

Writing Decisions that Stand the Test: A Judicial Review Lens

BCCAT Annual Continuing Education

Joana Thackeray

November 4, 2025

Overview

1. Foundational Principles and Leading Cases
2. Best Practices for Legal and Peer Review
3. Tips for Maximizing the Benefit of Legal Review

Foundational Principles and Leading Cases

1. The person who hears must decide

- The adjudicator decides.
- Longstanding aspect to the right to procedural fairness.
- Parties have a right to a decision from the person who heard their case.
- Rooted in the concern that discretionary power must be independently exercised by the administrative decision-maker on which it is conferred.

2. Adjudicative Independence

- The adjudicator must be independent.
- About having the “complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons”.
- Decision makers cannot be forced or induced to adopt positions they do not agree with.
- The ultimate decision is that of the decision maker and they assume full responsibility for that decision.

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282 at pp. 332-333.

”

3. The *Audi Alteram Partem* Rule

- Procedural fairness requires that the parties be given adequate notice and an opportunity to be heard.
- The essence of the rule is that the parties must be given a fair opportunity of answering the case against them.
- Consultation brings the risk of the presentation of new evidence or argument.
- If a decision is rendered based on new evidence or argument without having given the parties notice or an opportunity to respond, you have a denial of procedural fairness.

Leading Cases: Applications

- *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282
- *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952
- *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 2001 SCC 4

The Benefits of Consultation

There is no rule against consultation:

“I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might “influence” the decision maker”: *Consolidated Bathurst*, p. 331.

Contemporary reasons writing is a consultive process:

“It must also be recognized that the volume and complexity of modern decision-making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason-writing is very much a consultive process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons. It is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing.”: *Khan v. College of Physicians & Surgeons of Ontario*, 1992 CanLII 2784 (ON CA)

The Benefits of Consultation

The benefits are manifest:

- Makes expertise of the institution as a whole available to all members
- Members benefit from the acquired experience of colleagues
- Keeps members informed of existing precedents
- Fosters coherence in decision making
- Facilitates maximum understanding and appreciation of policy developments
- Opportunity to evaluate fully the practical consequences of proposed policy initiatives

Safeguards to Ensure a Fair Process

- Voluntary
- Limited to questions of law and policy, not facts
- No compulsion
- Notice and an opportunity to respond

Ellis-Don at para. 29.

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282

- Board meetings at the request of the hearing panel or any of its members. Not imposed
- Clear understanding amongst participants that ultimate decision rests with the panel
- Discussions were limited to policy and legal issues, not facts
- The facts as set out in the draft decision are taken as given
- The evidence was that the consultation process was designed to foster discussion without trying to verify whether a consensus has been reached; not to discuss who will win but which legal standards may be adopted by the Board and to discuss their relative value
- No votes taken
- No minutes taken
- Attendance not recorded

Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952

- In practice, consensus table machinery was compulsory, not voluntary
- Appeared that it was required when legal counsel identified a draft was contrary to previous decisions
- President could on their own motion refer a matter for plenary discussion
- Plenary meetings held so as to arrive at a consensus
- Votes and show of hands are generally taken
- Attendance generally taken and minutes kept

Khan v. College of Physicians and Surgeons of Ontario, 9 O.R. (3d) 641, [1992] O.J. No. 1725., 1992
CanLII 2784 (ON CA)

“ The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the proceedings and the integrity of the overall discipline process. Without attempting an exhaustive description of these concepts, fairness includes considerations of bias, real or apprehended, independence, and each party's right to know the case made against them and to present their own case. Integrity concerns encompass those fairness concerns, but include the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits. If the reasons presented for the decision are not those of the decision-maker, or do not appear to be so, it raises real concerns about the validity of the decision and the genuineness of the entire inquiry.

There is no single formula or procedure referable to the drafting process that can be uniformly applied across the very broad spectrum of decision-making, when determining whether the involvement of the non-decision-maker in the drafting process compromised the fairness of the proceedings or the integrity of the process. The nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal's workload, and other factors will impact on the assessment of the propriety of procedures used in the preparation of reasons...”

Shuttleworth v. Ontario (Safety Licensing Appeals and Standards Tribunals), 2019 ONCA 518

- Divisional Court was entitled to find the absence of a written policy significant when it considered the adequacy of the tribunal's procedural safeguards. The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and evidence was that adjudicators were expected to participate in the review process (para. 39)
- Based on factual findings not challenged on appeal (para. 18):
 - (1) the legal services unit generally sent decisions to the executive chair without assent or input from the adjudicators;
 - (2) in this particular case, the adjudicator did not request the consultation with the executive chair and the executive chair only informed the adjudicator of her review after it had already taken place;
 - (3) there was no formal or written policy protecting the adjudicator's right to decline to participate in the review by the executive chair or to decline to make changes proposed by the executive chair;
 - (4) a manual describing the tribunal's procedure made no reference to the voluntariness of the peer review process; and
 - (5) by virtue of reappointment powers granted to the executive chair by statute, she exercised a superior level of authority within the administrative hierarchy.

Bui v. British Columbia (Superintendent of Motor Vehicles), 2018 BCCA 168

- It can be appropriate for statutory decision-makers and adjudicators to seek, receive and even adopt legal advice provided by legal advisors;
- However, the advisor must not become the primary recommender or default draftsman of the decision on its merits and the adjudicator must retain and independently exercise throughout the ultimate decision-making power; and
- Certain types of legal advice received by the decision-maker or adjudicator, e.g., advice as to the jurisdiction of the Tribunal, should be disclosed to the other party who should then be allowed to make submissions in relation to same.

Best Practices

1. Internal Policy about legal and/or peer review

Key features of an internal policy include:

- Policy is in writing
- The member who hears decides
- Members are independent
- Members are free to take whatever decision they deem right based on the facts and the law
- Review is voluntary, at the request of the member
- Facts taken as given; review is on questions of law and policy
- For policy consultations with membership, no votes, no minutes, no attendance

2. Exchange advice and feedback in accordance with the policy

- “Walking the walk”
- Consider the policy in how you talk, write and think
- Supports role clarity
- Encourages analytic clarity
- Supports an institutional culture that values fairness

2. Exchange advice and feedback in accordance with the policy

For example:

- Think about your phrasing in seeking or providing feedback
- Try to pin down what you need help with and/or how you can help a decision-maker
- Avoid seeking or giving bold assurances
- Avoid seeking or communicating agreement or disagreement with a draft or aspects of it

3. Be the Draftsperson

“....the **process of drafting reasons** with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning”

“The **process of drafting reasons** also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the “discipline of reasons”: *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.”

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 128 and 80

4. Be open to changing your mind

“...decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter”.”

Consolidated Bathurst, p. 333

5. Consider when you need to go back to the parties

- Remember the *audi alteram partem* rule
- Does not include the right to repeat arguments every time the adjudicator discusses the case
- Parties only have the right to state their case adequately and to answer contrary arguments

Consolidated Bathurst at p. 339

Tips for Maximizing the Benefit of Legal Review

1. Reach out

- Don't be a stranger
- Remember the benefits of consultation
- Consider reaching out early, before you write or submitting a draft

2. Put your best foot forward: Identify “Writing to Discover”

- “**writing to discover**” vs. “**writing to deliver**”: Edward Berry, *Writing Reasons: A Handbook for Judges*, 5th Edition (Lexis Nexis Canada: Toronto)
- **Writing to Discover**: “thinking out loud on paper” (p. 131); writing you do for yourself; writing you do to discover what you think
- **Writing to Deliver**: to deliver or present reasons; to communicate with your reader; writing to persuade
- Recognize writing to discover and build in time for revision

2. Put your best foot forward: Identify “Writing to Discover”

Stream-of-consciousness writing is thinking aloud, thinking on paper. It has a very important purpose, and is indeed the way in which much real thinking gets done. But it must not be confused with delivering reasons, with communicating. Hence the need for revision. Only through a second look can one make the transition from writing as discovery of reasons to writing as delivery of reasons.

Edward Berry, *Writing Reasons: A Handbook for Judges*, 5th Edition (Lexis Nexis Canada: Toronto), p. 3

3. Recognize and value the invisible labour of decision writing

- Parts of decision writing are a lot like domestic labour: they are essential to decision writing, but are often devalued, undervalued or unacknowledged. The work that goes into them is often invisible.
- You may be required to interpret, translate or distill the materials before you to discern the gist or essence of the matter or the party's submissions.
- This is hard work. It is also valuable.
- It shows that you are alert and sensitive to the matter before you.

4. Beware of lean reasons when the stakes are high

Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

Vavilov at para. 135

See e.g. *Fraser v. 1392383 B.C. Ltd.*, 2025 BCSC 1669 at paras. 136-137

5. Have you grappled with the key arguments of the losing party?

- A failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was alert and sensitive to the matter before it: *Vavilov* at para. 128
- Before you submit a draft for review, you may wish to ask yourself:
 1. What were the losing party's key or central arguments?
 2. Have I considered and dealt with them?
- Take your draft and see if you can point to the place that shows you considered and answered these questions:
 1. "I understand Ms. X's main argument to be...."
 2. Where is the word "because"? What words come after it?

5. Have you grappled with the key arguments of the losing party?

In saying that better reasons were required, what is required is not difficult. The usual guidance to decision-makers is to explain why they decided as they did. The explanation need not be lengthy. Sometimes it simply requires adding the word “because” at the end of the sentence stating the decision and then carrying on to complete the sentence.

Eloufy v The Association of Professional Engineers And Geoscientists of Saskatchewan,
2024 SKKB 45, at para. 92

6. Sift, delete and keep track

- Filtering feedback is a skill developed over time
- There may be good reasons to delete or ignore feedback
- Consider asking for what you need
- Keep track of feedback – add to your decision review checklist

Questions or Comments?

Thank you.

Joana.1.Thackeray@gov.bc.ca