Session 2: Decision Writing: Making Your Decisions Appeal Proof

Moderator: Mark Nakamura, Health Professions Appeal and Review Board

Speakers: Justice John Laskin, Ontario Court of Appeal
Justice Anne Molloy, Ontario Superior Court of Justice

Justice Anne Molloy

Justice Anne Molloy spoke about administrative tribunals and decision writing in the context of proportionality. She commenced her discussion by stating that we all have the common objective of having tribunal decisions that are not susceptible to reversal by the court. It is in the public interest to have a strong system of administrative tribunals. It is also in the public interest to limit judicial review of decisions of tribunals.

The focus of her discussion was on how to write a decision that will survive judicial review and still manage your case load. She identified the key to achieving this as "clarity" in both the content of your writing and your writing style.

Clarity in decision writing is important because clear decisions are less vulnerable to judicial review and more likely to be upheld if reviewed.

Clarity in decision writing addresses two legal requirements. Firstly, the need to demonstrate that your decision meets the reasonableness test established in *Dunsmuir*. Secondly, it addresses the requirements of natural justice and procedural fairness.

Dunsmuir established two standards of review: reasonableness and correctness. Correctness is not very commonly used. It is usually reserved for jurisdiction and issues of law with broad application. Reasonableness is more commonly used and it is based on deference.

Transparency is also very important because parties must feel that they were heard and understood. Parties will want clear explanations for your findings and conclusions. It is also very important to give justification. As a decision-maker, you must show the path that connected the issues, the evidence and the findings to your decision. You must show a logical connection between the decision and the basis for the decision. You should avoid bare conclusions and boilerplates.

For quasi-judicial tribunals, procedural fairness and natural justice require reasons for the decision. Failure to give reasons might be sufficient grounds to quash a decision. The process of writing reasons ensures better decisions. Reasons also foster tribunal coherence and consistency.

In *R v. Sheppard*, the trial judge did not give any satisfactory reasons for his decision. The Supreme Court found that the reasons given were not adequate. This case reflects the idea that justice must not only be done, but it must be seen to be done.

There are three main purposes for giving reasons. First, the parties need to know why they lost or were not believed. Second, the general public needs to know that decisions are not arbitrary. Third, it allows for meaningful appellate review.

Justice Anne Molloy outlined common pitfalls to avoid in decision writing. These were:

- Full steam ahead – no adjournments → even though adjournments are discretionary, you still have to articulate your reasons for granting or not granting an adjournment.
- Shooting from the hip → in your oral or written reasons, you might wander in different directions and forget to address something. To avoid this, it is important to make a list of all issues that you want to touch on.
- "Trust me; I know what I'm doing." → Just stating statutory criteria followed by the conclusion is not reasons. Saying that you have considered all relevant matters is also not sufficient. See *Daneshvar v. National Dental Examining Board of Canada*, [2002] O.J. No. 2487 (Div. Court) and *Alwan v. Canada*, F.C.T.D. 2006, for examples of what not to do.
- The court reporter approach → a long recitation of the evidence and issues followed by bald conclusions will not be adequate. The analysis is more important than summarizing the evidence. The leading decision on this point is *Law Society of Upper Canada v. Neistein*, 2010 ONCA 193, at para. 83.
- Inconsistencies cannot be ignored → when writing a decision you have to address inconsistencies and say why you believed someone's testimony over someone else's. Adjudicators have a duty to address inconsistencies.
- "We always do it this way" → Doing something in a certain way because that is the way that it is always done is not a good enough reason. You have to stay current and stay flexible. Standards change and rigid adherence to existing practice or precedent is not always appropriate.

When it comes to proportionality, the adequacy of reasons is not measured by how much you write, but how your write. Brevity, content and style are all important.

In deciding how to write your decision, you have to consider whether only the parties involved care about the decision or whether it might be a precedent setting decision. Another consideration is the complexity of the issues. More complex cases require more detail in your reasons. Based on these considerations, you can give formal reasons, oral reasons or use a short endorsement.

Oral reasons should be used when there is not as much at stake, when the decision has no precedential value, it is straightforward and there are time constraints.

The short endorsement should only be used when dealing with a simple case with limited issues (1 or 2), when only the parties are affected by the decision, when the decision has no precedential value and when the parties need a quick decision. However, you still have to say why you made that decision.

Short endorsements usually omit the background, positions taken, and the arguments advanced. They refer to the facts or other matters set out elsewhere, without quoting them. They just refer to cases and legislation, without quoting them. They should be organized, list the issues and provide bare essentials for why you decided as you did.

Traditional reasons should only be used when necessary. Brevity is still a goal. Every fact or piece of evidence that you mention must meet the test of having a purpose. See *R. v. R.E.M.* (SCC 2008).

A structured decision focuses your thoughts, covers the essentials, eliminates the non-essentials, and makes it easier for your readers to understand.

Justice John Laskin

Justice John Laskin focused his discussion on organization. He began his discussion by stating that organization is important for two main reasons. The first one is that organization and clarity go hand and hand. The second one is that well organized decisions are more likely to be upheld on review or appeal.

Justice John Laskin talked about how to organize the evidence to create clarity. He stated that organizing the evidence is the hardest and most important part of decision writing. He distinguished between the process of getting a handle on the evidence and the process of presenting the evidence to your readers. Some judges use witness summaries, timelines or outlines to get a better handle of the evidence. To present the evidence to your readers in a way that makes sense to them, you have to find the balance between a reader friendly approach and a writer friendly approach.

Justice John Laskin suggested that adjudicators have a choice when deciding how to organize the evidence. They can organize the evidence differently for different kinds of cases.

In terms of the structure of a decision, he considered the introduction as an organizing devise. It gives readers a context for the rest of the decision and it helps writers structure the rest of the decision. He suggested writing the introduction first and then going back to it after the entire decision has been written to ensure it matches what you wrote.

Three key elements of an introduction are the claim (who wants what), the issues (what precise question must be answered), and the narrative (a little story to put the issues in context).

He then discussed the use of templates. Templates are good because they are an easy way to deal with recurring kinds of cases and they provide predictability for your main audience. However, you must be prepared to deviate from them.

Justice John Laskin also talked about four ways to organize the evidence. These ways are: witness by witness, chronological, issue-driven: standard, and issue-driven: proximity.

When using a witness by witness approach, you describe each witness' evidence. The advantages of this approach are that it is quick and easy. It is useful in simple cases with few witnesses. The disadvantages are that the presentation does not mesh with the questions that must be decided and the story may be disjointed.

The chronological approach is useful in that we are all natural story tellers. It is relatively quick, easy and effective in straight forward cases with few issues. It is especially useful when the sequence of events is important. However, this way of organizing the evidence may not mesh with the issues that must be decided and editing will be required.

Under the issue-driven structures, information is grouped under topics important to the issues. These structures are especially useful when the facts are long and complicated. Under the standard issue-driven structure, the evidence and the analysis are separate with the evidence being organized under topics related to the issues. Under the proximity issue-driven structure, evidence and analysis are collapsed. The evidence and statutory provisions are close to the issues they are relevant to. Justice John Laskin used Adga Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC) as an example to demonstrate how these two different issue-driven structures work.

The advantages of using the standard structure are that it is more concise and the presentation meshes with the questions that must be decided. It is especially useful in complicated cases with several issues. The disadvantages are that it is hard, takes time, and the story may get lost.

The advantages of using the proximity structure are that it even more concise and the information is even easier to grasp. It is especially useful in very complicated multi-issue cases. The disadvantages are that it is even harder work, can be very time consuming and the story may get lost.

The chronological and issue-driven structures are not mutually exclusive. In issue-driven structures, there can be chronology within each topic. Some narrative at the beginning may be inevitable.

He also discussed the tension between trying to be concise and giving enough details. Details help persuade; however, too many details can turn one off. He also indicated that you should not be a court reporter. You should not be afraid to leave some things out as long as you cover all the important evidence for each party. Every fact and every piece of evidence that you include must have a purpose.

Using case specific headings and subheadings help keep readers on track. It also creates white space which makes the decision easier to read.

Question 1:

When a judge writes a decision overturning a tribunal decision, is the tribunal part of the audience? How do you communicate this to the tribunal?

Answer:

Both speakers suggested looking at a number of decisions. They particularly mentioned one decision where there were substantial problems with staff members of the tribunal.

Question 2:

There is a dichotomy between being brief and being fair. Justice John Laskin was asked to explain his concept of proximity again.

Answer:

Justice John Laskin – Agreed that there is tension between being brief and being fair. He said that if you have to err on one side, you should err on the side of fairness. However, you should not become a court reporter. Decision writers have to make decisions in terms of what to include and what to exclude. You have to use your analytical skills for that.

Proximity is about collapsing the description of evidence and analysis sections into one.

Question 3:

How do you deal with credibility?

Answer:

Justice Anne Molloy – You have to explain what you are relying on to make your credibility findings. You have to go through why you did not believe a certain witness, so

sometimes you have to deal with all the evidence in different sections of your decision. When you are not sure whether someone is telling the truth, you have to tie your reasoning to inconsistencies and impossibilities.

Justice John Laskin – If you are looking for a reason, sometimes you hold on to certain points. You have to trust the fact that you were there and judges reviewing your decision were not.