Decision Making and Decision Writing

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Decision Making and Decision Writing
Writing Good Decisions: The Essential Requirements and Some Related Questions

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This paper is virtually a reproduction of a presentation on decision writing which I have given at past seminars held by the Canadian Institute for the Administration of Justice, at BCCAT's 1996 Education Conference and elsewhere. Other adjudicators have expressed their views on the same topic, some in terms which are considerably more comprehensive than my remarks.

Two recommended references are: Administrative Decision Writing, Andrew C.L. Sims, Q.C., April 11, 1991 (CIAJ, Edmonton, Alberta), and Strategies for Effective Decision Writing, J. Robert W. Blair, March 16, 1995 (CIAJ, Edmonton, Alberta). Another source of guidance on the subject of decision writing is Tribunals - Reasons, and Reasons for Reasons (1990), 3 CJALP 123 (Ellis, Trethewey and Rotter). Although described as a "note", the article is an extensive reference which evolved from a workshop on the "Policy of Reasons" at the first Conference of Ontario Boards and Agencies.

I encourage you to read these papers (which, in turn, list additional worthwhile references). They were prepared by experienced adjudicators and offer different perspectives on writing decisions as in the current paper. To a certain extent, writing is a matter of personal style; you must develop a technique which best allows you to effectively and efficiently prepare reasons. Canvassing the experiences and suggestions of others will contribute to that development.

I also encourage you to re-read the papers several months from now, and again in the future. There are at least two reasons for doing so. First, you should always be seeking to improve your writing (few among us reach a level of excellence which cannot benefit from further refinement). Second, there are common "bad habits" which typically re-appear over time. A refresher course is a simple means of ensuring they do not hinder your writing.

Before discussing the essential elements of a decision, I will address several related questions by way of introduction. The answers to these questions contain guidance which I have personally found beneficial in learning how to write decisions. At the outset, however, I should declare a bias in terms of past experience: my involvement with administrative law has been almost exclusively in the field of labour relations, both as counsel and adjudicator. While my comments are designed to be of general application, they should be examined critically before being imported elsewhere.

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Some Related Questions

What Are Reasons For Decision?

Reasons for decision are more than simply a conclusion or the result in a particular case. They must adequately reveal the analysis which led to that conclusion or result. Thus, reasons identify the parties, crystallize the issues, accurately set out the relevant facts (and resolve any evidentiary conflicts), and explain the conclusion in light of the applicable law and the arguments of the parties.

Why Write Reasons?

There are a variety of answers to this question which fall broadly into two categories: legal requirements and practical considerations.

Some administrative tribunals are statutorily required to publish reasons; others need only issue their decisions in writing (i.e., there is no statutory duty to publish reasons). Nonetheless, even in the absence of an express requirement, there may be a legal obligation to provide reasons. The traditional approach that reasons need not be provided is under increasing erosion. The emerging trend suggests that a failure to give reasons may breach the duty to be fair, even where there is no statutory requirement.

Our Labour Board has adopted the following remarks of the Supreme Court of Canada in Re Northwest Utilities and City of Edmonton (1978), 89 D.L.R. (3d) 161:

> The law reports are replete with cases affirming the desirability if not the legal obligation at common law of giving reasons for decisions... This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgement and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and if taken the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed. ... (p. 175)

Our Labour Board has also recognized an obligation to give reasons in these terms:

> While the authorities are not entirely consistent with respect to the duty of an administrative tribunal to give reasons for its decisions, it is generally accepted that a statutory right of appeal, ...implies a duty to give reasons to ensure the review power is effective. Where a tribunal does not set out its reasons in sufficient detail to show the principles upon which it has proceeded, the parties are in effect deprived
The practical considerations for giving reasons are equally compelling. Some were alluded to by the Supreme Court in the *Northwest Utilities* case (i.e., avoiding arbitrary decisions and reinforcing public confidence). As well, reasons allow for policy development and provide an avenue for "communication" with the community within which the tribunal operates. The credibility of an administrative tribunal is often judged by the reasons which it publishes; they must be perceived as fair, consistent and demonstrate a rational application of policy to the facts.

Decisions of administrative tribunals are, of course, reviewable by the Courts on two grounds. A decision may be set aside where it is made in excess of the tribunal's jurisdiction. Alternatively, decisions which are seemingly made within jurisdiction may be set aside where they are "patently unreasonable", such that there is a loss of jurisdiction. The Courts are routinely called upon to scrutinize the decisions of administrative tribunals on the second ground. In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 SCR 941, the Supreme Court of Canada relied on dictionary definitions to say "...it is apparent that if the decision the Board reached, acting within jurisdiction, is not clearly irrational, *that is to say evidently not in accordance with reason*, then it cannot be said that there was a loss of jurisdiction" (pp. 963-64; emphasis added). In *Health Sciences Association of British Columbia et al.* (1992) 91 D.L.R. (4th) 582, the B.C. Court of Appeal declined to set aside a decision, stating "...I do not find it necessary to decide whether the [tribunal] was right or wrong. Its decision does not show a lack of reason" (p. 598).

The point is simple: where adequate reasons are not provided, a decision may be susceptible to judicial review. The interests of the successful party are not advanced by a poorly crafted decision. On the other hand, adequate reasons are also necessary for the losing party to pursue judicial review or other avenue of appeal. Both objectives are important.

**Who Are You Writing For?**

Reasons are inevitably written for several audiences at the same time. Those audiences are certainly the parties, and may include (in no particular order) the public, the Courts, the press, the legal community, your colleagues and others.

The scope of your audiences and their respective significance may well vary depending on the decision in question. However, almost without exception, I have long believed that the single most important audience is the losing party (I take no credit for this advice and fortunately received it very early in my adjudicative career). A decision must satisfy the parties that their positions were understood and considered. This especially means responding to unsuccessful arguments with a balanced and logical analysis. The losing party may not agree with the result, but should have a sense of "fair hearing".
On the other hand, there is one audience for which you should not write: namely, the law journals. In a similar vein, you must resist the temptation to write reasons which purport to demonstrate the full extent of your knowledge and wisdom. This is an affliction which often strikes new adjudicators who seek to justify their appointments. "Overwriting" will typically be regretted at a subsequent date.

When Should Decisions Be Written?

The short answer is "as soon as possible". Parties do not like to wait, and timely decisions generally make the result more palatable. Where reasons are published long after the hearing, there can be a suspicion that evidence or arguments were either overlooked or forgotten entirely. The task of writing is also far easier when the matter is fresh in the adjudicator's mind.

As desirable as this objective may be, the reality of your caseload may mean it is days, if not weeks, before sufficient time can be devoted to writing a decision. I have developed two techniques to assist me in those circumstances. First, I begin "writing" the decision through notes taken during the hearing. This is not actual writing, but merely highlighting key evidence to be included in the reasons, noting assessments of credibility, and writing reminders in the margin for subsequent consideration. Second, as soon as the hearing is completed, I prepare a comprehensive outline of the reasons. This may extend to a few pages in length. I sketch in point form the issues, facts, arguments, analysis and tentative conclusions. I have on occasion returned to such outlines long after the hearing and immediately been able to draft full reasons for decision.

The "Institutionalization" of Decisions.

This last point is obviously not a question, and is included as a caution. In my experience, the decisions of administrative tribunals tend to become "institutionalized" over time. That is, a decision is immediately recognizable as being from a specific tribunal, both in terms of format and contents. The latter is the more problematic. We all tend to develop and use the terminology of our specific field. However, to most of our "customers" (as distinguished from their legal counsel or other representatives), this jargon can be a foreign language. Reasons lose much of their acceptability if they cannot be readily understood. Look at your tribunal's decisions in terms of both format and contents: would the average party be able to readily comprehend what has been written and understand the reasons for those decisions?
The Essential Elements

There is no universal formula for writing decisions. In addition to the factor of personal style, the many different characteristics of cases preclude the development of an inflexible framework. Reasons must be responsive to the specifics of the proceeding. Nonetheless, there are certain essential elements which should form a component of any complete set of reasons. To varying degrees they are: (a) an introduction or description of the application; (b) the issues; (c) the facts; (d) the arguments of the parties; (e) an analysis of the applicable principles; and (f) the conclusion.

There are some frequently repeated recommendations regarding the manner in which you should write when dealing with each of these elements. Bad writing by the standards of ordinary English is bad legal writing. Write with clarity and precision. This usually means using short, simple sentences. Each sentence should convey a single point. At the same time, varying the length of some sentences will make reading your reasons more interesting. Learn to use punctuation properly.

Limit the use of legalese or technical jargon. Likewise avoid unnecessary phrases. A needless transitional phrase is "Having carefully considered the evidence, I find..." (would you not consider the evidence carefully?). Write in the first person and don't "hide" behind the tribunal. This will add more force and conviction to your reasoning. Don't overwrite, use flowery language or unwarranted modifiers (e.g., "clearly", "obviously" and so on). In a related vein, attempts at humour are best left to comedians.

Finally, consider using headings and sub-headings. They can make the task of writing easier and will assist the reader. Headings are now routinely used by no less an authority than the Supreme Court of Canada.

Nature of the Application

A brief statement regarding the nature of the application will serve as an introduction to your decision. It may only be one paragraph in length, and should identify the parties, any operative statutory provisions, the subject matter of the application and the decision or order being sought.

In order to write an introduction which will be readily understood, avoid a mere repetition of the formal application giving rise to the proceeding. An example of a plainly worded introduction might be as follows:

The Union complains that its chief organizer was improperly dismissed. It alleges that the Employer committed an unfair labour practice contrary to Section 6 of the Code. The Union seeks an order of reinstatement and damages.
Use the active voice to describe the application (and continue throughout the decision). It is far more effective than using the passive:

This decision concerns an application by the Union under Section 6 of the Code in which it is alleged that the Employer was motivated by anti-union animus and committed an unfair labour practice when it dismissed the Union’s chief organizer. The remedy specified in the application is an order of reinstatement and damages.

**Issue**

You should at some point near the beginning of your decision state the issue in your own terms. I normally do this when describing the nature of the application; some of my colleagues state the issue in a separate section of their reasons.

The issue is what must be decided in the case. There may well be more than one issue. Further, the issues may be factual, concern the applicability of legal precedent, or give rise to a question of statutory interpretation.

When the issue is articulated near the beginning of your reasons, the remainder of your decision will have more meaning to readers. This will also assist you in writing the decision. Once the issue has been brought into focus, it is easier to determine what facts are relevant (or irrelevant) and what analysis should be included (or excluded).

**Facts**

Decisions are not made in a vacuum. They are made based on your application of legal principles to the facts in the case. There is a critical (and often overlooked) distinction between facts and evidence. The latter is the testimony of witnesses, documents and other materials which have been placed before you. Findings of fact must be made in light of that evidence.

Recounting the facts can be the most challenging aspect of decision writing. They are usually best recorded as a narrative in chronological order. This is not an invariable rule. If a different format is followed, the reader should be given some sense at the outset as to how the narrative will proceed. In factually complex decisions, you may wish to include a general overview. Maintaining a chronological order can be difficult if several witnesses have testified to the same event at different points of the hearing. You should try and avoid writing "He testified that... She later testified that...". Where there is no conflict, all of the evidence should be considered together and emerge as a single series of events in your findings of fact.

Where considerable documentary evidence has been introduced, attempt to avoid lengthy quotations. Paraphrase the essential points unless the precise wording is important to your reasons.
Quotations can sometimes be incorporated into sentences, rather than adopting all of the original material in a large block. This is easier to read and does not disturb the flow of your narrative.

One of the most difficult tasks faced by adjudicators is assessing credibility when making findings of fact. It is only human nature to recall events differently. Sometimes there is conflicting evidence on matters which are crucial to your decision. You must resolve the conflict and give some basis for your findings. An oft-quoted (if not well-worn) passage is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA):

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, ...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ... (pp. 356-57)

There are many reasons why evidence may be in conflict – truthfulness is only one. Further, you may accept some aspects of a witness's evidence but not others. Adjudicators typically avoid lengthy findings on credibility, particularly where the parties have an on-going relationship. Rather than saying the evidence of a witness is "disbelieved", a common phrasing is to say you "prefer the evidence" of the other witness. Once again, the reason for this may have nothing to do with intended truthfulness. One witness may have a better recollection of the incident due to notes made at the time. It can be counter-productive (if not destructive) to elaborate at length on a point of credibility.

Where there is a conflict in the evidence, it may be necessary to digress momentarily from your narrative of the facts. The conflicting evidence should be set up in opposition. This can be followed by a resolution of the conflict (i.e., which evidence is preferred and why it forms part of your findings of fact). Alternatively, if the evidentiary conflict is one of the central issues in the case, your findings may be more appropriately included as part of the analysis.

Making findings of fact requires a knowledge of the rudimentary rules of evidence. You will no doubt have developed these skills in order to properly conduct the hearing. I refer to such matters
as the use of hearsay evidence, direct as compared to circumstantial evidence, the drawing of
evidentiary inferences and so on.

The only facts which should be recounted are those which are relevant to your reasons. Irrelevant
facts should not be included except, perhaps, where they have been heavily relied upon by one of
the parties. Where areas of irrelevant evidence have been extensively canvassed during a hearing, I
will sometimes allude to those areas but indicate that the testimony was not helpful to my decision.

A simple and obvious point is that the facts must be accurately stated. You risk infuriating a losing
party by incorrectly stating the facts (even where the point is not central to your decision).
Likewise, nothing can be more upsetting to a witness than to be misquoted in a published decision.
Further, findings of fact are normally not disturbed on appeal. Incorrect findings may thus cause
irretrievable prejudice to an appellant, unlike erroneous legal determinations which may be
overruled. Review your notes of the evidence and any transcript carefully as part of the editing
process.

Arguments of the Parties

Some adjudicators will repeat the arguments of counsel in their decisions. I do not like this
approach and do not find it useful when reading the decisions of others. At most it indicates the
adjudicator heard the arguments and considered them at least to the point of incorporating them in
the decision.

I typically follow a practice of briefly summarizing the arguments of the parties in no more than
one or two paragraphs. This serves to acknowledge the competing positions and establish the
framework for the analysis which follows. If there is substance to a specific argument, it will need
to be addressed in my analysis; if there is no merit to the point, it is either not included or rejected
with a short statement to that effect.

Analysis

The analysis explains why you reached your decision. It is more than simply a conclusion or a
statement of the result. Your analysis must disclose a chain of reasoning. It may include an
examination of past authorities, a discussion of their relevance and your application of those
authorities to the present facts.

Reasons must impart to the reader a logical understanding as to why you reached your conclusion.
A common flaw in some decisions is what has been described elsewhere as reasons which require
"a leap of faith". The adjudicator may set out the arguments or law, and then decide on one side or
the other without explanation. Reasons for decision should flow, so that the conclusion appears
obvious from the facts and discussion which precede it. (I accordingly do not favour the style of
decision writing which places the conclusion at the beginning.)
The "leap of faith" flaw is related to the "cut and paste" syndrome. I have seen decisions where the adjudicator has quoted numerous and seemingly relevant passages from prior authorities. The quotations are then followed with a sentence along the lines of "Therefore, in this case, it is concluded that...". The missing step is some discussion on the applicability of the earlier authorities.

This leads to the appropriate use of precedent. My sense is that new adjudicators overuse past decisions in an effort to bolster the persuasiveness of their own decisions. Such "support" is typically unnecessary. Most areas of the law have one leading authority. If it is necessary to use precedent, I suggest that you quote from the leading authority and, perhaps, a more recent case or one which factually resembles the present application. Then get on with it and provide your own reasons.

Before leaving this section, I will briefly mention some other pitfalls. The caution against "overwriting" has already been recorded. Deal only with what is necessary to dispose of the issues before you. Anything more wastes time and creates the potential for future problems. Second, don't be drawn into counsels' ordering or characterization of the issues. Arguments are advanced for tactical reasons which are often not consistent with an objective analysis. Third, limit the use of quotations. If you find yourself emphasizing (by italics or underlining) portions of lengthy quotations, perhaps only those limited passages are required. You can often paraphrase past authorities and then simply give the case citation. Lastly, remember that your most important audience is the losing party. Does your analysis respond to the unsuccessful arguments which warrant discussion?

**Conclusion**

In anything other than short decisions, a succinct statement of your decision can be included. In longer decisions, you may wish to include a brief summary of your analysis. If there are aspects of the matter you have not decided, the extent to which you remain "seized" should be made evident. This will avoid jurisdictional arguments at a later date.
Once you have written and proofed a decision, avoid the urge to send it to the parties. The editing process has just begun and you should take time (if only a day) to reflect on what you have written. The importance of this step cannot be overemphasized.

The object of editing is to shorten and simplify your decision – not to make it longer. Too often editing results in additional thoughts and authorities being included. It is difficult to criticize one’s own work, and harder yet to completely delete whole sentences and paragraphs which you believe were initially conceived in moments of brilliance. It must be done!

There is a trade-off between achieving perfection in decisions and meeting the realities of your caseload. A very effective method for editing decisions is to have them critically reviewed by one or more of your colleagues. They will be far more dispassionate in deleting sections which are not required and might more readily identify areas which require elaboration. Your editing of the decision is “writer based”; your colleagues will bring a "reader based" perspective.

I believe it is also in the broader interests of most administrative tribunals to have other adjudicators review draft decisions prior to publication. Vetting decisions will serve policy development objectives and help foster consistent results. This is not to say that decisions should be made by committee—ultimately, it is your decision based on the facts of the case.
Hallmarks of a Good-Quality Adjudicative Decision

The following is the list of hallmarks of good quality relating to adjudicative decisions as adopted by the Workers' Compensation Appeals Tribunal in its Statement of Missions, Goals and Commitments, October, 1988.

1. The decision does not ignore or overlook relevant issues fairly raised by the facts.

2. The decision makes the evidence base for the panel's decisions clear.

3. On issues of law or on generic medical issues, the decision does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.

4. The decision makes the panel's reasoning clear and understandable.

5. The decision meets reasonable standards of readability.

6. The decision conforms reasonably with Tribunal standard decision formats.

7. From decision to decision the technical and legal terminology is consistent.

8. The decision contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.

9. The decision does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.

10. The decision conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.

11. The decision forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

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