“OURS IS TO REASON WHY”
(THE PROCESS OF RENDERING A WRITTEN JUDGMENT)

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INTRODUCTION

A "failure to take the time necessary to provide reasons has serious consequences for the access to justice interests of both the complainant and the accused" (see ***R. v. Loutitt***, 2018 ABCA 216, at paragraph 5).

Adequate reasons for judgment "fulfil certain functions...they justify and explain the result, particularly to the losing party, provide a basis for appellate review, and satisfy the public interest in demonstrating that justice has been done" (see ***Andraws v. Anslow***, 2016 BCCA 51, at paragraph 9). In his 2019 Year-End Report on the Federal Judiciary, Chief Justice John Roberts of the Supreme Court of the United States, points out that "[w]hen judges render their judgments through written opinions that explain their reasoning, they advance public understanding of the law".

In the sentencing context, it has been noted that "it is important that sentencing judges should take care to set out clearly, and in sufficient detail, the reasons for their decisions to impose particular sentences in order to ensure, as far as possible, that the basis for those sentences are apparent to those being sentenced, to the victims of crime and to the general public" (see ***Director of Public Prosecutions -v- Hall***, [2016] IECA 11, at paragraph 29). Interestingly, in ***R. v. Vigon***, 2016 ABCA 75, Wakeling J.A. bemoaned the fact that in his view too "many sentencing judgments fail to explain how

sentencing purposes and principles and the facts relating to the offence and the offender interact and contribute to the selection of the sanction. They often recite the applicable *Criminal Code* sentencing purposes and principles and record the facts that establish the physical and mental elements of the offence before the sentencer declares the sentence as if the preceding discussion makes it self-evident that this is a just sanction. Regrettably, most of the time this premise is not valid" (at paragraph 62).

In an earlier paper *("Ours is to Reason Why": The Law of Rendering Judgment* (2015), 62 C.L.Q. 301), I discussed the law involved in the process of rendering judgment. The purpose of this paper is to consider the process involved in preparing a written judgment. The most difficult step can be starting. However, as will be seen, the use of a standard format can alleviate this problem.

HOW TO START

Writing is a solitary experience for a trial judge. It does not involve the social element that I expect court of appeal judges have the opportunity to enjoy (see Lord Hope of Craighead in his 2005 Judicial Studies Board Annual Lecture (*Writing Judgments*), at page one). Lord Hope notes that there "is nothing more daunting than the blank page, or a blank screen on ones computer" (at page 5).

If you are newly appointed, try to write a judgment shortly after you start to hear cases. A simple case will do nicely. The sooner you write your first judgment the better. The more you write the easier it will become. Learn to type, to cut and paste. Ask for electronic copies of briefs, applications, pre-sentence reports, etc. In ***Cojocaru v. British Columbia Women's Hospital and Health Centre***, 2013 SCC 30, the Court held that "lack of originality alone [is not] a flaw in judgment-writing; on the contrary, it is part and parcel of the judicial process" (at paragraph 31).

Lord Hope suggests that the "easiest way to get going...is to begin by saying who the parties are" (at page 6). Lord Hope recommends that we start a written judgment by "identifying the essence of it before getting down to the boring details" (at page 6). Lord Hope notes that one of his colleagues (Lord Hoffman) "confessed" to him "that it has sometimes taken him longer to write the first paragraph than it has to complete the rest of the opinion" (at page 6).

I start writing a judgment by setting out a standard format I use for all written judgments and then an introduction (the charge, the main issue (or "deep issue"; a concept which I will examine later in this paper), the result (if I know what it is at the time), etc. This is followed by a summary of the evidence presented at the trial or hearing. I believe it is important to start

with the evidence portion of your judgment as soon as you can. Ideally, while the trial or proceeding is taking place, i.e., during breaks, at lunch time or before you go home at the end of the day.

In *Decisions, Decisions: A Handbook For Judicial Writing* (Justice Louise Mailhot and Justice James Carnwath, Les Editions Yvon Blais, 1998), the authors indicate at page 34 that the "golden rule" involves preparing a judgment "immediately after the judgment is reserved":

> The golden rule in drafting a decision consists in getting down on paper or on a screen, immediately after the judgment is reserved, a resume of the facts and issues to be decided, adding the principal ideas that will then form part of a conclusion. Even the best memories can fail and pertinent details can rapidly fade. Of primary importance is to commit to this first exercise of drafting within 24 or 48 hours following the end of the submissions or taking in reserve.
>
> If your cases come one after another over several weeks or months, it is imperative to make a daily summary of the evidence, immediately setting out your impressions as to the pertinence of the evidence and the credibility of the witnesses. These impressions are never definitive and can later be changed. There is always a difference between the ideas which swirl around in your heard and their placement in a structured order, a daily challenge for decision writers. Noting these ideas while they are still clearly remembered will simplify considerably the drafting of the final decision. Two contradictory forces are at play: first impressions are often the best, yet rarely is there writing without revision.

I would add to this that there are instances in which we can commence to prepare a written judgment before the case starts. For instance, in pre-trial

applications in which briefs are filed, the issues and positions of the parties will be known to you before the hearing of the application commences.

Once the evidence portion of the judgment is completed I will add some of the easy parts such as setting out any applicable statutory provisions or the positions of the parties. I then set out my analysis of the applicable law. Once this is done, I commence to set out my factual conclusions and then apply the law set out earlier.

One method you can use to assist in setting out your factual conclusions is to commence with the undisputed facts or issues. I find this useful because it is a method of starting the most difficult portion of the judgment and the uncontested issues and facts can help you to think about the contested ones and put them in context.

Should you use a standard format?

THE USE A STANDARD FORMAT

In *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 39 The Judges Journal 4 (1999), Professor Timothy Terrell, at page 2, suggests that the format adopted in a judgment is relevant to "the writer's sense of the appropriate role of judges within both our system of law and our society more generally." Even if this is somewhat overstated, utilizing a standard format does have its advantages. Let me explain.

THE FORMAT OF THE JUDGMENT

Developing a standard format provides an easy transition from the completion of one written judgment to commencing to prepare another written judgment. The Supreme Court of Canada uses a standard format. The use of a standard format can help to clear the blank screen or page. You can use a standard format as a method of starting your next written judgment. Lord MacMillan in *The Writing of Judgments* recommends that "in framing a judgment attention to its structure is of high importance" (at page 492):

> In framing a judgment attention to its structure is of high importance. The theme should be developed in logical sequence from the opening to the conclusion, so that the mind of the reader can follow the progress of the argument with ease. The normal course is first to set out the facts which have given rise to the question at issue. The selection and arrangement of the facts is a matter requiring no little skill. Unessential details have to be discarded and prominence should be given to the material circumstances. It is often a good plan to preface the statement of the facts by posing broadly at the outset the nature of the problem to be solved and so to give the reader a clue to what is to follow. The facts having been duly set out, the next step is to formulate and apply the law to them. This generally involves a critical examination of principle and precedents and is the core of the judgment. The conclusion follows.

One method of framing a judgment is through the use of headings.

HEADINGS

My written trial judgments consistently apply the following format with headings for each of these subjects:

1. an introduction, including the charge; the primary or deep issue, the nature of the allegation, and the decision (i.e., context before details). In other words: "put the issue before the facts" (Stephen Armstrong and Timothy Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (3rd ed., Practicing Law Institute, New York, 2009);

2. a summary of the evidence, but never witness by witness, rather issue by issue or factual dispute by factual dispute. I often summarize the essence of an accused person's evidence under its own heading. I find this helpful in applying ***W.(D.)***;

3. reference to the applicable legislation and the elements of the offence (or sentencing principles, etc.);

4. the standard and onus of proof applicable;

5. a summary of the positions of the parties, which can include reference to legal principles and summary rejection of certain arguments;

6. analysis of the applicable law;

7. analysis of the factual dispute (i.e., the facts found);

8. an application of the facts found to the law;

9. the conclusion, which always includes a restatement of the decision; and

10. a final paragraph stating: "Judgment accordingly."

Lord Hope points out, at page 10, that "reaching the end" of a judgment should "not be seen as the end of the exercise." He says that a conclusion provides us with the opportunity to go "back over the whole product." I use the phrase "Judgment accordingly" so that my written decision does not come to an abrupt ending.

In *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, Stephen Armstrong and Timothy Terrell suggest that the "structure of a simple opinion" should always apply the following format (at page 359):

1. Introduction, including issue and, usually, the result;

2. Procedural history and facts;

3. Discussion of law;

(a) proof of right argument

(b) proof of mistaken argument

4. Restatement of conclusions, if necessary, and order, judgment, etc.

Justices Mailhot and Carnworth in *Decisions, Decisions: A Handbook For Judicial Writing*, at pages 37 to 38, recommend that following format:

> 1. Introduction: Describe briefly the situation before the court and answer these questions in two or three short sentences: Who? Did what? To whom? And what are the issues to be decided?
>
> 2. The narration of the pertinent facts: by chronological order, or by description.
>
> 3. Findings of credibility on the disputed facts.
>
> 4. Analysis:
>
> a) the positions of the parties;
>
> b) the comments of the judge and finding of facts;
>
> c) the application of the law to the facts found.
>
> 5. Conclusion.

In *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, Professor Terrell points out, at page 4, that a "seductively attractive way to organize an opinion is to let the parties supply its pieces and order." However, he suggests that such an approach illustrates "judicial despair or fatigue" and a failure to "control" the judgment:

> For a judge to demonstrate appropriate professional control of any case, the decision should emphasize the court's thought process rather than the litigants. That thought process can indeed ultimately contain a response to each point raised by either party, if necessary, but the order and method of response should clearly be under the judge's control.

One method of maintaining control of a judgment is to summarily deal with certain issues raised by counsel when setting out their positions.

ALWAYS ADDING

I find it helpful to continuously add to a judgment. What I mean is that after I have started to write a judgment I have reserved, if I come across a case that applies to it, I add that case to the judgment immediately rather than waiting until my research is completed. In addition, I keep a "miscellaneous" file on the desktop of my computer. I use this as a place to put references from judgments or articles I have read which may be of use in a subsequent written judgment. One of the great advantages of modern technology is that it allows us to move portions of our judgments around, depending on how they unfold.

FINDING THE TIME TO WRITE

The reality for most trial judges is that preparing written reasons involves not only the inclination and confidence to do so, but the time and resources to do so as well. Finding the time is obviously crucial, but in my view, having the confidence to do so is as equally if not more important. I believe this is the primary reason why so few judges write. A written judgment is a publicly issued document setting out a judge's reasons and illuminating his or her legal and analytical skills. This requires a certain

degree of confidence. This confidence is gained by writing. The more you write the easier it becomes.

Writing judgments can take a considerable period of time and effort. This is, however, only part of the process. Unless the trial judge is able to personally prepare his or her written reasons, i.e., she or he is able to type, then the judge must have access to staff that are able to perform this function. In many courts, such staff does not exist. Therefore, being able to personally type your written judgments is not only a significant advantage, it provides invaluable flexibility. You will never have to review a final draft shortly before the decision is to be delivered. This is a judicial skill that is underestimated and that receives little educational emphasis. Being a great scholar and writer is of little practical value to a judge who cannot properly use a computer or who does not have access to sufficient staff.

One of the other advantages of writing often is that it allows a judge to develop his or her personal style.

WRITING STYLE

We all have our own style or can develop it. In *Preparation Of Factums*, Mr. Justice Cromwell (Canada Law Book, 1996, at page 17), says: "Keep the sentences simple, and generally favor short over long ones. This

is especially true with complicated facts or law. Do not confuse obfuscation with nuance, and avoid complicated subordinate clauses like the plague."

Professor Timothy Terrell in *Judicial Opinion Writing: Beyond Logic to Coherence and Strength*, a presentation made at the 2011 New Appellate Judges Seminar, July 2011, in New York, suggests that simplicity in legal writing "has nothing to do with over-simplification":

> To become a good legal writer, most of us must go through two stages of intellectual growth. First, either in law school or through practical experience, we learn that what seems simple to non-lawyers—"the law"—is in fact quite complex. Then—perhaps in law school, but usually much later—we learn that, to communicate about the law, we must turn our new sophistication upside down. We must return to a simplicity based on our mastery of all that complexity. This simplicity has nothing to do with over-simplification. Rather, it results from organizing complex information so that our readers can understand it as easily and clearly as possible.

Professor Terrell argues in his presentation that it is not sufficient to simply create "logic and precision" in our judgments. We must create what he describes as "coherence—the perception of focus and organization—in your readers' minds." Professor Terrell describes the creation of coherence in the following manner:

> To create coherence, begin by seeing your document from your readers' perspective. To you, it is a finished product that you can grasp as a whole. For them, as they are reading it, the document as a whole never exists. At any one point, readers will remember only a few sentences, if that, in relatively precise form. What has gone before will have been winnowed and compressed to fit into their memory, and what is to come is largely a mystery.

COHERENCE DEFINED

Professor Terrell in *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, suggests, at page 3, that coherence is a function of three primary factors: "labeling, structure, and purpose" (or "point").

Professor Terrell in his appellate presentation explains that "labeling" involves setting out the "areas or issues of law at stake." "Structure" sets out "the analytical steps" to follow and "purpose" sets out the "reason for the journey." He says this latter element of a judgment can be accomplished in two ways:

> ...either in the form of a question that the opinion will answer, or the answer itself that the opinion will defend.

In summary, based upon these propositions our judgments should follow a format which emphasizes the following:

(1) the issues involved;

(2) the analytical steps followed; and

(3) the reason for the journey.

Lord Hope, at page 7, suggests that phrases such as "of course" can be used to "reassure readers that they and the writer are on the same wavelength." I find such phrases as "of course"; "I have considered all of the evidence"; "I have considered counsel's submission"; etc., as boiler plate

of the worst kind. These phrases suggest the opposite of what they purport to say. Is it ever necessary to say that we have considered all of the evidence? Have we ever rendered a judgment, orally or in writing, in which we did not do so? Would we ever write or say: “Having considered some of the evidence, I conclude that...”

THE USE OF BOILER PLATE

Are boilerplate statements appropriate? In many instances they are appropriate and necessary. There are, for instance, only so many ways of describing the effect of ***R. v. W.(D.)***. Thus, a certain degree of “personalized boilerplate” is inevitable (see Judge Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric*, at page 1385).

The Honorable John M. Evans in *Writing Effective Tribunal Decisions and Reasons* (2002-2003), 16 Can. J. Admin. L. & Prac. 95, however, cautions against its overuse (at page 5):

> Among the boiler plate phrases that come to mind are: "having considered all the evidence", and "in all the circumstances of this case". As stand-alone "reasons", these catch-all phases simply do not cut it. However, they are sometimes used towards the end of careful reasons in which the decision-maker has canvassed the principal areas of contention and simply wants to assure the parties and the appellate court that, although she has not specifically mentioned some less significant evidence or marginally relevant facts, she has not overlooked them.

I would suggest that boiler plate is often used to avoid appellate criticism. Thus, our audience for the boiler plate is the appeal court. The topic of who is the audience for a written judgment will be returned to later. At this point, let us move on to the concept of developing a "personal style"

A PERSONAL STYLE

Much has been written about developing one's personal style. Lord Hope says that "the character of the judge may be revealed to the reader through the style of his writing." Lord Hope also suggests that though it "would be nice to think that the example of the experts could be emulated" those of us "who are less gifted have to face the fact that the attractive use of language is indeed an art that comes more easily to some than to others." He says that the best the rest of us can do "is try our best to keep our sentences short and our propositions simple and accessible" (at page 8).

This is rather harsh, though in ***Cojocaru v. British Columbia Women's Hospital and Health Centre***, 2013 SCC 30, the Court indicated that the "scope for judicial creativity [in writing judgments] is narrow, but not non-existent…"

We are all capable of writing and improving our writing over time through practice, i.e., writing more judgments. Robert Leflar in *Some Observations Concerning Judicial Opinions*, 61 Colum. L. Rev. 810 (1961),

states, at page 815, that no judge "can not by conscious effort improve his writing style and thereby improve his opinions. This is true regardless of the ability or age of the judge." He says that for the effort to be successful it must consist of two elements: "(1) deliberate working at the job of improvement and (2) an open minded willingness to recognize that methods formerly regarded as good may not be good at all, or at least that other methods previously disdained may in fact be better."

One of the keys is to find enjoyment in writing judgments. If you come to enjoy it you will do it more often. The enjoyment of writing judgments can be developed through writing them. The more you write the more opportunity you have to think about your writing and therefore improve it.

There are many sources which make recommendations on the basic rules of writing that all of us should follow. One of the more interesting one's is George Orwell's essay *Politics and the English Language* (Horizon, Volume 13, Issue 76, 1946, at pages 252 to 265).

ORWELL'S RECOMMENDATIONS

In his essay, Orwell states, at page 251, that "the slovenliness of our language makes it easier for us to have foolish thoughts." However, he says that "the process is reversible. Modern English, especially written English,

is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble. If one gets rid of these habits one can think more clearly, and to think clearly is a necessary first step toward political regeneration: so that the fight against bad English is not frivolous and is not the exclusive concern of professional writers." Orwell suggested five rules (at page 265):

> (i) Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
>
> (ii) Never use a long word where a short one will do.
>
> (iii) If it is possible to cut a word out, always cut it out.
>
> (iv) Never use the passive where you can use the active.
>
> (v) Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
>
> (vi) Break any of these rules sooner than say anything outright barbarous.

Orwell's reference to avoiding jargon is one that is often seen in writing manuals (see, for instance, *Opinion Writing and Drafting*, Inns of Court School of Law, Blackstone Press Limited, 1998) and its is a reasonable recommendation. However, from a judge's perspective some jargon cannot and should not be avoided. Though the use of *inter alia*, *supra* and *ibid* are never necessary, such words as *actus reu*s and *mens rea*

are necessary, useful and appropriate. Having said that, we can all avoid such words and phrases as:

-hereinafter;

-counsel proceeded;

-the witness presented;

-the instant case;

-facially; and

-heretofore (see ***D.P.P. v. Murray***, [2012] IECCA 60).

I recommend that you avoid using acronyms. They unnecessarily lessen the formality of a judgment without adding any value to it. Never use, for instance, *CDSA* for the *Controlled Drugs and Substances Act*. The *Criminal Code of Canada* is not the *CCC* and an information to obtain a search warrant is not an ITO. The ability to cut and paste has rendered the use of acronyms unnecessary.

ACTIVE AND PASSIVE VOICES

As we have seen, Orwell recommended the use of an active voice rather than a passive voice in writing. What are active and passive voices?

The distinction between active and passive voices is explained by Bryan Garner in *Legal Writing in Plain English: A Text with Exercises* (the University of Chicago Press, 2001) by noting, at page 24, that “if you’re

active you do things; if you're passive things are done to you." He suggests that the active voice in writing has "four advantages" over the passive (at page 25):

1. It usually requires fewer words.

2. It better reflects a chronological ordered sequence.

3. It makes the reader's job easier because its syntax meets the English speaker's expectation that the subject of a sentence will perform the actions of the verb.

4. It makes the writing more vigorous and lively.

Consider two simple examples provided by Bryan Garner (at page 25):

PASSIVE VOICE	**ACTIVE VOICE**
"In 1998, only ten executives were covered by Article 12."	"In 1998, Article 12 covered only ten executives."

Consider two simple examples by Professor Terrell in his appellate court presentation:

"Constable Jones arrested the accused one block from the bank."	"The accused was arrested one block from the bank."

In New Zealand many of its trial judges (see www.courtsofnz.govt.nz) use an active voice in rendering oral judgments (see, for instance, ***R. v. Callahan***, [2012] NZHC 596 and ***R. v. Thompson***, [2012] NZHC 798. For

a Canadian example see ***R. v. D.S.***, 2012 SKQB 118). Thus, rather than saying: “In this case the accused assaulted the victim and caused an injury to his eye. The accused has no prior convictions. The court must now determine an appropriate sentence”, an active voice says: “Mr. Smith you assaulted Mr. Jones on March 23, 2012 and caused an injury to his eye. You are twenty-five years of age and you have no prior convictions. I must now impose sentence upon you.” If you try this you will find it to be very powerful.

Judge Posner in J*udges Writing Styles (and do they matter?*), 62 U. Chi. L. Rev. 1421 (1995), says, at page 1424, that many judges “are disdainful of ‘fine’ writing. They think it unprofessional, ‘literary,’ affected, over refined. They are mistaken. One can be as ‘professional’ as one likes yet still write well in the sense of avoiding stylistic ‘mistakes’ that obscure readability with no offsetting benefit to any purpose of the writer.”

Judge Posner recommends that we “pay...attention to the music of [our] sentences” (at page 1424):

> ...go easy on adjectives, adverbs, italics, and other modifiers, qualifiers, and intensifiers; alternate (irregularly, not metronome style) long and short sentences; don't end a paragraph with a preposition; don't use agentless passives; go easy on parenthetical and other qualifying phrases; try to begin and end sentences with important words, because the first and the last positions in a sentence are the most emphatic; avoid jargon and clichés; punctuate for clarity rather than to conform to grammarians' fusty rules for the placement of

> commas and other punctuation marks; be clear; go easy on quotations, especially long block quotations; pay some attention to the music of one's sentences; don't bust a gut to avoid ever splitting an infinitive; disregard deservedly obscure and unobserved rules, such as never begin a sentence with “But” or “And.”

This is a long list, but at its essence it deals with the manner in which readers of judgments absorb the information contained within a judgment.

HOW DO READERS ABSORB INFORMATION?

Professor Terrell (in *Thinking Like a Writer*) indicates, at page 14, that “thinking like a writer” does not mean relying on the familiar lists of writing “tips.” It means starting from the principles that lie at the foundation of “effective communication.” He sets out three principles which he recommends be followed.

In his first principle (at page 15) he notes that readers “absorb information best if they understand its significance as soon as they see it. They can do so only if you provide an adequate focus or framework before you confront them with details.” Therefore he makes the following suggestions:

a. put focus before details.

b. put familiar information before new information.

c. make the information’s structure explicit.

In his second principle (at page 16) he says that readers "absorb sequences of information best if the sequence's order (its 'form') is consistent with the information's purpose (its 'substance')." Therefore he recommends the following:

> Match the organization of your information to the logic of your analysis.
>
> Pay attention to the difference between how you initially encountered and understood complex information (its "superficial" order) and how you later analyzed and assessed that information (its "deep structure"). You communicate more confidently by using the latter as your organizing guide.
>
> At the sentence level, link the sentence's grammatical form (its "syntactical core") to the focus or theme of your information. You communicate more clearly and efficiently by telling your story through the subjects, verbs, and objects of your sentences.

Finally, in his third principle (at page 16), Professor Terrell points out that readers absorb information best if they can absorb it in relatively short pieces. Thus:

> a. break information into segments.
>
> b. put the most important information into the most emphatic segments.
>
> c. make the segments concise.

Having set out these principles of writing the next questions to be considered are: Who is our audience? Whom are we writing for? Does it matter?

WHAT AUDIENCE?

Much has been written about whom the "audience" is for a written judgment (see for instance, the Honorable Abner J. Mikva, *For Whom Judges Write*, 61 S. Cal. L. Rev. 1357 (1988)). In *Writing Judgments*, Lord Hope indicates that this "is not an idle question." He notes, at page 2, that "sometimes we choose our own audience. This includes members of the public. We issue warnings to those who are tempted to engage in criminal activity and we try to reassure the victims of crime. We give directions on practice to the profession and to other judges" (at page). Similarly, in ***R. v. Eide*** [2005] 2 NZLR 504, at paragraph 21, the New Zealand Court of Appeal indicated, in the context of fraud trials, that "in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form."

It is often suggested that the litigants are our audience, but we know that the accused and other parties to a dispute are often not overly concerned with our reasoning process (one judge is reported to have said that the "lay public still won't read legal opinions. They're too complex, laborious, and

uninteresting to the lay public" (see Bryan Garner, *Clearing the Cobwebs from Judicial Opinions*, (Court Review: The Journal of the American Judges Association, Volume 38, Issue 2, Page 4, at page 16). In ***The Queen v I R T*** [2015] VSC 372, the sentencing judge in considering legislation designed to create "baseline sentences" indicated in an appendix to the oral judgement that in "circumstances where the reasons for the sentence imposed are recited by me to the accused man directly, there is no utility in this unusual part of my reasons being dealt with in that manner. The accused would be unlikely to follow the reasoning and so I publish this separately as an appendix but nonetheless with the intention that it will illuminate how the provisions have affected this case" (at paragraph 69).

In a criminal case the accused wants to know the verdict or the sentence imposed. There are exceptions, such as unrepresented litigants and those involved in certain types of litigation (family and small claim matters, for instance). In those cases simplicity and clarity take on added importance. Counsel may read a judgment they were a party to, but, not everyone is interested in the manner in which a judgment is written. Sometimes it is solely the result which is of interest to certain individuals. As an illustration try the following experiment.

The next time you prepare a written judgment have the clerk circulate it to both counsel after you have entered the courtroom, but before you commence to indicate your decision. After counsel are passed the written judgment you will observe that they immediately turn to the last page looking for the result. But, if you use the same process with an unrepresented litigant, she or he will not know where to look. They will continue to look at you waiting to be told the result and the reasons for it. So if we are not always writing for the litigants or counsel (and hopefully never for the appeal court) then who are we writing for and does it matter? Let us start with the former.

I believe that whatever we conclude as regards our audience, we must always write for ourselves and should always be writing for other judges. This does not mean that clarity and coherence are irrelevant (they lead to better results), but it does mean that when a judge starts to read a judgment she or he should know immediately if this is a judgment they should continue to read. The internet allows access to all written judgments rendered in Canada, but most of us do not have the time to fully read every judgment written, though we do have the time to read the first paragraph of any written judgment issued in Canada. The first paragraph should tell us

whether we should continue. If the judgment is solely an analysis of credibility, then unless the facts are enticing, we will stop.

Consider these two possible openings:

OPENING NUMBER ONE:	**OPENING NUMBER TWO:**
The accused is charged with having assaulted the complainant. For the reasons that will follow I have concluded that the Crown has proven beyond a reasonable doubt that he committed this offence.	Mr. Atwood is charged with having assaulted Mr. Ross. The only issue involved is whether the defence of self-defence applies. For the reasons that will follow I have concluded that the Crown has proven beyond a reasonable doubt that this defence does not apply in this case. I also conclude that the Crown has proven beyond a reasonable doubt that Mr. Atwood assaulted Mr. Ross.

Both openings are adequate (the second could be immensely improved by the insertion of the word “because”). Both could be better, but why is opening number two superior? It is superior because the second opening provides us with some of the information necessary to determine whether we should continue reading and it provides context (or a road map) for what is to follow. Thus, if we have a decision pending in which self-defence is an issue then we immediately know that the judgment with opening number two is one we should continue reading. Opening number one provides us with no way of determining if we should continue with it or look elsewhere for help and inspiration. Finally, the use of the parties’

names makes the second opening more readable (see *Decisions, Decisions: A Handbook For Judicial Writing,* at page 34).

Professor Terrell in his appellate seminar indicates that a judgment should at its beginning tell its reader: "How does this information relate to me? Why should I care? How will this help me—in concrete, practical terms?"

Thus, the introduction to a judgment is important. So then let us consider in more detail the nature and role of a judgment's introduction.

A JUDGMENT'S INTRODUCTION

In his text, *Point Taken: How to Write Like the World's Best Judges* (2015, Oxford University press), Ross Guberman notes that "when judges write the opening paragraphs of their opinions, they face three decisions: how much detail they want to provide, how much of their ultimate conclusion hey want to reveal, and how much effort they want to devote engaging readers from the outset" (at page 42).

Professor Berry in *Writing Reasons: A Handbook for Judges* (3rd edition, E-M Press, 2007) notes, at page 19, that an introduction to a written judgment should not confuse "discovery and delivery." He recommends that an introduction to a written judgment should always indicate "what is the case all about? What are the issues that must be decided?" Thus, he says

that the "goal" of an introduction to a written judgment is to let the reader "know immediately where they are going and why." This is often referred to as a "road map." Professor Barry (*Making Introductions, Style and Context: Mastering the Skill of Judgment Writing*, Toronto, 2011) recommends the use of the word "because" in a judgment's introduction.

He provides the following two examples:

"The respondent argues that she should not pay the contractor's bill."	"The respondent argues that she should not pay the contractor's bill because the contract was invalid."	

This simple example illustrates the power of a single descriptive word in a judgment's introduction.

In *First Things First: The Lost Art of Summarizing* (Court Review: The Journal of the American Judges Association, Volume 38, Issue 2, Page 30), Joseph Kimble states that all legal writing "should be front-loaded. It should start with a capsule version of the analysis. It should practice the art of summarizing" (at page 30).

Kimble (at page 30) gives credit to Bryan Garner for having "coined" the phrase "deep issue" and recommends that for "maximal clarity" a "judicial opener demands" three elements (at page 30):

(1) the crucial facts;

> (2) the deep issue, stated explicitly or implicitly in terms of the pertinent legal rule or requirement; and
>
> (3) the answer, which may involve simply applying the pertinent rule, or choosing between two possible rules, or sometimes applying an even deeper rule that I'll call the dispositive rule. Note that the answer goes beyond a mere yes or no; it includes the reasoning.[1]

Professor Berry in *Writing Reasons* suggests that an effective introduction will "almost invariably include four elements." At page 21, he lists them as follows:

> (1) the nature of the case;
>
> (2) the parties involved;
>
> (3) the issue or issues to be decided; and
>
> (4) a signal of the route to be taken to decide the issues.

Professor Berry also says that a "reference to the essence of the factual context of the case will make an introduction more effective." In addition, Professor Berry suggests that reference in an introduction to the "deep issue" should be included in the introduction. When he refers to the deep issue he is suggesting that we be more specific than simply setting out "the issue in a broad fashion" (at page 24).

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[1] In *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SJLW 1 (1994-1995), Bryan Garner defines the concept of setting out the "deep issue" as follows (at page 2):

> A "deep" issue is concrete: it sums up a case in a nutshell, and is therefore difficult to frame but easy to understand. By contrast, a "surface" issue is abstract: it requires the reader to know everything about the case before it can be truly comprehended, and is therefore easy to frame but hard to understand.

Professor Terrell in his appellate judges' seminar makes a similar recommendation. He indicates that there "is a difference between starting an opinion and introducing it" and that a "true introduction...goes for the jugular":

> There is a difference between starting an opinion and introducing it. A start simply takes hold of a loose end of string, most often one point in the case's history. A true introduction, on the other hand, is much more ambitious and useful to both the author and the reader: it makes the reader smart enough to cope with the complexities that follow; it grabs the reader's attention; and it gains the reader's respect.
>
> A true introduction...goes for the jugular: it focuses on the crux of the opinion. It should also perform two other functions: it should make the reader smart enough to grasp the significance of what follows the introduction (usually the facts or procedural history), and it should provide a map of the opinion's conceptual structure.

However, an effective introduction is not solely for the reader of the judgment. It can assist us in our reasoning process. As pointed out by Bryan Garner in *Legal Writing in Plain English: A Text with Exercises* (the University of Chicago Press, 2001, at page 58), an "up front summary" assists us in (1) testing the validity of [our] conclusions; (2) it ensures that we will "carry through with them when we get to the middle"; and (3) it helps to eliminate "the slag that [our] research has produced but that doesn't help the analysis."

Keep in mind, however, that a powerful or dramatic opening of a judgment is not the same as an effective opening. Consider the following introduction:

> Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.
>
> [see ***R. v. D.A.I.***, 2012 SCC 5]

This opening, though powerful and dramatic, does not tell us what the judgment is about. This is not of concern in the context of ***R. v. D.A.I.*** because the nature of the Supreme Court of Canada is such that it can have a dramatic impact on our legal system any time it renders a judgment and thus a dramatic opening is a suitable beginning. In addition, we tend to read most of what the Supreme Court of Canada writes, regardless of the opening paragraph, and the opening paragraph of a Supreme Court of Canada judgment is preceded by a detailed head note which summarizes the decision.

In contrast, a trial judge must exercise caution against being overly dramatic. It can look superficial.

Justices Mailhot and Carnworth in *Decisions, Decisions: A Handbook For Judicial Writing*, at page 38, suggest that "the beginning of a judgment is of enormous importance." They recommend that you "begin by drafting two or three sentences which answer the following simple questions: who did what to whom? This should be followed by a summary of the issues to be decided. The first paragraph or two thus forms a preview of the judgment."

One of the great issues of dispute among those who write about writing judgments is: should the outcome of the case be set out in the introduction?

SHOULD THE OUTCOME OF THE CASE BE SET OUT IN THE INTRODUCTION?

Should we announce our conclusion at the beginning? Professor Berry (*Writing Reasons*, at page 24) suggests that there are "good reasons for revealing the decision at the outset." He refers to it improving the "context" and "clarity" of the judgment. However, he also suggests that there are good reasons to place the "decision at the end" (at page 25).

Professor Berry indicates, at page 25, that reading the conclusion "before the reasons might make the reasons not appear to be reasons at all, but mere rationalizations." He says that "one might think, this judge decided the case in advance." For an oral judgment this is correct, but this is not a

compelling argument in the context of a written judgment because the conclusion is always reached before the judgment is issued. Thus, placing our conclusion at the beginning of a written judgment will not have the negative effect Professor Berry suggests. I agree, however, with Professor Berry's statement that choosing where to put the conclusion illustrates that judgment writing requires thought about writing as "delivery, not merely discovery" (at page 25).

I always place my conclusion in the introduction. I believe that setting it out at the beginning helps to create an effective introduction; it helps other judges to decide if they should continue reading; and it helps me to organize the remaining portion of my judgment.

TWO ALTERNATIVE OPENINGS

Consider the following introductions and ask yourself which of the two judgments are you more likely to continue to read and why?

NUMBER ONE:

[1] The accused is charged on an information with the following offence:

On or about the 5th day of December, 2011, A.D., at or near Digby, in the Province of Nova Scotia, Mr. Ross assaulted Mr. Scovil, and used a weapon, to wit: a knife, contrary to section 267(a) of

NUMBER TWO:

[1] Mr. Ross is charged with the offence of assault with a weapon, contrary to section 267(a) of the *Criminal Code of Canada*, R.S.C. 1985. It is alleged that Mr. Ross stabbed Mr. Scovil with a knife. Mr. Ross concedes that he stabbed Mr. Scovil, but says he did so accidentally. Therefore, denying that he had the necessary *mens rea*. For

the *Criminal Code of Canada*, RSC 1985, as amended. [2] The evidence consisted of five witnesses. [3] The first witness, Mr. Smith testified that.... [4] The second witness, Mr. Jones testified that...	the reasons that will follow, I have concluded that the Crown has proven beyond a reasonable doubt that Mr. Ross stabbed Mr. Scovil, but it has failed to prove that he did so intentionally. As a result, Mr. Ross is acquitted of the offence with which he is charged. Let me explain my reasons for this conclusion by commencing with a review of the evidence presented at the trial.

Why is number two superior? Because it invites us to read further, though it would have been even better if the word "because" had been utilized. Some jurists and teachers of writing will not like the use of "for the reasons that will follow" because it is stuffy. I have no difficulty with it. Some formality is required. A judgment is a separate species of writing.

Once we set out an introduction to our written judgment, then we must commence the substantive portion of our judgment. This includes headings and segues.

HEADINGS AND SEGUES

Headings are an invaluable method of organizing and providing coherence to a judgment. They facilitate reading by giving the reader a break and a road map. They help the judge to organize his or her thoughts. This includes the headings contained in most judgments (**Introduction**, **The Evidence Presented**, etc.), but should also include headings specific to the

case **(The Incident on July 4, 2011**, **The Manner in Which the Search was Conducted**, etc,). Professor Barry (*Writing Reasons*, at page 47) concludes that the "most useful headings, for both reader and writer, are those that are specific to the judgment at hand. If the issues involved have been set out in the introduction, the headings used can mirror that wording."

Any heading or paragraph must be introduced. For instance, one might write: "I now intend to consider the applicable legislation." This sentence might then be followed by the following heading:

THE APPLICABLE LEGISLATION:

Before this topic is exhausted, the next heading must be introduced before it is set out. Justices Mailhot and Carnworth in *Decisions, Decisions: A Handbook For Judicial Writing*, at page 12, refer to using "connectives." For instance, one might write: "Having considered the applicable legislation, I now intend to address the onus and standard of proof which applies." This might be then be followed by the following heading:

THE ONUS AND STANDARD OF PROOF:[2]

This can be a very effective manner of moving a judgment from one portion of its reasoning to its next portion of reasoning. Another effective

[2] In *On Judicial Opinions Considered As One Of The Fine Arts*, 51 U. Colo. L. Rev. 341 (1980), at 350, Irving Younger refers to Mr. Justice Brandeis decision in ***Erie Railroad Co. v. Tompkins***, 304 U.S. 64 (1938), as illustrating a contrary approach which he describes as "the device of unmodulated inconsistency...it is comprehensible not as logic, of course not, but as art."

method of doing so involves the using of a question at the end of a paragraph followed by a heading and then your analysis of the question you have posed. For instance, one might write: "The next issue to be addressed is: was Ms. Smith detained? This might be followed by the following heading:

WAS MS. SMITH DETAINED?

This heading might be followed by an opening sentence such as: "In determining if Mr. Smith was detained, I must consider..." The use of such questions also has the benefit of illustrating that the judge is in control of his or her reasons.

Professor Berry in *Writing Reasons: A Handbook for Judges* points out that if we state the issues as questions we can "use the questions later as topic headings" (at page 32). Bryan Garner in *Legal Writing in Plain English: A Text with Exercises*, indicates, at page 65, that "the best approach is almost always to open the paragraph with" a "topic sentence."

Having considered the importance of headings and segues let us now consider the necessary evil of the inclusion of quotations from other judgments in our written judgments.

QUOTATIONS

Quotations are a necessary evil in writing judgments, but their deadening effect can be diminished. Long quotations have a deadening

effect on both the reader and the writer of a judgment. For instance, when we review a draft of one of our written judgments and come to a long quotation we have mistakenly inserted we immediately stop thinking about what we have written. We skip over the quote. Those who read our judgments and come to a long quotation know that at that point we had stopped thinking. As a result, they skip over the quote. Thus, never under any circumstance quote long passages from other judgment in one of yours. It is never necessary and no one will ever read them. They have the effect of lessening the reasoning power of a written judgment by suggesting the judge is not thinking about what she or he is writing.

Yes, I agree that we must quote from other judgments. Yes, I also agree that sometimes the relevant quotes are long. But, there are options and methods of lessening their deadening and mind numbing effect. Consider the following two examples.

OPTION NUMBER ONE:	**OPTION NUMBER TWO:**
[10] In ***R. v. W.(D.)***, [1991] 1 S.C.R. 742, the Court stated: In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly	[10] When an accused person testifies, a trial judge must assess his or her evidence applying the reasonable doubt standard. The judgment of the Supreme Court of Canada in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742, supports the adopting of an approach to the assessment of an accused person's credibility which

believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in R. v. Morin, supra, at p. 357.

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

involves a three step analysis. Those steps are as follows:

(1) in the first step, the trial judge should ask him or herself whether she or he believes the testimony provided by the accused. If so, an acquittal must be entered. If not, then

(2) the second step requires a consideration by the trial judge as to whether the accused person's evidence causes her or him to have a reasonable doubt concerning the accused person's guilt. If so, an acquittal must be entered. However, if the answer to the first and second questions is no, then

(3) the final step in the analytical process developed in ***W.(D.)*** requires the trial judge to consider the totality of the evidence presented to determine if the accused's guilt has been proven by the Crown beyond a reasonable doubt.

> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

Some might not read option two, but almost no one will ever read option one. You will not read it if it is in one of your draft judgments and virtually every person who encounters it in one of your written judgments will not read it. They and you will skip over the quote and go to the next paragraph. Why then, if both the writer and reader are not going to read it, is it included in your written judgment?

Consider a third option:

> [10] When an accused person testifies, a trial judge must assess his or her evidence applying the reasonable doubt standard. The judgment of the Supreme Court of Canada in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742, supports the adopting of an approach to the assessment of an accused person's credibility which involves a three step analysis. Those steps are as follows: (1) if the accused's evidence is believed he or she must be acquitted; (2) if the accused's evidence raises a reasonable doubt she or he must be acquitted; and (3) if the accused's evidence does not raise a reasonable doubt the entire evidence presented must be considered to determine if the Crown has proven beyond a reasonable doubt that the accused committed the offence with which she or he is charged.

This option is more difficult because it requires more thought about what ***W.(D.)*** stands for. However, it is more readable and the thought process

involved leads to better results. One other method that can be used with quotes is to introduce them to the reader.

INTRODUCING THE QUOTE

One method of lessening the deadening quality of long quotes is to introduce them. Avoid such techniques as: “And at page 16:”, “And at page 22:” etc., followed by a long quote. Consider the following choices.

OPTION NUMBER ONE:

[5] In ***R. v. Hundal***, [1993] 1 S.C.R. 867, the Supreme Court of Canada indicated that it is "clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care." The Court held that "the *mens rea* for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident." The Court then set out a modified objective test which concentrates on whether a “reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused”:

> It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt

OPTION NUMBER TWO:

[5] In ***R. v. Hundal***, [1993] 1 S.C.R. 867, the Supreme Court of Canada stated:

> In summary, the mens rea for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident. That approach will satisfy the dictates both of common sense and fairness. As a general rule, personal factors need not be taken into account. This flows from the licensing requirement for driving which assures that all who drive have a reasonable standard of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers.

[6] And:

> In light of the licensing requirement and the nature of driving offences, a modified objective test

that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused ... The offence can be readily assessed by jurors who can arrive at a conclusion based on common sense and their own everyday experiences.

satisfies the constitutional minimum fault requirement for s. 233 (now s. 249) of the Criminal Code and is eminently well-suited to that offence

[7] Later:

It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

[8] Later the Court stated:

Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused ... The offence can be readily assessed by jurors who can

> arrive at a conclusion based on common sense and their own everyday experiences.

Option one is preferable, but the quote is too long. Who would read number two? It is an example of judicial laziness.

As a third option consider taking out the quote entirely. You are then left with the following:

> [5] In ***R. v. Hundal***, [1993] 1 S.C.R. 867, the Supreme Court of Canada indicated that it is "clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care." The Court held that "the *mens rea* for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident." The Court then set out a modified objective test which concentrates on whether a "reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused."

This option is harder. It requires more work, but also more thought and thus, a better judgment and more likely a better result.

One final topic: proof reading.

PROOF READING

There will always be instances in which typos or spelling errors find their way into our judgments. It is not uncommon to see a *corrigendum* (correction) or an *addendum* (addition) filed after an initial written judgment is rendered.

There is no perfect manner in which to prevent such errors from occurring, but consider the following suggestions:

-before reviewing your final draft of a written judgment do not look at it for a few days;

-when reviewing your final draft review the pages out of order. Proof read them on a random basis. This helps to prevent our eyes glossing over from having read the same thing several times; and most importantly

-have someone else read your final draft before filing the written judgment, preferably another judge. This can be of great assistance not only for proof reading purposes, but for suggestions from someone who is looking at the written judgment with a fresh perspective.

BE CAREFUL WHEN READING YOUR JUDGMENT IN COURT

In ***R. v. Munroe***, 2016 NSCA 16, the accused was convicted of the offence of murder after a trial before a judge sitting alone. The trial judge provided his decision orally, but passed counsel a written document which set out his decision. The Nova Scotia Court of Appeal indicated that “when

the judge delivered his decision on November 21, 2011, there was a publication ban on any evidence in the proceeding against Mr. Munroe until the conclusion of the murder trial against Cody Muise. The judge had prepared his reasons in writing. In court, he stated that, in light of the publication ban and the seriousness of the matter, it was appropriate that he read them aloud. The judge delivered his decision orally, and he gave copies of his written document to counsel for the parties."

In the "written document", the last two lines of paragraph 41 read as follows:

> At any rate, Downs appears to be in this thing up to his eyeballs. His evidence <u>has not</u> been considered in light of that.

However, in his oral decision the trial judge said the direct opposite:

> At any rate, Downs appears to be in this thing up to his eyeballs. His evidence <u>has to be</u> considered in light of that.

[my emphasis]

The Court of Appeal noted that the "document the judge provided to counsel appeared in the Appeal Book as the judge's decision. Its cover page indicated that it was an oral decision. It was not signed. Searches by counsel and court staff for a signed decision came up empty."

The accused argued that this discrepancy between the oral judgment and the written document should cause the Court of Appeal to order a new trial. The accused argued that "the judge's decision was embodied in the document he provided to counsel. He relied on case law that prohibits or limits later modification of an oral or a written decision...According to the appellant, this panel must address whether, after stating in ¶ 41 that Mr. Down's evidence would not be considered, the judge erred by doing just that."

The appeal was dismissed. The Court of Appeal concluded that the decision was the one provided orally and that the written document was simply "speaking notes" (at paragraphs 36 to 38):

> With respect, I do not agree that the document passed to counsel contains the judge's decision. Importantly, it was not signed. Its cover page described the contents as "Oral decision". Moreover, his reasons read as a whole shows a recounting and reliance on Mr. Down's evidence that is completely contrary to ¶ 41 in the document which said that it would not be considered.
>
> In my view, the judge's actual decision was what he spoke on the record on November 21, 2011. Counsel agree that the judge stated that Mr. Downs' evidence had to be considered in light of his involvement, not that it was not considered in light of his involvement. As extensive as it was, the document he passed to counsel were speaking notes. Accordingly, the law regarding changes to written decisions does not apply.
>
> As a consequence, I see no inconsistency between the judge's characterization of Mr. Downs' evidence and his subsequent reliance on it.

CONCLUSION

I have broken every suggestion made in this paper in my judgment writing at one time or another. However, I continue to try to improve my written judgments. We should all write as many judgments as we can. Modern technology has facilitated the writing of judgments to a degree that our predecessors could never have imagined and would envy. The more we write judgments the easier it becomes and it is the best method of improving our writing. Writing judgments can add a degree of satisfaction to our work not otherwise available. Written judgments add value to the administration of justice and to our well being. They help us to get it right. In *Writing Reasons*, Professor Berry offers the following summary of "tips" for organizing a judgment:

> Create issue-driven-structures-everywhere.
>
> Use headings and transitional statements to orient readers.
>
> Don't get trapped by structure imposed by the parties.
>
> Keep the evidence brief and the facts tied to the issues.
>
> Prefer thematic to chronological structures, unless chronology is important.
>
> When credibility requires sustained attention, make it an issue.
>
> Focalize judiciously.

Avoid formulaic conclusions.

To this list I would add: Write as often as you can. The practice will make you a better writer and it will enhance the administration of justice. It has been pointed out that "the proper functioning of the judiciary within our constitutional framework requires judges to provide rational justifications for their decisions" (see ***Brake-Patten v. Gallant***, 2012 NLCA 23, at paragraph 109).

It is important that we take judicial opinions seriously. Writing them is one way to illustrate that you have done so. An oral judgment, in certain cases, can suggest that you have not. If you write often, then when a case arises for which only a written judgment will suffice, you will not suffer any anguish.

On taking judicial opinions seriously, I give the last word in this paper to Irving Younger who, in *On Judicial Opinions Considered As One Of The Fine Arts*, at page 352, suggests that a written judgment is a "fine art":

> Judicial opinions deserve to be taken seriously. Only when we do take them seriously, when the profession insists that their authors hold themselves to standards as high as those by which the great composers, writers, and painters are content to have their work judged, will it be possible for some future Coen lecturer to consider judicial opinions as one of the fine arts without running the risk of being thought facetious.