Decision Writing - Guiding Principles for Administrative Decision-Makers

By: Julie Gagnon
Reynolds, Mirth, Richards & Farmer LLP

As decision-makers, administrative tribunals face many challenges. Administrative tribunals assess evidence from lay and expert witnesses and review exhibits in various forms. They are called on to analyze this information and make findings of fact in relation to the evidence put before them. At times, they are called on to choose between conflicting evidence, make findings of credibility and rule on objections and other issues that arise in the course of a hearing. They may be called upon to make decisions on questions of jurisdiction or to interpret legislation. At the end of the process, the administrative decision-maker must consider all of the evidence and submissions and reach a decision, choosing one party's position over another. That decision must, in most cases, be reduced to written form. This is not an easy task.

The purpose of this paper is to provide an overview of the essential elements of a written decision and to provide a discussion of some recent court cases. The focus of the paper is on decision-writing in a broad sense - that is, on general principles of decision-writing as developed by the courts.

Overview of the guiding principles of a written decision

Canadian courts are called on to review the decisions of administrative tribunals. Review by the courts may occur either by way of an appeal or by judicial review. Over the years, the courts have outlined principles that help guide administrative decision-makers in their task.

In 1999, the Supreme Court of Canada set out guiding principles on the issues of procedural fairness. In *Baker* v. *Canada (Minister of Citizenship and Immigration)*[1], the Supreme Court of Canada established that there will be circumstances where procedural fairness will require that an administrative tribunal issue a written decision. The Supreme Court noted that a written decision will be required where the decision has significant importance for an individual or where there is a statutory right of appeal.[2] The Supreme Court also recognized that the written decision is an important mechanism to ensure transparency of the process - that the process has been open and fair, that the decision-maker has carefully considered the evidence and that the decision was made free of any reasonable apprehension of bias.[3]

More recently, the Supreme Court of Canada has outlined two purposes for written reasons: first, the parties have a right to know why the reason was made and second to allow for appellate review. In *Hill* v. *Hamilton*[4], the Supreme Court of Canada held that reasons will be adequate if they:

- allow for meaningful appellate review; and
- if they meet the test of the parties "functional need to know" why the decision has been made.

The "functional need to know" recognizes that the requirement for reasons may vary. The requirement for reasons in a decision is tied to their purpose, which will vary depending on the context[5]. The "functional need to know" test recognizes that there will be different degrees of reasons required in a written decision (as between different administrative tribunals or even for different questions that arise before the same administrative tribunal).

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[1] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193.
[2] *Baker*, *supra*, at para. 43
[3] *Baker*, *supra*, at paras. 38 and 39
[4] *Hill* v. *Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41, at para. 100
[5] *R.* v. *Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 24

In Alberta, the Court of Appeal of Alberta has recently held that there are three essential elements to reasons. These are[6]:

- intelligibility;
- accountability; and
- reviewability.

Another recent decision from the Court of Appeal of Newfoundland has stated the issue as follows[7]:

> As to what constitutes the minimum content of reasons adequate to satisfy the requirement of providing written reasons, there is no answer that can be given in the abstract. The content of reasons is context-specific.

The Newfoundland Court of Appeal in *Walsh* re-iterated that reasons must be sufficient to allow the parties whose rights are affected to understand why the decision is made and to allow for review by the courts.[8]

The requirement that individuals who are affected by the decision of an administrative tribunal be able to understand the decision is rooted in the principles of procedural fairness. The need to provide written reasons helps to ensure that the decision-maker has considered the evidence and the positions of the parties. It also allows the parties to see that the process is open and transparent and that the decision-maker based its decision on the merits of the case and not on its own biases.

The second purpose of written reasons is to allow for meaningful appellate review. Once the decision-maker issues a written decision, the decision is final. If a party chooses to appeal or to seek judicial review, the decision-maker will not be provided an opportunity to defend or supplement its reasons to the court. If an issue is not addressed in the written decision, then it will not be considered by a reviewing court. As such, it is important for

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[6] *Maitland Capital Ltd*. v. *Alberta (Securities Commission)*, [2009] A.J. No. 523, 2009 ABCA 186, at para. 20
[7] *Walsh* v. *Council for Licensed Practical Nurses*, [2010] N.J. No. 61, 2010 NLCA 11 at para.28
[8] *Walsh*, *supra*, at para. 28

a decision-maker to provide reasons that can withstand judicial scrutiny. The degree of judicial scrutiny will depend on what standard of review is applied by the court.

Standards of Review – Correctness and Reasonableness

Over the years, the law dealing with standard of review has evolved. For many years, three standards of review were applied to administrative tribunals – correctness, reasonableness *simpliciter* and patent unreasonableness. It was even thought for a period of time that there was a spectrum of standards of review.[9] However, in 2008, the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, in an attempt to simplify the issue of standard of review concluded that there should only be two standards of review – correctness and reasonableness.[10]

A full review of the law relating to the standard of review is a topic of its own and is beyond the scope of this paper. However, in very broad terms, if the standard of correctness is applied, no deference is given to the tribunal below. The court will undertake its own analysis. If the court disagrees with the decision reached by the administrative tribunal, it will simply substitute its own decision, without deference to the administrative tribunal's decision. The standard of correctness generally applies to questions of law and questions of jurisdiction.

In addition, where a court finds that the principles of procedural fairness have been breached, then no standard of review is applied. No deference will be given to the tribunal below if the duty of procedural fairness has been breached. Because no deference is given, it is akin to a standard of correctness.

[9] D. Jones & A.S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 516.
[10] *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. No. 9, 2008 SCJ 9

As noted above, the Supreme Court of Canada in *Dunsmuir* amalgamated the standard of reasonableness *simpliciter* and patently unreasonable into one standard of reasonableness. The Court held:[11]

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Supreme Court of Canada has also articulated the standard of reasonableness as follows[12]:

> … [W]hether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

Where the reasonableness standard is applied in reviewing a tribunal's decision, the analysis will consider whether there is justification, transparency and intelligibility within the decision-making process. An administrative tribunal often has some expertise on the issues before them. The administrative tribunal will often hold oral hearings where the panel will hear witnesses and make findings of fact and credibility based on its review of evidence. Given these factors, the courts should (generally speaking) defer to the findings of the administrative tribunal by applying a standard of review of reasonableness.

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[11] *Dunsmuir*, *supra*, at para. 47
[12] *Law Society of New Brunswick* v. *Ryan*, [2003] S.C.J. No. 17, 2003 SCC 20, at para. 56

Recent Cases – Application of the Guiding Principles by the Courts

The courts have taken different approaches to the issue of whether the written reasons provided by an administrative tribunal are adequate. In some cases, the courts will review the decision as a whole on the standard of reasonableness, giving deference to the findings made by the tribunal. In other cases, the courts have held that if reasons are inadequate, the inadequacy constitutes an error of law or a breach of the duty of procedural fairness and the reasons will be reviewed on a correctness standard, without giving any deference to the administrative tribunal's decision.

The theme that emerges from recent cases is not a new one, but is an important one to review. By reviewing recent court decisions, administrative decision-makers are reminded of the importance of stating, through their reasons, how and why the decision was reached. If this is not done, the court may either quash the decision or return it to the administrative decision-maker for a new hearing. The cases selected here are by no means an exhaustive review of recent cases. However, they have been selected as providing an interesting overview of some recent issues considered by the courts.[13]

Law Society of Upper Canada v. Neinstein[14]

In *Law Society of Upper Canada* v. *Neinstein*, a lawyer was subject to a discipline hearing for allegations he had sexually harassed two complainants. The central issue in the hearing was credibility.

The Ontario Court of Appeal expressed concern that appellants may at times advance arguments about the adequacy of reasons in an effort to invoke the standard of review of correctness rather than reasonableness.[15] However, the Court of Appeal went on to hold that the reasons of the hearing tribunal in the case before it were so inadequate as to

[13] Thank you to David Jardine for his helpful analysis of the following cases presented at a seminar of the Canadian Bar Association.
[14] *Law Society of Upper Canada* v. *Neinstein*, [2010] O.J. No. 1046, 2010 ONCA 193
[15] *Neinstein, supra*, at para. 4

foreclose meaningful appellate review and this constituted an error of law, reviewable on the correctness standard.

The Court of Appeal described the case as a "classic he said-she said case". The hearing tribunal's decision was 39 pages and involved a lengthy review of the evidence given and discussions about legal principles, including corroboration. In its decision, the hearing tribunal found that it preferred the evidence of the complainant over the lawyer, for the following reasons:

- the complainant gave her evidence in a forthright manner;
- she withstood cross-examination well;
- there was independent evidence, as noted, which corroborated her version of relevant events;
- although there was contradictory evidence as to the layout of the lawyer's office and related matters, that evidence was not material to a finding of whether sexual harassment took place.

In reviewing the tribunal's reasons, the Court of Appeal looked at the first two points together. The Court of Appeal recognized the inherent difficulty in articulating reasons for credibility findings and the advantage a tribunal has over an appellate court in assessing credibility.[16] However, the court held that the reasons stated by the tribunal were generic and conclusory, without any insight as to why the tribunal found the witness to be forthright or to withstand cross-examination. The Court of Appeal stated that "bald general assertions defy appellate review."[17]:

The Court of Appeal also found that, although the reasons indicated that there was "independent evidence, as noted", there was no indication by the hearing tribunal as to what "independent evidence" it was referring to and the court could not determine specifically what evidence the tribunal relied on as independent evidence. It held that there may well have been some independent evidence, but disregarded this reason as it would require the Court to make assumptions as to what this evidence was.[18]

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[16] *Neinstein, supra*, at para. 63
[17] *Neinstein, supra*, at para. 66
[18] *Neinstein, supra*, at para. 73

With respect to the last point, the Court found that it was not necessary for a hearing tribunal to explain various inconsistencies that were not material to the ultimate question in issue, although it noted that the conclusory assertion made appellate review difficult.[19]

The Court of Appeal also noted that the hearing tribunal assessed the lawyer's evidence in one sentence. The Court held[20]: "It can be fairly said that Mr. Neinstein, on a reading of the Hearing Panel's reasons, would have absolutely no idea what, if anything, the Hearing Panel made of his evidence, and that of his supporting witnesses."

The Court held that it is not necessarily a reversible error to fail to give reasons for rejecting the credibility of a witness. However, the Court found that there should at least be some reasons given on how the panel considered the member's evidence. The Court stated:[21]

> … The adequacy of the reasons can only be assessed by considering those reasons as a whole. In some cases, what might appear to be insufficient reasons for a favourable finding of credibility may be buttressed by additional reasons given for rejecting the evidence of a witness who gave contradictory evidence. Similarly, the absence of reasons addressing the credibility of one side of a "he said she said" case may impact on the adequacy of the reasons as a whole.

The Court found that the reasons were so deficient as to constitute an error in law. The Court of Appeal allowed the appeal and remitted the matter to a different hearing tribunal for a new hearing.

Assessing witness evidence and accepting the evidence of one witness over another on questions of credibility is a difficult task. It can be even more difficult to articulate the reasons for doing so. However, the decision in *Neinstein* illustrates that something more than generic statements must be given on findings of credibility. Also, it highlights the importance of making findings and providing reasons for those findings for the evidence of <u>both</u> parties.

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[19] *Neinstein, supra*, at paras. 75-76
[20] *Neinstein, supra*, at para. 80
[21] *Neinstein, supra*, at para. 78

Dodd v. Alberta (Registrar of Motor Vehicle Services)[22]

Mr. Dodd sought a judicial review of a decision of the Alberta Transportation Safety Board, which had denied his appeal from the suspension of his driver examination licence. After investigating various complaints, the Registrar had suspended Mr. Dodd's licence for a period of six months. Mr. Dodd appealed the period of suspension to the Board, arguing it was excessive. At the appeal to the Board, the Registrar raised a new issue that Mr. Dodd had provided false information on an examination checklist.

The findings by the Board were:

- the Appellant failed to give his undivided attention to driver examinations he conducted;
- the Appellant failed to test a critical competency component in a Class 5 advance road test;
- during a road test the Appellant failed to notice the client run a red light and fail to stop at a stop sign;
- the Appellant falsified information on a driver examination checklist; and
- the Appellant has a history of non-compliance and lesser forms of disciplinary actions have failed to have the Appellant comply with the driver examiner procedures manual.

The Board upheld the six month suspension. The reasons given by the Board were:

- the Board finds the 6 months suspension imposed by the Registrar is well within the Registrar's authority granted through the *Traffic Safety Act*;
- the Board finds the violations investigation carried out by the Special Investigation Unit was very thorough and the evidence presented by the Registrar very credible and not in dispute by the Appellant;
- driver examinations are the only requirement Alberta Transportation imposes on drivers to ensure they know the rules of the road and are capable of safely operating a motor vehicle. The testing requirement must

[22] *Dodd* v. *Alberta (Registrar of Motor Vehicle Services)*, [2010] A.J. No. 877, 2010 ABQB 506

ensure this. Any deviation from the testing requirements puts the public at risk; and

- in view of the above, the appeal is dismissed and the six months suspension of the Appellant's Driver Examiner License is upheld.

On judicial review, the Court of Queen's Bench found that there was an absence in the decision of the Board of any analysis of Mr. Dodd's arguments. The Court was critical of the Board's finding that Mr. Dodd had falsified information, without addressing Mr. Dodd's argument that any errors in the examination checklist were not deliberate. The Court further found that it was difficult to determine if this issue was significant as the Board did not link this fact finding back to its decision to uphold the sentence.[23]

The Court also found that there was no analysis of the two main submissions by Mr. Dodd that other driver examiners had been treated less harshly and that he had taken positive steps since the decision to re-habilitate himself. Although the Court recognized that decisions of administrative tribunals are not binding on subsequent decision-makers and that there was authority to impose a six month suspension, the Court found that the Board should have compared Mr. Dodd's circumstances to those of other driver examiners.[24] The Court was also concerned that there was no discussion in the decision of the Board of Mr. Dodd's submissions on the issue of rehabilitation.

The Court held that the decision of an administrative tribunal must contain more than a recitation of what it decided. It must explain <u>why</u> it decided what it did. The Court held that it was unable to: "glean the 'why' in the Board's decision for their decision to reject Mr. Dodd's arguments and to uphold the Registrar's suspension."[25]

The Court found that the decision of the Board failed to meet the duty of fairness required to provide adequate reasons. It quashed the decision and remitted the matter back to the Board to provide adequate reasons or to have the matter reheard by another panel.

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[23] *Dodd, supra*, at para. 44
[24] *Dodd, supra*, at para. 45
[25] *Dodd, supra*, at para. 59

Guttman v. Law Society of Manitoba[26]

A different approach was taken by the Manitoba Court of Appeal in *Guttman* v. *Law Society of Manitoba*. At a discipline hearing, Mr. Guttman, a lawyer, pleaded guilty to a charge of professional misconduct. At issue at the hearing was the appropriate penalty to be imposed. Several mitigating factors had been raised by Mr. Guttman before the discipline committee, including that his wife had been diagnosed with cancer, that he had to care for his two children and that he was involved in a high profile trial at the time of the misconduct. He also presented several letters from colleagues and clients, explaining the pressure and stress Mr. Guttman was under at the time. The discipline committee disbarred Mr. Guttman, who had prior convictions of professional misconduct.

The discipline committee noted that no medical evidence was adduced to establish the link between his life circumstances and the misconduct and that it would not be appropriate to rely on observations of colleagues rather than medical evidence to conclude that there was a connection. The discipline committee went on to note that medical evidence would not be needed in every case, but that in any event, it was not persuaded that evidence presented supported that the stresses Mr. Guttman was under at the time of the misconduct had any causal connection to the misconduct. At the appeal, Mr. Guttman applied to adduce expert evidence from a psychiatrist. The Court of Appeal allowed the evidence.

The Court of Appeal applied the standard of review of reasonableness. The Court reviewed the evidence presented and found that the evidence of Mr. Guttman was uncontroverted. The Court of Appeal held:[27]

> In light of the submission and the evidence before the Committee, which, as noted, was uncontroverted (although its import was not accepted by the Society), it is difficult to understand the lack of reasons for the Committee's rejection of the significance of the stress caused by the appellant's personal circumstances. The Committee said that it was "not persuaded that a causal connection between the

[26] *Guttman* v. *Law Society of Manitoba*, [2010] M.J. No. 198, 2010 MBCA 66
[27] *Guttman, supra*, at paras. 54-55

> stresses in Mr. Guttman's life and his behaviour has been established." That conclusion must mean that the Committee rejected the evidence outlined above which clearly tends to establish such a connection. The Committee did not explain why it rejected the evidence, simply stating that it did "not accept that those stresses caused him to lie to E.I."
>
> It was open to the Committee to accept or to reject the evidence proffered by the appellant. If the evidence was to be rejected, some rational basis for so doing must exist and to some extent must be articulated in the Committee's reasons. Otherwise, neither the appellant nor this court on appeal can understand why the evidence, which in this case was uncontroverted, was not accepted.

The Court of Appeal held that the there was a complete absence of any rationale for the rejection of the evidence and that the discipline committee's decision fell short of the standard of reasonableness. The Court held that pursuant to the standard of reasonableness, the committee was entitled to deference, however, the discipline committee's reasoning process "must withstand the spotlight of scrutiny consistent with that standard."[28]

The Court of Appeal found that the discipline committee failed to provide any analysis of the letters from colleagues and clients submitted by Mr. Guttman. The Court of Appeal found there was nothing to suggest they were unreliable and yet the evidence was rejected without any rational reason. The Court allowed the appeal and replaced the order of disbarment with an order suspending Mr. Guttman from practice for one year. Of note, the Court of Appeal noted that the reasons suffered from the same deficiency as noted in *Neinstein*[29], although in that case the Court applied a standard of review of correctness and overturned the decision on the basis of an error of law.

[28] *Guttman, supra*, at para. 63
[29] *Guttman, supra*, at para. 64

Conclusion

In order for the courts to give deference to the findings of fact and the reasons given by administrative decision-makers, there must be reasons in the decision that are sufficient enough to allow for meaningful appellate review. As such, there must be at least a minimum threshold met for the sufficiency of reasons that explains not only the "what" of the findings but the "why" of the reasons for the decision.

What has made the administrative decision-maker's task more difficult is that in some instances a court will review the decision as a whole on the standard of reasonableness and in others, will approach the adequacy of reasons as a question of law or procedural fairness, applying a standard of correctness. This standard gives no deference to the tribunal's findings.

However, there are useful themes that re-occur in recent courts cases, which provide useful reminders to administrative decision-makers. These are:

- The decision must not only state the "what" but also the "why";
- Both sides of the evidence must be reviewed – there should be an assessment of the evidence presented by both parties;
- If evidence is rejected, the decision-maker must provide reasons for doing so;
- Where credibility is an issue, there must be more than cursory and generic statements about findings of credibility;
- If one party is found credible, the decision should still address why the other party was found not to be credible;
- The decision-maker must address in its reasons all of the arguments or submissions advanced by the parties;
- The decision-maker must state why it rejects the unsuccessful party's submissions or arguments'
- In assessing a penalty against a party, the decision must link the findings of fact to the penalty imposed;

- It may be prudent to review past penalties imposed by the tribunal in similar cases.

These are not new principles. However, they are useful reminders of the essential elements of a written decision. They are directly linked to the purposes of the written-decision which are to allow the parties to understand why the decision was made (thereby ensuring a fair and transparent process) and to allow for meaningful appellate review. An administrative decision-maker must remember that its written decision is the only product at the end of the hearing that will explain how the decision was reached. Should a decision be further appealed or reviewed by the courts, the decision-maker will not have any further opportunity to explain its decision or provide further reasons to bolster or support the decision made. As such, it is essential for an administrative decision-maker to understand the purpose of its decision and the obligations on it to provide sufficient reasons, which may vary depending on the nature of the tribunal and the particular issue being determined by the tribunal.