CLARITY IN DECISION WRITING

COBA

NOVEMBER 2010

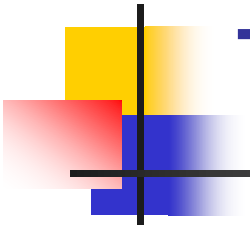
INTRODUCTION

- Why is clarity in decision writing important?
- The vital role of administrative tribunals
- It is in the public interest to limit judicial review of administrative tribunal decisions
- Clear decisions are less vulnerable to judicial review and more likely to be upheld if reviewed

S*** my Dad says

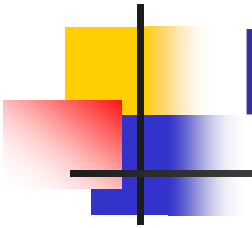
Ongoing Process

- We are all learners
- Clarity in decision writing is a goal; perfection is never achievable
- Good writing is a lifelong learning process



This talk

- We cannot hope to cover everything about good decision writing in this session

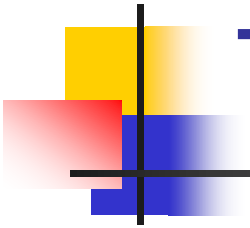


More s*** my Dad says

WRITING GOOD DECICIONS

CANADIAN INSTITUTE

MARCH 2009



This Talk

Our focus: two aspects of clarity in decision writing

- the content of your writing (what you say)
- the style of your writing (how you say it)

The Legal Framework

Clarity in your decision writing addresses two legal requirements:

- the need to demonstrate that your decision meets the reasonableness test established in *Dunsmuir*
- the requirements of natural justice and procedural fairness rooted in *Baker*

Reasonableness

- Dunsmuir---two standards of review---correctness and reasonableness
- Correctness usually reserved for jurisdiction and issues of law with broad application
- Reasonableness standard---most common---based on deference

Dunsmuir

"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."

(2008 SCC 9, [2008] S.C.R. 190, para. 47)

Procedural Fairness

- For quasi-judicial tribunals, procedural fairness and natural justice require reasons for decision
- Failure to give reasons, standing alone, sufficient grounds to quash

The importance of a reasoned decision

- 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. (*Baker v.Canada*, Supreme Court of Canada, 1999).
- Foster tribunal coherence and consistency

Justice must not only be done; it must be seen to be done.

R. v. Sheppard, [2002] S.C.R. 869

Trial judge's entire decision (36 words): "Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged."

Supreme Court decision (69 paragraphs): Those reasons are not adequate---functional approach

Purpose of Reasons

- Parties
- General Public
- Meaningful appellate review

"The adequacy of reasons is not measured by the inch or the pound"

- The tension between brevity and detail
- Think of conciseness as a persuasive strategy
- Make every word count
- Show that you grappled with the live issues in the hearing
- One size does not fit all

Context matters: more detail is required of you when

- The case is difficult
- The case is close
- The case has troublesome points of law
- The case has conflicting or confusing evidence on key points
- An important witness's evidence contains significant inconsistencies

Who are your audiences?

- The losing party
- The other party
- Lawyers
- Victims and their families
- Your colleagues
- Appellate courts
- Law professors
- Public
- Press
- Politicians

Transparency

- The parties must feel that they were heard and understood
- The parties want clear explanations for your findings and conclusions

Justification

- You need to say “why”
- Show the PATHWAY
- Issues→evidence→findings→decision
- The logical connection between the decision and the basis for the decision
- Avoid bare conclusions and boilerplate

Four common pitfalls

- 1. “I know what I’m doing---trust me.”
- 2. The court reporter approach
- 3. It’s all about credibility
- 4. Inconsistency? What inconsistency?

1. I know what I'm doing

- Stating statutory criteria, followed by the conclusion is not reasons
- Saying you have considered all relevant matters is also not sufficient
- Show; don't tell

Not this:

- The letter simply repeats the criteria established in the Board's regulation for rejecting an appeal at the first stage. These are not reasons. They are the conclusions that follow from whatever the reasons may be. *Daneshvar v. National Dental Examining Board of Canada,* [2002] O.J. No. 2487 (Div. Court)

And not this:

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)

Remember Sheppard

"Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged."

- Not good enough

2. You are not a mere scribe

- A long recitation of the evidence and issues followed by bald conclusions will not be adequate.
- Again---tension between brevity and completeness
- May need more detail where no record

- 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 at 374-5 (C.A.)

3. Credibility Findings are not Immune

- Difficult task, but …conclusory credibility findings will not suffice
- Explain the why
- Tie to evidence, logic, weight of other evidence
- Beware of demeanour

- The mere recitation of “credible” or “incredible” is insufficient. The “why” has to be provided. *Duriancik v.Ontario (Attorney General*) [1994] O.J. No. 958

[28] Finally, the majority relied on Megens' demeanour alone to disbelieve him. While actually seeing the witnesses in the box is an undoubted advantage possessed by the trier of fact, demeanour alone is a weak reed upon which to base an adverse credibility finding in an important case. Surely some analysis of Megens' evidence was necessary, giving some examples of the vagueness and uncertainty about straightforward matters on which the majority relied.

[29] For the foregoing reasons, I am of the view that the reasons of the majority utterly fail to grapple with numerous issues of importance as to the credibility of the principal witnesses. They are deficient to the point of denying the applicant natural justice and procedural fairness. He, and this court, simply do not know why he and the witnesses favourable to him were disbelieved and the uncorroborated word of an admitted liar with a huge motive to bear false witness was preferred.

(*Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142 (Div.Ct.), per Lane J.)

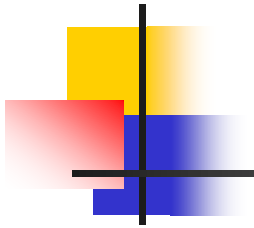
Neinstein: the "high water" mark

- [83] 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 (e.g. the failure to articulate any analysis of Mr. Neinstein's evidence) and uncertainty as to the legal principles applied to the credibility analysis (e.g. the corroboration finding). Taken together, these inadequacies render the reasons in respect of C.T.'s allegations so inadequate as to prevent meaningful appellate review.

(*Law Society of Upper Canada v. Neinstein,* 2010 ONCA 193)

4. Inconsistencies cannot be ignored

- A fourth exculpatory witness was William Megens, Paul Megens' father, who spoke with Brown on the telephone. He said that Brown told him: 'You know, Paul is not involved.' The majority does not mention this evidence, much less give its reason for not accepting it. *Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142

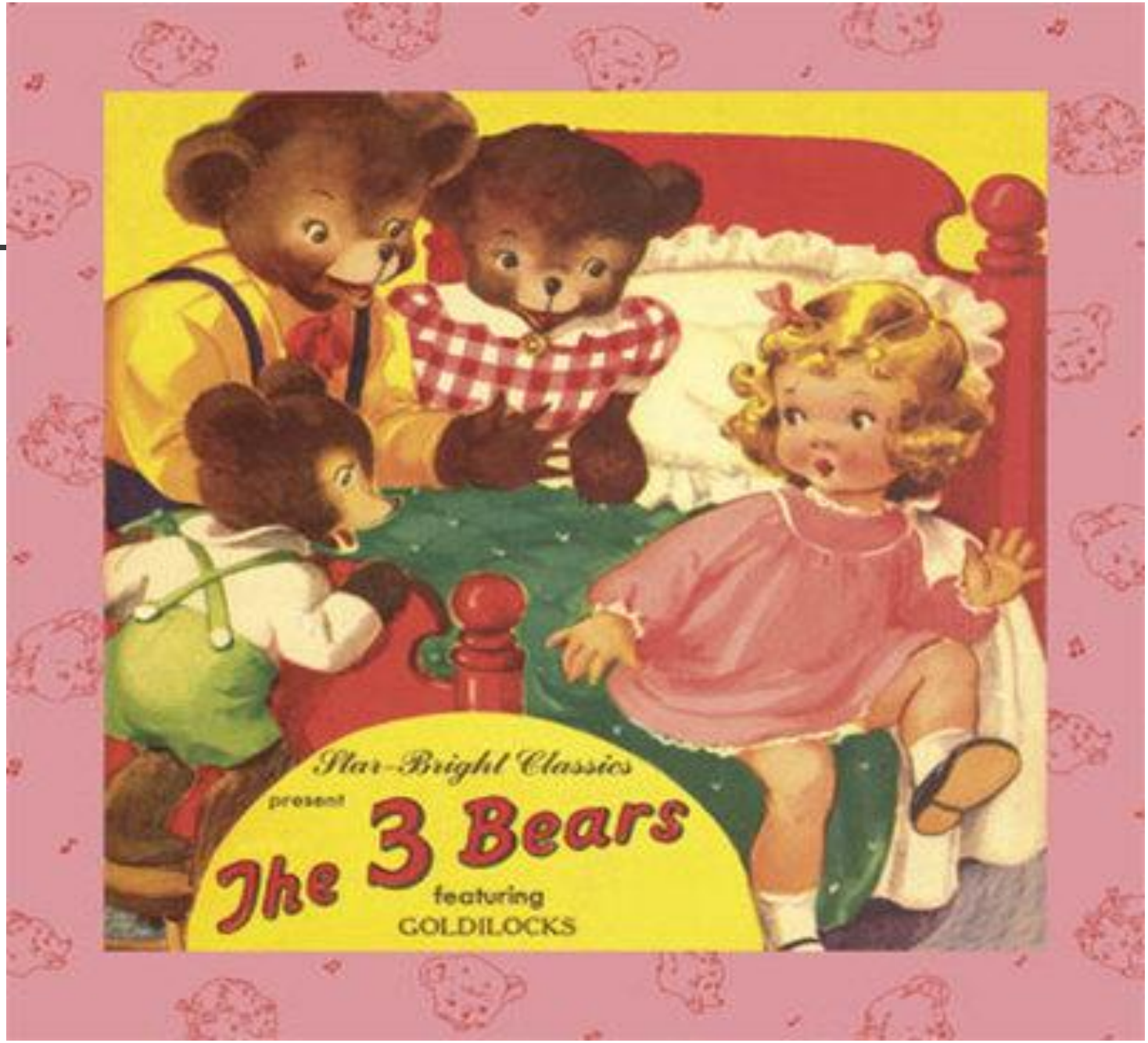


- It is not the law that the trial judge must expressly deal with every inconsistency in the evidence so long as the basis for the trial judge's conclusions is apparent from the record.
- But the complainant gave three different versions of the last two incidents…These were not secondary details… The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

- The majority award glossed over evidence, was selective in what evidence it considered, and failed to refer to, consider and evaluate a wealth of relevant, cogent evidence that should have weighed very heavily on the crucial question of credibility. *Ontario Public Service Employees Union v. The Queen (Ontario)* (1984), 45 O.R. (2d) 70 (H.C.J.)

To summarize

- Clarity in writing requires you to be succinct, not verbose
- But bald conclusions will not suffice
- Always say “why”
- Not too much…and not too little…sounds like …..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Don’t panic---there’s good news

- Explaining the “why” and its logical link to the “what” does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict.
- [Reasons are not intended to be] a verbalization of the entire process engaged in by the trial judge in reaching a verdict. (*R. v. R.E.M.,* 2008 SCC 51)

- *R.E.M.* followed by Court of Appeal in *Clifford*
- the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

- As *Baker* indicated, recognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. 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.

(*Clifford v. OMERS*, 2009 ONCA 670)