

Decision writing

by Kenneth J. Boyd

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

Kenneth J. Boyd is a graduate of the University of Alberta 1951 with a Bachelor of Arts and a Law Degree. He was admitted to practice in 1952. Mr. Boyd has been the first Chairman of the Land Compensation Board since 1974 and prior to serving on the board has been general counsel for Texaco Exploration Company for 23 years.

The art of decision writing

Lord MacMillan¹ 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 upon² 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 pur-

poses 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 Trainor³ 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-

DICK AVAZIAN
PRESIDENT

GENE SCHMOLL
VICE PRESIDENT

RIGHT OF WAY ACQUISITION • SURVEYING •
TELEPHONE ENGINEERING • MINERALS LEASING •
ENVIRONMENTAL IMPACT STATEMENTS •

NFS

NATIONAL FIELD SERVICE CORP
NATIONAL BLDG., 162 ORANGE AVE.
SUFFERN, N.Y. 10901 914-368-1600