**Perspectives and Reflections on Decision Writing- What is it We Do?**

By Peter D. Lauwers- November 2016[[1]](#footnote-1)

[Ask about experience levels and tribunal types}

As public servants, the duty of decision makers like judges and tribunal members is to do the right thing, for the right reason, in the right way, at the right time, in the right words. This is the deceptively simple formula for good decisions and for good reasons. A decision in which you do all of these things right will usually achieve justice and the specific objectives assigned to your tribunal by legislation. It will also survive judicial scrutiny.

I begin by making two general observations about the fraught relationship between tribunals and courts. First, there is no escaping the way courts look at tribunal decisions; everything is seen by a court through judicial lenses. Reviewing courts adapt the practices and standards that have evolved to control the conduct of trial judges and apply them to tribunals. Second, don’t be upset when you get corrected by a court. Judges too get corrected in the interests of justice; no one always gets it right. Don’t’ take it personally. Our common concern must always be justice.

In my talk today I will discuss two perspectives that guide courts in judicial review. The first is why reasons are necessary and the second is the standard of review. You will see how these two perspectives converge. Then I will talk about the content and format of reasons. I will spend some time on how to set out the evidence of witnesses, and on some typical problems we see. I will end by reviewing some suggested “Do’s and Don’ts.”

1. **Why reasons are necessary**

In recent years there’s been a continuing conversation about the duty to give reasons that explain a decision. The cases talk about accountability, intelligibility, adequacy and transparency.

**Accountability**

The Supreme Court’s decision in *R. v. Sheppard*[[2]](#footnote-2)is often cited. I highlight a few of the Court’s comments:

The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

**Intelligibility**

In *R. v. R.E.M*.[[3]](#footnote-3) Chief Justice McLachlin focussed on intelligibility:

The basis …must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent.

She explained that:

In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

The Chief Justice is referring to the need to lay out the chain of reasoning. In discerning that chain, the court reads the reasons: “as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered.”[[4]](#footnote-4)

**Adequacy**

Adequacy is a functional concept. Reasons must be adequate in terms of their various purposes, which go beyond simply announcing the result:

"Adequacy" is to be assessed in light of the functions performed by reasons: enhancing the quality of decisions, assuring the parties that their submissions have been considered, enabling the decision to be subject to a meaningful judicial review, and providing future guidance to regulat[ors]… Equally important, the adequacy of the reasons must be assessed in context, including the agency's record, the issues to which the reasons relate, and the scope of the agency's expertise.[[5]](#footnote-5)

**Transparency**

What are the policy reasons for encouraging tribunals to write good decisions? As the Supreme Court of Canada said in *Baker*:

Reasons… foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out.  The process of writing reasons for decision by itself may be a guarantee of a better decision.  Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: …those affected may be more likely to feel they were treated fairly and appropriately if reasons are given (internal citations omitted).[[6]](#footnote-6)

The necessary elements of accountability, intelligibility, adequacy and transparency apply not only to the reasons of trial courts, but also to tribunals.

So, what is this all about?

All of these features of the justice system, in which I include tribunals, are designed to encourage deliberative reasoning and to discourage the over-use of intuition in making decisions[[7]](#footnote-7). Many of the familiar rules and practices you routinely use were designed to induce you to follow a deliberative process, in order to cause you to question the result suggested by your intuition. Those checks on intuition include templates, checklists and standard forms that incorporate checklists. But the most effective check on intuition is giving reasons for decision.

The expression that “it just won’t write” reflects the idea that sometimes our intuitions about an outcome are wrong and need to be corrected. The deliberative thought that goes into crafting reasons imposes a substantial check on the over-use of intuition.

1. **The standard of review**

The second perspective that guides courts in judicial review is the standard of review.

Although you might not see it quite this way, courts do not just jump in and do what they like in judicial review. They actually hesitate. The degree of hesitancy is reflected in the standard of review, which is really about the degree of deference that the court will show to a tribunal.

The lowest degree of judicial deference is “correctness.” Essentially the court asks itself what it would do and then does it, regardless of what the tribunal did, as the Supreme Court noted in *Dunsmuir v. New Brunswick*[[8]](#footnote-8). But this approach is reserved for only a few issues such as the interpretation of legislation outside of the tribunal’s home statutes and the *Canadian Charter of Rights and Freedoms*.

The highest degree of deference to the tribunal is “reasonableness”.[[9]](#footnote-9)The tribunal’s decision will be quashed only if it is determined by the court to be unreasonable.

The Supreme Court requires courts to keep in mind two basic things in assessing reasonableness. The first is that the legislature has chosen to confer decision making power in a particular area on a tribunal, and that legislative choice must be respected. The second is that the right decision is often not glaringly obvious, and the tribunal’s expertise and “field sensitivity” in making the choice must also be respected.

The Supreme Court requires reviewing courts to show “a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist.”[[10]](#footnote-10)The principle is set out in *Dunsmuir*:

Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[[11]](#footnote-11)

That is the definition of reasonableness that will be applied in most cases.

Note how this language converges with the requirements of good reasons. Reasons must reflect the basic virtues of accountability, intelligibility, adequacy and transparency. Deference must be earned anew with every decision. A court cannot defer if the tribunal’s reasons do not pass muster.

1. **The Essential Content of Reasons for Decision**

There are some essential things that tribunals simply must do in their reasons, whether they are oral or written:

* Find the facts
* Identify the key issues
* Assess credibility and reliability
* Set out the chain of reasoning
* Make the decision.

All of this is necessary for the decision to be of acceptable quality and for there to be a meaningful right of appeal.

In a criminal case, the court noted a right of appeal “must not be an illusory right”, and added:

An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might otherwise have brought about an acquittal, then a reviewing court simply cannot make an assessment, and justice is not afforded to the appellant.[[12]](#footnote-12)

These words apply to tribunals too, with necessary modifications.

Now, some hopefully comforting words. In assessing a tribunal’s reasons, courts recognize that the context is important. For example. in *Nicholson v. Halliday*[[13]](#footnote-13) the court considered an appeal from a decision of the Deputy Director of Titles, a land surveyor, under the *Boundaries Act.* Justice Lang said:

In keeping with this deferential standard of review, the appellate court will consider the Director's reasons both in the context of his expertise in boundary disputes and his lack of expertise in the particularities of writing judicial reasons. That lack of expertise in writing judicial reasons means that the Director's reasons must be considered as a whole and not parsed in the same detail that might be applied to a judge's reasons. The Director was entrusted with a broad discretion in the determination of boundary disputes by way of a summary procedure because he has expertise in the discipline, not because he is an expert in decision writing.

In *Clifford v. OMERS*[[14]](#footnote-14) Goudge J.A. noted that many agency decisions are made by non-lawyers. He said: “If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.”

Reviewing courts are also sensitive to the nature of the decision, and do not, for example, subject oral decisions to the same degree of scrutiny as they do written decisions. In *R. v. Richardson*[[15]](#footnote-15) Carthy J.A. said: “In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result.”

Finally, in *R. v. Boucher*[[16]](#footnote-16)the Supreme Court said:

Trial judges deliver oral judgments every day and often limit their reasons to the essential points. It would be wrong to require them to explain in detail the process they followed to reach a verdict. They need only give reasons that the parties can understand and that permit appellate review.

These words from various courts should give you some reassurance. The court will be more concerned with your expertise than with your prose. And the court may cut you some slack if you give an oral decision. But only if your decision truly reflects those basic virtues of accountability, intelligibility, adequacy and transparency.

1. **The Format of Reasons for Decision**

Let me make some suggestions as to format for those cases where you do not have the benefit of a decision template, a form to complete or a checklist to guide your thinking. What I am advocating for is the issue-driven approach to decision writing. It is the style that judges are increasingly adopting because it is efficient, effective, and reader friendly.

Let’s contrast the old format with the issue-driven format. The old format had three big chunks and a tail:

1. Facts
2. Issues
3. Law and analysis
4. Disposition

The problem with the old format is that by the time the reader got to the law and analysis, she had forgotten the facts and had to flip back to bring them to mind. The reader-friendly judge might repeat the relevant facts in the law section, which made the decisions longer and more cumbersome.

The issue-driven format relies on the principle of proximity, what I would call the idea of “just-in-time” facts. I will explain this in more detail, but the basic idea is that the legal principles, statutory provisions, positions of the parties, evidence, findings of fact, reasons for the findings, and any legal analysis are all discussed under the issue to which they are relevant. This format applies to written and oral decisions.

The issue-driven template looks like this:

* Introduction
  + What is this case about?
  + Deep issues
* First Issue…
  + Relevant legal principle(s) and statutory provision(s)
  + Positions of the parties
  + Evidence or facts relevant to the issue
  + Credibility assessment
  + Findings of fact and credibility
  + “Because”
  + Law applied to your findings of facts🡪 conclusion on this issue
* Second Issue…
* Conclusion

Let me now unpack these elements for you.

**(1) Introduction or overview**

The introduction is an organizing device. It tells the reader briefly what the overall case is about in order to orient the reader and set the context for the decision. The introduction should express simply and directly the deep issue you are required to resolve in order to make the decision to which the reasons are addressed. If necessary some brief details about where things are in the ordinary process and how they got here might be needed. You might reveal the outcome.

Why is an introduction important for your readers? Because readers need help to grasp complex information. They need a conceptual framework before the information begins to flow. A good introduction creates smart readers by providing context for the detail in the rest of your decision

Why is an introduction important for writers? Because it helps you structure the rest of your decision, and it forces you to begin with the end in mind.

There are three key elements to the introduction. It sets out the claim, that is who wants what from whom, it provides a little story to put the issues in context, and it identifies the “deep” issue

**What is the “deep” issue?**

This useful concept gets at the difference between the real debate you must resolve, on the one hand, and the bottom line determination you will make, on the other hand. The deep issue is the concrete question that you need to resolve in order to decide the ultimate question. A way of getting to it is that it is the final question left when you can no longer usefully ask: “And what does that turn on?”

Here is a simple example from criminal law. Consider a charge of sexual assault where the complainant and the accused agree that they had sexual intercourse. The ultimate question is this: Is the accused guilty of sexual assault? And what does that turn on? It turns on this: Has the Crown proved beyond a reasonable doubt that the complainant did not consent to the sex? That is the deep issue to be addressed by the reasons. If it goes one way, conviction, if the other way, acquittal.

Keep things simple in the introduction, and save the details for later. Use plain and simple language in order to engage your readers. Don’t turn them away, but invite them in. John Laskin expresses the readers’ perennial question: Will you speak my language or will I have to endure yours?

A Bad Example

* This is an appeal against a reassessment made by the Minister of National Revenue on September 12, 2010, whereby the appellant was denied a deduction in the amount of $1250 as moving expenses in computing her income for the 2009 taxation year, pursuant to section 62 and the definition of “eligible relocation” in subsection 248(1) of the *Income Tax Act.*
* The relevant provisions of the Act provide...

A Good Example

* The appellant Alexis Smith lives in Sudbury with her husband and two sons. In 2009 she took a three month position with the Bank in Vancouver. Her family stayed behind in their home in Sudbury.
* For the 2009 taxation year, Ms. Smith claims a deduction for moving expenses for the cost of her airfare to Vancouver, $1250. The Minister reassessed her income and denied the deduction. Ms. Smith appeals.
* Ms. Smith is entitled to deduct her travel costs under s. 62 of the Act only if she was moving from an old residence to a new residence to enable her to take the job with the Bank.
* The issue on this appeal is whether the air fare expense related to a change in residence or was simply an incidental cost of travelling to a temporary workplace.

Which of these do you prefer, and why?

**(2) The factual context**

Any decision needs some factual context. Generally the facts should be set out chronologically in narrative form because that is how people think and organize their thoughts. The facts need not be particularly detailed in this section of the reasons. If more details are necessary to address an issue, they should be imported later, when the issue is discussed. The level of detail in the example we just discussed would be fine.

**(3) The issues**

Even though you may be called upon to decide a single large issue, the deep issue, there often are a number of logical steps involving discrete sub-issues that need to be considered. In the issues section you set those issues out in the logical sequence in which you will analyze them.

**(4) Discussion or analysis**

The discussion and analysis is organized around the issues, which can be used as headings.

I return here to an earlier slide:

* First Issue…
  + Relevant legal principle(s) and statutory provision(s)
  + Positions of the parties
  + Detailed evidence or facts relevant to the specific issue
  + Credibility assessment
  + Findings of fact and credibility
  + Law applied to your findings of facts🡪 conclusion on this issue

I am now going to go through an example that John Laskin created based on the facts and issues in ADGA Group Consultants Inc. v Lane [2008] O.J. No. 3076.

Here are the basic facts. Lane was hired as a software tester with ADGA. Within a few days, Lane began exhibiting manic behaviour. Lane was terminated from his position within a month of starting work. He filed a human rights complaint, alleging that ADGA’s termination discriminated against him on the basis of a disability. The Tribunal made findings in Lane's favour and awarded him general, mental anguish and special damages totalling about $80,000.

[Go over the slides]

…

A few general observations. The issue-driven structure is often good, but the discussion of an issue can be framed in different ways, and the format really depends on the circumstances. No hard and fast rule is possible.

In terms of explaining the chain of reasoning, a growing trend is to use the “point first” structure. The idea is to state the particular determination at the outset of the section, then make reference to the appropriate legal test and authority, if needed. Next, justify the result through the facts and analysis that you lay out thereafter. Here is where you marshall the more detailed facts relevant to the particular issue.

At a convenient point or points in the analysis, set out a brief statement of the positions of the parties. This signals to them you have heard their evidence and arguments, and have understood their positions on the way to your decision.

It is important to recognize that you are the decision maker. The parties can frame the issues any way they like, but the governing framework is your responsibility. You may not actually accept the way in which the parties have expressed an issue, and you may choose to frame it differently in your decision. If a different frame occurs to you in the course of the hearing, put it to counsel. In the decision, if you do decide to frame the issue differently, you should say so and explain why.

What are the advantages of an issue- driven structure? It is much clearer for your readers and listeners, because the organization of the evidence meshes with the issues, and information that belongs together is found together. The reasoning is more concise, because you will omit evidence and facts not needed to discuss the issue you must resolve, and you will minimize repetition. This acute focus is likely to produce a decision that is better reasoned and more persuasive. Once you get used to it, it is easier to do.

What is the disadvantages of an issue-driven structure? It is time consuming until you get used to it. There is a risk that the story will get lost.

You will need to ask yourself three questions:

* What structure should I use to organize the evidence?
* If I use an issue-driven structure, what evidence, if any, should I put in the “background facts” section of my decision, and what evidence should I save for the “analysis” section? You will be feeling your way on this in every case.
* Where should I put the submissions of the parties? You must lay them out or the parties will think they have not been heard.

1. **Setting out the Evidence of Witnesses**

What are the approaches to setting out the evidence of witnesses? I will outline three:

1. Witness-by-witness
2. Chronological
3. Issue-driven

My observations from experience. Issue-driven or thematic structures usually work best because they make your decisions clearer and more concise. The decision is not lumbered by long recitations of evidence, much of which is unnecessary. Chronological structures work best when sequence matters and in organizing the evidence within each issue, because that’s the way people remember and follow things. They tend to create a mental chronology if you don’t provide one, and that can be distracting and taxing on comprehension. Witness-by-witness structures are good if there are few witnesses but seldom effective when there are many.

I will now go over each approach.

**The witness-by-witness approach**

* Jim Smith testified…
* Sarah Jones gave evidence…

The advantage of the witness-by-witness approach is that it is quick and easy. Since evidence is led before you witness-by-witness, all you need to do is copy your notes into the reasons. This can be sufficient in very simple cases, and in cases with one, two or three witnesses.

The disadvantage is that the evidence might not mesh with the questions you must decide. The story can become quite disjointed and hard to follow. To make use of the evidence in your deliberations you will need to reorganize and repeat it elsewhere.

**The chronological approach**

* Once upon a time…

The advantage of the chronological approach is that it is natural. It’s the familiar way to tell a story, and humans really like stories. It’s relatively quick and easy, since you have likely prepared a chronology for your own use just to keep the sequence straight. This approach can be especially useful when the timing of events really matters. It is also effective in straightforward cases with few issues

The disadvantage of the chronological approach is that, like the witness-by-witness approach, it does not force you to think much, and it may not mesh with the issues you must decide. There is the danger, as in the witness approach, of keeping too much stuff.

For both the witness approach and the chronological approach you will need to edit ruthlessly.

**The issue-driven approach**

Under the issue-driven approach, you group information and evidence under topics or themes important to the issue.The themes can come from criteria in your home statute or in the case law. This is necessarywhen the facts are complex and numerous.

The advantage to the issue-driven approach is that it is more cogent and comprehensible, because the organization of the evidence meshes with the issues. Information that belongs in one place is found there. That is the benefit of proximity. The reasons are more concise because you will include only the evidence and facts needed to address the issue you must resolve, and you can omit the rest.

The disadvantage of the issue-driven approach is that it will take more work and time, at least until you get used to it.

It is important to understand that the issue-driven approach does not force you to entirely abandon the witness-by-witness or the chronological approach. Within each issue you can mix or match these approaches to suit the material. You can preserve the narrative or story in relevant chunks.

**How much evidence goes into the reasons?**

The tension is between the desirability of conciseness and the wish to demonstrate command over the details. Details, especially telling details, are persuasive. But too many details that are not especially relevant discourage the reader.

Don’t be a court reporter. Refer to important evidence for each party, but don’t be afraid to leave some things out. Ask yourself whether this fact or this piece of evidence really contributes to the narrative. If not, toss it.

**6. Sufficiency of Reasons**

Tribunals have a duty to give adequate reasons. Courts will respect the exercise of a tribunal’s discretion, and defer to it, but, as I have said, only if the reasons justify deference, by reflecting the basic virtues of accountability, intelligibility, adequacy and transparency.

I am going to go over five common sufficiency pitfalls and how to avoid them.

1. **Conclusory credibility findings**

It is sometimes difficult to say why you prefer one witness’s evidence to another, but you must explain your credibility findings. Otherwise your findings could lose the deference they ordinarily command. Complainants and parties (and their families) are entitled to know why they were disbelieved.

Example: Law Society v Neinstein, 2010 ONCA 193

* There is no analysis of his evidence or the evidence of his witnesses. There is nothing in the content of that evidence or the character of those witnesses that would make the evidence inherently unreliable and justify an outright, unexplained rejection of that evidence without any comment. It can be fairly said that Mr. Neinstein, on a reading of the Hearing Panel’s reasons, would have absolutely no idea what, if anything, the Hearing Panel made of his evidence, and that of his supporting witnesses.
* The reasons relating to C.T.’s complaints compel the conclusion that those reasons do not address the “why” component required in reasons for judgment. The Hearing Panel’s reasons are a combination of generic generalities (e.g., “gave her evidence in a forthright manner”), unexplained conclusory observations (e.g. “withstood cross-examination well”), material omissions…

Courts understand that the assessment of credibility is more of an “art than a science”. Use your common sense and life experiences. Try to unpackage your credibility findings and lay them out. Try to avoid bald conclusions about the credibility of one witness compared to another.

1. **Citing a statutory provision followed by your conclusion**

Let me give you an example:

The Office of the Independent Police Review Director has carefully reviewed the complaint about the conduct of Chief William Blair of the Toronto Police Service.

The OIRPD is aware of your concerns. S 60(2) of the *Police Services Act* permits the Director not to deal with a complaint if the complaint is made more than six months after the facts on which it is based occurred.

Taking all the information into consideration, I have decided not to proceed with the complaint as it was made more than six months after the facts on which it is based occurred. (*Wall v OIPRD,* 2014 ONCA 884)

This decision quashed for unreasonableness because the “why” is missing. The link or the path is not set out.

1. **Saying you have considered the relevant criteria without showing you have**

Examples:

In rendering this decision, I have considered most extensively all of the above factors and the information on file as a whole. With all the evidence before me, I am not satisfied that the requested exemption is justified by humanitarian and compassionate considerations. (Alwan v. Canada, F.C.T.D. 2006)

Taking all the information into consideration…(*Wall*)

Here the key is to show that you have considered the relevant criteria by setting them out and pointing to the related facts. As the expression goes: Show, don’t tell.

1. **Failing to analyze the evidence or explain findings**

An example:

The Board simply states that “based on the evidence taken as a whole, the undervaluation is important and lies in an interval of between 10 and 15 percent.”…It is not enough to say in effect: “We are the experts. This is the figure. Trust us.” *(CAB v. Society of Composers, Authors and* *Music Publishers of Canada*, F.C.A., 2006 per Evans J.A.)

Again here you can see the failure to show the reasoning process.

* The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors. *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364
* I am of the view that, in the absence of a true analysis of the evidence, the appeal process is frustrated and that the duty to give reasons cannot be met simply by listing the evidence considered. Bastarache J.A. in *Boyle v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (1996), 39 Admin. L.R. (2d) 150 (N.B.C.A.)

There is a competing tension, since a tribunal is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues in the hearing. (*REM)*

1. **Disregarding material evidence or failing to deal with important inconsistencies**

A few principles:

A failure to deal with material evidence or a failure to provide an adequate explanation for rejecting material evidence prevents effective appellate review. *(Barrington v Institute of Chartered Accountants,* 2011 ONCA 409).

* It is not the law that the trial judge must expressly deal with every inconsistency in the evidence so long as the basis for the trial judge’s conclusions is apparent from the record.
* But the complainant gave three different versions of the last two incidents…These were not secondary details… The trial judge had a duty to address these inconsistencies and she failed to do so. (*Stark* (2005), 190 CCC (3rd) 502.)

A suggested approach is this: Decide whether the evidence or the inconsistencies are important. If they are you should address them.

By now you are wondering if this is all just too much work. So let’s hear from two masters of the craft: Nathaniel Hawthorne: “Easy reading is damn hard writing.” Samuel Johnson “What is written without effort is in general read without pleasure.”

1. **Dos and Don’ts**

**Do start writing immediately after hearing arguments**. You will never again be as conversant with the evidence, the material and the arguments as you are then. That is the time to get the guts of the decision down, even if you have not yet decided the issue. Writing it down is often part of the thinking and reasoning process.

**Do the basic things that reasons must do**, whether they are oral or written:

* Find the facts
* Identify the key issues
* Assess credibility and reliability
* Set out your chain of reasoning clearly
* Make the decision

**Do use plain language**. You want to achieve accountability, intelligibility, adequacy and transparency. These are best served if you use clear and simple language, candour, and sequential development. Use short sentences; long ones confuse readers. Don’t use big words unless you must. Strive for clarity.

**Do use headings, if you have to write something up of any length**. Headings serve to keep you as the writer, and others as the readers, organized and moving along in a reasonable way. If the decision is relatively short, you might not need headings and an elaborate structure, but the elements I have discussed should all be present in one form or another.

**Don’t use lengthy quotes from legislation, case law or other documents in the reasons**. It is more user-friendly to summarize or paraphrase than it is to force the reader to read lengthy passages of marginal relevance. Often an entire section of legislation, or a long stretch of reasons from a case will be quoted in a decision when only a couple of lines, carefully and accurately edited, are needed. This is known as the “quote-snippet”. Experience shows that people skip long quotes. Use quote snippets.

If you believe the entire section from legislation should be added for context, then think about putting it in an appendix that can be readily referenced by the reader. This is also true for lengthy quotes from decisions or documents.

**Don’t use “boilerplate reasons” or “generic one size fits all” reasons.**[[17]](#footnote-17) Intelligibility is case-specific so using boilerplate can show a suspicious lack of deliberative thought. The exception is stating a test, when clarity and consistency are critical.

**Do edit your reasons, ruthlessly.** The great American judge, Loius Brandeis said: “There is no such thing as good writing; there is only good rewriting.”

**Do consider another set of eyes in really difficult situations, if time and circumstances permit.** Other eyes can help you identify unclear statements or gaps in logic that you may have missed.

Let me end where I began, by repeating the deceptively simple formula for good decisions and for good reasons: Do the right thing, for the right reason, in the right way, at the right time, in the right words. Words to live by, perhaps.

1. Justice, Court of Appeal for Ontario. I acknowledge a huge debt to my colleague, John Laskin, a great teacher who has changed judicial writing in Canada for the better. With permission, I have plundered his work shamelessly in this talk. [↑](#footnote-ref-1)
2. [2002] 1 S.C.R. 869 per Binnie J. at para. 55. [↑](#footnote-ref-2)
3. [2008] 3 S.C.R. 3 at para. 35. [↑](#footnote-ref-3)
4. *Ibid*. at para. 16. [↑](#footnote-ref-4)
5. *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* [2006] F.C.J. No. 1547 (C.A.) at para. 11. [↑](#footnote-ref-5)
6. *Baker v. Canada (Minister of Citizenship and Immigration,* [1999] 2 S.C.R. 817 per L’Heureux-Dubé J. at para. 39. [↑](#footnote-ref-6)
7. See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, “Blinking on the Bench: How Judges Decide Cases” (2007) 93 Cornell L. Rev. 1, Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, “Inside the Judicial Mind” (2001) 86 Cornell L. Rev. 777, Jeffrey J. Rachlinski, Andrew J. Wistrich, “Altering Attention in Adjudication” (2013) 60 UCLA L. Rev. 1586, Jeffrey J. Rachlinski, Andrew J. Wisterich and Chris Guthrie, “Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences” (2015) 90 Ind. L.J. 695, Jeffrey J. Rachlinski, “A Positive Psychological Theory of Judging in Hindsight” (1998) 65 U Chicago L.R. 571, Andrew J. Wisterich, Jeffrey J. Rachlinski and Chris Guthrie, “Heart Versus. Head: Do Judges Follow the Law or Follow their Feelings?” (2015) 93 Texas L.R. 855, Daniel Kahneman, *Thinking, Fast and Slow*, (Anchor Canada, 2011), Jonathan Haidt, “Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment and the Search for Evidence” (2013) 64 Ala. L. Rev. 867, Hugo Mercier and Dan Sperber, “Why Do Humans Reason? Arguments for an Argumentative Theory” (2011) 34 Behavioral and Brain Sciences 57. [↑](#footnote-ref-7)
8. [2008] 1 S.C.R. 190 at paras. 45, 46, 50 [*Dunsmuir*]. [↑](#footnote-ref-8)
9. *Ibid*. at para 46. [↑](#footnote-ref-9)
10. *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)* [2011] S.C.J. No. 62 at para. 47 [*NFL Nurses’ Union*]. [↑](#footnote-ref-10)
11. *Ibid*. at para. 47. And see *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)* [2011] S.C.J. No. 62 at para. 47 [*NFL Nurses’ Union*]. [↑](#footnote-ref-11)
12. R. v. Richardson, [1992] O.J. No. 1498, 9 O.R. (3d) 194 (C.A.) at para. 13. [↑](#footnote-ref-12)
13. (2005), 74 O.R. (3d) 81 (C.A.) at para. 48. [↑](#footnote-ref-13)
14. [2009] O.J. No. 3900, 98 O.R. (3d) 210 (C.A.) at para. 43. [↑](#footnote-ref-14)
15. [1992] O.J. No. 1498, 9 O.R. (3d) 194 (C.A.) at para. 13. [↑](#footnote-ref-15)
16. 2002 S.C.C. 226. [2002] 1 S.C.R. 869 at para. 29. [↑](#footnote-ref-16)
17. See *R. v. Braich,* [2002] 1 S.C.R. 903 at paras. 40-42. [↑](#footnote-ref-17)