Reflections on the Art ... and Science of Decision-Making

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal
Halifax, N.S., Canada
February 4, 2011

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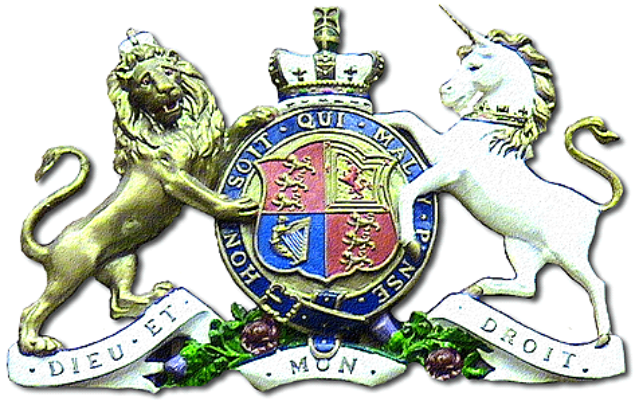
… and Science of Decision-Making



Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal

NSBS Boot Camp for Decision Makers
February 4, 2011
Halifax, N.S., Canada

(PPS 1)

Introduction

Good afternoon. Let me begin by thanking Victoria Rees and the other members of her planning committee at the Bar Society for their kind invitation to participate in this weekend's conference[1]. They have obviously put a great deal of thought and time into preparing such an ambitious program. In looking at the line-up of lawyers who are participating, you can rest assured that you will be hearing from some of the most experienced and respected counsel in Atlantic Canada.

Frankly, I feel lucky just to have been included!

Next, let me thank you, the registrants, for giving up two days from your own busy schedules. It's clear to me from watching some of the earlier sessions today that you are very anxious to learn.

Finally, I wish to express my sincere appreciation to Ms. Meghan Murtha, one of our law clerks at the Court this year, not just for her help in gathering and critiquing much of the research material which forms part of my presentation, and in creating the PowerPoint slides[2] to go with it, but also in acting as a sounding board in bringing a sharper focus to my remarks to you this afternoon.

Outline

We have an hour and a quarter together. That's not a lot of time. My goal is to make sure that when we've finished you will think the time was well spent and that you profited from the experience.

This afternoon I want to challenge you. I want to take you out of your own comfort zone, by encouraging you to think outside the realm of your own experience. And at the same time, I want to leave you with some very practical

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[1]This paper was first presented as a lecture to those attending a Boot Camp for Decision-Makers organized by the Nova Scotia Barristers' Society and held at the Lord Nelson Hotel, Halifax, N.S., February 4-5, 2011

[2]The text of this paper will include in parentheses the numbers which match the sequence of PowerPoint slides referred to by the author during the course of his lecture. Copies of these slides were also included in the package of reference materials distributed to registrants electronically on their thumb drives.

techniques to improve your game, and which you can start to use on Monday.

In a moment I will share with you the instructions I was given by the organizers and explain the approach I intend to take in meeting those objectives.

But first, let me say how I intend to divide our time. **(PPS 2)**

I've organized my presentation into four parts. The first segment will deal with the mandate I was given and my objectives. The second segment will offer a broad overview of decision-making as human beings. Here I will explore research and theory from some of our most noted scientists, scholars and judges who have written on the subject. The third segment will take some of these broader concepts from science and academia and apply them to every day life, as we shift our attention to the arena of decision-making, as seen from the perspective of those whose job it is to decide cases every day. In this segment I will offer suggestions on how to deal with two aspects of decision-making which are especially challenging. First, how do we protect and assert our own impartiality as decision-makers? Second, how do we decide and explain matters of credibility? In the final segment I will take what we've learned from our earlier discussions and develop a set of guiding principles and practical tools[3] to assist you in your work.

I have organized my remarks so that there will be at least ten minutes available at the end for questions. Please don't let that dissuade you from asking questions at any time during my remarks. I will do my best to answer your questions as we go, but if I think our time can be better spent by dealing with your question at the end I will make a note of it and defer our discussion until that time.

You have only one homework assignment and I will give it to you now. Pick up your pen and on a piece of paper write down one word you would use to describe an essential quality of a competent decision-maker. We will compare our lists later.

Now I must mention one *caveat*. In today's presentation I do not presume to speak on behalf of my Court. I know you will understand that the views and perspectives I share with you are mine and mine alone, and should not be taken to

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[3]See Appendix "B"

reflect the sentiments of my colleagues.

So with that out of the way let's get started.

Mandate and Objectives

When first approached by Bar Society officials to participate at your conference, Ms. Rees made it very clear that there really weren't going to be any strings attached to what I chose to say. In fact, I was encouraged to think outside the box and offer my own personal insights into how it is that we who judge the conduct and actions of others actually come to a decision. As your program makes clear, I was invited to explore the intellectual aspects of decision-making by reflecting upon the unspoken brain and thought processes that result in the making of a decision. And in the context of this conference, how does one accomplish that in a way that the decision ultimately rendered will be understood, followed and upheld?

So that was my mandate.

I am very grateful for the assignment not only because of its intriguing subject-matter and for the chance it gave me to participate in your deliberations, but also for the opportunity it presented, to think about thinking. To actually sit down, in a quiet place, and reflect upon how it is that we as humans assimilate information and mold it into a reasoned result. It challenged me to consider what other thinkers have said about the subject and to ask myself whether the results of their inquiries would find meaningful application in the environments in which you and I work.

In seeking to fulfil my mandate, my objectives were to probe my own notions of decision-making; to explore the research and writing of others; to test my personal assumptions about thinking and expression; and attempt to extract from all of that a list of guiding principles with practical utility in the real world.

I recognize that some of what I say this afternoon will sound "old hat" or perhaps seem so obvious as to appear trite. And I suspect that some of my comments will be reiterated by other speakers during their own segments in the program.

But I suggest that is as it should be. Sometimes we get so busy in our every day lives that we tend to overlook the most obvious. And sometimes the most important points bear repeating. **(PPS 3)**

Let's start with the good news. Lawyers and judges often embark upon a kind of juridical Odyssey, striving to pull back the curtains on the mystery surrounding standard of review and unearth a "bright line" separating questions of law, questions of fact, or questions of mixed fact and law. This exercise has sometimes prompted me in the middle of cases over which I've presided, to say to spectators sitting in the gallery that what they are hearing must sound like some ritual known only to high priests, or make them feel as if they had been dropped into one of Lewis Carroll's rabbit holes in his famous book, *Alice in Wonderland*![4]

Thankfully, I don't intend to say anything about such matters this afternoon. Reviewing the law is not part of my mandate. If I mention law at all, it will only be in passing so that you will add it to your checklist as one of the subjects you have to address. But I do believe there is a leading case to support practically every proposition I put forward today.

Before turning to my next segment which will explore current knowledge as it applies to decision-making at the human level, let me state three assumptions which are intended to recognize both the context of this conference, and set some parameters for our discussions later.

(PPS 4)

My first assumption is that "decision-making" is a process. It begins with the gathering and presentation of information which is then assimilated by the decision-maker, along with other values, biases and acquired experience and later distilled through various steps of thinking and reasoning until it is ultimately refined and expressed as a recorded result we would recognize as a "decision". To my mind, these intervals are linked and form a recognized sequence or pattern. There is a beginning, and an end. And so this afternoon when I speak about "decision-making" I mean it in the sense of a continuum, a spectrum from one stage leading to another, to another, and so on.

My second assumption is that in the context of this weekend's conference,

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[4] *Alice in Wonderland* by Lewis Carroll (1865)

the decision-making we will be talking about will have both a factual and a legal component. In other words, your decisions and mine oblige us both to assess a body of evidence from which we must determine, resolve and state the facts and, having done that, we will then be required to identify and apply certain legal principles, in order to arrive at a result which is intended to answer the dispute placed before us for resolution.

My final assumption is that the decision imposes a legal result. Thus, the "decision-making" I will speak of is intended to address the resolution of disputes at either a certain juridical interval, or at the end of a legal conflict, and in that way will have had a dispositive impact upon an individual or an institution.

Seen from this perspective, and framed by these three assumptions, let me now turn to the process of decision-making at the human level.

Human Decision-Making

In 1921, the famous American jurist Benjamin Cardozo began his classic work, *The Nature of the Judicial Process*[5], with the observation that:

(PPS 5)

> "[A]ny judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth."

I hope the remarks that follow do not sound presumptuous. I have no credentials in neurology, psychology, philosophy or medicine which might offer some support for the observations I am about to make.

However, when I reflect upon some of the theories advanced by our more celebrated scholars and clinicians, I am satisfied that some of their discoveries have practical application to our roles as decision-makers.

In your registration materials you will see a handout I prepared offering a suggested reading list[6] of text books and other materials you can explore at your

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[5]*The Nature of the Judicial Process* by Benjamin N. Cardozo (New Haven: Yale University Press, 1921), p. 9

[6]See Appendix "A"

leisure. For the purposes of this afternoon's presentation, time constraints will permit me to mention only a few.

Here is how a software developer might illustrate the basic components of artificial intelligence. **(PPS 6)**

Next, we see how neuro-scientists might diagram the process.

(PPS 7)

If noted University of California physicist Leonard Mlodinow were in today's audience I suspect he would wish to add randomness to my illustration of the sequence of intervals that occur in decision-making. In his fascinating book, *The Drunkard's Walk*[7], he writes at p. 11:

> "A lot of what happens to us – success in our careers, in our investments, and in our life decisions, both major and minor – is as much the result of random factors as the result of skill, preparedness, and hard work. So the reality that we perceive is not a direct reflection of the people or circumstances that underlie it but is instead an image blurred by the randomizing effects of unforeseeable or fluctuating external forces. That is not to say that ability doesn't matter – it is one of the factors that increase the chances of success – but the connection between actions and results is not as direct as we might like to believe. Thus our past is not so easy to understand, nor is our future so easy to predict, and in both enterprises we benefit from looking beyond the superficial explanations."

When we talk about the process of human decision-making I have always considered *thinking* to be different than and distinct from *reasoning*. For me thinking involves the process of collecting data through the use of one's senses (i.e., hearing, observing, reading); categorizing the data in a strictly preliminary way so that it can be retrieved later, and storing that information in the brain. Reasoning, on the other hand, suggests to me a process whereby all of that data is retrieved from where it was stored in the brain, then assimilated, sifted, sorted and valued in its original form and molded together with the other sources of knowledge in the brain, so that it is gradually worked on until a conclusion ultimately emerges.

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[7] *The Drunkard's Walk* by Leonard Mlodinow (First Vintage Books Edition, Random House, Inc.: New York May, 2009)

Lest we get too impressed with our own capacities to think and reason as humans, how many happened to see the article in the Halifax Herald last week describing the amazing ability of the dog Chaser whose owner (a noted psychologist) had taught his dog to learn and distinguish between 1,022 words! The dog's mastery of such an extensive vocabulary was proved to scientific levels, as was his ability to distinguish among verbs such as "Fetch" and "Drop".

In their book, *The Cambridge Handbook of Thinking and Reasoning*[8], the editors of the book, Keith J. Holyoack and Robert G. Morrison describe their attempt to create the most comprehensive overview of research on thinking and reasoning that has ever been available. While their primary focus has been on cognitive psychology and neuroscience, they also include recent works in the fields of social psychology, philosophy, economics, artificial intelligence, linguistics, education, law and medicine. They devise a complex definition of thinking, of which reasoning would appear to be a subset. I won't challenge you this afternoon with their formula-laden modeling of what we do in order to think, however, some snippets are relevant.

They say that thinking is directed towards achieving some desired state of affairs, that is to say, some goal that motivates the thinker to perform the necessary mental work. Part of that process, according to the editors, will involve reasoning which springs from philosophy and logic and involves drawing inferences from initial information or assumptions. Testing the strength of the assumptions will add weight to the conclusions. Thus, judgment and decision-making call for an assessment of the value of a conclusion and the probability that it will yield a certain result, within a group of possible alternatives or outcomes. They say decision-making demands planning and constructing a course of action to achieve the objective of problem-solving. In the next slide I've tried to design a schematic to illustrate these steps in the process of decision-making in the courtroom.

(PPS 8)

In her chapter *Legal Reasoning*[9], Phoebe Ellsworth, Department of Psychology, University of Michigan, explains the various theories of legal reasoning and how legal reasoning differs from scientific reasoning. For our

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[8]*The Cambridge Handbook of Thinking and Reasoning*, edited by Keith J. Holyoak and Robert G. Morrison (Cambridge University Press, 2005)

[9]*Ibid*, p. 685

purposes it is enough to say that legal reasoning is most often described as that form of reasoning based on analogy, i.e., the ability to spot the factual and legal similarities, or differences, between the case in litigation, and earlier precedent, together with the ability to recognize which similarities and differences are relevant and important, and which are not. Thus, the focus is on precedent with the intellectual analysis depending on both legal principle and a sorting out of the facts.

Whereas science and its experiments require no final decisions and proceed on an ongoing basis, judges on the other hand are always faced with at least two competing hypotheses proposed by the parties, and are obliged to make final decisions, notwithstanding conflicting data or inconclusive evidence.

Whereas the scientist's theories may be tested empirically, the judicial decision-maker seeks to resolve a dispute in a way that is consistent with the law and previous precedent, and in a manner that is just. There is no empirical test for justice.

The Venn diagram I've drawn is intended to illustrate how law now looks to science, and vice versa, for insight in problem-solving. **(PPS 9)** While the focus and objectives of these two disciplines may be very different, it seems to me that some of the lessons learned in science will be very useful to judicial and administrative decision-makers in their own legal problem-solving.

In his recent book, *How Judges Think*[10] noted author and jurist, Richard A. Posner, Circuit Judge of the United States Court of Appeals for the 7th Circuit, and Senior Lecturer and the University of Chicago Law School, examines our judicial profession from the inside. While acknowledging external restraints upon a judge's role as decision-maker, such as rules, including the Rule of law; standard methods of analytical legal reasoning; the requirement to be impartial; etc., Judge Posner emphasizes what he calls the "involuntary" freedom possessed by judges. This is a blank slate on which judges have decisional discretion to inscribe their judgments. How judges actually, and ought to, fill-in this open area is the fundamental question Judge Posner addresses in his fascinating text. I commend it

[10]*How Judges Think* by Richard A. Posner (Cambridge, Massachusetts: Harvard University Press, 2008)

to you.

How many of you are familiar with the works of Malcolm Gladwell? I'm sure many of you have read ***The Tipping Point***[11]. In his more recent book, ***Blink***[12], he refers to the work of New York University psychologist John Bargh to explain what Gladwell calls "the locked door of unconscious reasoning". I'd like to mention it briefly because I think it serves as a powerful illustration for the traps we will need to guard against in our (too) early judgment of people who appear before us. For if we can be so easily duped by unconscious priming as is apparent in the experiment Gladwell describes, then shouldn't we be equally vigilant for the triggers and traps of which we are *actually* aware?

Here's how Bargh's experiment worked. He and two colleagues staged a ruse in the hallway just down from Bargh's office. They used a group of undergraduates as subjects and gave everyone in the group one of two scrambled-sentence tests. The first group's list was sprinkled with words like "bold", "rude", "aggressively", "intrude", "disturb", etc. The second group's list was sprinkled with words like "respect", "courteous", "polite", "patiently", "considerate", etc. In neither case were there so many words that the students figured out they were being set up. After doing the test, which took only about five minutes, the students were instructed to walk down the hallway and talk to the person running the experiment in order to get their next assignment. However, when the student arrived at the office, Bargh made sure that the experimenter was busy, apparently locked in conversation with somebody else — a confederate — whom Bargh appointed to stand in the hallway, block the doorway, and thus prevent the student from meeting the individual and obtaining his or her next assignment.

Bargh wanted to learn whether the people who were primed with the polite words would take longer to interrupt the conversation between the experimenter and the confederate, then those students who were primed with the rude words. He knew enough about the strange power of unconscious influence to suppose that it would make a difference; but he thought the affect would only be slight. He and

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[11] *The Tipping Point: how little things make a big difference* by Malcolm Gladwell, reprint (New York: Little Brown and Company, 2000)

[12] *Blink, The Power of Thinking Without Thinking* by Malcolm Gladwell (New York: Little Brown and Company, 2005)

his colleagues were wrong. The difference was dramatic. The people primed to be rude eventually interrupted the conversation, on average after about five minutes. But the people primed to be polite, the overwhelming majority — some 82% — never interrupted at all. They just stood there, and said nothing.

So I come back to my earlier question. If we can be unconsciously led by suggestive adjectives in the written word, what might the result be when we feel uncomfortable or threatened by someone's outward appearance, and if we then use that as a reliable indicator of the individual's ability, knowledge and honesty? I will say more about that later.

Let me turn now to a consideration of bias. **(PPS 10)**

In their text *Problem Solving, Decision-Making and Professional Judgment: A Guide for Lawyers and Policy-makers*[13], Paul Brest and Linda Krieger offer considerable insight into how biases can be introduced at any time during the decision-making process. They describe several different types of bias. One is "expectation" bias. This kind of bias can be introduced at the information acquisition stage, in that when we encounter new (evidence) we try to make it fit into our existing knowledge structures which are already established in our memories. One effect of expectation bias can be false confidence. Consider the example of a decision-maker who is very familiar with the subject-matter being litigated, having handled many such cases as a practitioner. Might that be a (+) or a (-) factor? Given such familiarity, and if all decision-makers and advocates are from the same mold, attend the same lectures, and read the same cases, how then will anything new, or novel be introduced to jar the *status quo* and ensure that the law continues to grow and be a "living tree"? Expectation bias can also cause conflict, or create faulty memories. For example, consider the difficulties encountered by trial courts when first confronted with "oral history" during the initial First Nation's treaty and land titles litigation. How could such oral history be "tested" through traditional cross-examination? How could it be given any value if not subjected to standard challenges which would ordinarily be applied to other kinds of evidence? Yet in facing these challenges our law evolved on a principled basis to accommodate and admit such historically important evidence.

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[13]*Problem Solving, Decision Making, and Professional Judgment; A Guide for Lawyers and Policymakers* by Paul Brest and Linda Hamilton Krieger (New York: Oxford University Press, 2010)

These authors say that we have "retention and retrieval" biases. That is to say the way in which we retain and retrieve information or memories can in themselves create biases. An example is that people may make incorrect estimates about frequency or causation based on how easily a particular example comes to mind. Consider the old stereotypical myth "Most cases of domestic abuse are reported to the police".

What psychologists refer to as "naive realism" may exacerbate bias. For example, Brest and Krieger point out that individuals have a tendency to assume they keep a balanced and neutral perspective about things, and that other people, if possessed of the same information, would see things the same way. Our experience in litigation tells us that isn't so!

Hindsight may introduce bias when processing and judging information. Experiments show that individuals have a tendency to assume a past event was more foreseeable than it actually was. Our legal system invokes procedural rules to safeguard against hindsight bias. Examples would include the great care attached to introducing an accused person's criminal record, or evidence of similar act offences, out of fear that it will skew the thinking of the trier by fostering the improper conclusion that the person is "obviously" guilty because of some previous propensity or history to commit a similar crime.

Anchor points are other triggers to bias. For example, experiments show that individuals given an opening offer of $2,000 are more likely to accept a final offer of $12,000 (and think it is generous) then individuals given an opening offer of $10,000. That is because the initial anchor point apparently changes the individual's expectations.

Brest and Krieger point to many other influences which may arouse or increase bias.

How do we counter these tendencies? How do we de-bias ourselves? How do we test the soundness of our conclusions to ensure we were not confounded by myths or falsehoods?

Justice Ian Binnie in his reasons in *Sheppard*[14] offered a list of propositions to commend the judicial obligation to provide meaningful reasons for judgment. Among them is the assertion that the very act of writing, and expressing oneself in reasons that are written down and accessible to the public, focuses the decision-maker's mind on the importance of lucidity in reasoning and prose.

Other theorists such as Brest and Krieger would insist that we get beyond bi-directional reasoning which simply tests the assumptions against the conclusion and then in reverse tests the conclusion against the assumptions. They would suggest we require decision-makers to "consider the opposite" by actually addressing the possibility that the opposite of what they believe might be true, as having a positive effect on the decision-making process.

And Professor Richard Devlin, Dalhousie Schulich School of Law in his writings on the subject of why legal theory matters[15] in social context education, emphasizes the importance of self-critique and self-reflection as a tool for exposing unjustified assumptions and for enhancing the legitimacy of judges.

To our list of strategies as decision-makers we could also add the act of dialogue. By that I mean conferring with one's colleagues. Never to the extent of delegating the decision-making process, which is obviously improper, but only to the extent of testing one's reasoning, or its expression. At the appellate level, we sit as panels, and thus the exchange of points of view as well as the process of writing and circulating draft reasons is recognized as being both an individual and a collective endeavour. While I am not suggesting that judges or adjudicators who sit alone, attempt to engage their colleagues in the actual decision-making process, I see nothing wrong with collegial discussion concerning novel or contentious issues.

And, of course, I stress the importance of attending conferences such as this, so that your knowledge of the human mind; how we come to think and reason; and how we ought to improve our ability in expressing ourselves in written reasons, is enhanced.

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[14]*R. v. Sheppard*, [2002] 1 S.C.R. 869

[15]Richard F. Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001), 27 Queen's Law Journal 161

All of these strategies will hone your skills, keep you current, and alert you to the types of outside influences we all seek to avoid.

Having explored, albeit in a superficial way, this broad canvas of current academic theory on the process of decision-making, I want to explain how I see many of these same discoveries play out in the every day world of administrative and judicial hearings over which you and I preside.

Administrative/Judicial Decision-Making

Let me begin this segment with a challenge. **(PPS 11)**

I have found that a good way to sharpen the mind as a decision-maker is to think of what it is that is expected of us. In today's parlance we often hear references to "accountability" and demands that someone or other be "accountable".

I'm not particularly attracted to that notion. To me the word "accountable" invokes the attitudes, perceptions and agenda of others.

I prefer to think of it in terms of "responsibility". As decision-makers I respectfully suggest that we ought to consider those matters, and those participants for whom we are responsible, because I think <u>that</u> shines the light where it ought to be, on each of us personally. It makes us self-regulatory by constantly reminding ourselves what it is that we ought to expect, of *ourselves*.

In my view, our very first responsibility is to *self*. Not in any selfish, arrogant or condescending way. But rather, taking pride in ownership of our work as decision-makers so that the *product* of our thinking, reasoning and expression will always be characterized by best effort. If we recognize our responsibility in the quality of our work and the duties I am about to describe to you, I guarantee that our abilities as decision-makers will be enhanced, and so too will be the level of respect accorded our judgments.

How would you imagine the skilled decision-maker? **(PPS 12)** Perhaps the workload is accurate, but we shouldn't have to hide behind a mask!

I suggest some of the qualities of a decision-maker that one would universally

support would include the following: **(PPS 13)**

- to be punctual;
- to be knowledgeable;
- to be prepared;
- to be engaged;
- to be alert;
- to be courteous;
- to be patient;
- to be open-minded;
- to be impartial;
- to be firm;
- to be fair;
- to be prompt;
- to be articulate;
- to be sound; and
- to be clear.

Have a careful look at each of these listed qualities. Remember the homework assignment I gave you? Did anyone write down a quality you do not see on the list?

What others would you like to add?

To be a good decision-maker I would urge you to think that you have a duty to acquire and demonstrate each of these qualities. Try it out in your own mind. "I have a duty to ...." "I have a duty to ...". and so on.

In a paper I wrote a few years ago entitled *The Morality of Judicial Reasoning*[16] I elaborate upon my thesis that our authority to judge the conduct and actions of others arises from an implicit moral pact with the community.

Among the reference materials I've provided as part of your tool box I

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[16]The Hon. Mr. Justice Jamie W.S. Saunders, *The Morality of Judicial Reasoning* first presented as an address to the Annual General Meeting of the Ontario Court of Justice, May 25, 2006 at Niagara-on-the-Lake, Ontario

commend the article, *A Matter of Trust*[17], by Iowa District Judge Annette J. Scieszinsky. She has written extensively in the field of judicial ethics and makes my point very well. She says:

> ".... judges act as fiduciaries of the judicial branch and bear an affirmative obligation to ensure the integrity of their conduct; they must proactively guard their impartiality; and they need to stand tall to model the courage and selfless independence required in adjudication. ... To earn and preserve the support of the people, judges must demonstrate a fortitude that beams beyond their own courtroom walls, transcends any isolated case, and shakes up a cozy work style — leadership that rises to a fiduciary level. It is a matter of trust: any forsaken standard of judicial diligence, by even one judge, one time, will erode the confidence of the twenty-first-century public that expects much."

Remember these qualities. Challenge yourself each time you sit in judgment of others by asking whether, in fact, these qualities would be apparent to a reasonably informed observer who happened to be watching you.

Each of these "duties" has a corollary.

- To be respectful of others .... you cannot be rude.
- To be impartial .... you cannot be biased.
- To be firm ... you cannot be indecisive.
- To be prompt ... you cannot be delinquent.
- To be prepared ... you cannot be lazy.
- To be alert ... you cannot be distracted.

Pay attention to these duties and their opposites. Let them serve as guide posts in the way in which you conduct yourself as a decision-maker.

Having now explained my view that decision-makers serve as fiduciaries of a public trust, with positive obligations to fulfill their mandate, let me turn now to a consideration of what I raised earlier this afternoon as being an especially challenging feature of our work. How do we guard and assert our impartiality as

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[17]"A Matter of Trust, A Judge's Fiduciary Responsibility", by Judge Annette J. Scieszinski, The Judges' Journal, Fall 2010, vol. 49 No. 4, American Bar Association

decision-makers?

Handbooks, codes of conduct or statements of principle which are intended to guide or regulate judicial behaviour often refer to the three I's... Integrity, Independence and Impartiality. Our time together this afternoon does not permit any discussion about Integrity. You will see that I did not include it in my list of "qualities" of a decision-maker. I simply presumed its existence, and took it as a given.

But I do wish to spend some time discussing Independence and Impartiality. **(PPS 14)**

Consider how far we've come in our expectations of independence and impartiality. In the early 1900's British Columbia's magistrates were only paid a fee by the government if the accused were convicted! By the 1930's it was common practice for defence counsel to offer to match the fee if an acquittal were entered!

To begin, it is important to understand that judicial independence is not the private preserve of judges. It is a constitutional right of all Canadians. It is the vehicle, the mechanism by which our impartiality as judges is sustained.

As the Supreme Court of Canada has stated:

> *"Litigants who engage our judicial system should be in no doubt that they are before a judge who is demonstrably independent and is motivated only by a search for a just and principled result."*[18]

Thus, our independence as judges or decision-makers is not the objective; rather it is the means to an end. It is the *means* by which we achieve the *end*, which is our impartiality. The two are companion values; distinct, yet each

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[18]*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General),* 2005 SCC 44, [2005] 2 S.C.R. 286 at ¶ 1

dependent on the other, and where the value of each would be very much diminished by the absence of the other.

As I will explain, in order for us to be, and be perceived to be impartial, we must insist upon our independence. One cannot maintain the public's trust in our impartiality if we cannot demonstrate that we are truly independent from any form of improper outside influence; be it government, bad press, popular opinion, mob rule, coercion, threats, protest, a Chief Justice or other judicial colleagues.

How do we maintain our independence and impartiality? Let me offer some suggestions.

A good starting point is to consider how it is we acquire and process information before coming to a legal result.

Remember that in Canada and in the context in which you and I both work, we operate within the adversarial system. It is the job of the parties, the litigants whose dispute is before you, to gather and present the evidence in accordance with the rules of evidence. Unlike decision-makers in certain civil law systems we do not work in an inquisitorial system. In other words, it is not our job to gather the evidence. We do not direct the police, or staff investigators, or researchers, or academic scholars, or expert witnesses to go out and hunt for the evidence and bring it to us. That is not our job.

The responsibility to collect and present the evidence is left in the hands of the litigants or their legal counsel.

That is not to say that we do not bring to the process of decision-making other "information" inherently available to us. We already possess considerable knowledge through our own independent learning and collective life experience. It would be silly to say that we decide cases in some kind of intellectual bubble, isolated from our inherent knowledge and experience as human beings. Such a proposition is absurd. Rather, the expectation of a skilled decision-maker is to recognize the difference between the evidence presented and the "other" information which might, conceivably, rightly or wrongly, enter into the process.

So, instead of an "investigator" who gathers evidence, you will instead adjudicate upon the evidence that is put before you, taking care that in performing

your decision-making role you do not allow yourself to be influenced by factors outside the hearing room.

Remember our earlier discussions and lessons learned from neuroscience as to how biases can be innocently introduced at any time during the decision-making process. **(PPS 15)** As human beings, there is a natural tendency to be partial, that is, to favour certain inclinations or perceptions, while perhaps reacting adversely to others. These are what I think of as potential bias "traps" which any decision-maker might have to face and recognize; yet not to the extent that he/she over compensates such that the action taken to avoid it, makes it worse. Consider these:

- foreign cultures (e.g., honour killings; sexual mutilation of adolescent daughters, etc.);
- disliking counsel, rightly or wrongly, and then ignoring the merits of the case or argument;
- being angry with, or overly sympathetic towards a self represented litigant;
- how we react to parties or witnesses who may have suffered a brain injury, or be challenged by mental illness. Do we immediately think that these individuals won't be as "quick" or "bright"? Will we over-compensate, for the wrong reasons?
- being (overly) confident/familiar with the subject area of litigation (e.g., intellectual property; commercial litigation; medical malpractice; homicide);
- being uncomfortable with the subject-matter of the charge/litigation (e.g., spousal assault; elder abuse; incest; pedophilia; cemetery vandalism; loitering and panhandling; child pornography; sexual harassment in the workplace, etc.);
- What about those persons charged with swarmings? Or people in the street you see wearing baggie pants, gang colors or hats on sideways? Or people charged with cross burnings or similar hate crimes? Do such subjects cause you to grit your teeth and question your own impartiality? If they do, how will you guard against such personal preconceptions clouding your judgment and obligation to be impartial and fair? How does a decision-maker resist such bias so as to ensure both explicit and apparent impartiality?
- And has simply hearing me recite such a list of topics, caused you, the audience, to question my attitudes for having included some of these

subjects in the same list? Or any list?!

It is very important to keep track of individual biases, or earlier acquired knowledge. Take demeanor, for example. It is critical for any decision-maker to pay close attention to any witness while testifying. How does the witness appear to respond during the tone and substance of certain lines of questioning? What is the witness's reaction when confronted with contradictory evidence? Was the person calm? Agitated? Belligerent? Arrogant? Insensitive? Boorish? Casual? Stupid? Hostile? If any of these adjectives come to mind as the decision-maker sizes up the witness, how might such characterizations affect the decision-maker's appreciation of the evidence, or the level of truthfulness and weight accorded to it?

It is not my intention this afternoon to answer those questions. I simply alert you to their importance. You as decision-makers must recognize their existence and take steps to filter them with whatever system of checks and balances, sixth sense or heightened level of scrutiny you develop, and as the circumstances may require.

Legal precedent reminds us that demeanor, in and of itself, is a poor and often entirely misleading guide to honesty and truthfulness. For example, a shy taciturn individual may by disposition or culture, be naturally reserved and uncommunicative, and yet be completely honest in one's testimony. How dangerous it would be to attach such outward indicators to dishonesty. And yet, by times, reluctance or silence will be indicators that the witness's testimony is unreliable. And what of the opposite? Will bold, loud and strident answers suggest confidence and truth, or smack of deception and efforts to mislead? Who knows? But you as decision-makers have to make those observations and take them into account, but carefully sift them through the filters of your own life's experience, preconceptions and biases.

Now let's get to some real nuts and bolts. We spoke earlier of decision-making as a continuum; a process which involves various steps in a deliberate course of action.

Let me highlight what appear to me to be the three principal stages in our analysis of this continuum:

(PPS 16)

- Getting ready for the hearing.

- Presiding over the hearing.
- Writing your decision.

Advanced planning and careful preparation is required each step of the way.

Getting ready for the hearing

Study the pleadings. Whether they are formally called "Statement of Claim" or "Defence" or "Notice of Motion" it really doesn't matter. The fact is that there will be documents in your file which precipitate and "give life" to the proceedings.

Read these documents carefully. Understand the nature of the claim; the remedy or relief sought; and the defence or objection to all or parts of the action.

Insist upon having your own working copy of the record, to mark up and annotate as you choose. There will always be a clean copy kept as the official record. But you should have your own, and not have to share your copy with anybody else.

Make notes as you begin your review. Develop some kind of record keeping system that works well for you, so that your thoughts (whether in a binder, or on looseleaf, or a legal pad, or post-its, or scraps of paper, or a computer monitor) will all, ultimately, be easily retrievable whenever you need to find them, and not scattered goodness knows where.

Make a list of the issues as you see them arising from the pleadings. Don't parrot the language used by the litigants in framing the issues. Rather, restate the issues in concise language which you understand.

Prepare your notes so that you grasp both the issue that is being raised by the plaintiff or proponent, and the issue or counter argument that is being put forward by the defendant or respondent. An easy way to do that is to set up your pages in a binder so that on one side of the binder you have the plaintiff/ appellant/applicant and on the opposite page you have the defendant/respondent. This is a good way to establish a mental picture of the key points. It is something you can look back at quickly when refreshing your memory before starting the hearing. And it may well form the decision tree or outline for your eventual decision.

It will also serve to prompt questions which you may want to pose during the course of the hearing. Start your list of questions as you work your way through the materials in the file and have those questions organized in a place that is easily accessible. You will have those ready, when you need them, for the actual hearing.

Develop a system to easily separate the issues, evidence and case authorities relied upon by the appellant/plaintiff, from those of the respondent/defendant. For me, a simple color coding system works best. I use a green highlighter for the appellant which to me simply represents "Go". I use a pink highlighter for the respondent which simply indicates "Stop". As I work my way through the record and books of authorities I use a green highlighter to mark or emphasize the appellant's points, and a pink highlighter for the other side. Then, for my own personal note taking or highlighting from the record, the transcript, the books of authorities, I'll use a yellow highlighter. Employing this simple, easy to remember system has served me well for 40 years. And if you have reserved judgment and are coming back to writing your decision a month or more later, it's a fool proof way to keep track of the arguments and who happened to have made a particular point, or other.

Besides the pleadings you will have to be familiar with the law. And that will be in at least two respects. First, you must obviously be knowledgeable about the enabling legislation by which you "exist" as a decision-maker. For example, is there a provincial or federal statute which creates the body or tribunal in which you conduct business? What does it say about your mandate? What does it say about the scope of your authority? What does it say about the standards of review you are obliged to apply in your determination of the case? What does it say about the limits upon your authority or the remedies and relief you are authorized to grant? What does it say about the rules governing proceedings that come before you? These are things you must understand.

Quite apart from any enabling legislation (whether by statute and/or regulations) you must also be knowledgeable in the common law as it applies to the issues arising in any given case.

(PPS 17)

To recap, in order to get ready for the hearing you must:

- study the pleadings

- identify the issues
- prepare your questions
- understand the law
- be familiar with the record, e.g., previous evidence given at a discovery.

Let me turn now to the second step in decision-making.

Presiding over the hearing **(PPS 18)**

In preparing yourself for the hearing, whether as a member of an administrative tribunal, or as a judge; whether as a rookie or a seasoned veteran, planning and visualization are always important. Get yourself ready by imagining how things will unfold.

Suppose you were planning a trip to a place you had never been before. What would you do? What information would you expect to have available to you in coming to the various decisions you had to make in planning your trip? How would you organize the information? How would you prioritize it? What outline would you prepare of the steps you had to take in getting ready? In going over the information how would you characterize what was important, and what was not? How much time would you allow yourself to complete the task?

The obvious place to start is the physical set up. As adjudicators and judges we need to listen, to read and to observe. Make sure that the physical set up of your hearing room does not obstruct or distract you in your work.

In any case before us we will all be faced with a mass of evidence, from which the facts have to be determined or inferred.

Your job is to find the facts. By that I mean you have to decide what facts you choose to accept, from all of the evidence. You need to know the rules of evidence. If you are not legally trained, you should have a lawyer give you advice on what rules apply to the presentation and admissibility of evidence. You need to know the rules of procedure. If you are not legally trained you need to have a lawyer advise you as to the proper practices and rules that are applicable to proceedings in your tribunal, or court.

I understand that there is a good cross section of experience in today's audience. Some of you are seasoned veterans, while others are just starting out. Your work may cover a broad spectrum of topics as might include: landlord/tenant disputes; **Motor Vehicle Act** infractions; breach of contract or warranty; zoning; boundary disputes; regulatory approval of rates and assessments; property tax appeals; business valuations; wrongful dismissal; human rights violations; harassment in the workplace; discrimination; professional negligence; unprofessional conduct and discipline ... and the list goes on.

Simply listing such a variety of topics reminds us of the importance of administrative tribunals in our every day lives. Yet despite the differences in subject-matter there are common features which will frequently arise in their resolution.

I assume you will be familiar with the practice and procedures of the body or tribunal, whether from past experience as a lawyer, or as a staff official. If not, you should take the opportunity to sit in the gallery and observe a case being heard, before you are actually put in the position of acting as a decision-maker. Get a "feel" for what goes on there. Introduce yourself to staff whose job it is to assist you in efficiently conducting proceedings.

Know your docket.

Set realistic time limits for the completion of cases on your docket. Learn to be efficient but don't allow yourself to be rushed.

Know the rules concerning the introduction of evidence (even down to the marking of exhibits and the careful keeping of a complete record).

Know the law with respect to the admissibility of evidence and how to deal with evidentiary rulings.

Know the law concerning the standard and burden of proof in the case you are hearing.

Be firm in your rulings. State them clearly on the record and then get on with things. It is your job to manage the case effectively and efficiently. Never let the case be highjacked by lawyers or self-represented litigants.

Remember that the presentation of the case should be left in the hands of the parties, subject to your fair and balanced management of the proceedings.

Try not to interrupt. Don't be interventionist. If necessary, write a note or post-it to yourself which will serve as a reminder that your job is to decide, and not to be an advocate for one side or the other.

Try to only ask a question if you need clarification. Don't ask questions that the lawyers or litigants will perceive as interference, or mistaking your role for theirs.

Never let your careful note taking interfere with your ability to observe whatever it is that is going on around you. This includes your careful observation of the witnesses who testify before you, the lawyers and litigants who appear as parties, and those who sit in the gallery as spectators. At the end of the day, should anyone ask "what was that witness like?" you should never say "well, ... I'm not sure ... I didn't really notice, because I was too busy writing notes of his/her testimony." You must always be alert, be aware to what is going on around you.

Be careful when documents are admitted into evidence, especially if the volume of material is large. Force the lawyers to be precise as to what they are admitting. For example, is the report admitted simply for the purpose of proving authorship and authenticity? Or is it admitted to prove that the document was written on the date stated? Or is it admitted to prove certain facts within the document? Or is it being admitted for the truth of its content without condition? Or is it admitted for the expert opinion expressed therein, together with the facts and assumptions upon which it is based? Or is it admitted as an expert opinion, but subject to formal proof of the facts and assumptions upon which it is based later?

These are all very serious questions and it is your job to establish clearly and on the record what is conceded, what is admitted, and what is not.

When presiding over a lengthy hearing, and many days worth of evidence, make sure you develop the habit of preparing summaries of the evidence, every evening, when your memory is still fresh. Such diligence pays dividends in at least two ways. First, it forces you to record the essence of a particular witness's testimony while carefully thinking about how that evidence relates to the principal issues in dispute. Second, it will save you countless hours of work later on trying

to reconstruct what a particular witness said, weeks or even months after the hearing.

I find it helpful to organize my witness summaries by theme, or by issue, as opposed to any kind of chronological order. In your written decision never simply parrot the testimony of a particular witness in the same order in which the evidence was presented at trial. That's lazy, boring and hardly reflects the intellectual rigour or confidence one would expect from a competent decision-maker.

You should bring discipline to your assessment of the final arguments made by counsel. Be alert to exaggeration. Never be taken in by bombast or the sheer force of argument. Always look for the substance of the submission and the jurisprudence to back it up.

Once all of the evidence is in, counsel will close their respective cases. You will hear final submissions or argument. These submissions are not "evidence". They are nothing more than the "spin" any particular party or advocate seeks to place upon the evidence that supports their position, or seeks to diminish or distinguish the evidence that supports the other side.

When reviewing case law or listening to the lawyers make their submissions about the authorities they have filed, make it easy on yourself by simply taking a colored marker and drawing a vertical line through the middle of the text, or somewhere in the margin to mark the spot. That's far easier, and faster, than soaking the page by going back and forth, left to right with your highlighter.

Ultimately it will be your job to apply the law to those facts in order to reach an outcome. Are you satisfied with the authorities that the parties have provided to assist you in that task? Are they current? Are they persuasive? Are they binding? Are certain lines of authority in conflict such that you will have to decide which you choose to apply to your case?

During final submissions don't hesitate to ask questions to clarify certain matters or challenge counsel/litigants in the positions they have taken. However, as discussed earlier, always be careful with the tone and pattern of your questioning. The questions should be posed to clarify a point or acquire a better understanding of the subject. Questions should never be asked which will leave the impression that the questioner is a bully, or has no other purpose than to

demonstrate how smart he or she is. That's a sure fired way to lose respect for the decision-maker and add a cloud of unfairness to the entire proceedings.

Writing your decision

(PPS 19)

Here I won't trespass on Mr. MacIntosh's presentation which follows mine. I know you will be given excellent advice in preparing well written and reasoned decisions. Let me offer some guiding principles.

Once the case is over you will be faced with a mass of evidence, from which the facts have to be determined or inferred. Then, having done that, there will always be law to apply to those facts. You will have to identify and properly apply those legal principles to the facts as you have found them.

A good way to start is by preparing what I call an Overview. Using conversational prose, write out two or three simple paragraphs which explain what the case is all about. Imagine that you are out in your back yard on a weekend and your neighbour says "I read something about a big case you are taking on and I think the paper said it starts next week. What's it all about?" How would you answer your neighbour? Write that down. What you've written (or something close to it) may well become the Introduction to your eventual, formal decision.

I am often asked "How do you know what evidence is important? How do you decide what facts to include in your decision, and what you should not?"

To me, the best way to answer that question is to decide what issues need to be resolved to dispose of the case before you? It's only when you sit down, in the solitude of your own room, and decide what the issues are, that you can then resolve in your own mind what evidence is important, and what facts need to be decided to resolve those issues.

When you sit down to write your decision, it will then be your task to sort out the evidence, find the facts, decide the issues, apply the law and draft your decision.

At this juncture let me emphasize two things: proving and deciding the facts. I will deal first with the standard and burden of proof. For today's purposes it's enough to remember that the burden of proof is generally upon the party advancing

the proposition. I don't imagine that any of you are involved in criminal matters, so we need not concern ourselves with the standard of proof beyond a reasonable doubt. Rather, I will restrict my comments to civil cases.

Here, the typical standard of proof would be "on a balance of probabilities". Like so many things in law we use metaphors to illustrate certain concepts. You should imagine a set of scales, equally balanced with no weight on either scale. That is what the set of scales looks like when you walk into the hearing on the first day, and the case begins. Eventually evidence is loaded on to one scale or the other. Occasionally it will be removed from one side or the other, or may be counter-balanced so that the scales are once again level. But at the end of the day you must decide whether the scales have been tipped in favour of the party who bore the burden. Balance of probabilities means 50 + 1, in other words, enough to tip the scales, every so slightly, in favour of the party asserting that particular proposition.

I mention this simply by way of illustration. We need not discuss it further this afternoon. My only purpose is to drive home the point that you must never lose sight of who bears the burden, and what the particular burden happens to be.

The second important thing you must remember is that "finding the facts" is absolutely your preserve. You do this alone. No one should ever be approached to assist you. It is not a job you can delegate. It is not something you discuss with your colleagues after the hearing, and try to figure out with their help. Without getting into Latin, there is a famous maxim that "he who hears, must decide". So remember that.

And don't forget that with any witness, whether a lay person, or an expert; whether educated to the post-doctoral level, or illiterate; whether a Nobel prize winner or a street sweeper; it is absolutely for you to decide whether you wish to accept all, none, or part of what the witness has said.

Now when I say you must "find the facts" I don't mean that you do it but then keep them to yourself! You must *declare* those facts. And because of the positions we hold, you have to do it in writing because we work in public. I urge that you state the facts clearly. Be bold without employing hyperbole or sarcasm. Do not be shy in your observations concerning liability. If your decision goes on to appeal by a higher tribunal or court, you will make my job much more difficult

and open yourselves up to the likelihood of reversal, if you fail to state the facts upon which you have based your conclusions, in plain, unambiguous language.

Remember as well that you are also entitled to draw inferences from the facts, provided there is some evidentiary basis for doing so and provided your inferences are reasonable.

Now don't forget the importance of your Outline. It's the list you created when you started to write your decision. On that piece of paper you itemized the headings and the key issues which would have to be resolved before you could decide the case.

Look over your list of issues carefully. Do they still resonate with the case that you heard? Can some be jettisoned? Should others be restated yet again?

Once you have refined your list of issues, you will then be able to decide what evidence is important to those issues. Then get busy determining and expressing the facts as you find them.

During the course of your own deliberations you will want to "test" the evidence. Ask yourself "How does it stack up in relation to the other evidence?" "How does it fit with the testimony of other witnesses, or the documentary evidence introduced at the hearing?" To what extent is the evidence truly "independent"? By asking yourselves these questions, you will be performing the necessary intellectual exercises in challenging your own conclusions with respect to the evidence, and the weight you choose to attach to it.

Remember that you have an obligation to resolve contradictory evidence and key issues, unless the basis of your conclusion is obvious from the record. This takes time and careful thinking.

Assessing and Deciding Credibility

One of the most difficult tasks facing any decision-maker is deciding credibility. **(PPS 20)** How do we assess truthfulness? How do we measure honesty? What are the criteria that go into such an evaluation? And after we've reached a conclusion, how should we express it?

These are some of the tough but very real questions we face every day. Let me offer some suggestions.

First, there is no machine, magic incantation, or truth serum to administer in our search for truth. We don't water-board people, or hang them upside down by their ankles as a way to find out whether the person is telling the truth. Much more is expected of decision-makers than that.

Our evaluation should be rooted in careful observation, knowledge, comparative analysis, and our every day experience in judging others.

To make use of experience, you have to have <u>had</u> some. Decision-makers, I hope, have not grown up in some kind of protective bubble where they were never exposed to conflict, challenge, disappointment or defeat. Better that the decision-maker has acquired callouses and blisters of the intellectual, emotional and physical kind. Such an individual will be far better able to judge people, and appreciate the frailties of human nature.

You need to distinguish between "credibility" and "reliability". It is important for any decision-maker to make strong findings when assessing credibility (which I use, narrowly, to mean "truthfulness") and to understand how it is different from "reliability" (which I define in much broader terms, i.e., a person may think that he/she is giving an honest account, yet be found to be unreliable when their evidence is contradicted by documents, or other better testimony).

As decision-makers you have an obligation to clearly state your conclusions regarding credibility and reliability, in plain, unambiguous language. You cannot be timid. Your findings should be strong, clear and easily traced to the evidence so that any reasonably informed observer will be able to say "While I may not agree with that conclusion, it is not an unreasonable finding, based on the record".

But you should be careful in your use of language when expressing yourself about the credibility or reliability of a witness. In more than 20 years of judging, I cannot ever recall saying in a judgment words like "I am convinced that Ms. X lied in her testimony ...".

It is not your job to make out a case of perjury for the Crown or the police to

investigate.

Remember that the witnesses and parties who appear before you have families, livelihoods, colleagues, clients, employees, patients, customers or shareholders to whom they might be accountable, or at least with whom they will associate the day after your decision becomes public.

Character assassination ought not to be part of a decision-maker's lexicon. While you should never be timid, you should always ask yourself whether there is a better, less disparaging way of expressing your findings.

You should never say:

(PPS 21)

"I reject the evidence of Mr. A because I am convinced he's a liar."

Such a sentence is nothing more than a conclusion and offers little insight or support for the decision. Similarly, you should never say:

(PPS 22)

"I disbelieve Ms. B because she fidgeted in her seat and never made eye contact with the plaintiff's lawyer during questioning."

Obviously those two "reasons" are not reasons at all for rejecting a witness as being untruthful.

How much better it is to say something along these lines:

(PPS 23)

"The evidence of Mr. A and Ms. B is in obvious conflict. Their testimony cannot be reconciled. Having carefully observed both their examination and cross-examination and assessed their evidence in light of the other evidence presented at trial, I have concluded that the evidence of Ms. B should be preferred. I say this for several reasons. First, the transcript of Mr. A's questioning will be replete with examples showing his reluctance to answer even the most direct question, without a rambling, unresponsive reply. Further, he was easily provoked and ill-tempered during many exchanges, especially when confronted with documents 106 and 32A which clearly contradicted his testimony. Third, his own letters in this dispute reveal that he was not forthcoming to even his own counsel when the

pleadings were prepared. As well, he was slow to answer Interrogatories and I think deliberate in withholding documents which ought to have been produced at Discovery and, at a minimum, included within his own list of documents. For these and other reasons which I need not take the time to describe, I conclude that Mr. A's testimony is unreliable and I give it no weight."

Do not laden your decision with cumbersome chunks of quoted statute or jurisprudence. It irritates the reader, dulls the persuasiveness of the prose, and destroys far too many trees.

Be confident. Be decisive. Go through the case law and in a simple sentence or two state the key principle for which that leading authority stands. Get it right and then merely include the name of one or two leading cases that make the point. A list of five or ten cases that support the same proposition is, to my mind, an unnecessary waste of time and suggests a lack of confidence on the part of the writer.

If you need to distinguish a case, do so in plain language so that your reasons are clearly understood.

When all of this is done you will be in a good position to apply the advice Mr. MacIntosh will give you in his next presentation this afternoon by producing a decision that is sound, carefully reasoned and well expressed.

To recap, let me highlight lessons I have learned over the years which have proved invaluable:

(PPS 24)

- Writing a decision is hard work. It is tedious and takes time. There are no shortcuts.
- Insist on solitude and quiet.
- Gather together all of the record, authorities, dictionary, thesaurus and other reference materials so that everything is within reach.
- Start with an Outline, in which you itemize the parts of your decision.
- Frame the issues so that you will then know what evidence/facts are important and what can be discarded.
- Write out a short Overview of the case (2 or 3 paragraphs to describe what's at stake. Use the "neighbour" test).

- Start to write, and work your way through the various headings in your Outline, checking off each part as it is completed. **(PPS 25)**
- Don't slow the process by auto-correction. Make changes later when you have something significant to review.
- Revise, revise and revise again.
- Edit to reduce, not to expand.
- Ask yourself whether your decision has responded to all of the issues.
- Ask yourself whether your decision grants a remedy or relief within your jurisdiction, mandate and authority.
- Who is your audience?
- Do not write for the Court of Appeal.
- Are your reasons sound, concise, clear and persuasive.
- Is the quality of your writing the best you can do?
- Is your decision just enough to dispose of the issue(s) without going too far such that it will compromise future cases?

In conclusion, remember what I consider to be six principal objectives in preparing a written decision that is intended to be readily accessible for public viewing and comment:

(PPS 26)

- resolve the dispute with the force of law;
- the parties, win or lose, will clearly understand the basis for your decision and the path of reasoning that led you to it;
- serve as a sound precedent to be followed and upheld;
- foster respect for the law;
- it will allow for meaningful appellate review if the result were challenged on appeal; and
- it fulfils the moral pact between you and the community which grounds your authority to judge the actions and conduct of others.

Let me turn now to the final segment of my presentation where I will attempt to reduce what we have learned to a set of reflections and guiding principles to assist you in your work.

Guiding Principles

Be punctual. Expect that of others. Be known as the adjudicator or judge who starts at 9:30 and finishes at 4:30. Take an abbreviated lunch hour if you must,

provided you are not upsetting the personal lives of your staff and other court officials.

Put the onus on the parties or their counsel to establish a timetable for concluding the case. They know the case better than you. This will sharpen their minds and force them to take a hard look at their line-up of witnesses. It will also prod them into talking about the case. You should have your staff send all counsel a letter directing that they confer and then send you the proposed timetable to which they consent. You can then review it and agree or disagree and revise it as required.

Stick to that timetable. After all, they vouched for it. But, of course, be reasonable. Sometimes you will have to be flexible in accommodating witnesses, especially those from out of town. If you need to lengthen the day by starting early or finishing late or working on the lunch hour, so be it. I always tried to make it my practice to accommodate, while still being punctual, firm and fair. And a word of caution: always extend the courtesy to your staff and other court officials by asking if it is alright before agreeing to some variation in the daily timetable.

Don't put up with delinquents or stragglers. But for exceptional circumstances, make it your habit to begin sharply at 9:30 a.m. Sometimes you may want to start, even if one of the parties is not present. That will send a clear message and believe me, they won't do it again. Or express your sentiments on the record, when the delinquent party or lawyer enters the court room. That too sends a message.

Never tolerate rudeness or belligerent behaviour. It is not part of your job description. Know the rules of procedure so that you can enforce them with a firm hand if necessary. If you are not familiar with those rules ask a staff lawyer to brief you. This is important because the powers of administrative tribunals are very different than the powers of a court. Judges have what's called "inherent jurisdiction". Members of boards or tribunals do not. Their authority does not extend beyond the powers given by statute. Obviously you will want to make sure that you are on solid ground before taking steps to punish bad behaviour. While rarely exercised, certain important enforcement tools would include:

- adjourning the matter to another day, and insisting that the parties behave and cool off in the interim. They bear the expense of

adjournment.

- Putting an end to questioning if it has become rude, improper or irrelevant. State your reasons clearly on the record as to why you've intervened.
- Bar the individual from the court room and proceed in her/his absence with instructions to sheriff's personnel to comply with your direction (obviously that would be an extraordinary measure).
- Consider the idea of finding the individual in contempt (note: this is a very specialized procedure which demands an adherence to specific steps and protections. It involves a 2-step process, and invokes the criminal standard of proof, that being, beyond a reasonable doubt. I need not get into specifics here. It is enough to remind you of its existence. You, with advice of counsel, will have to decide whether it ought to be invoked. Remember too that if the administrative tribunal does not have the power to find an individual or organization in contempt, it can turn to the courts for relief in making such a finding and punishing such behaviour)

Hopefully these are not measures you will have to impose. But find out the basis for your authority, so that you will be confident in its exercise, should that need arise. I doubt that it will.

Never match rudeness for rudeness. Be firm, and fair, both in substance and in appearance. Such presence will earn you respect that will last a lifetime.

As a judge or adjudicator you should, by example, set the standard for civility and decorum. You should always insist on ethical conduct by the parties and/or counsel who appear before you.

I urge you to be effective managers of the proceedings. This requires a delicate mix of several qualities. You must be fair to all parties. But that does not mean that you should be indecisive. When dealing with objections listen to both sides (never with two parties on their feet and speaking at the same), recess to review the law if need be, then make a firm ruling, and get on with the case.

Be respectful of others. Always be courteous to counsel or self-represented litigants, or any person who appears in your court.

Never conduct yourself in a way that your actions will be perceived as being rude or belligerent. In my time on the Court of Appeal I sometimes see transcripts of proceedings where - to my eyes - the apparent attitude of the person presiding is disturbing. I've noticed pointless interventions; obvious mistakes in procedure and law; and exchanges with counsel where the tone of sarcasm or arrogance is virtually palpable. Fortunately these examples are the exception rather than the rule. But it saddens me. And I can't imagine why the Bar puts up with it. If we as judges and adjudicators insist upon civility by the lawyers who appear before us, we should expect nothing less of ourselves.

Avoid casualness and humor. In my experience the subject-matter of administrative/judicial proceedings if far too serious for comedy. By all means be good-natured, pleasant and kind so as to put other people at ease. But don't resort to jokes or back-handed repartee which may reflect badly on the institution you represent.

Remember your audience. First and foremost you are writing for the parties so that the litigants, win or lose, will understand the basis of the decision. To a lesser extent, your audience is the public, being those members of the community who may be interested in the outcome. And the Bar, in the sense that your decision may have important precedential value to future cases. But do <u>not</u> write for the Court of Appeal. We are not, and should not be, your audience. You should not be crafting a decision hoping that it will find favour with us, or that you are making it "bomb proof" for reversal on appeal. Get that monkey off your back. This is the same approach I take in my own writing. When I was a trial judge I never gave a second's thought to how my decision might "look" to the Court of Appeal. Similarly, now as an appellate judge, I do not concern myself with how my decision might be received by the Supreme Court of Canada. In that context, my sole duty is to honour my oath by upholding the law as it has been interpreted and declared by higher authority. That is my only obligation. The rest is entirely up to me.

If you ascribe to my thesis that we who sit as judges or adjudicators do so by virtue of an unwritten pact we have with the community to conduct ourselves wisely, respectfully, fairly and publicly, grounded on what I call a "morality of judicial reasoning", I think you will have gone a long way towards understanding the values that ought to guide you in your work.

From what we have discussed this afternoon let me attempt to extract a series of key principles.

(PPS 27)

The parties and the public have a right to expect that you will be:

- punctual
- knowledgeable
- thoroughly prepared
- rested and alert
- open-minded
- independent
- impartial
- firm
- fair
- courteous
- respectful
- patient
- efficient
- prompt
- well-reasoned
- jurisprudentially sound
- logical
- clear
- concise
- articulate.
- persuasive

Let the last word be cautionary. **(PPS 28)** Be careful where you do your thinking!

CONCLUSION

Decision-making is about choices. You have options. You hold the pen. You choose the facts. You choose which argument ought to prevail and which side ought to succeed. You choose to be rested, alert, knowledgeable, well prepared and engaged. You choose to ensure that your reasoning and its expression in writing and in a public forum is of the highest quality.

I hope that my remarks this afternoon and the discussion to follow will help

you in meeting the challenges we all face as decision-makers. Thank you for your attention.

I wish you well in your conference.

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal
Halifax, N.S., Canada
February 4, 2011

Appendix "A"

Reflections on the Art ... and Science of Decision-Making

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal

SUGGESTED READING LIST: DECISION-MAKING, PERSUASIVE WRITING, ADVOCACY, ETHICS AND OTHER ESSENTIALS

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Appendix "B"

Reflections on the Art ... and Science of Decision-Making

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal

GUIDING PRINCIPLES: A TOOL KIT

Law ~ Science

Lessons in Problem Solving

Independence ~ Impartiality

Recognizing and Avoiding Bias

Accountability ~ Responsibility

3 Stages of Decision-making

Getting Ready for the Hearing

Presiding Over the Hearing

Writing the Decision

Getting Ready for the Hearing

Study Pleadings

Brief the Law

Create a System for Record Keeping and Retrieval

List the Issues

Prepare Questions

Know the Record

Know the Procedure

Presiding Over the Hearing

- Manage and Run the Show
- Lead by Example
- Punctuality, Civility and Decorum
- Enforcement of the Rules
- Firm Rulings
- Admissibility
- Assessing Credibility
- Burden of Proof
- Standard of Proof
- Daily Summaries
- Final Submissions

Writing the Decision

- Quiet Solitude
- Gather Material and Resources
- Prepare Outline
- Prepare Overview
- Identify your Audience
- List Issues
- Answer All Issues
- Credibility and Reliability
- Decide the Facts
- Draw Inferences
- Apply the Law
- Plain, Clear, Persuasive Prose

Revise, Revise, Revise

Power of Choice

Objectives

Resolve the Dispute

Understand Result

Sound Precedent

Respect for the Law

Permit Meaningful Appeal

Moral Pact

Qualities

Punctual

Knowledgeable

Thoroughly Prepared

Rested and Alert

Open-minded

Independent

Impartial

Firm

Fair

Courteous

Respectful

Patient

Efficient

Prompt

Well-reasoned

Jurisprudentially Sound

Logical

Clear

Concise

Articulate

Persuasive