Decision writing

by Kenneth J. Boyd

"A faculty for writing is valuable, but intense thought should precede the writing."

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The art of decision writing

Lord MacMillan[1] described decision writing as an art that cannot be taught but rather

"is acquired by practice and by study of the models provided in the innumerable volumes of the law reports in which are recorded the achievements of past masters of the art."

It is the truth of that statement which makes attempts to set down guidelines to decision writing difficult, if not impossible. Thus, it is perhaps not surprising that little has been written about the process of formulating and writing the reasoning that leads to a decision. However, one must face the fact that the process of osmosis described by Lord MacMillan is slow, time-consuming, uncertain and in some respects totally impractical for many of those who are called upon[2] to furnish written decisions. Many of those who are appointed to sit on administrative or quasi-judicial boards or as arbitrators have not had legal training and thus have had no exposure to judicial writing in general or the case reports and decisions in particular.

The most that those who attempt to write on this topic can hope to achieve is to provide, from their experience, some thoughts and suggestions which, however incomplete, may be of assistance.

Decision writing is, by its very nature, a specific and individual exercise. Each writer brings to the task his own particular style, talents and short-comings. However, there are principles and considerations which are common to every written decision and which must be dealt with and incorporated if the result is to be sound and comprehensible to the reader.

The comments and observations which follow are directed primarily to the situation where the decision making is by a tribunal of first instance. In that situation, major emphasis is placed on establishing the facts, the issues, the principles to be applied and the assessment of the evidence adduced as to credibility, relevance and weight. Somewhat different considerations apply where the decision arises on an appeal from a tribunal of first instance, or where the matter in dispute is of a legal or procedural nature.

The purposes of the written decision

It is obvious that the decision writer must have a clear conception of the purposes of the written decision. At first blush this seems disarmingly simple and not requiring further elaboration. However, experience indicates that careful thought must be given to such purposes of which at least three must be kept in mind.

1. First, the decision must arbitrate and determine the issues between the parties to the dispute. In carrying out that mandate the decision writer must recognize and deal with the positions adopted by the parties and the decision must demonstrate that the tribunal has carefully considered and weighed the positions so advanced. In this context it is sometimes necessary to deal with matters raised by the parties which the tribunal finds irrelevant, non-compelling and sometimes even spurious. Usually it is not necessary to deal with such matters at length. However, failure to deal with them may raise in the mind of the party affected the assumption that the tribunal has overlooked or ignored a matter which that party considered important, perhaps vital to the decision. Mr. Justice Trainor[3] put the matter very succinctly when he stated "A substantial effort merits response, not silence, as to why you were not persuaded." In short the decision must convey to the parties involved a complete assessment and finding with

respect to all matters raised at the hearing.

2. Second, the decision will be of interest to others not directly involved in the dispute. Decisions play a role in fleshing out and applying the provisions of statute law. They play a role in applying, extending or limiting earlier decisions and established precedents. Decisions should provide a measure of consistency. Where departure from what appear to be previously established principles is necessary, there should be a clear exposition of the reasons for so doing. A decision framed solely to meet the first purpose will not necessarily meet this second purpose. The reader of the decision who was not present at the hearing must rely solely on what is set out in the written decision. Accordingly, it is essential that the decision deal with the facts, issues, evidence and law in such manner that this class of reader will not be misled, confused or left uncertain as to the reasoning and findings of the tribunal.
3. Third, the decision may be, and usually is, subject to appeal to a higher tribunal. The decision of the tribunal of first instance should not leave the appellate tribunal in the dark as to whether or not certain facts, evidence or law were or were not considered and determined. While the foregoing statement may seem to be self-evident the following example illustrates the magnitude of the task at hand. The tribunal of first instance may have sat through many days of hearing evidence and argument generating hundreds of pages of transcript and documents. It must reduce that flood of words to a written decision of reasonable brevity. The hundreds of pages must be reduced to a handful. The task is awesome but cannot be avoided. It is not suggested that a decision should be written with constant glances over the shoulder, as it were, as to how an appeal tribunal might react. Nor is it suggested that the decision writer should attempt to craft an "appeal-proof" decision. However, the decision writer must have the possibility of an appeal clearly in mind, and enable an appeal tribunal to effectively deal with the issues raised before it.

These three purposes are inextricably interwoven and related. However, each brings a somewhat different perspective to writing the reasons for the decision. Observance of all three purposes will lead to a clearer, more comprehensive and understandable decision. It is a good practice, upon completion of the draft of a decision, to take the time to read and re-read the draft, successively having in mind each of these purposes. As a result, many an obscure passage may be clarified and many an oversight or omission corrected.

Formulation and organization of the written decision

With the purposes of the decision clearly in mind one must next turn to its formulation and organization. Mr. Justice Dickson, discussing decision writing, has stated,[4]

"Although much of the legal writing in Canada is of high quality, many of the judgments one reads show a strong tendency to be wordy, unclear, and dull. One of the sources of the trouble, I fear, is sloppy thinking. Thoughts straggle across the printed page like a gaggle of geese, without form, without beginning or end, lacking in coherence, conciseness, convincingness. It is obvious that a person cannot write more clearly than he thinks. 'Thoughts and speech,' said Cardinal Newman, 'are inseparable from each other. Matter and expression are parts of one: style is a thinking out into language.' *A faculty for writing is valuable, but intense thought should precede the writing.*"

The concluding phrase "... but intense thought should precede the writing" captures the single most important factor in good decision writing. Decision writers are usually busy people. The case list rolls on inexorably. At the conclusion of a case one is faced with a mass of exhibits, reports, a lengthy transcript, and hopefully an adequate set of notes taken during the proceedings. One is often faced with a new case commencing immediately, or within a day or two. All conditions press for a speedy resolu-

tion and discourage the "intense thought" which should precede the writing of the decision. One must resist such discouragement. There is no short-cut to avoid such intense thought if a sound and cogent decision is to be written. Time must be found for intense thought whether it be during one's evening walk, commuting to and from the office or some other quiet uninterrupted period.

As the process of sifting, sorting and assessing the evidence heard and the principles to be applied takes place, gradually a framework for logically setting out the matters to be dealt with emerges. This process can be assisted by setting down in writing an outline as a guide. However, care must be taken not be become wedded to an outline once it is committed to writing. As the thought process unfolds changes may be required. Finally, when the issues and the principles to be applied have fallen into place and the evidence has been sifted, sorted and assessed the actual writing of the decision can begin.

Once cautionary note must be added. The foregoing observations are not to be taken as an excuse for procrastinating in getting on with the decision. The task should be commenced as soon as possible after the hearing concludes. At that point all that has transpired is fresh in the mind. With time, memory fades and no amount of subsequent pouring over transcripts and notes will provide the freshness and immediacy that prevail at the conclusion of the hearing.

Specifics of organization

In order to illustrate the specifics of organization and the logical sequence which is vital to a good written decision, a typical case before a land compensation board has been chosen[5] Part of an owner's land is expropriated and he claims compensation for the land taken, for injurious affection to the remaining land and, perhaps, for disturbance and incidental damages plus interest and costs. Although the example is specific most of the principles involved in this type of decision making and writing process are of broad and common application.

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1. **Setting the stage**

It is necessary to set the stage for the reader. This will involve

a. Naming the parties, their counsel and the tribunal before which they appear;
b. Outlining the purpose of the hearing and the facts giving rise thereto;
c. Providing a short paragraph stating the time, place and duration of the hearing, whether a view of the property was taken, and whether oral or written argument was submitted;
d. Outlining the established or agreed-upon facts such as the effective date for valuation and possession, and the nature of the taking and its purpose; and
e. Providing a succinct description of the land, its location and any other relevant facts.

2. **Summary outline of issues**

In the specific example chosen the following issues might require determination.

a. The highest and best use of the subject land.
b. The market value of the expropriated land and the amount of compensation to be awarded to the Owner.
c. The injurious affection, if any, to the remaining land and the amount of compensation to be awarded to the Owner.
d. The disturbance and the incidental damages, if any, payable to the Owner.
e. Interest and costs.

3. **Names of witnesses and nature of their evidence**

The names of the witnesses together with a capsule description of their role in the proceedings and the nature of their evidence is helpful to the reader in following the remainder of the decision as it unfolds.

4. **Determination of the issues**

Having set the stage, the reader is in a position to appreciate what follows in determining the issues without repetition and backtracking.

The sequence in which the issues are set out must be, and in the example has been, carefully selected to provide a logical progression. In the example, **highest and best use is considered first because the determination of that issue dictates the entire approach to valuation.** Time spent in determining the sequence in which the issues of the particular case should be dealt with pays substantial dividends. Proper sequence provides:

a. A clear and logical exposition of the matters which must be addressed;
b. A hedge against unnecessary repetition, lapses in logic, oversight or omission of salient matters, and ambiguity;
c. A smooth transition from one issue to the next, and
d. A clear and understandable communication from the decision writer to the reader.

There is one further comment with respect to defining and dealing with the issues. It relates to the "intense thought" process which precedes the writing. Where the final result of the decision is to award a sum of money, there appears to be a strong proclivity common to decision makers to fix on the amount of that award and then, as it were, to work backward to achieve the reasoning for such award. It is not suggested that there is anything sinister, underhanded or lacking in good faith in so doing. What is suggested, based on experience, is that such proclivity gives rise to pitfalls and obstacles to arriving at a sound and reasoned decision. The better and safer course is to think through the issues in their proper sequence in the manner outlined, and through that process the actual monetary award will surface and

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present itself as the natural outcome of the process.

The discussion of each issue should conclude with a concise statement of the finding or determination made with respect to that issue. The statement should usually be short and should be set out in a separate and final paragraph under that heading or section of the decision. Where, as in the case of disturbance damages on expropriation, a number of different items of claim are dealt with, it is useful in the concluding paragraph to set down in summary form the various amounts awarded and the total.

5. **Conclusions**

Finally, after each of the issues has been determined, it is necessary to draw the written decision to a conclusion. One practice is to issue the reasons for the decision and the order, award and directions resulting therefrom in two separate documents. Where this practice is followed the reasons for the decision conclude the first document and a separate order is issued.

Another practice is to incorporate everything in a single document. The practice may be a matter of choice or may be dictated by the rules which govern the particular tribunal. Where there is a choice a single document is preferable. In that event the decision concludes with a section entitled "Therefore It Is Ordered That." There follows, in point form, the specific amounts awarded under the various heads of claim, directions as to payment and interest, the disposition of costs and the disposition of any other relief or direction sought. Obviously this portion of the decision must be stated with precision. For example, in awarding interest all of the elements which are necessary to the calculation, namely the rate, the period, whether and how compounded and so on, must be spelled out to enable the parties to carry out the directions given.

Mechanics and style

Thus far what might be described as general principles have been discussed. Now it is necessary to touch on what may be described as the mechanics and style of decision writing. It will be appreciated that in so doing it is only possible to offer a miscellany of tips and suggestions which probably leaves unexplored as many areas as are explored.

More than any other literary form, decision writing requires a clear, concise and unencumbered exposition of the subject matter. That is not to say that one must abjure a pleasing literary style, but style must remain subordinate and, where necessary, give way to the primary requirement of clarity. What follows may be described as some "do's and don'ts" in decision writing. There is no particular significance to the order which they are set out. **All** are important.

1. Consider, and where necessary define, terms and phrases which appear frequently throughout the decision. In the illustrative example the land taken will be referred to frequently as will the land which remains in the hands of the owner. A full description of both such parcels early in the decision followed by in the first instance the phrase "hereinafter called 'the expropriated land'" and in the second instance by the phrase "hereinafter called 'the remaining land'" will avoid repetition and improve the clarity of the remainder of the text.
2. Avoid the elaboration of facts and evidence which are not relevant to the issues at hand. For example, it may be clear that although there are improvements on the land they have no bearing or influence upon the value of the land. In that event it serves no purpose to describe the improvements in detail.
3. Take great care in the selection of words used in the decision. This consideration appears in a multitude of guises a few of which are
   a. technical terms used by experts must be carefully defined and the parameters of the terms established.
   b. terms of the art or terms peculiar to a particular field of expertise must be used with caution and only with a full understanding of the implications.
   c. colloquial and vernacular language and usage should be avoided.
   d. excessive use of "legalese" be avoided.
   e. where a word with a broad, generalized or vague meaning comes to mind stop and search for a word which precisely and concisely conveys the meaning intended.

   In the context of this subhead obviously a good dictionary is essential. There are a number of other books that are useful.[6]
4. Avoid the use of unnecessary and vague qualifying adjectives and adverbs. Specific examples taken from expropriation law are the phrases "market value" and "fair market value." The former has a clearly defined and established meaning. **Addition of the adjective "fair" is not only unnecessary but casts doubt on the meaning intended.** A more general example is the much overworked word "very."

   The liberal scattering of favorite adjectives and adverbs through one's written work should be avoided. Each adjective and adverb should be scrutinized and deleted if it does not add to the desired meaning or impact of the writing.
5. A decision should be divided into manageable and readable parts. Attention must be paid to constructing manageable paragraphs. Those which run on for a page or more are unwieldy and difficult for the reader. The judicious use of headings, subheadings and point form, properly numbered, can do wonders for clarity and readability. Where point form is used care should be taken to provide short bridging passages from one topic to the next.
6. Do not leave matters dangling or in suspense. Often one finds it necessary early in a decision to refer to a matter

which will be explored and assessed in more detail later in the reasons. If that is the case then say so and alert the reader to the fact that the matter will be dealt with later.

7. Use punctuation sparingly. If a sentence is replete with punctuation careful analysis usually reveals that it should be rephrased or separated into more than one sentence to achieve the clarity that is sought.
8. Avoid what may be called "the scissor and paste method" of drafting, that is the insertion of lengthy passages taken from the transcript, reports, texts and cases. There is a place for quotations in a written decision but they should be short and to the point. Scissors and paste is no substitute for making a careful analysis of the matter at hand and then setting it out in concise narrative form.
9. Adequate notes taken during the course of the hearing are of great assistance in decision writing. With experience one develops a sense of what should be jotted down and what can be left to memory or omitted as of little importance. Where written reports, studies and so on are introduced in evidence marginal notes and comments can be placed directly on them for future reference. Notes and comments must not be made on documents which are marked as exhibits in the proceeding. These form part of the record and must remain unsullied. The solution is to have additional copies prepared which may be used by the tribunal as working papers. Notes must be used and relied on with caution but nonetheless they save a great deal of time that would otherwise be used in rummaging through stacks of exhibits or pages of the transcript to find the appropriate reference. Where such reference is necessary notes provide a direct identification and route to the source which must be checked.
10. In this age of electronic wonders and office aids there is a strong temptation to resort to dictating the decision. **Resist that temptation.** A moment's reflection should make it clear that dictation offends virtually all of the suggestions and guidelines discussed. There may be the exceptional author who can compose a polished, concise and unambiguous written decision in this manner but such exceptions are rare. Dictation introduces all of the undesirable predilections which one must avoid. The intense thought, previously referred to, calls for the same intensity in committing the results of the thought to writing. There is no substitute for writing in longhand the reasoning for the decision. Even when one used this method, one must steel oneself to occasionally completely abandoning a page or pages of painfully drafted text. Sometimes judicious tinkering will correction the offending passage but sometimes nothing short of a fresh attack will suffice.
11. The written decision must state conclusions clearly and unambiguously. The conclusions should be couched in terms that are no wider than are necessary to address the issues at hand. On the other hand the conclusions should not be couched in terms which are unnecessarily narrow, otherwise development of precedent and the future application of the conclusions in similar cases will be frustrated. It is sometimes necessary to circumscribe a conclusion with phrases such as "on the facts here present," or "in the circumstances of this case." However, that should not be done unless the situation provides no alternative.
12. The treatment in written decisions of witnesses and their evidence requires care.

    It is a generally accepted rule that comments about adverse impressions of witnesses and their testimony and opinions should be kept to a minimum. Only those comments that are essential to the reasoning and conclusions should be included and even in such instances reserve and moderation should be exercised. While that injunction is sound, it does present problems in dealing with the evidence of expert witnesses who give opinion evidence.

    Expert witnesses suffer from the same frailties as non-expert wit-

nesses. Some are good, some indifferent and some not very good at formulating and explaining the position they have adopted. Where, as is usually the case, experts are called by both sides, sharp differences and contrary opinions surface which impinge directly on the issues to be determined. The tribunal must decide either to accept one expert opinion and reject the other or must find some other ground upon which to base the resolution and determination of the issue. In either case the tribunal cannot escape giving a reasoned explanation as to why it has done so.

It is difficult to reject an expert opinion without dealing directly with such matters as credibility, qualifications, the substance of the opinion given, the research and analysis upon which the opinion was based and so on. This may create a dilemma for the tribunal. If it exercises too much reserve and moderation in its comment it runs the risk of failing to explain and substantiate the reasons for its choice. However, if it is too forthright in rejecting the expert testimony, it runs the risk of offending the injunction for reserve and moderation.

There is no simple solution to the problem. The decision writer must walk a tightrope, avoiding what might be perceived as condemnation but, at the same time, providing a clear and compelling rationale for rejecting or qualifying the expert's opinion evidence.

13. The written decision must convey an aura of dignity and impartiality. There is no place for invective or intemperate language. The decision should leave the reader with a clear perception of objectivity, calmly and impartially applied. Expressions of uncertainty, indecision and excessive humility must be avoided as must any display of arrogance or impatience with the manner in which the hearing unfolded, or the substance of the evidence adduced. Where the tribunal comprises more than one member personal pronouns should not be used.
14. Dealing with issues of statutory interpretation, case law and precedent (hereinafter called "legal issues") warrants comment. The incorporation of legal issues in the written decision presents one of the more intractable problems in achieving a smoothly flowing style. Usually legal issues are dealt with in a "lumped together" fashion in argument at the conclusion of the hearing. Thus there is a temptation to deal with them in the same fashion either at the outset or conclusion of the reasons for decision. Occasionally this may be satisfactory, but more often it makes better sense to deal with each legal issue in the section of the decision to which it specifically relates. Where this practice is followed, the discussion of legal issues is scattered throughout the decision. Each time this occurs it tends to interrupt the narrative flow of the reasoning and care must be taken to eliminate or at least minimize such interruption. This can be achieved by, first, providing a bridging passage explaining how and why the legal issue arose. Then one must set out to discuss the decision with respect to the legal issue. Finally one should provide another bridging passage to bring the reader back to the application of the finding on the legal issue to the facts and circumstances of the case.

Some counsel are prone to produce lengthy lists of precedents some of which are pertinent and some of which may require the exercise of great imagination and ingenuity to establish any relevance to the case at hand. The tribunal must sort and select such precedents applying those found to be relevant and sound and distinguishing those which are not. It is not always necessary or desirable to deal specifically with every precedent cited. Here one can obtain some guidance by careful attention to the emphasis and reliance which counsel placed upon the cases cited.

Where quotations are used they must be exact, but they should not be lengthy. Avoid a glut of case names all purporting to support the principle at issue. Select one or two leading cases in which the principle has been clearly confronted and dealt with.

The overall objective must be to integrate the discussion of legal issues in the decision in a logical manner while at the same time preserving the flow of the reasoning.

As in any form of art, decision writing presents a continuing struggle toward excellence. That struggle never ends. There is always room for improvement. It is hoped that the thoughts expressed herein may provide some guidelines which will be of assistance.

Footnotes

1. Lord MacMillan, ***"The Writing of Judgments,"*** (1948) 26 Can. Bar. Rev. 491.
2. Or required by statute; see, for example, the ***Administrative Procedures Act,*** Chapter A-2 Revised Statutes of Alberta 1980, Section 7.
3. William J. Trainor, "The Technique and Value of Writing Judgments," (1977) 25 Chitty's Law Journal 253, 254.
4. Brian Dickson, "Judgment Writing," (1983) 2 Civil Justice Quarterly 27, 28.
5. For a more detailed examination of organization and structure reference to cases reported in the Land Compensation Reports is useful. The following cases illustrate many of the points raised in this article. ***Servold et al v City of Camrose*** (1983) 25 L.C.R. 342. ***Gleneagle Developments Ltd. v City of Edmonton*** (1983) 26 L.C.R. 50. ***Robertson v City of Calgary*** (1983) 27 L.C.R. 289.
6. William Strunk Jr. and E.B. White, ***The Elements of Style,*** Third Edition, MacMillan Publishing Co. Inc. ***Fowler's Modern English Usage,*** Second Edition, Oxford University. ***Roget's Thesaurus of English Words and Phrases,*** Longsman Group Limited. Robert C. Dick Q.C., ***Legal Drafting,*** The Carswell Company Limited.

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