Effective Decision-Making

Caucusing

1. Caucusing after the hearing ends:

   - identify the issues and what needs to be decided;
   - review the citations, opening statements and closing statements;
   - review the evidence before the panel.

2. Each member to participate.

3. All members of the panel are equal in the decision-making process.

4. Will there be an oral decision at the end of the hearing, or will the Hearing Committee reserve and issue a subsequent written decision?

5. If written, when discussing the preparation of the written decision, decide who will write the first draft, on what time line, and how and when discussion of the draft will take place.

6. Do not discuss the case with anyone other than the members of the panel.

Reasons

7. The justification for requiring reasons to be articulated in a decision include:[1]

   - reasons provide discipline to the process of making decisions
   - foster better decision-making by ensuring that issues and reasoning are well articulated and therefore carefully thought out
   - providing reasons reduces arbitrary or capricious decisions
   - articulating reasons demonstrates fair and transparent decision-making
   - reasons reinforce public confidence in the judgment and fairness of tribunals
   - reasons allow the parties to see that the decision-maker heard the evidence and submissions, and why the decision-maker made the decision it did
   - reasons afford the parties the opportunity to assess whether to appeal
   - reasons are invaluable to an appellate body reviewing the decision.

8. Reasons need to show how and why and on what evidence the decision-maker reached its conclusion.[2]

9. Reasons need to demonstrate that the decision-maker considered the matters required by statute and the evidence.

10. Adequate reasons do not need to consider every item of evidence[3] or every argument, but must deal with the substantial points that have been raised.[4]

11. Reasons are not conclusions. Merely parroting the matters which a delegate is required to consider is not a "reason" for its action.

Example:

> Under the former *Planning Act*, a development appeal board was given discretion to approve certain non-conforming developments if they did not adversely affect the amenities of the neighbourhood.
>
> A decision that merely stated that the proposed development did not adversely affect the amenities of the neighbourhood was set aside, because that was a conclusion, and there was no reason provided for coming to that conclusion.[5]

12. Quoting submissions by counsel is not in and of itself a problem,[6] but the decision-maker must articulate reasons for accepting one submission rather than the other.[7]

13. Test for adequacy of reasons: they must demonstrate justification, transparency, and intelligibility.

Effect of Inadequate Reasons

14. Until recently, the inadequacy of reasons was a stand-alone ground for judicial (or appellate) review. The failure to provide adequate reasons was treated as a breach of procedural fairness.

15. Since 2011,[8] the Supreme Court has rolled the adequacy of reasons in to a determination of whether the decision as a whole is reasonable in the *Dunsmuir* sense[9]—namely, whether the decision as a whole demonstrates justification, transparency and intelligibility. The reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."

> Justice Abella in *Newfoundland Nurses*:
>
> 14. Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing

court can undertake two discrete analyses—one for the reasons and a separate one for the result.... It is more of an organic exercise —the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

16. Given that the adequacy of reasons is part of the determination about whether the decision as a whole is reasonable, the standard of review for the adequacy of reasons is reasonableness, not correctness.

17. If inadequate reasons make the decision as a whole unreasonable, the decision will be set aside.

Previous Decisions not Binding

18. Administrative decision-makers are not bound by precedent, but previous decisions are a guide, and departures from previous decisions should be explained.

No Extraneous Matters in the Decision

19. The decision should just deal with the actual issues in front of the Hearing Committee—

not any extraneous matters.

20. For example, the decision should:

- not address matters which were not in front of the Hearing Committee
- not reprimand the investigated lawyer for matters on which there is an acquittal
- not wish either the investigated lawyer or the Complainant "good luck" in sorting things out in the future.

Other Considerations

21. Consider whether it is necessary to reproduce an agreed statement of facts *verbatim* in the decision. Could this be summarized more succinctly, or put as an appendix to the decision?

22. Consider whether it is necessary to list all of the exhibits in the body of the decision? If needed at all, could it be put as an appendix to the decision?

23. Number the paragraphs in the decision.

Examples of a Model Template for Decisions

24. Previous decisions by Law Society Hearing Committees (since 2008) can be found on CanLii CanLII at http://www.canlii.org/en/ab/abls/.

25. An example of a well-written decision is *The Law Society of Alberta v. Ter Hart,* [2004] L.S.D.D. No. 25 (see attached).

26. An example of a model template for decisions is included in the training materials. The template is not meant to be universally prescriptive, and may be customized or departed from as circumstances require.