Remarks of the Rt. Hon. Beverley McLachlin, P.C.
Chief Justice of Canada

NJI and CIAJ Advanced Judgment Writing Seminar

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Judges have to decide cases. Unfortunately they also have to write. Les juges sont obligés de rédiger des motifs du jugement. Facile à dire; difficile a réussir. Which is why we are gathered here tonight.

The judge's life is a life of struggle — the struggle to decide fairly between contending parties and positions; and the struggle to explain the reasons for that decision, our focus tonight.

The two struggles are interrelated, part of the single indissoluble activity of judging. Should scientists ever decide to map the judicial brain, I am confident that it would not reveal one part of the frontal context outline in red for "decision-making" and another outlined in green for "judgment writing". Through writing and rewriting judges arrive at the right decision. Errors are revealed. Fallacies are exposed. Judges sometimes say of a result they thought they would get to: "It won't write". The process of articulating the reasoning has changed the result.

A wag once said, "There are two things wrong with legal writing. One is its content; the other is its style".

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I beg to differ that the deciding and writing are distinct activities. However, there is truth in the suggestion that bad decisions and bad reasons are often found together. If the content is bad, so the style will often be bad. And if the style is bad, so the decision will be suspect.

As the Economist reminds us in its pocket guide, "Clear thinking is the key to clear writing".[1] The converse is equally true. Clear thinking and clear writing are one and the same, two facets of the single indissoluble process of judging. For it is through writing that we think.

Which brings me to the theme that runs through my comments tonight. Judgement writing is not a cosmetic exercise in gussying up a pre-ordained position. Good judgment writing — whether the product be delivered orally or in writing — is inseparable from good judging.

This brings me to the news about legal writing: some good, some bad.

The bad news is that legal writing — this vital activity which we all must do — is difficult to do well. Or at least that is the rap it bears. Legal language is notoriously foggy. The struggle of the legal mind to encapsulate all detail , to foresee every eventuality, all the while sounding learned and authoritative, too often frustrates the basic goal of clear communication. What Canadian playwright Mavor Moor said of lawyers goes for many judges too:

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[1] The Economist, *Style Guide* (London: Profile Books Ltd., 2005) at 3, online: <http://www.economist.com/research/styleguide/index.cfm?page=673933>.

> The lawyer is your friend because
> He guides you through the maze of laws
> In fact we write them round about
> So only we can make them out.[2]

In "Plain English for Lawyers", American lawyer Richard Wydick says this of legal writing:

> We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has ... four outstanding characteristics. It is (1) wordy, (2) unclear, (3) pompous, and (4) dull.[3]

Too often, in the past, judges have sounded like the lawyer Calgary publisher Bob C. Edwards lampooned:

> If your honour please, I would not for a moment mutilate the majesty of the law nor contravene the avoir du poids of the testimony, but I would ask you to focalize your fine senses on the proposition I am about to propound to you. In all criminal cases there are three essential elements the locus in quo, the modus operandi and the corpus delicti. In this case I think I am safe in saying the corpus delicti and the modus operandi are all right, but there is an entire absence of the locus in quo. I therefore ask for dismissal of the case.[4]

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[2] M. Moore, "The Lawyer" in *And What Do You Do?: A Short Guide to the Trades and Professions* (London: Dent, 1960) 49 at 49.

[3] Richard Wydick, *Plain English for Lawyers, 5th ed.* (Durham, NC: Carolina Academic Press, 2005) at 3.

[4] Robert C. (Bob) Edwards, "Calgary Eye Opener", qu. R. St.G. Stubbs, *Lawyers* (1939) at ,186, quoted in R. Hamilton and D. Shields, eds., *The Dictionary of Canadian Quotations and Phrases* (Toronto: McClelland and Stewart Ltd., 1979) at 516.

The good news is that judgment writing is getting better. Much better. La rédaction des jugements s'améliore. As a major consumer of the product, I know whereof I speak. In the old days, reasons were often little more than a cryptic collection of observations and legal maxims. It was sometimes difficult to make out what facts the judge had found and what law the judge had applied. Now, thanks in no small measure to courses like this one things have improved.

Over the next two days you will be getting a lot of good advice on judgement writing. You will be told to state the issues with precision and organize your reasons around this. You will be told to be clear and brief. You will be told to jettison Latin maxims and hackneyed phrases. You will be asked to avoid the passive voice, advice which — I predict with 100% certainty — you will never entirely manage. I will leave these lessons to those more able than I. Tonight I embrace a more modest goal — to step back from the details and think about the process of judging and writing as a whole, from my personal perspective. I have been a judge for 29 years, and sat on every level of Court. All that time, I have struggled to produce clear and correct legal judgements. I have broken all the rules you will be discussing and have often failed in my ultimate goal. But along the way, I have arrived at some certainties on how best to approach the task of judging and judgment writing.

At the risk of sounding like the Dalai Lama, one might call them the Four Understandings.

1. Understand the dispute
2. Understand your role
3. Understand your audience
4. Understand and write for yourself

1. Understand (and write about) the dispute

Understand the situation in the case before you and write about what happened. What gave rise to the legal dispute or the criminal charge? What is the context? In a phrase, "What is this case really about?"

Whether it is a case of a poor woman charged with welfare fraud or a rarified constitutional dispute about the ambit of the federal criminal law power, this cardinal rule applies. You cannot make a good decision or write a good judgment unless you understand the factual situation and grasp the nature of the dispute before you. La cause, de quoi s'agit-il en fin de compte? Some of the greatest jurist of our time have taken this as their cardinal rule.

Oliver Wendell Holmes famously opined: "The life of the law has not been logic: it has been experience."[5]

Lord Denning gained renown by starting every judgement with the facts — the places and the people that told the story that lay behind the dispute. Who can forget the phrase: "It was blue bell time in Kent",[6] with which he began one judgment? Or this kick-off: "Old Peter Beswick was a coal merchant ... All he had was a lorry, scales and weights."[7]

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[5] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Co., 1881) at 1.

[6] *Hinz v. Berry* [1970] 2 QB 40 at 42.

[7] *Beswick v. Beswick* (1966) Ch. 538

Understand the situation. And right up front, in the first paragraph, tell the reader what the case is about. This is not cosmetic rhetoric.

Understanding and articulating what the case is about will help you frame the issues, get to the point, and avoid redundances. It will ensure that the judgment not only reads well, but is just.

2. Understand (and write for) your job

Before you put pen to paper or finger to keyboard, ask yourself this: What particular duties lie on you, the judge, in dealing with the case before you? Quels sont mes devoirs en fonction de juge de première instance, juge de la Cour d'Appel, juge de la Cour suprême du Canada These duties vary with the court which you sit.

(a) The primary task of a trial judge sitting without a jury is to decide the facts. It follows that a trial judge should clearly set out her findings of fact. Of course, the trial judge must get the law right and apply it correctly. But in 80% of the cases there is dispute about the law. And in the remaining 20%, it is important that the facts be clearly set out so that appellate courts can review the legal issues on the basis of a firm factual foundation.

(b) The main task of the provincial appellate courts is to ensure that the law was correctly applied at trial (correction of error), and to settle disputed legal issues. To discharge this duty,

appellate courts must focus on setting out the law as clearly as possible, thereby resolving the case justly and giving guidance to lawyers, judges and the public.

Dissents are important too. Dissents should clearly state the issue of law on which the dissent is based and clearly discuss the reasons why the judge is dissenting on the chance the matter may go to the Supreme Court of Canada, and in any event, to lay the foundation for future legal development. I add that this is essential in criminal appeals, where leave to the Supreme Court of Canada may turn on whether there is a dissent on a point of law alone.

(c) The main task of the Supreme Court of Canada is to settle legal issues of public importance. We leave correction of error — the application of settle law to the facts — to the provincial Courts of Appeal.

To discharge this task as effectively as possible: we adopted a number of practices relating to judged writing.

(a-i) We work to build consensus, by reconferencing and leaving to another day non-essential issues which divide to another day;

(a-ii) We strive to state the law as clearly as we can and give minimum guidance. We don't always succeed. But this is our constant preoccupation. This reflects itself in the form of our

judgements; we segregate legal analysis and give it primary place; we use headings and subheadings; we usually state the legal conclusions arrived at in the introduction and again in summing up.

Le fait que nous travaillons dans les deux langues officielles du Canada nous aide dans cette tâche. En traduisant une proposition du droit en anglais au français ou vice-versa — le sens précis de chaque mot, chaque phrase est examinée, et souvent nous amène à faire des révisions.

(a-iii) We try to write briefly. We decide what we have to, and avoid analyses that adds little to the final product. The length of the *Canada Supreme Court Reports* has declined significantly in recent years. In the early 1990s the average length of the Supreme Court Reports was 3,700 pages per year, with an all time high of 4,594 pages in 1990. In the past five years, the average length of the *Canada Supreme Court Reports* is about 2,500 pages per year.

For example, we summarize the facts much more briefly than in the past. Don't get me wrong — as I have emphasized, we must fully understand the facts. But that doesn't mean that we have to write them all out. Only the facts relevant to the legal issues need to be set out.

Similarly, we summarize the judgments below briefly — they're readily available on internet if someone wants more detail. All we need to set out is the legal reasoning of the judges below on the points in issue.

Finally, in the legal analysis, we avoid long recitations of authority and interruptions that distract from the logical line of our reasoning. We may put lengthy statutes or pieces of evidence in Appendices. We ask, first, last and at every step along the way whether every word, every sentence, every paragraph advances the march of the argument.

That does not mean that the product is always short. Many issues may take many pages. And 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.

As Oliver Wendell Holmes wrote to Felix Frankfurter in 1915:

> The eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials.[8]

Or to paraphrase Mozart in Peter Schaffer's *Amadeus*:[9]

> Precisely the number of words necessary; no more and no less.

The practices that I have been describing have taken the Supreme Court from an initial period of brief seriatim judgments from 1875-30; through a period in the 70's when core judgments

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[8] Robert M. Mennel & Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover, NH: University Press of New England, 1996) at 40.

[9] *Amadeus*, 1984, DVD (Beverly Hills, Calif.: Warner Home Video, 1997).

emerged; through the early *Charter* years when the lengthy and comprehensive Dickson model prevailed; to our present style of fewer and shorter judgments. These developments track the changing perceptions of the role of the Court and how it can best discharge its particular function of providing maximum guidance on legal issues of public importance.

We all have important jobs to do in the system of justice. Doing your particular job well requires you to focus on the particular goals and functions that come with that job.

3. Understand (and write for) your audience(s)

Judgment writing at is simplest, is an attempt to communicate. A good judgment is one that bridges the understanding gap between the judge's mind and the recipients' minds and communicates. A judgment that does not communicate is a failed judgment, no matter how learned or gracefully phrased.

To communicate, you must know your audience and how they think. Gardening expert Irma Dombrusch has stated that "the key to successful gardening is thinking like a plant". Pas toujours facile à faire. It's the same for judging.

Judges' audiences are multiple, and they vary according to the judges' court and task. A trial judge's main audience may be the jury. Or it may be the contending parties. And always the Court of Appeal. Each of these audiences suggests its own style of communication.

Often in provincial courts of appeal and always at the Supreme Court of Canada, the audiences include the parties, the parties' lawyers, interveners, legal practitioners, legal academics, the press and the general public. Plain, clear, readily understood language is the only way to address these diverse audiences. The complexity of may cases, makes the task difficult. Yet good judgment writing — judgment writing that communicates — demands that we do this.

Perhaps the late Chief Justice Brian Dickson said it best:

> 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.[10]

4. Understand (and write for) yourself

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[10] Brian Dickson, "Seminar on Judgment Writing" (Address delivered to the Canadian Institute for the Administration of Justice, July 2, 1981) at 6.

The late Marvin Catzman of the Ontario Court of Appeal, in a lecture directed to trial judges entitle "What Does the Court of Appeal want from me?" had two pieces of advice for trial judges. First they should make clear the facts found and the reasons for finding them. Then, they should "[f]orget about the Court of Appeal — the hell with the Court of Appeal — write your reasons the way you want to write your reasons."

I don't think Justice Catzman was inviting trial judges to abandon the rules of good judgment writing. Nor was he urging them to write rambling confused essays liberally laced with Latin and extraneous erudition.

What Justice Catzman was saying was something more basic — something every good writer in every field of writing from poetry to fiction to journalism knows — write what you think in your own voice. Or as William Shakespeare wrote, "To thine own self be true."[11]

I learned this the hard way. Over a long judicial career, I have tried to write like Oliver Wendell Holmes. I have tried to write like Benjamin Cardozo. I have tried to write like Viscount Sankey and Lord Denning and Brian Dickson. I have even on occasion tried to write like Ian Binnie! Sadly, I have learned, it never works.

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[11] William Shakespear, *Hamlet* (Act 1, scene 3).

Write what you believe, clearly and forcefully, as simply as you can, with the goal of communication. Your own voice will come through, and your judgments will ring true.

I return to where I began.

Good legal thinking and good legal writing are one and the same. Follow the effective writing practices the experts offer. And remember the Four understandings:

Understand (and write about) the dispute
Understand (and write for) your role
Understand (and write for) your audience
Understand (and write for) yourself

C'était un plaisir pour moi d'être avec vous ce soir. Que vos délibérations dans ?? les deux jours à venir soient fructueuses.

Thank you. And may all your judgments be good ones.

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