Journal 1, 10.

<sup>6</sup> Lynch, “Is Judicial Dissent Constitutionally Protected?” (2004) 4 Macquarie L. J. 81, 83 [“Judicial Dissent”].

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* 84; Herzog & Karlen “Attack on Judicial Decisions” in Cappelletti (ed), *International Encyclopedia of Comparative Law* vol 16, ch 8, para. 85.

<sup>9</sup> Lynch, Judicial Dissent, *supra* note 6, 84.

<sup>10</sup> Herzog & Karlen, “Attack on Judicial Decisions” in Cappelletti (ed), *International Encyclopedia of Comparative Law* vol 16, ch 8, para 84.

<sup>11</sup> Lynch, Judicial Dissent, *supra* note 6, 86. The entry for “dissenting opinion” in Walker’s *The Oxford Companion to Law* (1980) at 364 notes that “it is a matter of the practice of each individual court whether the expression of dissenting opinions is permitted or not”. It is important to note that even if judges are at liberty to dissent, this does not necessarily amount to a “right” to publish a dissenting opinion since publication is often a matter beyond their control – see *Musmanno v Eldredge* 114 A. 2d 511 (1955) discussed in Megarry (Gardner, ed) *A New Miscellany-at-Law: Yet Another Diversion for Lawyers and Others* (2005) 177-178.

1966.<sup>12</sup> It still cannot be expressed in most of the world's legal systems,<sup>13</sup> and is not allowed in courts of international law unless there is a specific provision to the contrary.<sup>14</sup> Accordingly, whether judges actually have a "right" to dissent, and what that entails as a matter of law, is unclear.

If the right of a judge to dissent is unclear, then the right of an administrative tribunal member to issue dissenting reasons amounts to unclarity on stilts (with apologies to Jeremy Bentham). As will be noted in the course of this article, there has been a distinct judicial reluctance to require such decision-makers to give any sort of reasons, let alone dissenting ones from minority members. However, the traditional reluctance appears to be wavering, and recent decisions have suggested that administrative decision-makers may have a general duty to give reasons for their decisions. Whether or not this developing duty requires dissenters to explain their reasons, or at least enables them to do so, is a matter that has been given little thought and is the subject of no commentary. This article therefore proposes to consider these issues at some length.

This consideration will focus on three related, yet conceptually distinct issues. The first relates to whether the person whose rights or interests are being adjudicated upon has the right to know of the existence of a dissent,<sup>15</sup> and in particular, whether he or she must be informed of the margin of the vote and the identity of the dissenting member(s). The second issue is whether a minority member of a tribunal is obliged to give dissenting reasons for his or her decision, or conversely, whether those whose interests are being adjudicated upon have a right to receive such reasons. A third, and related issue, is whether a dissenting member of a tribunal has the right to give dissenting reasons; in other words, whether the majority of a multi-member tribunal is duty-bound in law to allow a dissenter to register a dissent and the reasons therefore.

Before the topic of dissenting reasons can be considered, it is first necessary to examine the general requirements imposed on administrative decision-makers to give reasons for their decisions. This article will then discuss recent developments in administrative law that are relevant to the position of minority tribunal members, and in particular, will assess whether a party has the right to know of the existence of a dissent and the identity of the dissenting member(s). After doing so, it will then consider whether the duty to give reasons obliges minority tribunal members to give dissenting reasons, in light of both the basis for that duty and indications from the case law. Finally, the existence of a right to give dissenting reasons, as opposed to an obligation to do so, will then be considered.

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<sup>12</sup> Megarry, "Dissenting Reasons in the Judicial Committee" (1998) 114 LQR 574. This was because the Privy Council's role was, strictly speaking, to advise the Queen or King, and it was considered appropriate that this advice be unanimous.

<sup>13</sup> Kirby, "Appellate Courts and Dissent" (2004) 16(4) New South Wales Judicial Officers' Bulletin 25. See generally, Nadelmann *supra* note 2, 415.

<sup>14</sup> Lynch, *Judicial Dissent*, *supra* note 6, 84-85.

<sup>15</sup> The singular 'dissent' is used for convenience, but it should be taken to include more than one dissent or dissenter. Multiplicity of dissents may raise further issues, but these are not specifically addressed here.

## II THE GENERAL DUTY TO GIVE REASONS

### The Common Law Duty to Give Reasons

It is important, before considering the particular subject of dissenting reasons, to understand the extent to which the law generally requires administrative decision-makers to give reasons for their decisions. The general requirements have been altered, in many situations, by statutory changes and those changes will be outlined shortly. However, as will also be noted, the statutory changes do not apply universally and the position in many situations is still governed by the common law. A proper appreciation of the common law is therefore also necessary to understand the general reasons requirements, and consequently the particular subject of dissenting reasons.

Strictly speaking, the common law on this topic in New Zealand is no different to what it has always been – administrative decision-makers have no general duty to explain their decisions.<sup>16</sup> Reasons may be required, however, where fairness so requires, and there are a growing number of decisions in this category.<sup>17</sup> Indeed, the number of decisions in this category is growing at such a fast rate that many have observed that the “exceptions” may be swallowing the “rule” against giving reasons.<sup>18</sup> In *Stefan v General Medical Council*,<sup>19</sup> an English Court observed that:

There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions.

As the above discussion suggests, the current law in England is probably little different to that in New Zealand.<sup>20</sup> The key question, in both jurisdictions, is *when* fairness will require a decision-maker to give reasons. There is, of course, no definite answer to this question, not least because of the incremental way in which the duty has been extended.<sup>21</sup> It is possible, however, to identify a number of situations where reasons will commonly be required.

First, reasons are likely to be required where the decision which has been reached appears aberrant without reasons.<sup>22</sup> Accordingly, where there is an

<sup>16</sup> *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546,[75]. The common law is different elsewhere.

<sup>17</sup> Taggart, “Review: Administrative Law” [2000] NZ Law Review 439, 439-440 [“Review”]. See e.g., *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531; *R v Secretary of State for the Home Department ex parte Duggan* [1994] 3 All ER 277, 287H; *R v Director for Public Prosecutions ex parte Manning* [2001] QB 330; *A, B and C (a family of Peru) v Chief Executive Department of Labour* [2001] NZAR 981 noted in Fisher, “Improving Tribunal Decisions and Reasons” [2003] NZ Law Review 517, 528; *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405; [2002] 1 WLR 2397, [15].

<sup>18</sup> Taggart, “Review”, *ibid.* 439-440; Wade and Forsyth, *Administrative Law* (8 ed, 2000), 516; Fisher, *ibid.* 528; Fordham, *Judicial Review Handbook* (4 ed,2004) 1054.

<sup>19</sup> [1999] 1 WLR 1293, 1301A-B.

<sup>20</sup> Wade and Forsyth, *Administrative Law* (8 ed, 2000),516. See also *R v Minister of Defence ex parte Murray* [1998] COD 134 and *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531.

<sup>21</sup> Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3 ed,2004) 557.

<sup>22</sup> Wade and Forsyth, *Administrative Law* (8 ed, 2000), 517.

“absolutely inexplicable decision”,<sup>23</sup> which is “so aberrant as in itself to call for an explanation”,<sup>24</sup> a duty to give reasons will most likely be imposed.

A second, and related category, involves decisions which depart from existing policy. The obligation of a decision-maker in this situation to give reasons was summarised by Woolf J in the following terms:<sup>25</sup>

[If the decision-maker] is going to depart from the policy, it must give clear reasons for doing so in order that the recipient of its decision will know why the decision is being made as an exception to the policy and the grounds upon which the decision is taken.

At other times, the duty to explain a decision of this sort has been justified on the basis of a legitimate expectation.<sup>26</sup> According to this explanation, if the conduct of the decision-maker has given rise to a legitimate expectation then fairness requires the decision-maker, if it decides not to give effect to that expectation, to articulate its reasons for doing so.<sup>27</sup>

A third category of decisions which may have to be justified by reasons are those which involve interests that are so important, or so highly regarded, that fairness will always require reasons to be given.<sup>28</sup> A decision concerning personal liberty is, for example, one such decision.<sup>29</sup> The theory is, that for such decisions, the individual simply cannot be left to receive an unreasoned decision as if “the distant oracle has spoken”,<sup>30</sup> and he or she deserves an explanation.

Fourthly, the law may also impose an obligation to supply reasons where the failure to do so justifies the inference that the decision was not made for good reasons.<sup>31</sup> In other words, where a decision-maker has given no reasons, the Court may infer that there were none, or at least no good ones, to give.<sup>32</sup> It probably goes without saying, but should be said nonetheless, that the courts will be reluctant to draw such adverse inferences given the absence of a general duty to supply reasons.<sup>33</sup> The balance between this reluctance and the drawing of adverse inferences at all is probably best explained by Lord Keith in the following terms:<sup>34</sup>

The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

<sup>23</sup> *R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 256, 258B-E.

<sup>24</sup> *Ibid* 242, 256, 261E-G.

<sup>25</sup> *Gransden v Secretary of State for the Environment* (1985) 54 P & CR 86.

<sup>26</sup> See e.g., *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310 (CA).

<sup>27</sup> *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 at [59] noted in Fordham, *Judicial Review Handbook* (4 ed, 2004) 1067.

<sup>28</sup> Wade and Forsyth, *supra* note 22, 517-518; Fisher, *supra* note 17, 528.

<sup>29</sup> *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 565. See also de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (4 ed, 1995) 464.

<sup>30</sup> *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 565.

<sup>31</sup> Wade and Forsyth, *supra* note 22, 518.

<sup>32</sup> *Padfield v Minister of Agriculture Fisheries & Food* [1968] AC 997, 1061G-1062A.

<sup>33</sup> *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, [7].

<sup>34</sup> *R v Secretary of State for Trade and Industry ex parte Lonrho Plc* [1989] 1 WLR 525, 539H-540B.

Finally, decisions must be explained by reasons where this is explicitly or implicitly required by statute.<sup>35</sup> The construction and application of an explicit requirement is generally unproblematic and raises few issues.<sup>36</sup> Less clear, however, is when reasons will be implicitly required by statute. An implicit reasons requirement is most frequently found where there is a statutory right of appeal. This situation will be considered in greater detail later, but essentially, reasons are often required here on the basis that they are necessary to enable the affected individual to exercise their statutory appeal right.<sup>37</sup>

There is therefore a growing number of situations where administrative decision-makers will be required to give reasons for their decisions. Decision-makers must always think carefully about whether, in the particular circumstances of the case, reasons should be given.<sup>38</sup> As these “exceptions” have substantially eclipsed the “rule”, it is worth considering whether the law might soon recognise a general duty on administrative decision-makers to give reasons for their decisions, subject to exceptions to the contrary. The answer seems to be that the law may soon impose a general duty to give reasons, but how soon that will be depends on the particular jurisdiction under consideration.

In Australia, the duty of a judge to give “factually supported and reasoned decisions” in both civil and criminal cases<sup>39</sup> has long been recognised as an incident of the judicial process.<sup>40</sup> However, this principle has not been extended to administrative decision-makers. The New South Wales Court of Appeal attempted to do just that in the 1980s, but the attempt was spectacularly unsuccessful and the decision was “emphatically reversed”<sup>41</sup> by the High Court of Australia.<sup>42</sup> In the High Court, Gibbs CJ stated that a general requirement was “opposed to overwhelming authority”,<sup>43</sup> and proceeded to reiterate the traditional position that “[t]here is no general rule of common law, or principle of natural justice, that requires reasons to be given for administrative decisions”.<sup>44</sup>

<sup>35</sup> de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (4 ed, 1995) 462.

<sup>36</sup> There are many of these provisions in New Zealand – see, for example, ss61(4), 62, 67(5), 68(3) and 70B(5) of the Commerce Act 1986; ss46(5), 61(5), 77(5), 140(5), 142(5), 143(5), 146(3), 162(2), 171(5) and 209(5) of the Gambling Act 2003; ss38B(4), 38F(3), 38F(7), 44(2), 44(5) and 44B(3) of the Securities Act 1978; Arbitration Act 1996 sch 1, art 31 r(2).

<sup>37</sup> de Smith, Woolf and Jowell, *supra* note 35, 463. See e.g., *Pettit v Dunkley* [1971] 1 NSWLR 376. Contrast, *R v Awatere* [1982] 1 NZLR 644; *R v MacPherson* [1982] 1 NZLR 650.

<sup>38</sup> de Smith, Woolf and Jowell, *supra* note 35, 458.

<sup>39</sup> Taggart, “Review”, *supra* note 17, 439. See e.g., *Pannizutti v Trask* (1987) 10 NSWLR 531.

<sup>40</sup> Australian courts have required judges to give reasons for their decisions since the late 19<sup>th</sup> century. In England, on the other hand, that was not the case until some isolated dicta in the 1980s and it is still not necessarily “the law” – see, Ho “The Judicial Duty to Give Reasons” (2000) 20 LS 42. Interestingly, Australia is the only common law jurisdiction that for more than a century has required judicial reasons, although India has required judges to produce reasons for the last fifty years or so. See generally, Taggart, “Osmond in the High Court of Australia: Opportunity Lost” in Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 53, 58 [“Osmond”]; S. Sorabjee “The Duty to Give Reasons in Administrative Law” in V. Iyer (ed.) *Democracy, Human Rights, and the Rule of Law: Essays in Honour of Nani Palkhivala* (Butterworths India, New Delhi, 2000) 93; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission of New South Wales v Tamar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386.

<sup>41</sup> Wade and Forsyth, *supra* note 22, 516.

<sup>42</sup> *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559 rev’g [1984] 3 NSWLR 447. See generally, Kirby, “Accountability and the Right to Reasons” and Taggart, “Osmond” *supra* note 40.

<sup>43</sup> Taggart, “Osmond”, *supra* note 40.

<sup>44</sup> *Osmond*, *supra* note 42, 563.

Australian courts, like those in England and New Zealand, have since given limited recognition to the implication of a reasons requirement in some situations, such as where the decision which is being made affects rights (including property rights) or legitimate expectations.<sup>45</sup> However, the courts have refused to extend the general judicial duty to give reasons, “preferring to leave this step to the legislature”.<sup>46</sup> Until such time as there is legislative reform, or another decision of the High Court of Australia, administrative decision-makers in Australia can be confidently said to have no general duty to give reasons.<sup>47</sup>

At least until 1999, Canadian law was little different, and did not generally require administrative tribunals to give reasons for their decisions.<sup>48</sup> However, in *Baker v Canada (Minister of Citizenship and Immigration)*,<sup>49</sup> the Supreme Court of Canada broke new ground. Essentially, the Court held, for the first time, that the duty of fairness could include the provision of reasons and that the failure to provide such reasons may breach the duty of fairness.<sup>50</sup> It was clear from the decision that fairness is particularly likely to require reasons where an adverse decision would significantly affect the life of the individual concerned,<sup>51</sup> or where a right of appeal is specifically provided.<sup>52</sup> Interestingly, the Supreme Court saw fit to impose this duty despite the fact that at the time the same court did not require judges to give reasons in criminal cases.<sup>53</sup>

In New Zealand, there is still no general duty on judges to give reasons for their decisions.<sup>54</sup> It is hardly surprising, therefore, that the courts have declined to impose a general duty on administrative decision-makers which they themselves are not even subject to.<sup>55</sup> However, as noted previously, the exceptions to the “rule” of not requiring reasons appear more prominent than the so-called “rule” itself, which has led one former High Court Judge to observe that:<sup>56</sup>

[T]he de facto position in New Zealand may already be that, at common law, the safest approach is to assume that reasons for decision[s] are required unless there are sound reasons to the contrary.

<sup>45</sup> See e.g., *Coope v Iuliano* (1996) 65 SASR 405, 408; *Attorney-General (NSW) v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, 734-735.

<sup>46</sup> Taggart, “Review”, supra note 17, 439. This approach has been criticised by Kelly, who has attacked the refusal of the High Court of Australia in *Osmond* to argue from analogy with statute in expanding the common law – see Kelly, “The Osmond case: common law and statute law” (1986) 60 A.L.J 513. New Zealand case law is much more encouraging in this regard – see, generally, Gunasekara, “Judicial Reasoning by Analogy with Statutes: Now an Accepted Technique in New Zealand?” (1998) 19 Stat.L.R. 177.

<sup>47</sup> In the recent decision of the High Court of Australia in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* [2003] HCA 56, Kirby J delivered a dissenting opinion in which His Honour expressed a desire to revisit *Osmond* (para 124).

<sup>48</sup> Brown, *Judicial Review of Administrative action in Canada* (July 2003 Update, 1998) vol 2, para 12:5100. See e.g., *Northwestern Utilities Ltd v Edmonton (City)* [1979] 1 S.C.R 684.

<sup>49</sup> [1999] 2 S.C.R 817

<sup>50</sup> Brown, *Judicial Review of Administrative action in Canada* (July 2003 Update, 1998) vol 2, para 12:5211.

<sup>51</sup> Supra note 49, 220.

<sup>52</sup> Brown, supra note 50.

<sup>53</sup> Taggart, “Review”, supra note 17, 440.

<sup>54</sup> *Re Vixen Digital Ltd* [2003] NZAR 418.

<sup>55</sup> Taggart, “Osmond”, supra note 40, 56.

<sup>56</sup> Fisher, supra note 17, 534.

It is worth examining, in this light, whether the courts might soon formulate a general obligation on administrative decision-makers to give reasons for their decisions.

The traditional reluctance to require reasons, from either judges or administrative decision-makers, was symbolised by the 1983 case of *R v Awatere*.<sup>57</sup> In *Awatere*, the New Zealand Court of Appeal accepted that the provision of reasons was highly desirable,<sup>58</sup> and noted that this practice was by and large observed.<sup>59</sup> The Court further urged judges to “do their conscientious best”,<sup>60</sup> but stated that the “real issue” was reconciling the above ideal with “what is practically possible”.<sup>61</sup> As this qualification might suggest, the Court proceeded to find that reasoned decisions should not be required from judges, even though it accepted that they were highly desirable. Woodhouse P stated that the Court was:<sup>62</sup>

[U]nable, with respect, to accept the view that there is any general rule of law which requires reasons to be given; nor the conclusion reached in this case that a decision given in the absence of reasons would have to be regarded as a nullity.

His Honour further noted that:<sup>63</sup>

[I]t would be both undesirable and impractical to lay down an inflexible rule of universal application that would result...in an ‘indiscriminate requirement of reasons’.

*Awatere* therefore amounted to a denial, “in sweeping terms”, of any judicial obligation to give reasons.<sup>64</sup> The decision effectively overruled previous authority in the High Court which had suggested that “all judicial persons” were obliged to give reasons.<sup>65</sup> Academic commentary subsequently criticised the decision, and the judiciary was ambivalent. In particular, New Zealand judges sitting on various Pacific appellate bodies, such as the Fiji Court of Appeal and Vanuatu Court of Appeal, have “consistently refused” to follow the case.<sup>66</sup> Justice Kirby, writing extra-judicially, went as far as suggesting that:<sup>67</sup>

[T]he decision in *Awatere* exposed no acceptable legal principle, merely postponing the adoption of a satisfactory general rule by reference to the general satisfactory nature of the

<sup>57</sup> [1982] 1 NZLR 644.

<sup>58</sup> *Ibid* 648.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid* 649.

<sup>61</sup> *Ibid* 648.

<sup>62</sup> *Ibid* 647.

<sup>63</sup> *Ibid* 649.

<sup>64</sup> Taggart, “Review”, *supra* note 17.

<sup>65</sup> *Connell v Auckland City Council* [1977] 1 NZLR 630.

<sup>66</sup> *Akbar Buses Ltd v Transport Control Board* (27 July 1984) unreported, CA, Fiji, CA 9/84, Speight VC, Mishra and Barker JJ noted in Taggart, “Review”, *supra* note 17, 442; *Pacific Transport Company Ltd v Mohammed Jalil Khan and Transport Control Board* (12 February 1987) unreported, CA, Fiji, CA ABU0021/1996S, Thompson and Barker JJ noted in Taggart, “Review”, *supra* note 17, 442; *Picchi v The Public Prosecutor* (1 November 1996) CA, Vanuatu, Criminal Appeal Case No 4 of 1996, Robertson, Dillon & Muhammad JJ noted in Taggart, “Review”, *supra* note 17, 442.

<sup>67</sup> Kirby, *supra* note 42, 45.

decision-making of judicial officers in New Zealand, the absence of a large problem and therefore the adequacy of an injunction to such officers 'to do their conscientious best'.

One aspect of the *Awatere* decision certainly remains unchanged – the courts continue to stress the general desirability of reasoned decisions.<sup>68</sup> However, it is much less clear whether the Court's primary conclusion in that case is still good law, and a number of recent decisions have suggested that it might not be.

The first such case is *Lewis v Wilson & Horton Ltd*,<sup>69</sup> otherwise known as the "millionaire name suppression case".<sup>70</sup> The case involved Mr. Lewis, a US Citizen, who had been given name suppression after pleading guilty to two counts of importation of a Class C Drug. The proceedings reached the Court of Appeal, where one of the issues was whether the Judge who granted name suppression, Harvey DCJ, was obliged to give reasons for that decision. The Court of Appeal began by noting the general principle that:<sup>71</sup>

There is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions. That is a proposition which may seem surprising. Many think that it is the function of professional Judges to give reasons for their decisions. And in recent years the general proposition has been steadily eroded in the United Kingdom and Australia, although in Canada the traditional view seems still to be adhered to...

The Court proceeded to hold that reasons *were* required for the decision to allow name suppression, given the subject matter of that decision.<sup>72</sup> Judge Harvey's failure to supply these reasons was held to amount to an error of law,<sup>73</sup> which was, itself, a "proper and distinct ground of judicial review".<sup>74</sup> The ruling was significant, but it was influenced by a number of considerations, such as the need for openness of court proceedings,<sup>75</sup> which led the court to specifically limit the ruling to that context.<sup>76</sup> Perhaps most significant, therefore, is not what the Court actually *said*, but rather what it indicated that it *might say* in the future:<sup>77</sup>

Whether it is time to say that as a general rule Judges must give reasons, is a matter this Court would wish to consider at an early opportunity. In the present case however the point arose during argument and was not fully canvassed. It is not necessary to consider whether *R v Awatere* should be revisited to dispose of the present case.

*Lewis v Wilson & Horton* therefore signals a judicial willingness to reconsider *Awatere*.<sup>78</sup> In any such reconsideration, there is no doubt that the second major decision to reflect negatively on *Awatere*, *R v Taito*,<sup>79</sup> will also be prominent.

<sup>68</sup> See e.g., *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2; *Supra* note 16.

<sup>69</sup> *Supra* note 16.

<sup>70</sup> Taggart, "Review", *supra* note 17, 440.

<sup>71</sup> *Supra* note 16, [75].

<sup>72</sup> *Ibid* [86].

<sup>73</sup> *Ibid*; Taggart, "Review", *supra* note 17, 441.

<sup>74</sup> *Supra* note 16, [87].

<sup>75</sup> Taggart, "Review", *supra* note 17, 441.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Supra* note 16, [85].

<sup>78</sup> *Vercoe v Police* (6 June 2002) HC, Nelson, AP 10/01, Neazor J, [33].

<sup>79</sup> [2003] 3 NZLR 577.



*Taito* involved a challenge to the Court of Appeal's practice of dismissing legal aid applications without hearing, and without supplying reasons to those concerned. The appeal to the Privy Council involved a number of different issues, but on the issue of reasons, Lord Steyn simply commented that:<sup>80</sup>

Moreover, the applications were dismissed without reasons. Given that the dismissal of an application meant that the appeal could not be effectively pursued, a reasoned decision was required: *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565-567, paras 74-82, per Elias CJ.

The quoted paragraph clearly suggests that the Privy Council regarded *Lewis v Wilson & Horton Ltd* as requiring reasoned decisions in more than just name suppression cases.<sup>81</sup> It is unclear from the judgment exactly when decision-makers will be required to give reasoned decisions, but both the result and the reasoning in *Taito* certainly indicates a willingness to extend *Lewis v Wilson & Horton Ltd* beyond the particular confines of name suppression.

In light of the decisions in *Lewis v Wilson & Horton Ltd* and *Taito*, it seems that there now *may* be a general obligation on New Zealand judges to give reasons for their decisions. If this obligation does exist, it is unclear whether or not it extends to administrative decision-makers. The recognition of such a duty, for both groups of decision-makers, is certainly supported by some judges, and the vast bulk of academic commentators. They argue that the recognition of a general duty would be preferable to the "ad hocery" of "carving out exceptions to the common law rule";<sup>82</sup> an exercise which is said to have done the law "little credit"<sup>83</sup> and given rise to a 'cottage industry' of applications to appeal on the ground of inadequate reasons.<sup>84</sup> They further point to the Official Information Act 1982, section 23 of which manifests a clear policy of requiring many decision-makers to give their reasons, and argue that the common law should be aligned with this policy.<sup>85</sup>

There are many more arguments raised in support of a general duty to give reasons, both for judges and administrative decision-makers, but now is not the time to consider them. It suffices to state that judges may be under a general duty to give reasons, and that academic commentary supports extending this duty to administrative decision-makers. In any event, these considerations are of less importance than they once were, and might otherwise be, given the legislative change which has overtaken the common law in this area.

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<sup>80</sup> *Ibid* [17].

<sup>81</sup> The Privy Council has not always been so inclined, and for years it failed to intervene in cases where the decisions appealed from were unreasoned. The case that demonstrated this most clearly was Unnamed Privy Council case, *Times*, 19 November 1952 noted in Wade, "Statutory tribunal's duty to give reasons" (1963) 79 LQR 344, 346. For more examples, refer to Ho, "The Judicial Duty to Give Reasons" (2000) 20 LS 42, 44.

<sup>82</sup> *Akbar Buses Ltd v Transport Control Board* (27 July 1984) CA, Fiji, CA 9/84, Speight VC, Mishra and Barker JJ noted in Taggart, "Review", supra note 17, 442.

<sup>83</sup> *Ibid*.

<sup>84</sup> Taggart, "Review: Administrative Law" [2003] NZ Law Review 99, 118.

<sup>85</sup> *Ibid*.

## The Official Information Act 1982

Section 23 of the Official Information Act 1982 introduces a general reasons requirement, which is triggered when an individual requests the reasons for a decision or recommendation which affected him or her. Once such a request has been made, a decision maker subject to the Act must provide the individual with a written statement containing: the findings on material issues of fact; a reference to the information on which the findings are based and the reasons for the decision or recommendation. The requirements of section 23 are more extensive than the obligations imposed by the common law rules, and so decisions under the latter regime will be of limited use in determining the sufficiency of reasons under section 23, except for perhaps "providing a floor through which a statement under the Act cannot fall".<sup>86</sup>

The obligations imposed by section 23 are not, however, a complete substitute for the corresponding common law duties. One factor underscoring the continued importance of the common law duties is that section 23 only applies when a request for reasons has been made, whereas reasons may be required under the common law whether or not they have been requested. There is also a far more important consideration which means that, in many instances, section 23 is altogether irrelevant and the common law provides the only way to establish a right to reasons.

The coverage of the Official Information Act is generally very broad; all government departments, and nearly 200 specified organisations, are subject to the "exacting reasons requirements" provided for in the Act.<sup>87</sup> There is an "ironic exception"<sup>88</sup> provided for in section 2(6), however, which excludes a "Court" and "in relation to its judicial functions, a Tribunal" from the coverage of the Act.<sup>89</sup> The motivation behind the exclusion is purely historical<sup>90</sup> – the Officials' Committee which recommended the legislation did not consider its terms of reference to extend to information held by the courts or administrative tribunals.<sup>91</sup> The result, however, is of real consequence. Courts, and "capital 'T' Tribunals"<sup>92</sup> are not subject to section 23 and will only be required to give reasons if an obligation is imposed by their constituent statute or the common law.<sup>93</sup> As noted earlier, many statutes contain explicit reasons requirements, but others do not. For decision-makers in the latter category, the common law is the only possible source of an obligation to provide a reasoned decision.

Accordingly, in many situations, there will be no duty to give reasons other than that which *may* be provided by the common law. An assessment of the common law in this regard has already been made, and, given the developing nature of the law, is difficult to particularise beyond the bounds of what has already been laid down. A more extensive examination of this duty would, in any event, be superfluous for current purposes. Considering the obligation to provide *dissenting* reasons must logically assume the answer to a prior question, which is whether there is an

<sup>86</sup> Taylor, *Judicial Review: A New Zealand Perspective* (1991) 153.

<sup>87</sup> Taggart, "Review", supra note 17, 440. See generally, Eagles, Taggart and Liddell *Freedom of Information in New Zealand* (1992).

<sup>88</sup> Fisher, supra note 17, 519.

<sup>89</sup> Taggart, "Review", supra note 17, 440.

<sup>90</sup> Committee on Official Information *Towards Open Government: Supplementary Report* (1981) 64.

<sup>91</sup> Taggart, "Review", supra note 17, 440.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* There is a full consideration of this issue in Taggart, "The Rationalisation of Administrative Tribunal Procedure: the New Zealand Experience" in Creyke (ed) *Administrative Tribunals: Taking Stock* (1992).

obligation to provide reasons at all. If a decision-making body is not required to provide any reasons, then it surely cannot be required to provide any dissenting reasons for that decision. An outline of the general duty to give reasons therefore provides an essential background to the consideration which is to be undertaken, but the remainder of this article must necessarily consider whether, *for those decisions where there is an obligation to provide reasons*, that obligation extends to the provision of dissenting reasons. In other words, the pending analysis is concerned with the *content* of the duty to give reasons where it has been established, rather than its existence either generally or in a particular case.<sup>94</sup>

### III AN INTRODUCTION TO DISSENTING REASONS

#### Empirical Observations

Earlier, this article noted that the dissenting judicial opinion had become a well established practice in most common law countries, even though it might not have equally well established theoretical underpinnings. It seems that this analysis is equally apt in describing the dissenting reasons which are expressed by minority members of administrative tribunals.

The truth is that minority members of administrative tribunals often give dissenting reasons, and their ability to do so is seldom questioned.<sup>95</sup> Dissenting reasons have been given by minority members on a variety of bodies from administrative appeal tribunals<sup>96</sup> to national communications commissions,<sup>97</sup> from university disciplinary committees<sup>98</sup> to hospital review boards,<sup>99</sup> and from liquor licensing commissions<sup>100</sup> to school boards.<sup>101</sup>

By and large, the ability of a minority tribunal member to give such reasons has not been questioned, at least in the courts, and their right to do so has either been sanctioned by the majority of the Tribunal or just presumed to exist irrespective of the majority's wishes. This all changed less than five years ago in New Zealand, when, for the first time, the courts were required to consider the position of minority tribunal members.

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<sup>94</sup> Due to the exclusion of Courts and Tribunals from the Official Information Act, the working supposition here is that the duty to give reasoned decisions is most likely to be sourced in the common law, but the same arguments apply if there is specific statutory provision for reasons.

<sup>95</sup> See e.g., *Graphic Communication Union, Local 41M v Ottawa Citizen* 128 (1999) O.A.C. 208; *Re Hall and Repatriation Commission* (1986) 11 ALD 80; *Re Walsh and Repatriation Commission* (1987) 12 ALD 648; *Glengarry Memorial Hospital v Ontario (Pay Equity Hearings Tribunal)* (1993) 99 DLR (4<sup>th</sup>) 682; *Long & Hambly Ltd v Bryan* [1975] ICR 200.

<sup>96</sup> *Re Scherer and Commissioner for Superannuation* (1997) 45 ALD 593.

<sup>97</sup> In *Re Applications of Biscayne Television Corp* 15 Radio Reg 317 (1957) noted in Jacob, "Requirement of Findings of Fact in Administrative Determinations – Judicial Experience in India and the United States" (1966) 8 J.I.L.1 54, 84.

<sup>98</sup> *Pacheco v Dalhousie University* 2005 NSSC 222.

<sup>99</sup> *Re HSK* 2003 CanLII 28625.

<sup>100</sup> *The Returned & Services League of Australia (Victoria Branch) Inc v Liquor Licensing Commission* [1999] 2 VR 203.

<sup>101</sup> *Re Miljohns and Board of Education for the Borough of Scarborough* 29 OR (2d) 251.

### ***The Medical Practitioners Disciplinary Tribunal v Parry***

In *The Medical Practitioners Disciplinary Tribunal v Parry*<sup>102</sup> (“Parry”), the New Zealand High Court was faced with the issue of whether a person, whose interests had been the subject of a tribunal decision, had the right to know the identity of any dissenting tribunal members. The case therefore called the position of dissenting tribunal members directly into question, albeit that it considered whether their *identity*, rather than their *reasons*, must be disclosed.

Essentially, the case related to two decisions of the Medical Practitioners Disciplinary Tribunal dated 31 October 2000 and 20 December 2000. In the first decision the majority made a finding that Dr. Parry was guilty of disgraceful conduct in a professional respect. The second decision, which was also expressed as a majority finding, related to the penalty which should be imposed. The majority resolved that Dr. Parry’s name be removed from the Register of Medical Practitioners. The minority member, on the other hand, took the view that there was no evidence to suggest that Dr. Parry’s ongoing specialist practice in specific areas was unsafe, and therefore concluded that Dr. Parry could be permitted to resume his practice subject to appropriate conditions.

The Medical Practitioners Disciplinary Tribunal was constituted, at the relevant time, by the Medical Practitioners Act 1995. The Tribunal was comprised of five members; a legally-qualified Chairperson, three medical practitioners, and one other person who was not a medical practitioner.<sup>103</sup> Accordingly, “looked at from a medical practitioner’s standpoint, the composition of any Tribunal is three medical/two lay”.<sup>104</sup> Section 100(5) of the Act specifically required all members of the Tribunal to be present at a hearing, but further provided that the Tribunal could make a decision by majority, which was deemed to be a decision of the Tribunal itself. The Act did not mention whether the identity of the dissenting members must be disclosed, nor did it refer to the right or obligation of those members to issue dissenting reasons. It did, however, contain a general provision which required the Tribunal to give reasons for its decisions. This provision stated that:<sup>105</sup>

Every order made under section 103(4) or section 106 or section 110 of this Act shall—

- (a) Be in writing; and
- (b) Contain a statement of the reasons on which it is based; and
- (c) Be signed by the chairperson or a deputy chairperson of the Tribunal.

Part IX of the Act provided a right of appeal from a decision of the Tribunal to the District Court. Dr. Parry brought such an appeal, although the substantive resolution of that appeal has little relevance for present purposes. The relevant judgment, for present purposes, relates to an interlocutory application which was made before the hearing of the appeal. This application was brought by Dr. Parry to compel disclosure of the name(s) of the member or members who were in the minority in respect of the two decisions. Judge Hubble ruled that Dr. Parry was entitled to the orders sought, and that the identity of the minority member(s) should be

<sup>102</sup> (11 May 2001) unreported, HC, Auckland, AP49/SW01, Priestley J.

<sup>103</sup> *Ibid* [8].

<sup>104</sup> *Ibid*.

<sup>105</sup> Medical Practitioners Act 1995, s112(1).

disclosed to the respondent. The Tribunal appealed to the High Court, where Priestley J considered the issue at greater length. The judgment of Priestley J must be viewed in the context of the case, and so before proceeding, it is important to note two particular aspects of the litigation.

The first is that the decision in question was made under urgency. The appeal on the interlocutory decision was heard by Priestley J on Friday 11 May 2001, but the hearing of the substantive appeal was due to take place in the District Court on the very next working day, Monday 14 May 2001. For that reason, Priestley J heard the case and delivered an oral judgment on the same day. The urgency involved explains why, for reasons outside Priestley J's control, the judgment lacks the legal reasoning and analysis which would normally be required for a legal issue of this complexity.

The second relevant factor is that Dr. Parry's interest in the identity of the minority member was not motivated by mere curiosity. As noted, the Tribunal in question was comprised of both medical experts, with different areas of expertise, and lay people. Dr. Parry suspected, apparently, that the minority member who had supported him was the only Tribunal member who was a specialist in the relevant area of practice. Forcing disclosure of this fact, if it was true, would therefore enable Dr. Parry to call the Tribunal's decision into question in both the courts and the public arena, by arguing that the decision was contrary to the only specialist's opinion. Indeed, the Tribunal argued against disclosure of the identity of the minority for this very reason, suggesting that Dr. Parry's "underlying reason"<sup>106</sup> for seeking the names of minority members was:<sup>107</sup>

[t]o permit [Dr. Parry] to argue that much greater weight should be given to the view or decision of a minority member if it turned out that the minority member or members in question were specialists.

This factor explains certain comments, which were made in both the District Court and the High Court, as to the weight which should be given to the opinion of any one Tribunal member as against another.

Priestley J began by noting the submissions that had been made by both parties. The Tribunal argued that it would be objectionable to place greater weight on the opinions of some tribunal members at the expense of others; an outcome which, as mentioned above, was the very reason why Dr. Parry appeared to seek disclosure of the minority's identity. The Tribunal further expressed the concern that medical practitioners had a "heightened sense of collegiality" and that "professional embarrassment might follow if it were to become known that a particular member of the Tribunal had been in a minority (or indeed could have views attributed to him or her)".<sup>108</sup>

Dr. Parry, on the other hand, referred to "the desirability of the 'healthy winds of openness' blowing equally through all Courts and Tribunals in the land",<sup>109</sup> and argued that the disclosure sought was a proper part of this open judicial process. Dr. Parry further noted that minority views were normally clearly identifiable in tribunal

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<sup>106</sup> *Supra* note 102, [11],

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* [12].

<sup>109</sup> *Ibid* [13].

decisions, and that there was no good reason why they should not be in the current case.<sup>110</sup>

Priestley J had little difficulty in concluding that the views of all tribunal members should be treated equally, and that greater weight should not be given to the opinion of any particular member, even if he or she was a specialist. In a passage which is difficult to take issue with, His Honour noted that:<sup>111</sup>

The overall policy consideration which in my judgment must guide the District Court in hearing any appeals is that which is clearly apparent from the statutory provisions which constitute the Tribunal. This is not a Tribunal of medical practitioners alone. Public opinion has moved far beyond a situation where medical practitioners alone can sit in judgment on their fellow practitioners and reach decisions on disciplinary matters. Parliament has decreed that two of the Tribunal members at any one time must be lay members. The statute clearly envisages majority decisions. It would in my judgment be wrong in principle for any Court sitting in an appellate or review jurisdiction to entertain the view that the opinions, findings or decisions of medical and/or specialist members of the Tribunal are entitled to greater weight and respect than the decision of the Tribunal as a whole. Certainly minority views can be called into aid to mount attacks in relation to the merits, relevance, bias, jurisdictional error, breach of natural justice, fairness and so on. But care must be taken in that process to ensure that the findings and opinions of specialist members or medical members of the Tribunal are not accorded any greater weight or respect than the views expressed by other members of the Tribunal. To do otherwise would be to fly directly in the face of legislative intent.

His Honour also had little difficulty in determining that Dr. Parry was entitled to know the identity of the minority member(s) of the Tribunal. However, the reasoning on this point is much more problematic.

Priestley J began this consideration by stating that the issue of identity was not one which relates to the internal workings of the Tribunal.<sup>112</sup> This may well be so, but there was no explanation by His Honour as to why it was so, nor was there any other consideration of why that would be relevant in law or make any difference to the issue in question. It seems that Priestley J was referring to some sort of “internal workings” exception to disclosure, but the actual body of law or analogy that this exception was based upon is unclear. Possibly, His Honour may have been alluding to the principle of deliberative secrecy, which will be discussed later in this article.

Priestley J then considered whether or not an obligation to disclose the minority’s identity arose as an incident of the duty to give reasons for a decision.<sup>113</sup> His Honour rejected this proposition, and stated that:<sup>114</sup>

The reasons of any decision maker stand by themselves and are subject to appropriate scrutiny. I do not see disclosure of identity as being a necessary part of the requirement to provide reasons for the decision.

This conclusion can itself hardly be dismissed as irrational or even necessarily wrong, although once again, it could have certainly benefited from greater analysis.

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<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* [16].

<sup>112</sup> *Ibid* [20].

<sup>113</sup> *Ibid* [20][b].

<sup>114</sup> *Ibid.*

The difficulty arises when one attempts to reconcile the statement with His Honour's subsequent conclusions on other points:<sup>115</sup>

- [c] **22.3 Is a party entitled to know the identity of the minority person or persons, so as to assess what weight ought to be given to that opinion?**  
This question is, in my view, inelegantly framed and raises two separate issues. I intend to answer it in two parts:
- [i] A party is entitled to know the identity of the minority person or persons on this particular statutory Tribunal.
- [ii] The reason for a party's entitlement to know that identity has nothing, in my judgment, to do with assessing the weight which ought to be given to that minority opinion.
- [...]
- [e] **22.5 Is a Tribunal member, who holds minority views, entitled to anonymity?**
- No.

As the above excerpt shows, Priestley J effectively found that the Tribunal *was* obliged to disclose the identity of the minority member(s), even though the duty to give reasons was not the source of that obligation. This conclusion is problematic in itself; it suggests that a party could discover the identity of the minority member(s) of a Tribunal even if that party had no statutory or common law right to reasons. It also raises the rather obvious questions of *why* the Tribunal is obliged to disclose this information, and what the source of that obligation is, if it is not the duty to give reasons. Unfortunately, neither of these questions were answered by Priestley J, who simply asserted that a party is entitled to know the identity of the minority.

It is difficult to ascertain whether Priestley J's comments were confined to the Medical Practitioners Disciplinary Tribunal; at times, the judgment is qualified in this way,<sup>116</sup> but at other times, the stated conclusions appear to apply more broadly.<sup>117</sup> Ultimately, His Honour's other finding, that "the reasons for a party's entitlement to know that identity...has nothing to do with assessing the weight which ought to be given to that minority opinion", rather suggests that this entitlement was not influenced by the expertise of any of the dissenting member(s) on this particular Tribunal, and is instead of general relevance. An entitlement of this sort might perhaps be justified as being analogous to the right to "know your accuser" in natural justice – in other words, a right to "know your adjudicators" (for and against). Unfortunately, neither this justification, nor any other one, was given by Priestley J in support of the asserted right, and so the basis for that right remains unclear.

Justice Priestley may have failed to adequately explain why a party is entitled to know the identity of a dissenting tribunal member, but at least His Honour can claim to be in good company in this regard. In Canada, the Nova Scotia Supreme Court has recognised a similar duty and has also failed to offer any sort of adequate

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<sup>115</sup> Ibid [20][c].

<sup>116</sup> Ibid.

<sup>117</sup> Ibid [20][e].

explanation for it. In *Gosselin v Halifax (Regional Municipality) Taxi Committee* (“Gosselin”)<sup>118</sup>, this Court noted that:<sup>119</sup>

Here, the Minute records that the decision was passed unanimously by all members of the Commission who attended the hearing and therefore, any uncertainty as to whether one or more of the members had not supported the decision, is not present. It also appears the unanimous nature of the decision was eventually, although not immediately, communicated to the applicant. *We would note, however, that where a decision is not unanimous, it is a fundamental principle of natural justice and/or procedural fairness, that the person affected by a decision know those persons who supported the decision of the board or tribunal and those who were contrary.*

[emphasis added]

These observations, like the comments in *Parry*, fail to provide a satisfactory justification for the asserted right of a party to know the identity of any dissenting tribunal member(s). They are not, however, entirely devoid of practical value. The Court did state that the right was “a fundamental principle of natural justice and/or procedural fairness”, and the reference to this body of law rather supports the use of the “know your accuser” principle to conceptualise this right along similar lines. Unfortunately, the Court did not refer to this analogy nor did it provide any other reason why natural justice and/or procedural fairness required disclosure, and in that light, there is little more that can be sensibly said about either point. It suffices to note that both *Parry* and *Gosselin* suggest that a right to know the identity of any dissenting tribunal member(s) does exist, and so it is likely that this represents the current position in New Zealand.<sup>120</sup> The remainder of this article is devoted to analysing the two other key issues, which neither decision addresses, of whether a minority tribunal member has the right or the obligation to issue dissenting reasons.

## IV THE OBLIGATION TO GIVE DISSENTING REASONS

### Introduction and General Observations

If minority tribunal members are obliged to give dissenting reasons, then they must also have the right to do so, or the obligation would be nonsensical. It is therefore convenient to first examine whether minority tribunal members are obliged to give dissenting reasons, because if they are, then the additional question of whether they have the right to do so becomes somewhat superfluous.

Any obligation to give dissenting reasons could of course be provided for, either expressly or implicitly, by the statutory provisions which constitute and

<sup>118</sup> 2000 ACWSJ 506495.

<sup>119</sup> *Ibid* [9].

<sup>120</sup> There does appear to be one decision to the contrary, which is *In the Matter of H.B.W.* [1956-7] ALR 237 in *The British Journal of Administrative Law* 3 [1956-7] 237. This was a decision of the Disciplinary Committee of the Tomato and Cucumber Marketing Board, and the reported decision (which is three lines long) is predominantly focused on the penalty which H.B.W. should face for calling the Board “the biggest twisters ever set up in industry”. Ultimately, the Disciplinary Committee concluded that the appropriate penalty was £4. Its conclusion on the right of a party to know the identity of any dissenting member(s) of a Tribunal is, for obvious reasons, of limited authoritative value, and is therefore not discussed further.



regulate the relevant decision-making bodies. The reality is, however, that despite the prevalence of statutory tribunals in New Zealand, a computer search does not reveal a single provision on the statute books which actually refers to an obligation on such a body to give or not give dissenting reasons.<sup>121</sup> Accordingly, if there is an obligation to give dissenting reasons, then it must derive from either the common law duty to give reasons or the equivalent general duty which is often imposed by statute.

Most formulations of the common law duty to give reasons are inherently general in nature, and provide little assistance in assessing whether the duty extends to the provision of dissenting reasons. The courts frequently describe the content of the duty by making observations such as, “[a]n authority...required to give reasons for its decision...is required to give reasons which are proper, adequate and intelligible and enable the person affected to know why they have won or lost”.<sup>122</sup> On another occasion, the content of the duty was similarly expressed as: “[r]equir[ing] reasons that are clear and adequate and deal with the substantial issues in the case...what are good reasons in any particular case depends on the circumstances of the case”.<sup>123</sup>

The various statutory provisions which create an obligation to give reasons are little different, and normally simply provide that the relevant decision-making body is obliged to give reasons for its decision.<sup>124</sup> The Commissions of Inquiry Act 1908, which codifies aspects of tribunal procedure for many statutory tribunals, is little help; it contains no requirement to give reasons at all.<sup>125</sup>

Accordingly, both the statutory and common law formulations of the general duty to give reasons are not, by themselves, able to easily explain whether the duty extends to the provision of dissenting reasons. That issue can only be resolved by examining the more fundamental aspects of the duty to give reasons.

### **The Basis for the General Duty; Giving Reasons for a Decision**

As even the most basic formulation of the obligation reveals, the duty of a decision-maker to give reasons for a relevant decision requires, quite simply, a *decision-maker* to give reasons for *the decision*. Accordingly, the duty to give reasons will only require the provision of dissenting reasons if those reasons can be properly characterised as the *decision-maker's* reasons for *the decision*. Determining this question therefore involves considering *who* the decision-maker is, when a decision is

<sup>121</sup> This can be contrasted, at least slightly, with the position in Australia. Generally speaking, an obligation to give dissenting reasons is not referred to in either state or federal legislation in that jurisdiction either. However, there is at least one Australian statute which obliges minority members of a decision making body to give dissenting reasons. Section 75(1)(g) of the Commonwealth Electoral Act 1918 requires the Electoral Commission, when determining the names and boundaries of the electoral divisions which a state or territory is to be divided into, to forward to the relevant Minister a copy of various pieces of information, including “if a member of the augmented Electoral Commission has stated in writing the reasons for his or her disagreement with the determination made by the augmented Electoral Commission – those reasons”.

<sup>122</sup> *R v Brent London Borough Council ex parte Baruwā* (1997) 29 HLR 915, 929.

<sup>123</sup> *R v Immigration Appeal Tribunal ex parte Jebunisha Kharvaleb Patel* [1996] Imm AR 161, 167.

<sup>124</sup> See, e.g., ss61(4), 62, 67(5), 68(3) and 70B(5) of the Commerce Act 1986; ss46(5), 61(5), 77(5), 140(5), 142(5), 143(5), 146(3), 162(2), 171(5) and 209(5) of the Gambling Act 2003; ss38B(4), 38F(3), 38F(7), 44(2), 44(5), 44B(3) of the Securities Act 1978; Arbitration Act 1996 sch 1, art 31 r(2). Even s23 of the Official Information Act 1982 only requires that the party be given a written statement of “the reasons for the decision or recommendation (s23(1)(c)), and does not further explain what is meant by those terms.

<sup>125</sup> Fisher, *supra* note 17, 526.

made by the majority of a tribunal, and *what* that decision is, where the majority and minority have disagreed on the result.

The common law rules as to decision-making in a multi-member panel are insightful in this regard. It is a well established common law principle that, in the absence of a statutory provision to the contrary, a decision of a tribunal may be made by a majority of the members of that tribunal.<sup>126</sup> This rule was affirmed by the New Zealand Court of Appeal in *Atkinson v Brown*,<sup>127</sup> where North J observed that there is:<sup>128</sup>

[A] general rule of law that where a body of persons is entrusted with powers not of a mere private nature but in some respects of a public nature, and the members are regularly assembled, the decision of the majority will be treated as the decision of the whole and that this rule is applicable to statutory tribunals.

...

[T]his general rule must give way to, and be controlled by, the intent of the Legislature as collected from the scope and provisions of the statute. But short of this the general rule will prevail.

As North J also notes in this passage, a related common law rule provides that when a decision is made by the majority of the members of a tribunal, it is treated as a decision of the tribunal itself.<sup>129</sup> Accordingly, in *Riddiford v Wellington District Law Society*,<sup>130</sup> the High Court referred to “the common law rule that in the case of a body entrusted with powers in some respects of a public nature, the decision of the majority will be treated as the decision of the whole”.<sup>131</sup>

Effectively, then, a tribunal can generally make decisions by a majority, and if it does, the majority decision is treated as a decision of the tribunal itself. This principle suggests that, for two reasons, the duty to give reasons does not require the provision of dissenting reasons. First, dissenting reasons, as a minority view, do not represent the position of the tribunal and therefore cannot be considered to be the reasons of *the decision-maker*;<sup>132</sup> they are the views of another person who, unlike the tribunal, is not obliged to disclose them. Second, as the minority views are not followed, they can hardly be said to be the reasons for the decision; they are, by the very nature of the dissent, the reasons for something else entirely. This analysis draws support from a recent decision of the English Court of Appeal, but before discussing that decision, it is necessary to consider one argument to the contrary.

This argument is made by Andrew Lynch, and it essentially appears to suggest that the duty to give reasons may extend to the provision of dissenting reasons. Lynch contends, relying on a passage from Sir Anthony Mason, that “the judicial obligation

<sup>126</sup> *Attorney-General v Davy* (1741) 2 Atk. 212; 26 ER 531, per Lord Chancellor Hardwicke; *R v Beeston* (1789) 3 TR 592; 100 ER 750, per Lord Kenyon CJ; *Riddiford v Wellington District Law Society* (14 December 1990) unreported, HC, Wellington, AP188/89,19.

<sup>127</sup> [1963] NZLR 755.

<sup>128</sup> *Ibid* 765-766.

<sup>129</sup> *Ibid* 765. See also *Re Magrath* [1934] 2 KB 415; *R v Carrick District Council ex parte Shelley* [1996] Env LR 273, 283 noted in Fordham, *Judicial Review Handbook* (4 ed, 2004) 1075.

<sup>130</sup> *Riddiford v Wellington District Law Society* (14 December 1990) unreported, HC, Wellington, AP188/89, 19.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Supra* note 118, 8.

is to state the reasons and that means to state them fully".<sup>133</sup> This is not objectionable in itself; the duty to give reasons does, obviously, require those reasons to be stated, and it is equally obvious that they have to be stated fully (as opposed to, presumably, being only partially stated). However, the difficulty arises at the next stage of Lynch's reasoning, when he argues why a full statement of reasons necessarily requires the provision of dissenting reasons.<sup>134</sup>

As the reasons of the Court are necessarily to be understood by appreciating not just what a majority of the judges think, but also what they do *not* think, as often found in the opinions of the institution's individual members, surely Mason's exhortation must mean that dissents, in addition to concurrences, should be made known to the public.

Lynch may be merely arguing that dissenting reasons should be provided as an incident of good judicial practice, and if so, it is difficult to take issue with his comments. However, in light of the preceding reference to the duty to give reasons, he seems to be suggesting that dissenting reasons *must* be provided as part of the duty to give reasons. If his comments were intended to support this proposition, then the reasoning employed is perverse.

No judgment has ever suggested that the duty to give reasons requires a decision-maker to explain everything which he or she does "not think", and there are good reasons for this. Any such requirement would amount to a radical extension of the current duty to give reasons for decisions. It would effectively require decision-makers to address each and every other way in which the case could have been decided, and explain why it was not decided along those lines; in other words, the decision-maker would have to give reasons for not making a decision in addition to giving reasons for making one. In light of the obvious difficulties with this argument, and the lack of any other authority supporting it, it is not worthwhile to consider the point in greater length. It is sufficient to observe that the argument offers little support for a general duty to give dissenting reasons in an administrative context. Accordingly, the earlier proposition that dissenting reasons are not, properly considered, the *decision-maker's* reasons *for the decision*, remains intact. As alluded to earlier, this proposition is also strongly supported by a recent decision of the English Court of Appeal.

In *Cargill International S.A. Antigua v Sociedad Iberica De Molturacion S.A.*<sup>135</sup> ("*Cargill v Simsa*"), the parties had entered into a contract for the sale and purchase of Argentinean soya bean pellets. The contract provided that any disputes between the parties were to be referred to arbitration, and it further provided that the arbitration was to be governed by the rules of the Grain and Feed Trade Association ("GAFTA"). A dispute arose between the parties, and it was duly referred to arbitration. In accordance with the relevant GAFTA rules, each of the parties appointed an arbitrator with the third arbitrator appointed by GAFTA. Sociedad Iberica De Molturacion S.A. ("*SIMSA*") appointed Mr. Bridge, Cargill International S.A. Antigua ("*Cargill*") appointed Mr. Scott, and the third arbitrator was appointed, pursuant to the relevant GAFTA rules, by GAFTA.<sup>136</sup>

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<sup>133</sup> Mason, "The Centenary of the High Court of Australia" (2003) 5 (4) CLPR, 41, 45 quoted in Lynch, Judicial Dissent, *supra* note 6, 100.

<sup>134</sup> Lynch, Judicial Dissent, *supra* note 6, 100.

<sup>135</sup> [1998] 1 Lloyd's Rep 489.

<sup>136</sup> *Ibid* 491.

A majority award was then reached, but Mr. Bridge dissented, and he refused to sign the award unless his dissenting reasons were included in it. The majority, on the other hand, were unwilling to allow Mr. Bridge to insert his own reasons into the award. The dispute led to further disagreement between the parties, but for present purposes, it is not necessary to traverse the full history of the dispute.

Essentially, the case reached the English Court of Appeal, where the issue for the Court was whether a minority arbitrator was entitled, under the relevant GAFTA rules, to insist on the inclusion of his dissenting reasons in an arbitration award before signing that award. The GAFTA rules relevantly provided that:

- 3.8 If an arbitrator...refuses to act...or fails to proceed with the arbitration...the party appointing such arbitrator shall forthwith appoint a substitute...If a substitute is not appointed by the appointing party within five consecutive days after the notice of such...refusal...[or] failure...as the case may be, any two of the Officers shall have the power to appoint an arbitrator.
- ...
- 7.1 All awards of arbitration shall be in writing on an official form issued by the Association and shall be signed by...all members of the Tribunal.
- 7.2 The award shall state the arbitrators' reasons therefore and whether any sum awarded carries interest thereon.

Cargill argued that the rules required all three arbitrators to sign the award, even if one of them dissented and did not agree with the reasons expressed therein.<sup>137</sup> SIMSA, on the other hand, contended that it was "absolutely fundamental to an arbitrator's duty that he should be given the opportunity of expressing a dissenting view",<sup>138</sup> particularly where that view may be of considerable importance and assistance to an appellate review body.<sup>139</sup>

At first instance, Colman J decided that r7.1 required the award to be signed by all members, irrespective of whether or not one of those members might have disagreed with the award or its reasons.<sup>140</sup> On appeal, the English Court of Appeal unanimously reached the same conclusion. Waller LJ, who delivered the leading judgment of the Court, began by noting that dissenting reasons could not possibly be said to be the reasons for the award.<sup>141</sup>

[T]he reasons for an award are the reasons given by the majority who subscribe to that award. The dissenting reasons are by definition not reasons for the award which has been made but would be reasons for a different award which the dissenting member would have liked to make.

Waller LJ stated that there was nothing to stop a minority arbitrator indicating his dissent when signing the award, or even outside the award, without expressing

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<sup>137</sup> Ibid 492.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid 493.

<sup>141</sup> Ibid 496.

reasons.<sup>142</sup> However, His Lordship refused to accept that a minority arbitrator could insist on the inclusion of his or her reasons in the award before signing that award.<sup>143</sup>

But even in the Courts a dissenting opinion is not always given. For many years in the Privy Council dissenting opinions were not given. In the Court of Appeal, Criminal Division, they are still not given. Mr. Veeder suggests that a dissenting opinion is an Anglo-Saxon concept, and points to the fact that the European Court of Justice does not allow for dissenting opinions. Thus it cannot be said (as the appellants put it in their skeleton argument) that as a matter of "principle" a dissenter must be allowed to indicate his dissent or not be a party to reasons with which he does not agree...

Certainly, one can quite understand that some trade organizations who provide arbitration facilities in the context of quality disputes and such like may wish to discourage dissent being indicated at all and in particular the giving of dissenting reasons which may detract from the collegial nature of the arbitral process they are offering and add to the cost and complexity of the arbitral process with which they are concerned.

Waller LJ had earlier suggested that the position would be even more clear-cut if an arbitrator insisted on inserting his or her own concurring, rather than dissenting, reasons into the award before signing it:<sup>144</sup>

[I]f what Mr. Bridge was seeking to do was to have his reasons recorded for reaching the same conclusion, that is an entirely different matter from seeking to have inserted a dissenting view with dissenting reasons. If he was seeking to insist on different findings being recorded as reasons for the award of the majority, which would in fact support a conclusion different from the award, that again would be entirely different and in this instance obviously illegitimate.

It is interesting to note that Chadwick LJ, who delivered a brief concurring judgment, seemed somewhat unwilling to endorse Waller LJ's views on this matter.<sup>145</sup>

It is unnecessary to consider what the position would have been if Mr. Bridge had concurred in the result, but had reached his conclusion by a different route from his fellow arbitrators and wished to have recorded his own different, and perhaps inconsistent, reasons for the award. That question does not arise on the appeal and I would wish to reserve my opinion on it for another occasion.

*Cargill v Simsa* did, of course, relate to a decision of an arbitration panel rather than a tribunal, and even within those confines, it only considered the construction of a particular set of statutory rules. However, arbitrations are, on one view, very similar to tribunal decision-making. Both are alternative ways of avoiding courts; arbitrations by private consent, and tribunals by statutory creation.<sup>146</sup>

<sup>142</sup> *Ibid* 496-497.

<sup>143</sup> *Ibid* The absence of dissenting reasons in the Criminal Division in the Court of Appeal, which Waller LJ refers to, is due to s1(5) of the Criminal Appeal Act 1907 (UK) – see Megarry (Gardner, ed.) *A New Miscellany-at-Law: Yet Another Diversion for Lawyers and Others* (2005) 76-77. A provision of similar effect is contained in s398 of the Crimes Act 1961 (NZ), but one might be forgiven for suspecting that Baragwanath J has forgotten its existence in recent times.

<sup>144</sup> *Supra* note 135, 497.

<sup>145</sup> *Ibid* 497.

<sup>146</sup> See generally, Arthurs *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985).

Furthermore, even if the conclusion from the case is not directly applicable, the reasoning employed by their Lordships is highly relevant as to whether dissenting tribunal members are obliged to give reasons; it suggests that a dissenting member's views are not attributable to the body as a whole, and are certainly not reasons for that body's decision. In this way, *Cargill v Simsa* reinforces the earlier proposition that the duty to give reasons does not require minority member(s) to produce dissenting reasons. With that in mind, a final consideration which leads to the same conclusion, arising from the principle of deliberative secrecy, will now be outlined.

### Deliberative Secrecy

Deliberative secrecy is a privilege which protects judicial decision-makers from being forced to disclose how they reached a decision in any particular case.<sup>147</sup> The principle essentially applies to "how and why a judge arrives at a particular decision in a particular case...the evidence considered, the research done, the content of judicial discussions held, the compromises made, and the draft judgments written".<sup>148</sup> It will therefore prevent a party from discovering the notes made by tribunal members in the course of a hearing<sup>149</sup> or the draft decisions of such members or the tribunal,<sup>150</sup> and it will similarly often preclude the examination of a tribunal member in court.<sup>151</sup> The privilege has been justified on the basis that:<sup>152</sup>

The secrecy of a judge's deliberative process – the fact that a judge's decision-making takes place within a sanctuary of confidentiality safe from prying eyes – has always been regarded as an essential element of judicial independence, and has been held to require extending to judges unqualified protection from having to justify, defend or explain a judicial decision. This freedom from scrutiny – this principle of sanctuary for the decision-making process – enables judges to reflect on the evidence without restriction, to draw conclusions untrammelled by any concern of subsequent disclosure of their thought processes, and, where they are so inclined, to change these conclusions on further reflection without fear of subsequent criticism or of the need for subsequent explanation.

The privilege of deliberative secrecy extends to administrative tribunals, although exactly how it applies to such tribunals is less clear. Some authority

<sup>147</sup> *MacKeigan v Hickman* [1989] 2 SCR 796.

<sup>148</sup> Hawkins, "Behind Closed Doors II: The Operational Problem – Deliberative Secrecy, Statutory Immunity and Testimonial Privilege" (1996) 10 C.J.A.L.P 39, 40. There are some exceptions to the principle, such as where an administrative decision maker gives evidence as to the institutional aspects of their decision making processes – see *Quebec (Commission des affaires sociales) c. Tremblay* [1992] 1 SCR 952.

<sup>149</sup> Jacobs and Kuttner, "Discovering what Tribunals do: Tribunal standing before the courts" (2002) 81 *La Revue Du Barreau Canadien* 616, 639-640. See e.g., *Comalco New Zealand Ltd v Broadcasting Standards Authority* 9 PRNZ 153; *Alberta (Labour Relations Board) v IBEW, Local 1002* (1991) 5 Admin LR (2d) 301; *Yorke v Northside-Victoria District School Board* (1992) 90 DLR (4th) 643; *Privacy Commissioner (Canada) v Canada Labour Relations Board* (2000) 257 NR 66.

<sup>150</sup> See e.g., *Comalco New Zealand Ltd v Broadcasting Standards Authority* 9 PRNZ 153; *Re Consolidated-Bathurst Packaging Ltd and International Woodworkers of America, Local 2-69* (1985) 20 DLR (4th) 84.

<sup>151</sup> See e.g., *Agnew v Ontario Association of Architects* (1987) 64 OR (2d) 8; *Ellis-Don v Ontario (Labour Relations Board)* (1994) 110 DLR (4th) 731; *Graphic Communication Union, Local 41M v Ottawa Citizen*, (1999) 128 O.A.C. 208.

<sup>152</sup> Ellis and Aterman, "Deliberative Secrecy and Adjudicative Independence: The Glengarry Principle" (1994) 7 C.J.A.L.P' 171, 179.

suggests that administrative tribunals enjoy exactly the same degree of secrecy as the judiciary,<sup>153</sup> but there are other indications that the principle is more constrained in the case of such tribunals.<sup>154</sup> In any event, the proper limits of deliberative secrecy need not be exhaustively defined for present purposes. It is enough to note that the general principle is relevant to whether an obligation to give dissenting reasons exists, for two reasons.

First, the principle of deliberative secrecy reflects a distinct judicial reluctance to demand too much information from administrative tribunals as to their decision-making processes. This reluctance is consistent with the courts' longstanding unwillingness, which persists even to this day, to introduce a general requirement that administrative decision-makers provide reasoned decisions.<sup>155</sup> It is hardly likely, in this context, that the courts will impose an even higher duty on administrative tribunals which requires them to provide dissenting reasons, in addition to majority reasons, whenever the members of the tribunal disagree.

Secondly, the principle would seem to prevent a party from effectively obtaining dissenting reasons by making a request for information under section 12 of the Official Information Act. As noted earlier, the Official Information Act does not apply to "capital 'T' Tribunals",<sup>156</sup> and such tribunals will typically be the ones for which the issue of dissenting reasons arises. However, there are many administrative tribunals which are subject to the Act, and it is conceivable that the issue of dissenting reasons might arise in relation to one of these tribunals. In this situation, a party may attempt to obtain dissenting reasons by making a request under the Act for "information", namely, the discussions held between the tribunal members and/or the views held by the minority member(s). It is uncertain whether such discussions, as undocumented memories of events, do constitute "information"; the prevailing academic opinion seems to be that they do,<sup>157</sup> but most cases have reached the contrary conclusion.<sup>158</sup> In any event, however, the principle of deliberative secrecy means that, even if discussions between tribunal members are "information" which is subject to the Act, then a request for this information will almost certainly be denied on the basis of deliberative secrecy.<sup>159</sup> This outcome is supported by the fact that the Act does not apply to a Tribunal "in relation to its judicial functions",<sup>160</sup> which by itself, certainly suggests that the Act was never meant to extend to deliberations between tribunal members.

For these two reasons, the principle of deliberative secrecy strengthens the proposition that minority members of tribunals are not obliged to give dissenting reasons. Deliberative secrecy reflects a judicial reluctance to delve too deeply into administrative decision-making processes which suggests, when combined with the

<sup>153</sup> *Re Schabas and Caput of University of Toronto* (1974) 52 DLR (3d) 495, 508; *Agnew v Ontario Association of Architects* (1987) 64 OR (2d) 8, 15.

<sup>154</sup> Forbes, *Justice in Tribunals* (2002) para 13.15; *Spautz v University of Newcastle* (18 April 1991) unreported, NSWSC, Rolfe J; *Marsden v Human Rights & Equal Opportunity Commission* [2000] FCA 1619; *Tremblay v Commission des Affaires Sociales* (1992) 90 DLR (4<sup>th</sup>) 609.

<sup>155</sup> Wade and Forsyth, *supra* note 22, 518. See e.g., *supra* note 23.

<sup>156</sup> Taggart, "Review", *supra* note 17, 440.

<sup>157</sup> Eagles, Taggart and Liddell, *Freedom of Information in New Zealand* (1992) 25-28; Roth, "What is 'Personal Information'" (2002) 20 NZULR 40.

<sup>158</sup> A good summary of these cases, although it does not include the more recent decisions, can be found in Eagles, Taggart and Liddell, *Freedom of Information in New Zealand* (1992) 25-28.

<sup>159</sup> "Deliberative secrecy" is not a ground for refusing to disclose information under the Act, but there are other statutory grounds which could be invoked when the principle of deliberative secrecy applied – see, e.g., s6(c), s9(2)(ba) and s9(g) of the Act.

<sup>160</sup> Official Information Act 1982, s2(6)(b).

courts' unwillingness to introduce a general reasons requirement, that the courts will not go further still and require dissenting reasons from administrative decision-makers. Furthermore, deliberative secrecy will also stop parties from obtaining dissenting reasons by making a request for information, as opposed to the reasons for a decision, under the Official Information Act. These considerations, when combined with the earlier analysis which already suggested that the duty to give reasons did not require dissenting reasons, lead to an inevitable conclusion. It is quite clear, for all of the above reasons, that minority members of tribunals cannot be obliged to give dissenting reasons.

The rest of this article therefore considers whether minority members of tribunals have the right to deliver dissenting reasons, notwithstanding the fact that they are not obliged to do so. This question will primarily be answered by analysing whether there are good reasons to recognise such a right. Before departing from the area of deliberative secrecy, though, it is first necessary to explain why that principle does not provide any reasons *not to* recognise the right.

The principle of deliberative secrecy does not, *per se*, prevent a dissenting tribunal member from explaining his or her reasons. This is, quite simply, because the reasons which are given by the dissenting member relate to the actual decision which that person has reached, rather than the process involved in reaching that decision. Exactly the same reasoning explains why the majority are free to give reasons without offending the principle of deliberative secrecy, and furthermore, why judges are free to dissent, and frequently do so, despite the strength of the principle in that area.

The only way in which dissenting reasons could offend the principle of deliberative secrecy is, therefore, if they are inherently more likely to disclose information as to the tribunal's internal processes. One can understand the concern that dissenters may be more inclined to disclose such information, and in particular, that a disgruntled minority member of a tribunal might cast aspersions on the process which the tribunal followed in reaching its decision. A good example is *Glengarry Memorial Hospital v Ontario (Pay Equity Hearings Tribunal)*,<sup>161</sup> where the minority member of a Canadian Pay Equity Tribunal, Mr. Donald Dudar, stated in his dissenting reasons that there were events "which call into serious question whether the parties' rights to natural justice have been respected". Mr. Dudar further suggested that:<sup>162</sup>

[I]t may well be that, notwithstanding the seriousness of my concerns, it would be inappropriate and wrong in law for me to discuss the bases for my concerns in this decision. This arises out of my Oath of Office and my obligations to confidentiality as an adjudicator. This further calls into question whether the parties' rights are being respected, as well as my own independence as an adjudicator.

Certainly, Mr. Dudar's comments provide an example of dissenting reasons which come close to breaching the secrecy of the deliberative process. However, the potential for such a problem does not suggest that such adjudicators should be barred from expressing their dissent, for a number of reasons.

First, any suggestion that infringements of deliberative secrecy will arise frequently is purely an assertion, and moreover, it is not an assertion which is likely to

<sup>161</sup> (1993) 99 DLR (4<sup>th</sup>) 682.

<sup>162</sup> Hawkins, "Behind Closed Doors I: The Substantive Problem – Full Boards, Consensus Tables and Caucus Cabals" (1995-1996) 9 C.J.A.L.P 267, 282.



be true. Judges have been expressing their dissent for a long time, and to a lesser extent, so have many tribunal members. Despite this, there have been no significant inroads into the principle of deliberative secrecy in either area.

Secondly, the provision of dissenting reasons may do as much to help deliberative secrecy as it does to harm it. The dissenter's reasons may suggest that the decision-making procedure was improper, but equally, they may also confirm that the process was entirely proper and that the dissenter simply took a different view on the merits or facts of the case. In the latter situation, the affected party will presumably be discouraged from uncovering further details of the decision, which he or she might otherwise be tempted to do, particularly if the existence of a dissent was known.

Thirdly, the idea that any disclosure of the deliberative process is automatically undesirable rather assumes that such secrecy is an absolute concept which is not subject to restriction. In reality, there are other values in administrative law, and in particular, a party has the right to seek judicial review if a decision has been improperly made. The exercise of this right may, at times, conflict with deliberative secrecy, which will introduce the need to reconcile the two countervailing imperatives.<sup>163</sup> As Hawkins states:<sup>164</sup>

How can judicial review be used to police the safeguards built into the decision-making process if the operation of that process is veiled behind a cloak of deliberative secrecy. Just as at the substantive level, there exists a need for safeguards to reconcile natural justice with institutional decision-making; at an operational level some mechanism must be found to reconcile the need for judicial review with the privilege of deliberative secrecy.

It is therefore somewhat naïve to argue that deliberative secrecy must always prevail. It is particularly naïve to make that argument in those situations where a minority adjudicator feels so strongly about the impropriety of a particular decision that he or she has spoken out; it is in these very cases that the need for disclosure, as opposed to secrecy, is strongest.

Finally, it is a wholly disproportionate response to prevent all dissenters from expressing their reasons, simply because, in an exceptional case, aspects of the deliberation process might be inappropriately revealed. There is no reason why this problem, if it does arise at all, is not able to be dealt with by conventional disciplinary procedures in relation to the relevant member.

The principle of deliberative secrecy therefore does not support restricting the expression of dissent in administrative tribunals. With that in mind, it is now useful to consider whether there are good reasons that support recognising the right of a minority tribunal member to express a dissenting opinion. The existence of a right to dissent is not necessarily contingent on the establishment of these reasons; it is conceivable that the basic value of freedom of expression might guarantee the right to dissent irrespective of the value which that dissent might bring. Tribunal members are, after all, public officials, and therefore might also have the benefit of a claim based on, or at least underpinned by, the value of freedom of expression affirmed in the New Zealand Bill of Rights Act 1990. There may therefore be a guaranteed right to dissent, but this article proposes to consider whether a right to dissent should be

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<sup>163</sup> *Supra* note 161, 703.

<sup>164</sup> Hawkins, "Behind Closed Doors II: The Operational Problem – Deliberative Secrecy, Statutory Immunity and Testimonial Privilege" (1996) 10 C.J.A.L.P 39, 40.

independently recognised, irrespective of any justification based on freedom of expression, on account of the desirable consequences which it would bring.

A useful framework for conducting this analysis involves examining the arguments in favour of a general reasons requirement, and considering the extent to which those arguments also apply to dissenting reasons. In this way, the case in favour of dissenting reasons can be assessed, although for the reasons explained earlier, that assessment involves considering whether dissenting members should have the right to dissent, rather than the obligation to.

## V THE RATIONALE BEHIND THE DUTY TO GIVE REASONS; REASONING FROM FIRST PRINCIPLE

There are a number of “compelling” arguments which are commonly made in favour of a general reasons requirement.<sup>165</sup> Many of these arguments are interdependent, but it is nevertheless useful to analyse them individually when assessing any application that they might have to dissenting reasons.

### Improving the Quality of Decision-Making

[Reasons] provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice...in the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so.<sup>166</sup>

As this passage from the Court of Appeal’s judgment in *Lewis v Wilson & Horton Ltd* suggests, a reasoned decision is more likely to be correct.<sup>167</sup> Formulating reasons focuses the mind of the decision-maker, and in particular, makes it more likely that the decision is based on the evidence before them.<sup>168</sup> In the words of the Supreme Court of Canada, giving reasons therefore “reduces to a considerable degree the chances of arbitrary or capricious decisions”.<sup>169</sup> Providing reasons also helps to ensure that decisions are not wrong, as opposed to just not arbitrary. In particular, preparing reasons effectively tests the validity of the decision-maker’s conclusion, and is “the best self-assessment a decision-maker can make of his or her decision”.<sup>170</sup>

In these ways, providing reasons for decisions provides itself for better decisions, which must be an important goal of administrative decision-making. This goal also seems to be furthered by the provision of dissenting, in addition to majority, reasons, for three reasons.

<sup>165</sup> Taggart, “Review”, supra note 17, 442.

<sup>166</sup> Supra note 16, 567.

<sup>167</sup> *R v London Borough of Islington, ex parte Hinds* (1995) 27 HLR 65, 75.

<sup>168</sup> de Smith, Woolf and Jowell, supra note 35, 459; Brown, supra note 50, para 12:5100; Dyzenhaus and Taggart, *Reasoned Decisions and Legal Theory* in D. Edlins (ed.) *Common Law Theory* (Cambridge University Press, New York, Forthcoming, 16 [“Legal Theory”]; Lindsay, “Reasons to be Cheerful” (1994) 6 MLR 954, 956; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381G-H; *R v Sheppard* [2002] 1 SCR 869 [23].

<sup>169</sup> *Northwestern Utilities Ltd v Edmonton (City)* [1979] 1 SCR 684, 706. See generally, Herzog & Karlen, supra note 10, para 83.

<sup>170</sup> *Future Inns Canada Inc v Nova Scotia (Labour Relations Board)* (1997) 473 APR 241, 250.

First, the very awareness that there will, or might be, an express dissent, is likely to result in a better quality decision from the majority. The knowledge that others are going to dissent is likely, in particular, to stimulate greater care and attention in the drafting of the majority reasons.<sup>171</sup> As Munday notes: “the knowledge that one’s fellow Judges may string together a more coherent or better expressed argument spurs one on to apply oneself wholeheartedly to the task of elaborating a judgment that will carry conviction”.<sup>172</sup>

A related point, is that in addition to inspiring the majority to produce better reasons, the dissent may, itself, clarify those reasons. This is because dissenting reasons are likely to highlight the majority position, and in particular, make it clear what the majority *does not* stand for.<sup>173</sup>

Secondly, dissenting reasons may cause the majority to review their decision, and in some cases, alter that decision to endorse a more compelling dissenting opinion. The majority reasons will not always be correct, and in this situation, dissenting reasons are likely to express the better view; it is “wrong to conclude that any minority view only merits suppression”.<sup>174</sup> If minority members can provide dissenting reasons, then it is conceivable that they might, on some occasions, choose to circulate those reasons in a draft form.<sup>175</sup> Where this occurs, the circulation of the draft dissent may cause the majority to realise the error of their ways and support the dissent.<sup>176</sup> This observation certainly accords with judicial experience; as one former American Chief Justice noted, “an opinion circulated to the Court as a dissent, sometimes has so much in logic, reason and authority to support it that it becomes the opinion of the Court”.<sup>177</sup> The case of *Habton Farms v Nimmo* provides a good example of one such situation. In that case, Clarke LJ noted that:<sup>178</sup>

I initially prepared a judgment concluding that the normal measure of damages was appropriate on the facts of this case...I initially formed the view that there was no reason why the normal measure of damages should not apply...Since drafting a judgment in those terms I have seen a draft of Auld LJ’s judgment and, in the light of it, have reached a different conclusion, not on the basis of the reasoning of the judge that all depends upon when property would have passed under the contract, but because I am persuaded that this is a case in which it would not be appropriate to apply the normal measure of damages.

The final point relates to the expression of concurring reasons, as opposed to dissenting ones. The question of whether tribunal members can provide dissenting reasons as of right is, at least partially, linked to the related question of whether

<sup>171</sup> Lynch, Dissent, *supra* note 1, 737, 740, 743; Flanders, “The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable” (1999) 4 *Roger Williams University Law Review* 401, 403.

<sup>172</sup> Munday, “Reasoning Without Dissent; Dissenting Without Reason: Part I” (2004) 168 J.P.N. 968, 972 [“Reasoning Without Dissent I”].

<sup>173</sup> Lynch, Dissent, *supra* note 1, 737.

<sup>174</sup> Munday, “Reasoning Without Dissent; Dissenting Without Reason: Part II” (2004) 168 J.P.N. 991, 993 [“Reasoning Without Dissent II”].

<sup>175</sup> This should not be construed as suggesting that the circulation of draft reasons is a requirement. Any such requirement would, it is submitted, rely on an idyllic but misconceived view of administrative decision making which is at odds with the caseloads of, and demands on, many tribunals.

<sup>176</sup> Lynch, Dissent, *supra* note 1, 741.

<sup>177</sup> Nadelmann *supra* note 2, 420. Justice Kitto, writing extra-judicially, has recounted a similar experience – see Kitto, “Why Write Judgments” (1992) 66 A.L.J. 787, 797.

<sup>178</sup> [2003] 1 All ER 1136 [83], [87] and [89].

tribunal members have the right to provide concurring reasons.<sup>179</sup> Accordingly, if there is a general right to give dissenting reasons, then it is likely that a similar right to provide concurring reasons also exists, although that is not a subject to which comprehensive attention can be given here.<sup>180</sup> There are strong arguments in favour of the right of tribunal members to provide concurring reasons which may, therefore, also support the related right to dissent. In particular, the expression of separate concurring reasons is desirable, at least sometimes, as they are likely to portray the views of the tribunal more accurately than a joint statement of reasons might otherwise do.<sup>181</sup>

This is, in part, simply due to the fact that an opinion written by one tribunal member is unlikely to convey the true nature of another member's thoughts.<sup>182</sup> This difficulty is compounded by the possibility that members who do not have to formulate reasons may be less attentive in the course of the decision<sup>183</sup> and therefore the decision may not, in any event, represent their thoughts anyway. Even if they are paying attention, they may bow to the pressure of more dominant colleagues if unable to express their own reasons. This view was certainly held by Thomas Jefferson, in the context of judicial decision-making, when he raised concerns of a decision reached by Justices:<sup>184</sup>

huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty Chief Justice, who sophisticates the law to his own mind by the turn of his own reasoning.

Furthermore, if tribunal members do insist on the joint reasons reflecting their view, then those reasons may become devoid of all practical meaning.<sup>185</sup> Certainly, any disagreement amongst members will need to be consciously suppressed, in any joint statement of reasons, "in the interest of presenting a common front to the world".<sup>186</sup> Those reasons, therefore, will provide no indication of the true view of the tribunal, and are unlikely to explain the actual basis for the decision.<sup>187</sup> These problems will be exaggerated in the situation raised by Megarry:<sup>188</sup>

Suppose an appeal that can succeed on either of two grounds. Lords A and B would allow the appeal on Ground 1, declaring Ground 2 to be wrong. Lords C and D would allow the appeal

<sup>179</sup> See, generally, Munday, "Reasoning Without Dissent I", supra note 172, 973.

<sup>180</sup> As noted previously, this point was raised but not resolved in the context of arbitration in *Cargill v Simsa* [1998] 1 Lloyd's Rep 489. Waller LJ strongly suggested that a concurring arbitrator would not be entitled to express his own reasons in the award, at least in the context of the GAFTA Rules, but Chadwick LJ preferred to leave the issue open.

<sup>181</sup> Munday, "Reasoning Without Dissent II", supra note 174, 994.

<sup>182</sup> Barwick, *A Radical Tory: Sir Garfield Barwick's Reflections and Recollections* (1995) 222.

<sup>183</sup> Munday, "Reasoning Without Dissent I", supra note 172, 971; Gibbs, "Judgment Writing" (1993) 67 A.L.J 494, 502; Coper, "Joint Judgments and Separate Judgments" in Blackshield, Coper and Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 368.

<sup>184</sup> Coper, "Joint Judgments and Separate Judgments" in Blackshield, Coper and Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 368.

<sup>185</sup> This consideration is concerned with the quality of the reasons for the decision, rather than the quality of the decision itself, but it is nevertheless convenient to address the issue at this point.

<sup>186</sup> Munday, "Reasoning Without Dissent I", supra note 172, 972.

<sup>187</sup> Lynch, *Judicial Dissent*, supra note 6, 100; Lynch, *Dissent*, supra note 1, 724, 738; Coper, supra note 185, 368.

<sup>188</sup> Megarry, supra note 12.

on Ground 2, firmly rejecting Ground 1. Lord E would reject both grounds and dismiss the appeal.

In this situation, if the tribunal members in favour of a decision were divided, possibly equally, over whether the decision should be made on Ground 1 or Ground 2, any statement of joint reasons could not possibly explain the true basis for the decision.

Obviously, this consideration should not be treated as suggesting that tribunal members should always provide their own individual reasons. Other factors, such as time, cost and potential confusion,<sup>189</sup> will often weigh against the desirability of concurring reasons, particularly where there is little or no disagreement amongst those in favour of the decision. Moreover, judges themselves may prefer anonymity and the protection provided by “safety in numbers” in some cases,<sup>190</sup> and so might be unwilling to produce an individual judgment. However, there are clearly some situations where concurring reasons are highly desirable and these situations support a tribunal member’s right to deliver concurring, and therefore dissenting reasons. As noted previously in this section, the right to dissent is also supported by the fact that it is likely to result in better quality decisions, by causing the majority to produce better reasons and, at times, to endorse the dissenting position. With that in mind, the question of whether dissenting reasons furthers the next purpose of reasons can now be considered.

### **Facilitating Party Acceptance and Fulfilling the Basic Demand to be told “Why”**

The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the judge and satisfied the basic human demand of those affected by judicial action to be told why. In this way the losing litigant may be able to accept the decision. The statement of reasons connects the decision to criteria external to the judge and enhances the fairness of the process, as well as demonstrating the rationality of the process.<sup>191</sup>

As the above passage suggests, giving reasons for a decision is more likely to result in the affected parties accepting that decision. Reasons demonstrate that the decision was arrived at through a rational process, and that proper care was taken in that process to reach the correct decision.<sup>192</sup> Furthermore, the disappointed party is reassured that his or her representations and arguments were considered, and that the hearing, with all of its associated procedures, was not a mere “empty ritual”.<sup>193</sup> The party is thereby less likely to consider that the decision is arbitrary, and more likely to accept it.<sup>194</sup>

Even aside from facilitating party acceptance, the provision of reasons also performs a more rudimentary function. There is a basic value of fairness and respect

<sup>189</sup> Barwick, *supra* note 182, 222.

<sup>190</sup> See generally, Stein “Safety in Numbers: Sharing of Responsibility for Judicial Decision in Early Modern Europe” in [no editor] *Diritto e potere nella storia europa: Atti in onore di Bruno Paradisi [Law and Power in European History: Writings in Honour of Bruno Paradisi]* (1982), 271.

<sup>191</sup> Dyzenhaus and Taggart, *Reasoned Decisions and Legal Theory* 16.

<sup>192</sup> Taggart, “Osmond”, *supra* note 40, 60; *R v University of Cambridge ex parte Evans* [1998] ELR 515, 520H-521B.

<sup>193</sup> de Smith, Woolf and Jowell, *supra* note 35, 459-460; Brown, *supra* note 50, para 12:5100.

<sup>194</sup> Fisher, *supra* note 17, 524; *Murphy v Rodney District Council* [2004] 3 NZLR 421, 429.

which requires that the aggrieved party be told, “why”, and this value accords with the obvious human desire of that party.<sup>195</sup> Giving reasons is therefore as much a sign of respect for the dignity of the individual, as it is an attempt to persuade that individual to respect the decision.<sup>196</sup>

There is reason to believe that the provision of dissenting reasons will further both these goals. If a party is more inclined to accept a decision which is the product of reason, then that party should certainly draw comfort from any dissent. Dissent is, after all, a manifestation that “the [decision] is the product of reasoned dialogue”.<sup>197</sup> It demonstrates that the questions presented were thoroughly considered by the tribunal, and indeed, so much so that some of the tribunal members saw fit to disagree with their colleagues.<sup>198</sup> A dissenting opinion further reassures the party that the case was carefully considered by *all* members of the tribunal, and in doing so, appears somewhat more personalised to the party than the “reasons of the Tribunal”.<sup>199</sup> Finally, a disappointed party is likely to draw comfort from the fact that they have successfully persuaded at least some members of the Tribunal to their point of view, which in itself, shows that the procedure was not a mere formality. For all of these reasons, the goal of facilitating party acceptance, and fulfilling the basic human demand to be told “why”, is furthered by the provision of dissenting reasons.

### Promoting Confidence in the Legitimacy of the Decision-Making Process

The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.<sup>200</sup>

Public confidence in administrative tribunals is enhanced if such tribunals provide reasons for the decisions which they make.<sup>201</sup> By and large, reasons help to secure public confidence in administrative decision-making in precisely the same way that they secure a party’s confidence in, and acceptance of, such decision-making; as noted previously, reasons demonstrate that the decision was not arbitrary and was based on reason.<sup>202</sup> For the reasons which were also noted previously, the provision of dissenting reasons also furthers these goals, and therefore promotes public confidence in administrative decisions. The same considerations that apply to

<sup>195</sup> de Smith, Woolf and Jowell, *supra* note 35, 459; Taggart, “Osmond”, *supra* note 40, 60; Kirby, *supra* note 42, 39; Lindsay, “Reasons to be Cheerful” (1994) 6 MLR. 954, 956; *supra* note 30.

<sup>196</sup> Dyzenhaus and Taggart, *supra* note 191, 16; Schauer, “Giving Reasons” (1985) 47 Stan. L.Rev. 633, 658.

<sup>197</sup> Stack, “The Practice of Dissent in the Supreme Court” (1996) 105 Yale L.J. 2235, 2257.

<sup>198</sup> Munday, “Reasoning Without Dissent I”, *supra* note 172, 969; Evans, “The Dissenting Opinion – Its Use and Abuse” (1938) 3 Mo.L.Rev. 120, 129.

<sup>199</sup> Munday, “Reasoning Without Dissent I”, *supra* note 172, 973.

<sup>200</sup> *Supra* note 16 [79].

<sup>201</sup> Lindsay, “Reasons to be Cheerful” (1994) 6 The MLR 954, 956; *Northwestern Utilities Ltd v Edmonton (City)* [1979] 1 SCR 684, 706; *supra* note 167

<sup>201</sup> Lynch, *Judicial Dissent*, *supra* note 6, 101.

<sup>202</sup> Fisher, *supra* note 17, 525.

facilitating party acceptance therefore apply to promoting public confidence, but there is also one other factor which is more properly mentioned here.

Public confidence in administrative decision-making is also contingent, and no doubt a party's confidence is similarly contingent, on the relevant decision-maker being independent and free from improper influences.<sup>203</sup> Here, dissent has a vital role to play. The provision of dissenting reasons is a testament to the body's independence;<sup>204</sup> it has been described as "one of the key indicators of a robust and independent judicial system".<sup>205</sup> As Justice William Douglas noted in 1948:<sup>206</sup>

Certainty and unanimity of the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of *Der Fuehrer*, with a minority of one or four deploring or denouncing the principles themselves. One cannot imagine a judge of a Communist court dissenting against the decrees of the Kremlin.

Admittedly, there is a live issue as to whether tribunals are, and should be, truly independent at all;<sup>207</sup> in *Claydon v Attorney-General*,<sup>208</sup> the Court of Appeal suggested that the judicial paradigm of independence was not entirely applicable to tribunals.<sup>209</sup> These suggestions are certainly consistent with the process by which members are appointed to such tribunals, which is often based on nothing other than political patronage. There may therefore be qualifications to tribunal independence, but even despite those qualifications, tribunal independence is at least to some degree still important. This is well illustrated in *Claydon* itself, where several members of the Court specifically recognised the general importance of tribunal independence, despite the qualifications which they placed upon it. McGrath J stated that "it is of course important that such bodies are independent and free from pressure in adjudicating on matters before them",<sup>210</sup> and Glazebrook J similarly declared that "independence of a tribunal is of course important and the executive and legislative branches of government must take this into account when considering any measures which could affect a tribunal".<sup>211</sup> The Court's recognition of this independence is, to at least some degree, supported by traditional principles of judicial review – in an extreme situation, a tribunal which was not able to independently reach its own decision at all might be challenged on the basis that it had acted under dictation.

Accordingly, independence is important to tribunal decision-making, and for the reasons stated earlier, it is important for public confidence that the tribunal is perceived to have this independence. This perception can be promoted by recognising a right to dissent, which, when invoked, provides a manifestation of tribunal independence.

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<sup>203</sup> *Ibid.*

<sup>204</sup> Lynch, Dissent, *supra* note 1, 725-726.

<sup>205</sup> Lynch, Judicial Dissent, *supra* note 6, 81.

<sup>206</sup> Douglas, "The Dissent: A Safeguard of Democracy" (1948) 32 *J. Am. J. Soc.* 104, 105.

<sup>207</sup> See generally, Sossin, "From neutrality to compassion; The place of civil service values and legal norms in the exercise of administrative discretion" (2005) 55 *U.T.L.J.* 427.

<sup>208</sup> [2004] NZAR 16.

<sup>209</sup> *Ibid* [49]-[53], [90]-[99], [108]-[115].

<sup>210</sup> *Ibid* [95].

<sup>211</sup> *Ibid* [114]. This comment was reinforced by a similar statement in the very next paragraph – see *Ibid* [115].

## Facilitating the Exercise of Appeal or Review Rights

A statement of reasons allows the losing party to see whether there is a reviewable error of fact, law or reasoning worth challenging and, if so, the grounds of challenge. It may also deter appeals in cases where the losing party is persuaded, for the reasons expressed by the tribunal, that there is no point in taking the matter further.<sup>212</sup>

The giving of reasons enable a party to decide whether there is a good basis for appealing the decision or seeking judicial review.<sup>213</sup> Without reasons, a person may be unable to determine whether the decision is flawed;<sup>214</sup> they are left, in the words of Lord Mustill, with “virtually no means of ascertaining whether the decision-making process has gone astray”.<sup>215</sup> This is likely to lead to a greater number of unjustified challenges to tribunal decisions, as a party does not know whether the decision was rightly decided, and, for the reasons stated earlier, will be inherently less likely to accept an unreasoned decision.<sup>216</sup>

The extent to which dissenting reasons assist a party to exercise appeal or review rights is closely related to the way in which those reasons also assist the appellate or reviewing body. It is therefore convenient to postpone the consideration of both matters until the latter topic is addressed in the next section.

## Enabling the Appellate or Reviewing Body to Review the Decision

The second main reason why it [is] said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate Courts. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by section 27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined.<sup>217</sup>

Reasons are necessary not only to enable a party to decide whether or not to appeal or seek judicial review, but also, to enable the appellate or reviewing body to conduct such a review.<sup>218</sup> Reasons are the most cogent and sometimes only evidence of how a decision has been made, and therefore must be provided if a party is to

<sup>212</sup> Fisher, *supra* note 17, 524.

<sup>213</sup> Brown, *supra* note 50, para 12:5100; Wade and Forsyth, *supra* note 22, 519; Calamandrei, *Procedure & Democracy* (1956) 53; Lindsay, “Reasons to be Cheerful” (1994) 6 MLR 954, 956; *supra* note 167; *Northwestern Utilities Ltd v Edmonton (City)* [1979] 1 SCR 684, 706.

<sup>214</sup> *Supra* note 23, 256.

<sup>215</sup> *Supra* note 30, 565.

<sup>216</sup> Dyzenhaus and Taggart, *supra* note 191, 16; de Smith, Woolf and Jowell, *supra* note 35, 459; Taggart, “Should Canadian Judges be Legally Required to give reasoned decisions in civil cases?” (1983) 33 U.T.L.J. 1, 6.

<sup>217</sup> *Supra* note 16, [80].

<sup>218</sup> Herzog & Karlen, *supra* note 10, para 83; Lindsay, “Reasons to be Cheerful” (1994) 6 MLR 954, 956.



effectively exercise his or her right to appeal or seek judicial review.<sup>219</sup> Without this information, either “right” is illusory, as it will normally be impossible for a party to establish his or her case.<sup>220</sup> As Calamandrei observes: “an appeal presupposes a criticism and a censure of the act appealed against and this is hardly possible when the reasons and the justification for the act are not stated”.<sup>221</sup>

As stated earlier, the extent to which dissenting reasons assist an appellate or review body to assess the decision is closely connected to the ways in which those reasons help the party to assess the merits of such a challenge. There is a considerable benefit, for both purposes, in dissenting reasons being provided in the original decision. Dissenting reasons may provide details which are critical to both a party’s decision to appeal or seek judicial review and the appellate or reviewing body’s subsequent determination. This is particularly where the ground of review or challenge is an alleged breach of natural justice, and this point is best illustrated by a number of examples that show the value of dissenting reasons in this context.

The first such example is the case of *Graphic Communication Union, Local 41M v Ottawa Citizen*<sup>222</sup> (“Graphic Communication”). The subject matter of that case is not important for present purposes, and essentially, the majority of a Board of Review had upheld the dismissal of the plaintiff. That was, however, a majority finding, and the reasons of the dissenter contained the following statement:<sup>223</sup>

Finally, all of the above concerns combined with what can only be described as the style of the decision, leads me to have grave concerns with respect to the impartiality of the majority. The decision is so overzealous in its attack on the grievor, so uncritical in its acceptance of the employer’s witnesses, and so misleading in its findings of fact, so as to lead one to seriously question the legitimacy of the decision. The decision leads to clear apprehension of bias

...

In summary, I find that the grievor ought to have been reinstated with the lengthy suspension. I find the decision of the majority troubling to the point where I believe that an apprehension of bias is raised. As I have mentioned previously, evidence is misstated, or worse findings are made without any evidence or in the face of specific evidence to the contrary, there is no balance[d] approach to the assessment of the evidence. The tone of the decision is not in accord with the testimony. Evidence and argument presented on behalf of the grievor is completely ignored. The majority makes findings inconsistent with oral rulings made during the course of the hearing, and no comment is made regarding counsel for the employer’s breach of a Board order regarding the discussing of evidence with a witness under cross-examination.

It is difficult to imagine a more salient piece of information for a disappointed party who is deciding whether or not to appeal against the decision, or seek judicial review. Furthermore, a Judge presiding over an appeal or review proceeding would surely think twice before dismissing the minority member’s concerns. Even if the dissenting reasons did not, on their own, establish a ground of review or support an appeal, they would certainly direct the Court’s attention to the critical areas of alleged

<sup>219</sup> *Algoni Pty Ltd v Secretary, Department of Industrial Relations* (19 December 1985), unreported, CA, NSWCA noted in Kirby, *Accountability*, supra note 67, 49.

<sup>220</sup> Kirby, *Accountability*, supra note 67, 51; Lindsay, “Reasons to be Cheerful” (1994) 6 MLR 954, 956-957; Brown, supra note 50, para 12:5100.

<sup>221</sup> Calamandrei, *Procedure & Democracy* (1956) 55.

<sup>222</sup> 128 O.A.C. 208.

<sup>223</sup> *Ibid* per Browne J [13].

impropriety and provide an impetus for closer analysis of those areas.<sup>224</sup> The dissenting reasons in *Graphic Communication* therefore contained information which was highly relevant to both the disappointed party and the reviewing body, and the case is not an isolated example in this regard. There are at least two other situations where this has also been true.

The first situation involves a case that has already been discussed, *Glengarry Memorial Hospital v Ontario (Pay Equity Hearings Tribunal)*.<sup>225</sup> In that case, the minority member of a Canadian Pay Equity Tribunal, Mr. Donald Dudar, stated in his dissenting reasons that there were events “which call into serious question whether the parties’ rights to natural justice have been respected”.<sup>226</sup> In another Canadian case, a similar situation occurred, and a minority arbitrator alleged that the majority had been biased and prejudiced.<sup>227</sup> A final example of a situation where the minority views *may* have been relevant to a subsequent appeal also involves a case which has already been referred to, *Parry*.

The *Parry* decision itself can certainly not be taken as authority that a reviewing or appellate body will necessarily endorse the views of a minority tribunal member. As mentioned earlier, Priestley J’s judgment contained appropriate qualifications in this regard, which actually limited the weight which could be attached to a minority opinion of a tribunal member:<sup>228</sup>

[I]t would in my judgment be wrong in principle for any Court sitting in an appellate or review jurisdiction to entertain the view that the opinions, findings or decisions of medical and/or specialist members of the Tribunal are entitled to greater weight and respect than the decision of the Tribunal as a whole. Certainly minority views can be called into aid to mount attacks in relation to the merits, relevance, bias, jurisdictional error, breach of natural justice, fairness and so on. But care must be taken in that process to ensure that the findings and opinions of specialist members or medical members of the Tribunal are not accorded any greater weight or respect than the views expressed by other members of the Tribunal. To do otherwise would be to fly directly in the face of legislative intent.

The relevance of *Parry* in this context is therefore not for what was said in that judgment itself, but rather, for what transpired after the judgment in subsequent proceedings. *Parry*, after all, was only a decision on an interlocutory matter, and after it was decided, the substantive appeal against the two decisions of the Medical Practitioners Disciplinary Tribunal was heard. As it turned out, Judge Hubble went on to partially allow the appeal<sup>229</sup> in such a way that favoured the opinion of the minority tribunal member, the now identified Dr. R. W. Jones, on all points. Accordingly, the first majority finding which Dr. Jones had dissented from, that a second count of disgraceful conduct had been established, was reversed.<sup>230</sup> Similarly,

<sup>224</sup> There may be some restriction on the ways in which the dissenting reasons can be used by the Court in any appeal or on judicial review. At least in an arbitration situation, the minority adjudicator’s opinion appears to have no value as far as findings of fact are concerned but is or may be persuasive on questions of law: *Stinnes Intercoil GmbH v A Halcoussis & Co, The Yanxilas* [1982] 1 Lloyd’s Rep 445, 450; *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [1998] 4 All ER 286, 288. It is unclear whether this principle extends to the minority reasons provided by a dissenting tribunal member.

<sup>225</sup> Supra note 161.

<sup>226</sup> Supra note 162.

<sup>227</sup> *Noble China Inc. v Lei* (1998) 81 OTC 1; 42 OR (3d) 69.

<sup>228</sup> Supra note 102, [16].

<sup>229</sup> *Parry v Medical Practitioners Disciplinary Tribunal* [2001] DCR 769.

<sup>230</sup> *Ibid* [77]-[82].

the majority finding that Dr. Parry's name be completely removed from the Register was also reversed, and it was replaced with Dr. Jones' conclusion that Dr. Parry should be allowed to practice restrictively in the area of ultrasound and obstetrics.<sup>231</sup> Judge Hubble's judgment was subsequently upheld on appeal by a different High Court judge.<sup>232</sup>

One wonders, but can only wonder, if Judge Hubble was more inclined to reach this decision by reason of the fact that at least one member of the tribunal, the only specialist in the relevant area, also supported it. It certainly may not be a coincidence that His Honour agreed with the minority member in every respect, and if it is not, then Judge Hubble certainly derived assistance from the minority member's opinion. Even if this was not a situation where the minority reasons were helpful to either the party or the Court there are plenty of other cases, some of which have been noted above, where they have been. Collectively, these cases suggest that dissenting reasons can help a party decide whether to appeal or seek judicial review of a decision, and furthermore, can assist the body which is hearing any challenge. Accordingly, the right to give dissenting reasons is supported by both considerations.

### Promoting Consistency in Decision-Making and Providing Guidance for Future Cases

[Another] function of the courts can be described as law-making or law-announcing. [There] are cases in which the courts develop, change or modify the law. In most cases at first instance and in many that reach the intermediate appellate court, the controlling rule of law is not in controversy; rather what is disputed is the facts or the application of the law to the facts...The reasons for decision for judgment, buttressed by the doctrine of precedent and their innate persuasiveness, give some indication of how future disputes will be decided and give guidance to lawyers who advise the public as to the propriety of past, present and future conduct. This is the forward-looking function of the courts and the reasoned decision.<sup>233</sup>

The final purpose of reasons is to promote consistency in decision making and provide guidance for further cases. This purpose is reflected, in a judicial setting, by the doctrine of precedent; every decision makes law for the future, and is itself constrained by previous decisions.<sup>234</sup> The principle is less strong in administrative decision-making, and one could be forgiven for questioning whether it applied at all in this area, given that such decision-makers cannot fetter their discretion with self-created rules of policy.<sup>235</sup> The latter rule certainly limits the application of precedent for administrative tribunals, and means that tribunals cannot lose sight of the merits of the case when developing and applying precedent.<sup>236</sup> Lord Devlin explained this as follows:<sup>237</sup>

<sup>231</sup> *Ibid* [106]-[118].

<sup>232</sup> *Director of Proceedings v Parry* (15 October 2001) unreported, HC, Auckland, AP61-SW01, Paterson J.

<sup>233</sup> Dyzenhaus and Taggart, *supra* note 191, 14-15.

<sup>234</sup> John P Dawson "The Functions of the Judge" (Paper delivered for The Voice of America Forum Lectures, Law Series No 2) 1.

<sup>235</sup> Flick, "Administrative Adjudications and the Duty to Give Reasons: A Search for Criteria" (1978) P.L. 16, 38.

<sup>236</sup> *Ibid*, 39-40..

<sup>237</sup> *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, 193.

In my opinion a series of reasoned judgments such as the tribunal gives is bound to disclose the general principles on which it proceeds. I think that that is not only inevitable but also desirable. It makes for uniformity of treatment and it is helpful to the industry and to its advisers to know in a general way how particular classes of applications are likely to be treated. But the tribunal may not, in my opinion, make rules which prevent or excuse either itself or the licensing authority from examining each case on its merits.

A second reason to question whether precedent applies to administrative tribunals might arise from the nature of such decision-making, which is often concerned with questions of policy or discretion rather than law. However, as Flick points out, the doctrine of precedent is still of ongoing relevance even where this is true:<sup>238</sup>

At an early date, it was assumed that a fundamental difference between the administrative procedure and the procedure at law was that the administrative tribunals reached a decision not according to fixed rules of law, but according to governmental policy or discretion. This attitude would prevent, or at least hinder, the development of precedent in the area of administrative adjudication. A tribunal initially set up for reasons of its expertise in a field in which the government can only give vague guidelines is sure, in the space of time, to frame its own rules and formulate its own criteria according to which its discretion will be exercised. If reasoned opinions are to be given, these rules and criteria will be known to the public and will act as a check on the exercise of discretionary power. Thus, not only will the public have a guide to formal adjudications, a valuable body of administrative precedent will also act as a check on informal adjudications.

Accordingly, the doctrine of precedent is relevant to administrative tribunals,<sup>239</sup> although it applies less strongly here than it does in the courts.<sup>240</sup> The reasons which a tribunal provides for its decisions therefore promote consistency, and provide a guide as to how similar cases might be decided in the future.<sup>241</sup> Both of these values are of fundamental importance to both the tribunal itself, and the general public.

Most fundamentally, the consistency provided by a system of administrative precedent is, in and of itself, an important value.<sup>242</sup> As Dawson points out, the principle that “like cases are treated alike” is important.<sup>243</sup>

When decisions are known, especially if they are coupled with reasons, continuities are almost certain to develop. Surely Americans are not different from other human beings in wanting and expecting continuity and consistency in decisions, no matter who may make them. It is confusing and apt to seem unjust for the same problem to be decided in different ways merely because the decisions are made at different times or between different people. For the persons

<sup>238</sup> Flick, *supra* note 235, 37-38.

<sup>239</sup> Many agencies in the United States even prepare and publish reasoned opinions which resemble judicial decisions, and these opinions frequently cite other decisions of the agency, and at times, even overrule them: Flick, *supra* note 235, 40.

<sup>240</sup> Fisher, *supra* note 17, 525.

<sup>241</sup> *Ibid.* This is true to the extent that the courts *may* decide that a departure from a policy or precedent defeated a legitimate expectation, and therefore is a ground for judicial review: Flick, *supra* note 235, 41.

<sup>242</sup> Dawson, *supra* note 234, 2; Fisher, *supra* note 17, 525; *Murphy v Rodney District Council* [2004] 3 NZLR 421, 431-432.

<sup>243</sup> Dawson, *supra* note 234, 2.

affected by decisions, consistency is an important virtue, not only because it permits prediction but because it seems much more fair.

Furthermore, the precedent provided by the collective reasons of the tribunal promotes the orderly conduct of affairs. Individuals can order their affairs in reliance upon the anticipated outcomes of tribunal decisions.<sup>244</sup> In this way, the doctrine of precedent, and therefore the provision of reasons for administrative decisions, is also a sign of respect for the dignity of the individual. Precedent may also be helpful for the tribunal itself, as it serves as a guide to members of that tribunal and assists them to make future decisions.<sup>245</sup>

Finally, the effect of a system of precedent, in which individuals can make rational judgments in reliance on likely tribunal decisions, is also likely to be positive both for those individuals and the relevant tribunals. In particular, parties will be deterred from making applications to a tribunal where those applications are likely, in light of previous decisions, to be unsuccessful.<sup>246</sup> The “rule-stock” that is provided by the previous reasons of the tribunal therefore prevents wasteful litigation of the same issues in future cases.<sup>247</sup>

The precedent which derives from reasons therefore promotes consistency in decision-making and provides guidance for future cases, both of which are beneficial to administrative tribunals themselves and the general public. These benefits are likely to be enhanced if dissenting reasons accompany the reasons for the decision. This is primarily because the benefits that result from a system of administrative precedent are contingent on the accuracy and quality of the reasons given for decisions, and the existence of dissent enhances these reasons.

The way in which dissent enhances the reasons for a decision has, for the most part, already been outlined. Dissenting and concurring reasons offer a better “picture” of the decision than a statement of joint reasons might do on its own. In particular, they clarify exactly how the case was decided, and leave an outsider in no doubt as to the views held by each member.<sup>248</sup> The exact way in which they do so has already been described earlier in this article, and there is little point repeating this analysis. It is worthwhile, however, to note one particular consideration which arises when considering the role that dissenting reasons play in a system of precedent.

Dissenting reasons represent the view of the minority, but they will not necessarily do so forever. Frequently, a judicial dissenting opinion introduces ideas which go on to become the views of the majority;<sup>249</sup> it effectively serves as a “foothold for future legal change”.<sup>250</sup> Hughes therefore noted that:<sup>251</sup>

<sup>244</sup> Brown, supra note 50, para 12:5100; Fisher, supra note 17, 525; *R v Sheppard* [2002] 1 SCR 869, [22].

<sup>245</sup> Brown, supra note 50, para 12:5100; Fisher, supra note 17, 525

<sup>246</sup> de Smith, Woolf and Jowell, supra note 35, 459.

<sup>247</sup> Posner, *Economic Analysis of Law* (2 ed, 1977) 419-420 noted in Taggart, “Should Canadian Judges be Legally Required to give reasoned decisions in civil cases” (1983) 33 U.T.L.J. 1, 19.

<sup>248</sup> Coper, supra note 184, 368.

<sup>249</sup> Herzog & Karlen, supra note 10, para 85; Nadelmann supra note 2, 432; Lynch, Dissent, supra note 1, 726.

<sup>250</sup> Munday, “Reasoning Without Dissent II”, supra note 174, 993.

<sup>251</sup> Hughes, *The Supreme Court of the United States – Its Foundation, Methods and Achievements: An Interpretation* (1928) 67-68.

A dissent... is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

There is no reason why this role of dissent is restricted to a judicial setting, and the dissenting opinion of an administrative tribunal member is often likely to be based on similar sentiments. Where this does occur, it is important that such reasons are disseminated, as the benefits that result from promoting consistency and providing guidance for future cases will otherwise be undermined. This is particularly so if the dissenting reasons, as they often do, show that a decision was finely balanced. Without dissenting reasons, a later decision may appear plainly inconsistent with an earlier decision when, in reality, dissenting reasons would have simply revealed that both cases were finely balanced. In other situations, parties may have relied, to their detriment, on a decision which was subsequently overturned, when knowledge of the dissent would have allowed them to provide for the possibility of the decision not being followed. Finally, if a dissenting opinion is not disclosed, then subsequent tribunal members will be deprived of the thoughts and arguments in that opinion. This opinion would otherwise be a form of guidance which would assist such members to decide the case, particularly where a change in the status quo was advocated.

The preceding analysis shows that dissenting reasons, like majority ones, clearly promote consistency in decision-making and provide guidance for future cases. This is not the only reason why dissent is desirable, and as this article has demonstrated, all of the arguments in favour of a general reasons requirement also apply to dissenting reasons. In addition to these arguments, there may also be other reasons, which have not been canvassed in this article, as to why dissenting reasons should be provided. The philosophical basis for the duty to give reasons could, for example, provide one such area of argument,<sup>252</sup> but now is not the occasion to consider that area, nor is there time. It suffices to observe that, on the basis of the analysis conducted in this article, there are many reasons why the expression of dissent on administrative tribunals is highly desirable. Indeed, the rationale for the duty to give reasons applies so strongly to dissent, that one might even conclude that minority tribunal members are *obliged* to provide reasons, if it was not for the factors noted at the start of this article.

It therefore seems likely that administrative tribunal members must, at the very least, have *the right* to express their dissent. Before expressing a conclusion on this point, though, it is necessary to consider the arguments against such a right. Concerns as to deliberative secrecy have already been addressed, and so a useful way in which to consider the arguments against dissenting reasons is, once again, to start with the general arguments that are made against reasons per se. These arguments are, for the most part, unconvincing, and have already been rejected by both academic commentary and the growing judicial recognition of a right to reasons. This article therefore does not propose to recite such arguments and the various responses that are made to them, and instead will focus on any particular application which they might have to dissenting reasons.

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<sup>252</sup> See generally, Dyzenhaus and Taggart, *supra* note 191.

## VI REASONS AGAINST REASONS; DISADVANTAGES OF DISSENT

### Increased Costs and Delay

The most common argument against requiring administrative decision-makers to provide reasons for their decisions is that any such requirement increases the burden on administrative decision-makers, and leads to greater cost and delay.<sup>253</sup> Elsewhere, that argument has been heavily criticised,<sup>254</sup> but it is, in any event, simply not relevant to the current consideration.

Requiring minority decision-makers to provide dissenting reasons may well place an extra burden on them, but it is difficult to see how giving them an option to do so does this. The current question, after all, is whether minority members of tribunals should have the *right* to express dissenting reasons, rather than the *obligation*. Recognising this right places no burden whatsoever on decision-makers, unless they themselves choose to provide dissenting reasons. The fact that some may take up the invitation, which will take time and resources away from other decision-making, cannot provide a coherent reason for denying the right to dissent; the same could be said of decision-makers who simply think more carefully about decisions, or formulate reasons in favour of a tribunal decision that are better than adequate, but it is never seriously suggested that the right to do either of these things should be restricted. The argument of increased costs and delay therefore provides no argument at all against the right to provide dissenting reasons, and there is little point in discussing it further.

### Reduced Finality

A second argument against reasons is that they undermine the finality which is important in any adjudicative process, and is particularly important in administrative decision-making. The concern is that a disappointed party might scrutinise the reasons “in the hope of detecting some shortcoming for which to seek redress in the courts”.<sup>255</sup> This argument has never been particularly strong, given that reasons often discourage unnecessary litigation by convincing the losing party that it is not worth challenging the decision.<sup>256</sup> The reasons are therefore only likely to be challenged where they are erroneous, and in these situations, that challenge can hardly be said to be unjustified.

The same response explains why dissent does little to undermine the finality of administrative decisions. The actual existence of dissent may indicate that a decision was finely balanced, but for the reasons explained earlier, a party can probably ascertain that fact whether or not dissenting reasons are given. The knowledge of this dissent, if it is not explained by reasons, may arouse the suspicions of a disappointed party and increase the likelihood that the disappointed party will challenge the

<sup>253</sup> de Smith, Woolf and Jowell, supra note 35, 460; supra note 21, 554; Brown, supra note 50, para 12:5213.

<sup>254</sup> Taggart, “Osmond”, supra note 40, 55; Taggart, “Review”, supra note 17, 442; Kirby, supra note 42, 51.

<sup>255</sup> de Smith, Woolf and Jowell, supra note 35, 460-461. See also Fisher, supra note 17, 526; supra note 23, 257A.

<sup>256</sup> Fisher, supra note 17, 526.

decision. Dissenting reasons may therefore often perform an important role in allaying such suspicions by making it clear that the disappointed party has no basis for challenging the decision. At other times, the dissenting reasons may encourage a party to appeal the decision or seek judicial review, and earlier, some dissenting reasons which would positively incite such a challenge were referred to. In these situations, however, there is likely to be a good reason for that challenge, and so it is problematic to assume that finality is necessarily desirable; clearly, finality is not always desirable, or there would be no point in having either appeals or judicial review.

### Timidity in Decision-Making

Another criticism of the requirement to provide reasons is that it may result in timid decision-making. A reasons requirement is said to discourage difficult or controversial decisions, and particularly those which find against a claimant, as such decisions will need to be justified by a “lengthy and complex explanation of reasons”.<sup>257</sup> This argument has never been particularly compelling, given that the courts’ approach to the adequacy of reasons has been, if anything, too forgiving.<sup>258</sup> Moreover, as McCormac points out, “if a judge is in a position in which there is a reason that he or she is unwilling to state, the reason should be reexamined”.<sup>259</sup>

Dissenting members themselves are hardly likely to make timid decisions to avoid an exacting reasons requirement, given that no such requirement exists for them at all. Accordingly, the only possible way in which timidity might result from a right to dissent is if the dissent, or knowledge of a proposed dissent, discouraged the majority from making a difficult decision. This does not appear to have occurred when dissent has been expressed in administrative tribunals in the past, but it is questionable, even if it did occur, if that result would be a bad thing. If the majority are unwilling to defend their conclusion against criticism, and are concerned that the reasoning of a dissent will appear more attractive, then one must question whether the decision which they propose to reach is desirable at all; they should not be in a position where they are unwilling to defend their decision.

Before departing from this topic, it is interesting to note that it is also broadly relevant to another issue which has also been referred to in this article. The cases of *Parry* and *Gosselin*, which were discussed earlier, both suggested that a party had the right to know the identity of the minority member(s) of a tribunal. The concern of timidity could conceivably be invoked to criticise this result, on the basis that, if it is correct, tribunal members may be discouraged from dissenting at all by the knowledge that their identity may be disclosed. On one view, this criticism is not particularly strong, as it suffers from the same weakness as the general timidity argument; tribunal members should not reach a decision that they are unwilling to be associated with anyway. The position is slightly more complicated than that, however, as it is equally possible that the dissenting view is actually the better one, and the would-be dissenter(s) is simply not willing to forgo the protection provided by “safety in numbers”. Accordingly, the result in *Parry* and *Gosselin* might well be called into question, on the basis that it results in the suppression of desirable dissent.

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<sup>257</sup> Ibid 526; de Smith, Woolf and Jowell, *supra* note 35, 461.

<sup>258</sup> Taggart, “Review”, *supra* note 17, 442.

<sup>259</sup> McCormac, “Reason Comes before Decisions” (1994) 55 Ohio St. L.J. 161, 165.



### Legalisation and *pro forma* reasons

The fourth argument which is made against a reasons requirement is that such a requirement might result in a “legalisation” of administrative decision-making. The concern, in particular, is that the reasons may become *pro forma* and be written “largely with a view to making to making them ‘judge-proof’” rather than truly informing the parties of the actual reason for the decision.<sup>260</sup> This argument has also been heavily criticised by academics, who point out that the concern is overblown, and simply shows that there is a need for an adequacy test.<sup>261</sup> Even if the argument is a valid criticism of an *obligation* to give reasons, it is, like many of the other arguments against a reasons requirement, simply not relevant to the *right* of minority tribunal members to give dissenting reasons. This is, once again, because a right to give dissenting reasons imposes no obligation on a minority tribunal member to do so. Accordingly, a dissenter is hardly likely to make a conscious choice to inform the parties of the reasons for his or her decision, and then turn around to provide them only with a “judge-proof” set of *pro forma* reasons that does nothing of the sort; if he or she does not want to explain their actual reasons, then they need not make any attempt to do so at all.

### Inappropriate Analogy

The final argument against requiring reasons is that the judicial paradigm, where the requirement is sourced from, is an inappropriate analogy for administrative decision-making.<sup>262</sup> The argument states that administrative decision-making involves different considerations to the purely adjudicative inquiries which courts make, and as a result, the rationale for requiring reasons does not apply equally to both.<sup>263</sup>

The “inappropriate analogy” argument need not be considered at length, for the simple reason that it is not inconsistent with a right to dissent. Properly understood, the argument has never suggested that written reasons are always undesirable in an administrative setting; it merely asserts that they may, in some situations, be inappropriate, and so there should be no absolute requirement to provide them.<sup>264</sup> In this light, it is difficult to see how the argument, even if it is valid, would prevent a tribunal member from expressing his or her dissenting views in a situation where he or she clearly believed that there was value in doing so. In the course of this article, consideration has already been given to many situations where this might occur.

<sup>260</sup> Brown, *supra* note 50, para 12:5100; Aronson, Dyer and Groves, *supra* note 21, 554.

<sup>261</sup> Taggart, “Osmond”, *supra* note 40, 64-65; Taggart, “Review”, *supra* note 17, 442.

<sup>262</sup> See generally, Mashaw, “Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise” (2005) 55 U.T.L.J. 497 and Macdonald and Lametti, “Reasons for Decisions in Administrative Law” (1990) 3 C.J.A.L.P. 123.

<sup>263</sup> Macdonald and Lametti, “Reasons for Decisions in Administrative Law” (1990) 3 C.J.A.L.P. 123, 146-147, 150.

<sup>264</sup> *Ibid* 128, 134-135.

## VII CONCLUSION

As has been noted over the preceding pages, the arguments against a duty to give reasons are, for the most part, unconvincing. These arguments are particularly unconvincing when applied to the question of whether minority tribunal members should have the right, as opposed to the obligation, to give dissenting reasons. Earlier, this article also considered whether principles of deliberative secrecy might provide an argument against a right to give dissenting reasons, and concluded, for a variety of reasons, that they did not. There are therefore few reasons to think that a right to dissent is undesirable. In contrast, there are a large number of considerations in favour of precisely the opposite conclusion, and the same arguments which suggest that reasons are desirable suggest that dissenting reasons are too.

As a result, the conclusion that administrative tribunal members have the right to express dissenting reasons appears almost inevitable. This must necessarily be a right, rather than an obligation, given that the duty to give reasons for decisions does not seem, on any analysis, to extend to dissenting reasons. Both of these observations seem to accord with the only authority, of any sort, which appears to have ever touched on this area. In 2003, the Law Reform Commission of Saskatchewan released a Consultation Paper which addressed many aspects of Tribunal procedure.<sup>265</sup> This paper observed that:<sup>266</sup>

We are also aware that some tribunals are uncertain whether dissenting opinions should be included in reasons for decision when all members of the tribunal do not agree. Most often, the problem has arisen because a board member wishes to record his or her dissent. In our view, it would be appropriate to adopt as the default rule confirmation of the right of a tribunal member to insist on including a dissent in the tribunal's reasons for decision. A more difficult question is whether dissenting reasons should always be included when a tribunal is not unanimous. Some administrative codes make such a requirement. At present, we do not believe such a requirement is necessary.

With this in mind, it is useful to conclude the analysis of these issues with a brief reference to the case that raised them in the first place, *Parry*. That case, it will be recalled, held that a party has the right to know the identity of the dissenting member(s), but failed to explain why this was so. An attempt at rationalising the result on the basis of a right to “know your accuser” was made in this article, but this attempt did not purport to decide whether the case was rightly decided. Accordingly, it is conceivable, particularly given the concern as to timidity which was raised earlier, that *Parry* might have been wrongly decided.<sup>267</sup>

Strictly speaking, the validity of *Parry* does not affect either of the conclusions made in this article, which were reached without reliance on that decision. However, it is interesting to note that the correctness of the decision may nevertheless have a strong practical effect on the way in which the right to dissent is exercised. When combined with the other conclusions expressed in this article, *Parry* suggests that a party is entitled to know of the existence of a dissent, but is not entitled to an accompanying explanation. In itself, this is likely to cause a party to become

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<sup>265</sup> The Law Reform Commission of Saskatchewan *Consultation Paper: A Model Code of Procedure for Administrative Tribunals* (May 2003).

<sup>266</sup> *Ibid* para 3.2.

<sup>267</sup> In this event, the dictum in *Gosselin* would, of course, be incorrect also.

suspicious of the decision, and possibly challenge it.<sup>268</sup> Accordingly, if *Parry* is correct, then minority tribunal members may, as a matter of custom, provide dissenting reasons in order to discourage any sort of challenge. Perhaps, this is just another reason why the decision may be wrong.

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<sup>268</sup> See generally, Munday, "Reasoning Without Dissent II" *supra* note 174 and Herzog & Karlen, *supra* note 10.