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

Professional Development Conference ~ Maritime Provinces' Law Societies

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Introduction

Good morning. Let me begin by thanking Victoria Rees and the other members of her planning committee for their kind invitation to participate in this week's conference[1]. They have obviously put a great deal of thought into preparing this ambitious program.

I first presented this lecture to those attending a Boot Camp for Decision-Makers organized by the Nova Scotia Barristers' Society and held at the Lord Nelson Hotel in Halifax on February 4-5, 2011.

In being invited to reprise my lecture this year, Victoria asked me to divide its content into a morning and afternoon session. In the morning, we will explore decision-making. In the afternoon, we will turn our attention to decision-writing.

I understand that most in the audience are legally trained, but many are not. I think that's a good thing. Going over some basic principles in the law helps to set the stage for what I intend to cover during our time together today. And for those of you who practice law, this quick refresher will ensure that we are all "on

[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. This edition has been updated and expanded as a full day presentation directed towards an audience comprised of senior Benchers as well as public members of law societies who sit as panels convened to deal with formal discipline complaints against lawyers. Features of this paper and companion Powerpoint slides will address the "problem" and breakout workshop questions involving the fictional lawyer, Arnie Becker, whose competence and integrity have been impugned.

the same page" when we get into the practical aspects of the fictional complaint you've been asked to hear.

During the course of my presentation, I will introduce a series of PowerPoint slides that I hope will serve as helpful cues and focus our attention on some of the more important concepts and issues I've been asked to address. In broad terms, our time together today will be taken up with a consideration of the following subjects or themes:

i. My mandate and objectives

ii. The science of human decision-making

iii. The art of administrative/judicial decision-making

iv. The art of administrative/judicial decision-writing

v. Guiding principles and practical tools

[PPS 2]

Let me start by quickly outlining how I see the day unfolding.

Today's format

As I said, I intend to deal with decision-making this morning, and then after lunch I will talk about the tools and the environment you need to write effectively.

In terms of format we have organized the morning and afternoon sessions so that each will include time for me to speak, followed by a chance for all of you to

work with your colleagues at your respective tables on the fact pattern that has been created, and then to return to a plenary session where what each of you has produced may be shared with everyone else. We have built in ample opportunity for discussion, so that we may learn from each other's experiences in the difficult task of having to judge the conduct of a peer whose behavior or competence has been impugned.

I will begin each session with my substantive remarks which will take about an hour. I think it would be best if you held your questions until the plenary, after your workshops. That way we can talk about matters that may have occurred to you during my talk or arose at your tables as you worked on the problem. Be assured that there will be plenty of time set aside for a Q&A this morning, and again this afternoon.

So let's get started.

My objective & mandate

I want to challenge you. I want to take you out of your comfort zone by urging you to think beyond the realm of your own experience. At the same time, I want to leave you with some practical techniques to "improve your game"; things you can start to apply when you get back to your office on Monday.

My presentation this morning deals with human decision-making. I will start by offering a broad overview of how we make decisions as human beings. Here, I intend to mention research and scientific theory from some of our most noted scholars, neuro-scientists and judges who have written on the subject.

Then, as we shift our attention to the arena of actual adjudication, I will take some of these broader concepts from science and academia and apply them to everyday life, as seen from the perspective of one whose job it is to decide cases every day. In this segment, I will offer suggestions as to how to deal with two aspects of adjudication that 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 next segment, I will take what we've learned from our earlier discussions and develop a set of guiding principles to assist you in your work.

Finally, I will drill down into the complaint against Arnie Becker and how you might prepare yourselves to get ready for the hearing once you are formally notified that you've drawn the short straw, and been chosen as a member of that complaints hearing committee! That will set the stage for your chance to engage in the exercises at your tables.

This afternoon, I will apply much the same template to our discussion of decision-writing. But I'll get to the details of that after lunch.

Homework

Let me give you your first homework assignment right now. Please pick up your pen and without discussing your answers with your colleagues, write down on a piece of paper one word you would use to describe an essential quality of the kind of decision-maker you would like to see appointed to hear your case, if you were in the shoes of Arnie Becker. Later today we will compare our lists.

A caveat

And I must also 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 reflect the sentiments of my judicial colleagues.

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

An early interest

I am now in my 28th year of judging, the first ten spent on the Nova Scotia Supreme Court as a trial judge and the last 18 on the Nova Scotia Court of Appeal as an appellate judge. Prior to my appointment, I served on discipline bodies, both

at university, and later as lawyer, including complaints committees chaired by Larry Evans, Q.C. and other distinguished presidents of the Barristers' Society.

These experiences sparked a curiosity in me to explore the mental and physiological aspects of decision-making by trying to understand the unspoken brain and thought processes that combine to produce a decision. And, once a decision is made, how then does one ensure that the decision itself will be clearly communicated so it can be understood, followed and enforced?

My research led me to reflect upon how it is that we as human beings 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 labour every day.

That work caused me to question my own notions of decision-making and to test my own assumptions about judging the conduct of others. From that I then tried to create a set of guidelines that would be useful to decision-makers in their day-to-day work.

I recognize that some of what I say today will sound "old hat" or perhaps so obvious as to appear trivial. And I suspect that some of comments will be reiterated by other speakers at your two-day conference.

But I think that is as it should be. We can get so busy in our everyday lives that we tend to overlook the obvious. And sometimes the most important points bear repeating.

Let's start with the good news. Lawyers and judges often set out upon a kind of juridical Odyssey, where they completely confuse everyone else in the room by talking about such mind-numbing concepts as "standard of review", or "questions of law", "questions of fact", or "questions of mixed fact and law".

This tendency has sometimes prompted me in the course of cases over which I presided, to say to spectators sitting in the gallery that what they are hearing must sound like some ritualistic incantation 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*![2] **[PPS 3]**

Thankfully, I need not say much about such matters today. Reviewing the law is not part of my mandate. If I mention law at all, it will only be in passing so that you can add it to your checklist as one of the things you will need to think about as you prepare for the hearing.

My approach to decision-making at the human level starts with three assumptions. **[PPS 4]**

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

Three assumptions

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 an identifiable sequence or pattern. There is a beginning, and an end. And so, today when I speak about "decision-making" I mean it in the sense of a continuum, a series of steps, one leading to another, to another, and so on.

My second assumption is that in the context of this conference, 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 consider 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 proper legal principles to those facts, in order to produce a result that resolves the dispute placed before us for determination.

My final assumption is that the decision imposes a legal outcome. Thus, the kind of "decision-making" I am talking about is enforceable and puts an end to a

legal conflict. In that way, it will have a dispositive impact upon an individual or an institution and may also produce consequences beyond the interests of the parties to the dispute.

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*[3], with the observation that:

> "[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."

[PPS 5]

Judge Cardozo is right. There is nothing easy about decision-making.

I have no credentials in neurology, psychology, philosophy or medicine which might offer some support for the observations I am about to make.

But I do think that the theories and discoveries made by our leading scientists and scholars 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[4] of text books and other reference materials you can explore

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

[4] See Appendix "A"

at your leisure. For the purposes of today'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 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*[5], 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

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

(i.e., hearing, observing, reading); categorizing the data in a strictly preliminary way so that it can be retrieved later, and then 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, and then it is sifted, sorted, tested and valued, and then brought together with the other sources of knowledge in the brain, until a conclusion ultimately emerges.

In their book, *The Cambridge Handbook of Thinking and Reasoning*[6], 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 today with their formula-laden modeling of what we do in order to think. But some of their findings are relevant.

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

They say that thinking is directed towards achieving some desired state of affairs, in other words, 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*[7], 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 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,

[7] *Ibid,* p. 685

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 is engaged in an environment where finality is neither required nor expected, 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 book, *How Judges Think*[8], Richard A. Posner, noted author and recently retired Judge of the United States Court of Appeals for the 7th Circuit, examines our judicial profession from the inside. While acknowledging external constraints upon a judge's role as decision-maker, such as rules; precedents; methodology; 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 question Judge Posner addresses in his fascinating text. I commend it to you.

You may also be interested in reading Joel Cohen's book, *Blindfolds Off: Judges on How They Decide*[9], described by Alan Dershowitz as being:

> *"…an essential guide to one of the best kept secrets of our legal system. …. Judges make their decisions in secret, and the processes they use to decide are also secret. This book, which exposes these secrets, is an essential tool of democracy, visibility, and accountability."*

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

[9]*Blindfolds Off: Judges on How They Decide by James Cohen* (Chicago, Illinois: American Bar Association, 2014)

How many of you are familiar with the works of Malcolm Gladwell? I'm sure many of you have read *The Tipping Point*[10]. In his more recent book, *Blink*[11], 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 of the traps we 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

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

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

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 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]**

Bias

In their text *Problem Solving, Decision-Making and Professional Judgment: A Guide for Lawyers and Policy-makers*[12], Paul Brest and Linda Krieger explain 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

[12]*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)

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.

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? Well one way is forcing yourself to explain what you mean in writing.

Justice Ian Binnie in his seminal decision in *Sheppard*[13] 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 urge 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[14] 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. Of course, never to the

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

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

extent of delegating the decision-making process, which is obviously improper, but rather to test one's reasoning, or its expression. At the appellate level, we sit as panels, where the exchange of points of view and the job of writing is recognized as being both an individual and a collective endeavor. While I am not suggesting that judges or adjudicators who sit alone ever attempt to engage their colleagues in the actual decision-making process, I see nothing wrong with collegial discussion concerning novel or contentious issues.

And finally, I would 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 can improve our ability to express ourselves in written reasons, is enhanced.

All of these strategies will hone your skills, and make you aware of the types of outside influences that can impair our judgment.

Having explored, albeit in a superficial way, this broad canvas of current scientific research into the process of decision-making, let us consider how these findings play out in the context of administrative and regulatory adjudication.

Administrative/Judicial Decision-making

Turning now to the facts of this case, you are asked to hear a complaint of professional misconduct and incompetence against Arnie Becker.

The hard reality is that you are asked to decide the fate of one of your peers. Hopefully nobody reading the fact pattern imagined so creatively by Victoria Rees and her staff would ever say: "There, but for the grace of God, go I."

That is not the standard you apply in addressing this complaint. Whatever sympathy or antipathy you might have for Arnie you have a responsibility to hear the case against him objectively and impartially. Your first responsibility is to the public at large, and the administration of justice as a whole.

As a self-regulatory profession, you are obliged to hear this case fully prepared and ready to decide its outcome based upon your assessment of the evidence and a correct application of the law to that evidence.

Accountability & Responsibility [PPS 11]

I have found that a good way to sharpen one's 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 suggest we ought to consider our duty towards others in terms of the cases, people

and interests for whom we are responsible. Because I think that shines the light where it ought to be - on each of us personally. It serves as a constant reminder of what it is that we ought to expect of *ourselves*.

We need to take pride of ownership in our work as decision-makers so that the *product* of our thinking, reasoning and its expression will always be characterized by careful, balanced judgment and best effort. If we strive to meet such a standard, I guarantee that our skills as decision-makers will be enhanced, and so too will be the level of respect accorded our judgments.

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

I suggest that a list of some of the qualities of a competent decision-maker we could all 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*[15] 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 is the article, *A Matter of Trust*[16], 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:

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[15]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

[16]"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

> "... 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 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 morning as being the first of two especially challenging aspects of our work. That is: how do we maintain and assert

our impartiality as decision-makers? This afternoon we will deal with deciding and communicating findings of credibility.

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.

Independence & Impartiality

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."*[17]

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 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.

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[17] *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

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.

Bias: Triggers, Traps & Avoidance

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 swarming? 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, by carefully sifting them through the filters of your own life's experience.

Knowing what you do about the facts of <u>this</u> case, are there aspects of it which would cause you to check yourself when first hearing, or later reflecting upon, the testimony of "Mr. Becker" and his various "accusers"?

[JWSS – reminder – here drill down into some of the specific facts of the complaint against Arnie Becker which give rise to heightened scrutiny on their part: e.g. bias; power imbalance; self-interest; conflict of interest; credibility; etc.]

Having now considered some of the common traps that can lead us astray as decision-makers, let me now turn to a discussion of the next "steps" in this "process" of decision-making which will be: **[PPS 16]**

- Getting ready for the hearing.
- Presiding over the hearing.

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

<u>Getting ready for the hearing</u> [PPS 17]

Start by studying the complaint, and any other documentation distributed to you in advance. An early appreciation of this material should provide a "heads-up" for the proceedings that follow. And they will start to "engage you", in thinking about, and in writing down notes as you begin your preparations.

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 file) will all, ultimately, be easily retrievable whenever you need to find them, and not scattered goodness knows where.

Issues

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 your own words.

And it's not unusual for the issues to change during the course of the hearing. The dynamic of the case is fluid and you may have to stop and ask

yourself whether what you supposed to be the key issues in dispute have now morphed into something quite different. Always be alert to that so that when you sit down and begin to write, your statement of the issues accurately reflects the evidence and the arguments you just heard.

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/complainant and on the opposite page you have the accused/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 help you draft questions 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.

Make it colourful

Develop a system to easily separate the issues, the evidence and the 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 represents "Go". I use a pink highlighter for the respondent which 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 notetaking or highlighting from the record, the transcript, the books of authorities, I'll use a yellow highlighter. Employing this simple system has served me well for 45 years. And if you have reserved your judgment and are coming back to writing your decision a month or more later, it's a foolproof way to keep track of "who said what".

Your authority and its source

Besides the record, you must also know the law. That will be in at least two respects. First, you must be familiar with the enabling legislation by which you "exist" as a decision-maker. 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.

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

- study the complaint
- identify the issues
- prepare your questions
- understand the law
- be familiar with the record.

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

Presiding over the hearing

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. You must be confident and show that confidence in your management of the case. You are in charge. **[PPS 18]**

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.

Knowing the rules & other essentials [PPS 19]

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.

You will need to understand the standard and burden of proof that applies to the complaint you are about to hear.

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 hijacked 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.

Questioning

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 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.

Keeping ahead

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, perhaps 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 hyperbole 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 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. But always be careful and courteous 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.

Afternoon session

Decision-writing

This afternoon I wanted to share with you some of the strategies I've developed to produce what hopefully will be a sound, clear, concise and persuasive judgment; a product that reflects your best effort and is something you are proud to sign.

In doing that, I will cover a series of steps I think are critical to the decision-writing process. And, as I will explain in a minute, it is definitely a "process", and not something you do all at once.

I will talk about the value of plotting your course and organizing your decision with an outline. I will speak of the importance of an Overview. I will offer my suggestions on organizing your "toolbox" and finding a space where you will have the time and solitude in which to write effectively. I will explain the need for constant revision, and describe the different kinds of editing any decision-maker needs to understand. I will offer some samples of writing to illustrate how you might express your findings of fact and your conclusions with respect to credibility and reliability of witnesses or testimony. Finally, I will leave you with

a list of suggestions to guide your conduct of a hearing and improve your skills as a writer.

To do that will take me about an hour. After that we will follow the same format we did this morning. You will work on some specific problems at your tables. Then we can share among ourselves how each of you approached the issues and chose to express your conclusions.

So let's get started. **[PPS 20]**

Outline

The first thing I do when I start to write a decision is to quickly sketch out an outline. Don't forget the importance of your Outline. It's nothing more than a list you create when you begin to write your decision. This is for your eyes only. You can tweak it as you progress in your thinking. On that single piece of paper, you itemize the headings and the key issues which have to be resolved in deciding the case.

If you were to pick up any one of my judgments you would recognize the "template" I typically use: These are virtually the same headings I write down on a legal pad before I start to write:

Introduction
Background
Issues
Standard of Review

Analysis
Conclusion

Doing this helps focus my mind on the task at hand and also shows the progress I am making in getting through my first draft.

With some tweaking, you might want to employ these headings in your own drafting.

Standard of Review

One of the headings you won't have to concern yourself with is "Standard of Review". That is because you will be hearing the case as a matter of first instance. In other words, you will be the first person or panel to adjudicate the merits of the complaint. You will not be sitting on appeal from an earlier decision of a lower functionary or tribunal.

I will come back to Standard of Review later in my remarks. It's an important concept but not one that you need to worry about in terms of your decision-making or decision-writing.

All you need to know at this stage is that "Standard of Review" is a term used to describe the level or degree of scrutiny we will apply to your work. It defines the "margin of error" or "tolerance" allowed for the kinds of conclusions you reach when you decide the case in an administrative law context. One way to look at it would be to imagine being asked to examine something through a hole cut in the wall. How

big is the aperture? Is it the size of a loonie where the focus is very narrow and specific? Or is it an open window that offers a much wider view? Applying a sports metaphor, how big is the strike zone for that particular umpire in that particular game?

Things get complicated when you learn that the Standard of Review can vary depending upon how one characterizes the issue being contested.

Look over your list of issues carefully. Do they still resonate with the case you just heard? Can some be jettisoned? Should others be restated a different way? Does the sequence need to be switched?

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.

I'm often asked, "How do you know what evidence is important?" "How do you decide what facts to include in your decision and what can be ignored?" To me, the very best way to answer that question is to decide what issues need to be resolved in order 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 in order to dispose of those issues.

Remember that in writing your decision, it is your responsibility to articulate the issues, sift through the evidence, find the facts, communicate your findings with respect to those facts, apply the law to the issues, and craft your decision in a way that brings clarity to your analysis and your conclusions.

So that's enough about the Outline. Let's turn now to what some say may be the most important part of a decision.

Overview

You may be interested to know that the judiciary in Nova Scotia considers this aspect of a submission to be so important that we revised our *Civil Procedure Rules* to make it mandatory. Every Factum filed in the Court of Appeal must start with the Overview.

In my view, this step should apply equally to our decisions as adjudicators.

Using conversational prose, force yourself to explain in two or three simple paragraphs what the case is all about. Imagine that you are out in your backyard on a weekend and your neighbour says, "I read something about a big case you're taking on. 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 decision. I like to refer to that approach as satisfying the "neighbour

test". Being able to distill complicated issues using language that is clear, simple and enlightening, requires thought, discipline and time. It disciplines the mind by focusing on what is truly important in the case.

As we will see, it is hard work. There are no shortcuts. The very best writers are always trying to improve, by honing their skills. That is the principal focus of our discussion this afternoon.

You'll be surprised how spending time on your Overview pays great dividends in the end. It may provide the pathway through which you will navigate the evidence in coming to a conclusion. It may prompt you to revise or refine your thinking as to what the important issues in the case really are. Later, as you write the other sections of your decision it helps to look back at your Overview and see if what you are writing still seems logical and connected to what you said in the Overview. And, finally, when you conclude your reasons, you may find that it's now much easier to sum up your decision with a brief Conclusion by simply expressing in a different way, the things you said at the beginning in your Overview.

Sitting down to write [PPS 21]

You must first understand that decision-writing is a process. It cannot happen all at once. Life gets in the way. We have other responsibilities. People

and things will interrupt your best laid plans. If you do not accept those realities, you will become very frustrated in the time it takes you to produce a decision. In some cases. it may be weeks or months before you can get back to the case and start your writing. When that happens it's awfully helpful to have prepared your summaries after each day's hearings so that when you come back to it, your memory will be refreshed by the accurate notes you kept at the time.

I cannot write effectively in an environment where I will be distracted or disturbed. I need a quiet place. Usually that's my office at work or at home, with the door shut and newly charged batteries in my Dictaphone. I will gather together all of the materials I need to produce my decision so that everything is within reach. This means having all of the documents and exhibits, your notes, transcripts of testimony or submissions of counsel, and whatever else you need, at your fingertips. There's nothing worse than being in the middle of a thought or brilliant paragraph, only having to leave the room to search for a banker's box to find something you think you need.

Other essentials in my "toolbox" are Post-its, coloured markers, legal pads, different coloured file folders, a dictionary and a thesaurus.

You already have your copy of the record well noted and colour highlighted in a way that works for you.

You may wish to label the different coloured file folders to match particular sections or parts of your decision. As an idea or solution to a nagging problem occurs to you, you can jot it down and add it to the file folder, retrieving it later when you move on to that part of your draft.

As you begin to write, you will get great satisfaction from being able to cross off the different headings in your Outline, and see that you are making headway in finishing the initial draft.

Issues, facts, inferences, and law [PPS 22]

As mentioned earlier, before getting into the evidence and the facts, it's important to identify the key issues that have to be addressed in your decision. Remember that your list of issues is not the list prepared by one side or the other. You might decide to distill and reframe the issues presented by the parties. You are also entitled to reach your own conclusions as to what the issues are and express them in your own words.

Once you've done that, you can turn your attention to the facts and how you choose to express them.

At this juncture, let me emphasize two distinct functions: proving the facts, and then deciding the facts.

Because today's conference focuses on a complaint against a lawyer, I will restrict my comments to civil cases.

Here, the typical standard of proof would be described as "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. 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, ever 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 called upon to assist you. 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 well-educated, or illiterate; whether a Nobel prize winner or an ex-con; 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 as judges, you have to do it in writing. I urge that you state the facts clearly. Be precise. Do not engage in hyperbole or sarcasm. Do not be shy in your observations concerning culpability. 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.

In this case involving Arnie Becker, there is an array of challenging issues and conflicting evidence you will have to sort out. Your resolution of those matters must be clearly communicated in your decision.

[JWSS – reminder – here drill down into some of the specific facts of the complaint against Arnie Becker which give rise to heightened scrutiny on their part: e.g. bias; power imbalance; self-interest; conflict of interest; credibility; etc.]

As you write your decision, you will want to "test" your analysis by asking yourself how your findings stack up in relation to the other evidence. Ask yourself such questions as "How does it fit with the testimony of other witnesses, or the documentary evidence introduced at the hearing?" Or "To what extent is the evidence truly independent?"

By asking yourselves these questions you will be engaged in an important intellectual exercise that forces you to challenge your own conclusions regarding the facts and inferences drawn from the facts, and the weight you choose to attach to them.

The law does not oblige you to review all of the evidence in your reasons. If that were so, library shelves would buckle and collapse under the sheer weight of our decisions! Rather, the law obliges you to deal with the material evidence (as defined by the issues before you) and to explain your treatment of any significant evidence that is contradictory, unless the basis for your conclusion is obvious from the record.

Assessing and Deciding Credibility [PPS 23]

Some of you may be familiar with the writings of Daniel J. Levitin, who is both a professor of Psychology and Neuro-science at McGill University as well as the Haas School of Business at the University of California, in Berkeley. Perhaps you read his bestseller, *This is Your Brain on Music: The Science of a Human Obsession*, a few years ago.

I commend to you his latest book, *A Field Guide to Lies: Critical Thinking in the Information Age*[18], where the author warns:

> *"We've created more human-made information in the last five years than in all of human history before them. Unfortunately, found alongside things that are true is an enormous number of things that are not, in websites, videos, books, and on social media. This is not just a new problem. Misinformation has been a fixture of human life for thousands of years …. The unique problem we face today is that misinformation has proliferated; it is deviously entwined on the Internet with real information, making the two difficult to separate. And misinformation is promiscuous – it consorts with people of all social and educational classes, and turns up in places you don't expect it to. It propagates as one person passes it on to another and another … other social media grab hold of it and spread it around the world; misinformation can take hold and become well-known and suddenly a whole lot of people are believing things that aren't so."*

Professor Levitin offers many useful techniques we can all apply to our assessment of the mass of information that confronts us every day. In order to discern what is true he says:

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[18] *A Field Guide to Lies: Critical Thinking in the Information* Age, Penguin Random House: Allen Lane, 2016

> *"…we … need to rely on ourselves, on our own wits and powers of reasoning. Lying weasels who want to separate us from our money, or get us to vote against our own best interests, will try to snow us with pseudo-facts, confuse us with numbers that have no basis, or distract us with information that, upon closer examination, is not actually relevant …".*

One of the most difficult tasks facing any decision-maker is deciding credibility. 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 waterboard 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. **[PPS 24]**

To make use of experience, you have to have had 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).

When considering the truthfulness of testimony, you need not trouble yourself with having to search for "proof" of a *motive* to lie. Your task is to decide whether you believe the testimony, or not. There may be many motives to lie. For example, the witness may be a serial perjurer; or be biased against the accused/defendant; or be a supporter of the complainant/plaintiff; or be a witness who seeks to cover up their own misdeeds; or someone who has a vested interest in the outcome; or be lying to protect somebody else.

Saying that a person's testimony is "incredible" or "not worthy of belief" is different than saying a witness's evidence is "unreliable". The reason is that a witness may firmly believe that he or she is honestly recalling events to the best of

their ability. However, that recollection is shown to be faulty when it is compared to the testimony of other witnesses, or contradicted by the written record. In writing your decision you need to be careful about the labels you attach to particular witnesses, or their 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 almost 30 years of judging, I cannot ever recall using words in a judgment like "I am absolutely convinced that Ms. X lied in her testimony ...".

It is not your job to make out a case of perjury for 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 25]**

"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 26]**

"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 27]**

> *"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 and dulls the persuasiveness of the prose.

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.

I want to now briefly turn to a few other very effective techniques to make your writing more readable and compelling. This will include the importance of headings, sentence structure, and editing.

<u>Headings</u> [PPS 28]

Can you imagine buying a book without chapters? Or going to a play or symphony without a program? It would be a most unusual event for an audience to

gather and wait for the curtain to go up, having no idea in the world why they were there, or what to expect.

Why should arguing a case, or writing a decision be any different?

I am always impressed by the lawyer who starts his or her oral argument by saying something like this:

> "*My Lords, My Ladies, this afternoon I intend to address three issues. I will now describe them briefly and indicate the sequence in which I will present my arguments ….*".

In the space of those first 30 seconds I am immediately impressed. Why? Because it shows me the lawyer is confident, knows the case, and is tuned in to the Bench. Not only is the introduction effective, it is also a sign of courtesy and respect. The lawyer has set the stage, engaged the panel by making it interesting, and supplied important cues on what to expect.

And there's another enormous benefit when a lawyer adopts that approach. If I am sitting as a judge alone, or as a member of a 3-judge panel, I have now been alerted to the format this advocate intends to take. So, if I have difficulty with an argument, or a description of the facts, or a precedent relied upon by the lawyer which has to do with Issue #3, I am now able to hold off with my questions until he/she gets to that issue. I won't be interrupting the lawyer during his/her

presentation on Issue #1 or Issue #2 which then forces the lawyer to interrupt the flow of the submission or be forced to say "I intend to come to your point when I address the third issue in my submissions this afternoon".

If we want our written work to be just as impressive, I urge you to adopt the same approach. Whether you are writing a brief, or a factum, or a decision, you should extend the same courtesy to your readers by supplying them with a "map" of where you intend to take them. Describe the journey, with adequate "street signs" and "speed bumps" along the way. Use punctuation, indentation, different sentence structures and other techniques to slow, or speed up the reader's grasp of the content. In that way you are constantly providing the reader with cues on the direction in which <u>you want</u> to take them.

You may be interested to hear that the late Chief Justice of Canada, the Right Honourable Brian Dickson was, as I recall, the first leading jurist to make use of headings in his own writing. When I started out as a young lawyer in the early 70s, Chief Justice Dickson first employed headings in the famous "Trilogy" of decisions dealing with monetary damage awards intended to compensate for horrific personal injury claims. You may remember *Arnold v. Teno*[19] as being one of those cases. A

[19] [1978] 2 S.C.R. 287

little girl was struck after running out into the street upon hearing the tinkling bell of the ice cream truck.

In that and its companion decisions, the Court used headings like: Non-pecuniary damages, Pecuniary damages, Loss of enjoyment, Loss of future income; Cost of future care, etc.

The Court's use of headings to separate and better explain the content of these three judgments soon caught on and before long everyone was doing it.

If you are curious about the improvement this simple change brought about, go back and look at any Supreme Court of Canada decision from the 50s or 60s. The writing was ponderous and unhelpful. Chunks of dense information just seemed to have been thrown on the page, often cluttered with the arguments of the parties themselves, and it was often difficult to figure out who the author was, and whether the ultimate outcome was unanimous, or some kind of confusing split decision.

Paragraph Structure

Imagine if I handed out to you and the other people at your table the same one-page script. Imagine as well that everybody's page was exactly the same, with the same number of words per line, the same number of lines, and now imagine that it did not have any punctuation or indentations to mark the start of new paragraphs.

Imagine how boring that would sound if I asked you to read it out loud.

Now imagine that I gave each of you the time to punctuate it and separate the ideas and thoughts on the page in any way you wished.

Think how different that result would be!

Now imagine that the first time I asked each of you to read it out loud, I couldn't see you. And you couldn't see me or your fellow actors. Each of us was literally in the dark, listening only to the spoken word. In that environment, the only difference in your respective presentations would be inflection, speed, and cadence.

Now imagine that I changed the environment by turning on the lights so that everyone could see one another. What a difference that would make in giving life to what you were saying.

It's kind of like that popular television show, ***The Voice*** where the four judges sit in big high-backed chairs that are deliberately turned away from the stage so that when the performer first sings, all the judges hear is the voice. The judges then "vote" for their favorite contestant based only upon what they hear. Then, once they've made their selection, they are able to turn their chairs to face the performer whom they then try to persuade to join their team. It is quite an effective way to show the difference between "hearing" and "seeing" someone.

That's what you have to do when you write. Set the hook. Make your audience want to turn around!

My point is to emphasize the importance of putting yourselves in the shoes of your readers. Take the time to make sure your analysis is as clear and persuasive as you can make it.

Whenever you are working away at drafting a decision, always take the time to look critically at your work to test the soundness of your conclusion and the analytical reasoning that led to it. Sometimes, despite best efforts, you will discover that it "just doesn't write". That may be an early indication that your intended outcome is wrong and that you had better look at the case with fresh eyes.

If you are a member of a panel, in other words a group of adjudicators who having heard the case are now expected to prepare a decision, one of you will be tasked as its author. Or you may decide to divvy up the work, each taking on a certain responsibility. No matter what approach you take, make sure that you keep your colleagues "in the loop" as to both the content and the progress of your writing. That way the prospect of achieving consensus is much improved. And if, at the end of the exercise, one of you on account of your view of the law, or the facts, or personal conscience and principle, feels compelled to write separate concurring reasons, or a dissenting opinion, do not second guess yourself. The

bottom line, for all of us, is that we must try to do justice between the parties, according to law. That is really the only precept that need guide your decision-making and your decision-writing.

Editing [PPS 29]

I cannot over-emphasize the importance of editing. To improve the effectiveness of your writing, your mantra should be: Revise, Revise, and Revise again!

You have to understand that there are different kinds of editing, each with its own objective. You can edit for length. Or grammar. Or spelling. Or adjusting your sentence structure to improve the cadence of your prose. Or improving the appearance and "readability" of your written submission with good use of headings, paragraph structures and sequencing. Is what you have written set out in a way that will be most persuasive? Have you used words that are strong and clear so that the reader won't mistake your message? Are your thoughts expressed in lucid prose such that the reader will recall the arguments you've made weeks or months later?

When you reflect on these questions, you should have a better idea of the importance of editing, and the time and discipline it will take to do it properly.

To recap, let me highlight lessons I have learned over the years which have proved invaluable: **[PPS 30]**

- 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 31]**
- 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 decision that will be readily accessible to the parties and the public. It should be written in a way that: **[PPS 32]**

- resolves 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;
- serves as a sound precedent to be followed and upheld;
- fosters respect for the law;
- will allow for meaningful appellate review if the result were challenged on appeal; and
- manifests the moral compact between you and the community, which is the very basis of your authority to judge the actions and conduct of others.

Let me turn now to the final segment of my presentation where I will try to reduce what we have learned to a list of suggestions to guide you in your work as decision-makers.

Experiment with some of these suggestions when you return to your respective offices on Monday. See if they work for you. Adopt the ones that seem natural and helpful. Ignore those that aren't.

Don't make the mistake of trying everything at once. Learning to write well is an ongoing exercise. For me, first as a lawyer and now as a judge I've been doing it for almost 50 years. And there hasn't been a week that's gone by that I haven't learned something to make my writing, and my approach to it, better.

Now that we have considered some of the key elements of decision-making and decision-writing, let me conclude by offering some practical advice on how to earn a reputation as a competent, fair and effective adjudicator.

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 or 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 timetable they jointly propose. You can then review it, 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 criticism of tardiness 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 curtail bad behaviour.

Never match rudeness for rudeness. Be firm, and fair, both in substance and in appearance. Such an approach 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 not 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 subscribe to my thesis that we who sit as judges are permitted to do so because of an unwritten pact we have with the community to conduct ourselves

competently, respectfully and fairly – an arrangement I call - the "morality of judicial reasoning", I think you will have come 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.

The parties and the public have a right to expect that you will be: **[PPS 33]**

- 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 34]** 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 my remarks today and the discussion that follows will prove helpful in meeting the challenges we all face as decision-makers. Thank you for your attention.

The Honourable Mr. Justice Jamie W.S. Saunders
Nova Scotia Court of Appeal
Halifax, N.S., Canada
November 9, 2017

Appendix "A"

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

Professional Development Conference ~ Maritime Provinces' Law Societies
Thursday & Friday, November 9-10, 2017

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

LIST OF RESOURCES: DECISION-MAKING, DECISION-WRITING, ADVOCACY, ETHICS, PRINCIPLED REASONING AND OTHER ESSENTIALS

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Appendix "B"

Reflections on the Art and Science of Decision-Making and Decision-Writing
Professional Development Conference ~ Maritime Provinces' Law Societies
Thursday & Friday, November 9-10, 2017

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

2 Stages of Decision-making

Getting Ready for the Hearing

Presiding Over the Hearing

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

Impartial

Firm

Fair

Courteous

Respectful

Patient

Efficient

Prompt

Well-reasoned

Jurisprudentially Sound

Logical

Clear

Concise

Articulate

Persuasive

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Appendix "C"

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

Professional Development Conference ~ Maritime Provinces' Law Societies

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

Important Administrative Law Principles for Adjudicators to Remember in the Context of Self-Regulatory Hearings into Complaints of Professional Misconduct & Incompetence against Lawyers

1. He/She who hears, must decide.

2. Every decision that affects the rights, privileges or interests of an individual attracts the duty of fairness.

3. That duty of fairness includes procedural fairness; proper notice of the details of the complaint; and the opportunity to properly prepare and present one's case.

4. Failure to institute a proceeding within a reasonable time may constitute breach of the duty of fairness.

5. No person should be judged without a fair hearing in which everyone is given the opportunity to respond to the evidence against them.

6. Those whose livelihood or reputation is at stake as a result of professional disciplinary proceedings is entitled to counsel.

7. Failure to grant an adjournment may, in certain circumstances, amount to denial of natural justice.

8. The duty of fairness requires that the parties be informed of the identity of the adjudicator(s) who participated in making the decision.

9. Professional discipline proceedings must be adjudicated by a neutral decision-maker. In other words, one who is truly impartial and independent, and in no way tainted by actual or perceived bias, or conflict of interest.

10. Decisions must be based only upon properly admitted evidence and not information obtained through the adjudicator(s) own investigations, or communications with other persons who did not sit as members of the complaints panel who conducted the hearing.

11. Decisions are confined to the allegations in the complaint and ought not to address extraneous, unproven issues.

12. There is a duty to give reasons.

13. The duty to provide reasons cannot be delegated.

14. The adequacy of reasons always depends upon context but they should be clear enough to explain the outcome and the reasoning which led to it; that all material evidence was considered and an explanation given as to why certain contradictory evidence was preferred over other evidence; that adequate consideration was given to the consequences of the outcome especially individual interests affected by the decision; that a party's representations were considered; that any applicable legal principles were properly applied; and that the reasons for the decision are sufficient to permit meaningful review on appeal.

JWSS
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