CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
SEMINAR ON JUDGMENT WRITING

AN ADDRESS BY
MR. JUSTICE BRIAN DICKSON
SUPREME COURT OF CANADA

THURSDAY, JULY 2, 1981

Thank you for the generous introduction. It is a delight for me to be here this evening among old friends and new. And I was pleased to have been asked to speak on a subject, to which I make no claim to expertise, but which is part and parcel of the daily life of a judge—the writing of judgments.

Judges have to decide cases. Unfortunately, they also have to write. Here the difficulties arise. A recent issue of the New Yorker magazine depicted a university student, at prayer. The caption read: "…And give me good abstract-reasoning ability, inter-personal skills, cultural perspective, linguistic comprehension and a high socio-dynamic potential". Judgment writing seems to call for all these qualities and a few others in addition.

It is not my purpose this evening to lay down any formula for legal writing. To attempt to do so would be rash and presumptuous. Perhaps the formula for legal writing is that there is no such formula. Writing itself is an art. Each of us, as a judge, is a professional writer and each of us in the process of exposition is practicing an art. Writing is not a science which can be reduced to mechanical rules. Nor a drill-book exercise. A judge can hope to improve his work by analyzing and emulating the best work of the best writers, within and without the profession, but as Holmes said: "the best style that a man can hope for is a free, unconscious expression of his own spontaneity, not the echo of someone else".

Although much of the legal writing in Canada is of high quality, many of the judgments one reads show a strong tendency to be wordy, unclear, and dull. One of the sources of the trouble, I fear, is sloppy thinking. Thoughts straggle across the printed page like a gaggle of geese, without form, without beginning or end, lacking in coherence, conciseness, convincingness. It is obvious that a person cannot write more clearly than he thinks. "Thoughts and speech", said Cardinal Newman," are inseparable from each other. Matter and expression are parts of one: style is a thinking out into language". A faculty for writing is valuable, but intense thought should precede the writing.

Another source of trouble is a love for resounding words and phrases, "half-tones", opaque language, obscure conceptualization. All tend to leave the reader in a state of obfuscation, or to use professor Kolb's apt word, "lobotomized".

What is needed is clear, succinct, forceful writing. It is not easy. It is time consuming. We may sweat blood for a month over a judgment but it is worth it if we can expunge clumsy legalese, tedious, obscure prose, overblown phrases, the vagueness and verbosity which are neither good law nor good literature.

A sound, well written judgment at trial or on appeal has a powerful influence upon provincial jurisprudence and also, I can assure you, upon the decision of the court of last resort, The Supreme Court of Canada. This is reason for preferring, not perfunctory treatment, but the best possible judicial product. May I add this. It is regrettable when an intermediate Court of

Appeal dismisses or allows an appeal without written reasons. It is unfair to the litigants, to the bench and bar of the province and to the court of final appeal. Written reasons, however brief, explaining the reason for the action taken are of highest importance.

Why do we have formal, written judgments? Because preparation of a formal judgment assures intensive and thoughtful study of the record, the briefs and the law. The articulation in writing minimizes snap judgments and casual theorizing. It compels thinking at its hardest. One jurist spoke of it as "wrestling with the devil". The result not only decides the dispute but, in its law-announcing function, it advises bench and bar of the rules of law to be followed and guides the lives and actions of thousands of Canadians, who, though not parties to the litigation, may be directly affected by it.

I would like to say a word on the composition of style. There can be no one and exclusive style, appropriate for the written outpourings of jurists. One notes what Karl Llewellyn has referred to as the "formal" style in which precedents are "mechanically ribbon-matched to find the one most approximating the case at hand". This style is thought to be on the wane. Then there is what is called the "grand" style in which precedents are welcome and persuasive but there is nevertheless a constant and conscious search for a principle that will lead to a just result. Rules are shaped and reshaped, in the grand tradition of the common law, to allow the law to grow with the times.

It would be impossible and unwise to attempt to provide an exhaustive list of the qualities of the "good judgment". I make no such essay here. I would simply observe that in my opinion the identifying badge of a superior judgment is a focus on principle and reason. There has been a tendency in the past, a tendency happily disappearing, to over-emphasize precedents and case law in legal argument. Lawyers and judges had become, in the words of Dean Wigmore, "mere compilers" rather than careful thinkers. The advocate stalked an elusive creature called "the law" through the law reports, certain that the answer to his problem was lurking in the cranny of a dusty volume. The lawyers on both sides would cite innumerable cases to the judge who would be expected to adjudicate by sifting through the mountain of law reports and selecting the precedent which seemed, to him, the most similar to the facts in the case before him.

We now know that the good judgment must be more than a mere digest of cases. Cases are important only to the extent that they enunciate principles or rules. Legal argument is essentially an attempt to justify a certain conclusion through an appeal to reason and principle. The quality of Canadian jurisprudence must be judged therefore by the degree to which the judgments of our courts of law invoke sound legal principle.

The bench and bar have come to view law in broader terms than at an earlier date. This change in attitude is reflected in the use now made of periodical literature. At one time courts prohibited the use of periodicals altogether. As recently as 1950, in the Supreme Court of

Canada, the Chief Justice refused to allow counsel to refer to an article in the Canadian Bar Review. He said that the Canadian Bar Review was not an authority in the Supreme Court of Canada. Elsewhere, a rule was applied that only writers who had held or actually held judicial office could be cited. Alternatively, it was said that living authors could not be cited presumably on the ground that only when dead could the author be depended upon not to change his opinion.

The illogical requirement that an authority be contained in a "bound" volume and not in periodical form in order to be considered is, happily, no longer with us. Judges do read and use legal periodicals, both Canadian and non-Canadian. The weight to be given to a citation depends upon the cogency of the argument, the intellectual honesty of the scholarship, the thoroughness of the research and, yes, the reputation of the author.

Along with the increasing use of the legal research reflected in the periodical literature, judgment writing in our court has shown a new openness to extrinsic materials from other sources. The anti-inflation reference is one example. The recent decision of the Court in reference to the *Residential Tenancies Act* is another. In the latter case the Court accepted as evidence various reports prepared by the Ontario Law Reform commission dealing with landlord and tenant matters. I welcome these developments particularly in the field of constitutional law. As the Court noted in the *Residential Tenancies Act*, constitutional cases are more than a barren exercise in statutory interpretation. What is involved is an attempt to determine a given effect to the broad objectives and purposes of our Constitution viewed as a "living tree," in the expressive words of Lord Sankey in *Edwards v. Attorney General for Canada*.

The structure of the ordinary appellate judgment is well known. It opens with a description of the nature of the action and how it reached the appellate court. The issues or questions to be decided are stated, then the essential facts, discussion and application of relevant legal principles and authorities, and finally, the disposition of the case.

Lord Denning's method, which I happen to admire, is to start with a careful, smooth exposé of facts put as a story. Take this example of an opening sentence: "It was blue bell time in Kent," or this, "Old Peter Beswick was a coal merchant … all he had was a lorry, scales and weights". It is almost like telling a tale: "There is in Lancashire a river call Eller Brook…". The judge then proceeds to explain the situation, taking care to be understandable rather than strictly relevant. The form of the judgment is felicitous and integrates various forms of reasoning.

Language is communication. People must be capable of understanding what we say. We, as judges, as insiders, should not use a specialized jargon like that of the law to talk only to other insiders, to other judges and members of the bar. The law of today has a broad consumer base. Our judgments touch the lives of all Canadians. They should convey meaning to all who read them, whether or not they are learned in the law. It is not a matter of pandering to illiterates. It is simply recognition of the obvious. When we talk to a broad audience and

demand to be understood, we should use the language of simplicity, whatever difficulties this may entail in expressing the subtleties which constitute some of the pivotal considerations of law.

How then do we fulfill the function of judicial writing, which is to inform and to persuade? How do we convey our ideas in a manner in which the reader will follow the ideas effortlessly, without being conscious of the words? "Short words are best and the old words when short are best of all", says Sir Winston Churchill, winner of the Nobel Prize for Literature in 1953. Churchill offered this advice to writers: "I began to see that writing, especially narrative, was not only an affair of sentences, but of paragraphs. Indeed I thought the paragraph no less important than the sentence. Macaulay is a master of paragraphing. Just as the sentence contains one idea in all its fullness, so the paragraph should embrace a distinct episode; and as sentences should follow one another in harmonious sequence, so the paragraphs must fit on to one another like the automatic couplings of railway carriages…". Sir Winston concludes that, "Good sense is the foundation of good writing". Who can doubt the validity of that?

At the invitation of Mr. Justice Stevenson and not without some temerity, I have compiled a list of do's and don'ts. In my judgments I have erred in both directions; I have done the don'ts and failed to do the do's. I nonetheless offer the list in the hope that it may be of interest. Here are the "do's". I suggest that you

1. Write the first draft of your judgments in your own handwriting. This avoids discursiveness and affords a strong inducement to write brief judgments, although I confess it does not always accomplish that purpose. In his later years Holmes wrote his opinions *standing up*, commenting that, "Nothing conduces to brevity like a caving in of the knees".
2. Open with a strong paragraph. The importance of the first paragraph cannot be over-emphasized. Tell the reader what the case is about so that he may know what to look for as he proceeds. Don't leave him hanging until page five and six. Don't bury him under a mountain of detail. Whether the author of the judgment lets the cat out of the bag and reveals in the opening paragraph who is going to win the appeal or whether he leaves the reader in suspense until the end of the judgment is a matter of individual style.
3. If the judgment is to be lengthy prepare a plan or method of organization, listing, in some logical and understandable sequence, the essential elements. The preparation of an outline before creating the judgment should add to brevity, clarity and reader comprehension.

4. Break the text of a long judgment into parts by using numbers or topical headings. The headings are not propositions of law or of fact or even sentences but merely informative phrases.
5. Use the active voice - passive voice indicates a vague, anonymous thing. Use the transitive rather than intransitive, the personal rather than the impersonal. Use affirmative statements. I recently read a judgment which in a single sentence contained three negatives in quick succession. The text read well but the reader was left to his own devices in divining what was meant.

I make a plea for language of simplicity and strength. Let me quote to you the finest opening, by the counsel for the defense in a murder case, ever known. It was by John English, when he appeared in the great trial of Madeleine Smith. "Gentlemen", he said, "the charge against the prisoner is murder, and the punishment of murder is death, and that simple statement is sufficient to suggest to you the awful nature of the occasion which beings you and me face to face." The Sixth Suggestion—

6. Let each topic, if possible, be discussed and disposed of in a compartment by itself. Say one thing at a time. It is both distracting and unhelpful to find a topic appearing and re-appearing through the text. Polanyi, the Hungarian mathematician, said, "The first rule of style is to have something to say. The second rule of style is to control yourself when, by chance, you have two things to say; say first one, then the other, not both at the same time". Lawyers are not troubled by a dearth of things to say. But the second rule deserves careful attention; it is not as self-evident as it may seem.
7. State the legal principle or principles which are dispositive of the appeal. Respect *Stare Decisis*. If you intend a juridical revolution and departure from established decisional law, say so, and say why. Do not attempt to distinguish the indistinguishable case.
8. Keep readily at hand a good dictionary and a thesaurus of synonyms; both are helpful tools.
9. Finally, write and rewrite. Justice Louis Brandeis said: "There is no such thing as good writing. There is only good rewriting". I have found that the first draft of a judgment is usually a confusing mass of refractory, repetitive and, at times, contradictory material. One must go over the drafts. Re-arrange the sequence to make the judgment flow easily. Rub away every muddy word. "Cut out unnecessary words" is advice not easy to take. Once we have put something on paper we find it hard to cut. To do so while still glowing with the pride of

> authorship is hard. But we should reject matters of little relevance. Reduce the cumulative statements of fact and law. Dr. Johnson's only rule for writing was this: "Read over your compositions, and when you meet with a passage which you think is particularly fine, strike it out". I say, therefore, edit and re-edit so that the end product is clear, concise and readable.

If I might turn now, but briefly, to the "don'ts". I suppose the first must be a preference for the familiar to the far-fetched, the concrete to the abstract, the single word to the circumlocution. Is it no better to "refer" than to "advert", to "tell" rather than "advise", to "inform" rather than "apprise". There is really no need in legal writing to be formal and stuffy. Yet how much of it we see! If, as has been said, the law deals with man's relation to man, to his society, and to his government; with ordinary day-to-day events and occurrences; then, for these, does the law need Latin? Does it need obsolete terms and phrases? The language of the law should be as dynamic as the society which the law seeks to serve. We have a tendency to take a phrase such as *res ipse loquitur* or *novus actus interveniens* and give it a respect which it does not deserve. Because it is Latin, and adds a certain elegance, we elevate it to a principle. The uncritical use of Latin phrases and maxims bedevils the law. Their very facility tends to distract and lead to lazy repetition, expressing different and sometimes contradictory ideas. Lord Esher once said: "I detest the attempt to fetter the law with maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which is really not intended to be included in them", and Justice Cardzo has observed: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought they end often by enslaving it". So, among the "don'ts"—avoid Latin and maxims. Next, let me pleased for the avoidance of clichés. Why do we mar out otherwise excellent judgments by such phrases as "I would venture to suggest", "If I may be permitted to add", "Speaking with all deference" and so on.

There are many words and phrases which, though once fresh or novel, have become worn out from overuse. Take such phrases as "at arm's length", "incontrovertible fact", "to all intents and purposes". Professor Kolb and his associates have no doubt warned against expressions such as "a cursory examination is sufficient" or "this point need not long detain us". The losing lawyer and his client will feel the examination has been too cursory and that the court should have detained itself a little longer. And against such redundancies as "no citation of authority is needed". If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found.

How often do we use dogmatic and conclusion-begging phrases such as "it is obvious", "it is clear", "it is too plain for words" or "undoubtedly" to introduce arguments that were not

obvious, clear or beyond doubt. As one author has noted, if you can give a new twist to an old wheeze, that's quite different. To "think twice before you act" is a cliché. But it can be renovated to sound like new: "The will compel the administrator to think once, even if not twice, before he acts". "Not worth the paper it's written on" is hackneyed; but one judge dusted it off when he said in his court "the unwritten law is not worth the paper it isn't written on".

Other "don'ts" readily come to mind; the avoidance of such trite phrases as "well-settled" and "constrained to hold". I wince when I read stilted words as "learned defence counsel contended". The ensuring discussion invariably establishes that defence counsel is anything but learned, at least in respect of the point in contention.

I wish to make brief reference to but one other matter, footnotes. I am not an ardent footnoter. I resent being asked to interrupt my reading of the text to read, or at least glance at, the footnote. If the thought is important enough to be recorded it is important enough to deserve a place in the body of the judgment. It is particularly irritating when, as has occurred, the footnote contains what is really the decisive point of the entire judgment. I have no doubt that footnotes may at times serve a useful purpose but let them not compete with the main text.

I return to my theme of writing in words which are easy to understand. In support I have the Bible, First Corinthians Chapter 14, Verse 9: "so likewise ye, except ye utter by the tongue words easy to be understood, how shall it be known what is spoken? For ye shall speak into the air".

Let us develop a logical narration so that when the conclusion is reached people will know that certainty of which Llewellyn spoke—"the certainty after the event which makes ordinary men, and lawyers, recognize as soon as they see the result that, however hard it has been to reach, it is the right result. Then men feel that it has really been close to inevitable".