

What are the Key Requirements of Acceptable Written Decisions?

COBA 2010

November 4

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Topics for consideration

1. Key requirements of acceptable written reasons
 2. How an adjudicator should explain his or her decision
 3. What does the decision of the Ontario Court of Appeal in *Clifford v. OMERS* mean for everyday tribunal decision-making?
 - *Clifford v. Ontario Municipal Employees Retirement System* ONCA 2009
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Clifford: decision of the Tribunal

- **Tribunal** Appeal sub-committee of the OMERS Board
 - **Issue** Pension entitlement under OMERS legislation
 - **Facts**
 - Divorced wife and designated beneficiary under the deceased's OMERS plan, against the alleged common-law spouse who would be successful if she proved that the relationship was subsisting at the time of death
 - **Decision**
 - Tribunal found that a common law relationship existed & that it was in place at the time of death
 - Found in favour of the common-law spouse
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Clifford: issue on appeal

- Decision of the Divisional Court:
 - The Tribunal failed to give adequate reasons. Decision quashed.
 - Issue before the Court of Appeal:
 - Were the reasons of the administrative tribunal (composed entirely of non-lawyers) sufficient, or should the matter be sent back for re-hearing?
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Clifford: Court of Appeal

- The Court addressed the following questions:

Question #1: When are reasons required?

- When the duty of procedural fairness requires them. The following factors guide the analysis (*Baker* 1999 SCC):
 1. The nature of the decision being made & the process followed in making it
 2. Nature of the statutory scheme and terms of the statute pursuant to which the tribunal operates
 3. Importance of the decision to the individual or individuals affected
 4. Legitimate expectations of the person challenging the decision
 5. The choices of procedure made by the agency itself
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Clifford: Court of Appeal

- The Court addressed the following questions:

Question #2: What purposes are the reasons intended to serve?

- The reasons must allow the parties and a reviewing court to understand, in a fair and transparent manner, what the decision is and why it was made
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Clifford: Court of Appeal

- The Court addressed the following questions:

Question #3: On a judicial review or appeal, what is the standard of review for adequacy of the reasons?

- The test as to whether a tribunal has complied with the duty of procedural fairness is one of correctness (not reasonableness)
 - With regard to the sufficiency of the reasons, the court asks did the reasons meet the tribunal's legal obligation?
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Clifford: Court of Appeal

- **How to determine if the reasons are sufficient to meet the tribunal's legal obligations**
 - “The basis of the decision must be explained and this explanation must be logically linked to the decision made.”
 - Flexible assessment, alive to the day-to-day realities of administrative agencies (*Baker* 1999 SCC)
 - Functional assessment, are the reasons sufficient to fulfill the purpose required of them? (*REM* 2008 SCC)
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Clifford: Court of Appeal

- **The decision** Goudge J.A. found the reasons sufficient:
 1. The Tribunal identified the live issues in the case
 - The existence of the common law relationship 3 years prior to, and at the time of death of the employee).
 2. The Tribunal “grappled” with the live issues
 - It provided the evidence upon which it relied. Inherent in this provision was the finding that the Tribunal found the evidence credible and reliable. The reasons also addressed the contradictory evidence regarding the existence of the relationship at the time of the employee’s death.
 3. The Tribunal provided answers to the live issues raised
 - *Goudge J.A. concluded that the parties could have no doubt as to why the Tribunal gave the answers that it did.*
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Lessons from *Clifford*

□ **Sufficient reasons require:**

1. Identification of the issues before the tribunal
 2. Identification of the relevant legal principles (any statutory criteria?)
 3. The key issues at play
 4. The evidence relied upon in coming to the decision
 5. The decision
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Lessons from *Clifford*

- Where there is **contradictory evidence**:
 - Refer to the contradictory evidence on key issues (though not necessarily all of it)
 - Address why the Tribunal/decision-maker resolved the evidence in the way that it did
 - Reviewing courts will recognize that findings of credibility may be difficult to articulate
 - *R. v. REM* SCC 2008
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Other considerations

□ **AVOID**

■ **Generic findings**

- A finding that “could apply equally to any other case involving any other allegation against any other person.”

- *Neinstein 2010 ONCA*

■ **Conclusory Statements**

- These are the opposite of transparent - they are “frustratingly opaque.”

- *Vancouver International Airport Authority 2010 FCA*

What is **NOT** required

□ **Perfection**

- “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.”
 - *Clifford 2009 ONCA*
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What is **NOT** required

□ **Volume**

- “Reasons need not refer to every piece of evidence to be sufficient, but must simply provide an **adequate explanation** of the basis upon which the decision was reached.”
 - *Clifford 2009 OCA*
 - “The task is not to count the number of words or weigh the amount of ink spilled on the page.”
 - *Vancouver International Airport Authority 2010 FCA*
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