

CIAJ ICAJ
 Canadian Institute for the Administration of Justice / Institut canadien d'administration de la justice
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The Point-First Writing Approach

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Ontario Deputy Judges Association
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An brief introduction

- What it the training on judgment writing
- The approach
- Key éléments
 - Overview
 - Point-first writing
 - Context before details
 - Managing facts and law
 - Clear writing

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Overview

- What does the reader want?
- Writing overviews
- Point-first writing

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4 **Context is everything**

“The human mind is not a computer. It cannot absorb and remember vast banks of mysterious data, waiting patiently for the writer to punch a “compute” button to make sense of it all. Readers absorb information best if they understand its significance as soon as they see it.”

Stephen Armstrong, *Thinking Like a Writer*

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What does the reader want...

- Clarity
- Conciseness
- Correctness

Why is this important? You are writing for an audience, and as in a theatre, there are many different members of that audience.

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What does the reader want...

According to former Justice John Laskin of the Court of Appeal for Ontario, the two most important members of the audience are:

- Your nextdoor neighbour (*overviews*); and
- The losing party (arguably the most important person in the courtroom) (*point-first writing and managing the facts*).

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There are two types of clarity...

- Perceived clarity on the part of the writer; and
- Actual clarity on the part of the reader—this is created by reader-based prose.

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8 What is reader-based prose?

- Reader-based prose imagines the needs of the reader.
- Reader-based prose creates a "smart reader" by signalling the significance of information before providing details.

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Point-first writing: make your reader feel smart

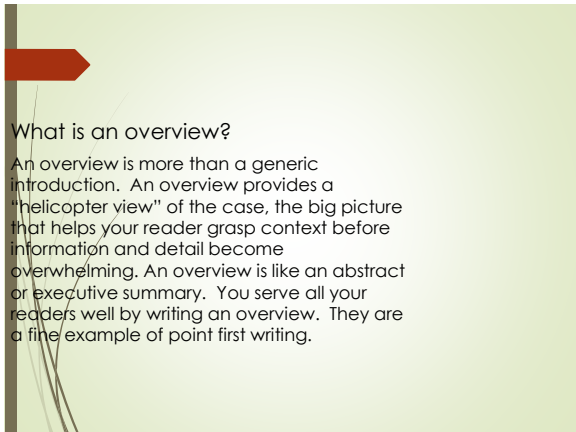
Tell the reader what you are writing about:

1. Set the context before details
 - Overviews
 - Issues
2. Use point-first writing
 - Conclusions upfront
 - Headings
 - Topic sentences

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Point-first writing: make your reader feel smart

Tell the reader what you are writing about:

1. Set the context before details
 - Overviews
 - Issues (later today)
2. Use point-first writing
 - Conclusions upfront
 - Headings
 - Topic sentences

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What is Context?

- The sentence or two that says what the details are about and why they matter
- The answer to the reader's question, "Why are you telling me all this?"
- Context sentences are not necessary to the writer; they are the writer's gift to the reader.

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Good Reasons

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Michael Lewis: Against the Rules

<https://www.pushkin.fm/show/against-the-rules-with-michael-lewis/>

Decision makers need to make sure their decisions are fair – what does this mean?

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We want a fair process and a fair outcome.

One way of both ensuring and demonstrating fairness, is through the decisions.

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■ I insist, always, that all the arguments of the losing party are frankly and fully addressed—perhaps the greatest check against an incorrect conclusion, and the greatest assurance to the loser and the public that the process was honest.

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- Judgment writing at its simplest form is an attempt to communicate. ... A judgment that does not communicate is a failed judgment, no matter how learned or gracefully phrased.
- We should do what we can to make the law clear and accessible to Canadians. The law is, perhaps, the most important example of how words affect people's lives.

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Reason #1 – how we communicate

It is through reasons that we speak about the case. It is the only way to justify the decision made.

We have no other opportunity to explain the decision (no speeches, no tweets).

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Reason #2 - to whom we communicate?

- who is the audience for reasons?
- the parties (especially the losing one)
- the complainant
- witnesses involved in the proceedings
- other tribunals/courts across the country

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22 Reason #2 Cont'd:

- reviewing/appellate courts
- your colleagues
- the media/public
- the legal profession
- academics

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23 Reason #3 –Accountability/Transparency

To do justice, and to be seen to do justice.

Permits the losing party to understand that their evidence and arguments were heard and understood, and why they lost.

Permit scrutiny by other audiences, including by a reviewing court.

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24 Reason #4 – focusses thinking

Writing reasons helps in the decision making process by focusing the mind on the key factual and legal issues.

Does the decision write itself?

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25 Reason #5 – develop the law

Reasons assist in developing the law uniformly and consistently – helps to develop intelligible rules by which all are bound – precedent.

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26 What Should Reasons Do?

Reasons should explain **what** you have decided and **why**.

The most important word you need to remember is **because**.

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27 Fact Finding

The primary role of a tribunal of first instance is to make findings of fact.

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"It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts.

And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before it, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas."

Stewart v. Elk Valley Coal Corp. 2017 SCC 30 at para 40

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Credibility vs Reliability

"Reliability has to do with the accuracy of a witness' evidence – whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian.

Credibility has to do with whether a witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. ... Although honest, their evidence is not reliable".

R v Nyznik, 2017 ONSC 4392

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Credibility

"If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. ...

Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.

...

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

Faryna v Chorny, [1952] 2 DLR 354 per O'Halloran.

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31 **Reasons are Permanent**

"Courts should treat all litigants – even vexatious ones – with dignity and respect. To the court, the litigant may deserve to be declared a vexatious litigant.

But to others, the litigant may be an employee or volunteer, a friend or acquaintance, an aunt or uncle, a parent or child – and a good one too. No one deserves to be tarred and feathered and paraded through the town square, least of all by courts."

Canada v Olumide, 2017 FCA 42 at para 39

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32 **When to Write?**

Right Away.

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33 **How to Write Reasons?**

What is the story that needs to be told in *this* case?

- Think about the issues, the witnesses, the evidence, the law.
- Is the case about sexual harassment? Religious discrimination? Is it workplace or access to accommodation?

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34 Issues

- How many issues do you have to decide?
- Is there one main issue and sub issues, or several different main issues?
- Are the issues factual or legal?

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35 Issues

- Are any issues admitted? Perhaps *prima facie* discrimination is admitted, and the issue is accommodation?
- For example if dealing with family status: if discrimination (facts focus on the claimant); if accommodation (facts focus on the employer).

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36 Evidence

Generally four ways to organize the evidence:

- witness by witness
- chronological
- thematic
- issue driven

What will be appropriate for your story?

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37 Evidence

Consider where and when you want to make your findings of fact.

Consider where and when to make your findings of credibility and reliability.

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38 Expert Tribunal

It is not enough to say in effect: "We are the experts. This is the figure. Trust us." The Board's reasons on this issue served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.

(CAB) v. SOCAN, 2006 FCA 337.

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39 Experts

Reviewing court will defer to a tribunal:

- findings of fact
- credibility findings
- application of law to facts

Reviewing court will show some deference to:

- interpretation of law

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For the Court of Appeal to defer on these issues, means that you have to do your job: make the findings, make the decisions, and explain why or how you have come to these conclusions.

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Some Lessons from the Cases

- The Goldilocks Principle

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Too Short:

Entire reasons of trial judge:

"Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged."

R. v. Sheppard, 2002 SCC 26

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43 Too Long:

Welton v. United Lands Corporation Limited, 2020 ONCA 322

Should avoid the "factual data dump" (para 62):
 -74 pages of a witness-by-witness account of examination in-chief, cross-examination, and re-examination.

+ Some of this is repeated in the analysis section

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44 *Welton* at para 58

- Identify the key issues first
- Then find facts relevant to issues
- Assess credibility and reliability where there is a conflict
- Explain reasoning
- Make decision

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- No need to recite all of the evidence (especially the irrelevant) para 60
- No need to recite every argument made: "In its essence, the argument is..."

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46 Welton at par 61

The task of a trial judge is to find the golden mean, to "decant and simplify," to synthesize the evidence and make the necessary findings; the task is not to be a court reporter.

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47 Just Right

R. v. R.E.M., 2008 S.C.R. 51

A functional, context specific approach to reasons. One size does **not** fit all.

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The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

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REM at para 17

The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. ... The trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision

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" What is required is a logical connection between the 'what' – the verdict – and the 'why' – the basis for the verdict. "

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"The 'path' taken by the judge must be clear from the reasons read in the context of the trial. But it is not necessary that the judge describe every landmark along the way. "

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52 **Who Should Write Reasons?**

The decision maker should write reasons.

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53 **Do not Copy:**

Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30

Trial judgment consisted of 368 paragraphs.

47 paragraphs were predominantly in the judge's own words; the balance of 321 paragraphs (87%) was copied from the plaintiffs' submissions.

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54 **The Concern with Copying**

The concern is not that the judge is taking credit for someone else's work.

Rather, the concern is that copying might suggest "that the reasons for judgment do not reflect the judge's thinking. They are not the judge's reasons, but those of the person whose prose the judge copied. Avoiding this impression is a good reason for discouraging extensive copying." (para 35)

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Cojocarú at para 50

"The process of casting reasons for judgment in the judge's own words helps to ensure that the judge has independently considered the issues and come to grips with them."

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Do my reasons convince me?

Do our reasons demonstrate to the reader that there was a fair hearing, and a fair result?

It is this, one decision at a time, that establishes and maintains the integrity of the institution.

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Conclusion

Decision-makers "should not be expected to achieve high literary standards". ... trial judges do not have to "exhibit the novelist's touch for character delineation and motivation". It is the substance, not the style, that matters.

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