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David J. Mullan
LL.B. (Vict.) LL.M. (Queen's)
Professor of Law
Queen's University

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Preface to

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1. *Armstrong v. Canada (Royal Canadian Mounted Police Commissioner)*, [1994] 2 F.C. 356 (T.D.) (considering degree of assistance to which Commissioner entitled in exercising his function as appellate body from decisions of discharge board).

2. *I.W.A., Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Quebec (Commission des affaires sociales) v. Tremblay*, [1992] 1 S.C.R. 952.

§189 The extent to which a tribunal may use a lawyer is subject to statutory regulation in some instances. Some statutes establishing tribunals specifically authorize the use of legal advisers independent of the parties and may oblige the tribunal to reveal that advice to the parties so that they may make submissions on the law.[1] Such provisions clearly apply to legal advice rendered during the course of a hearing. However, whether they apply to advice rendered in the post-hearing, deliberative phase depends upon the precise wording of the relevant statutory provision.[2] Also, to the extent that such provisions refer to legal advice, they do not apply to other forms of advice such as assisting a tribunal in the content and formulation of its reasons for decision by, for example, advising on erroneous references to evidence and the addition of references to evidence.[3]

1. **E.g.,** Regulated Health Professions Act, S.O. 1991, c. 18, Sched. 2, s. 44; see also Casey, *The Regulation of Professions in Canada* (1994) at 8.9; Macaulay, *Practice and Procedure Before Administrative Tribunals* at 22.4.1(*a*)(iv).

2. *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R. (3d) 641 (C.A.) (former Health Disciplines Act, s. 12(3), not applying to post-hearing stage).

3. *Khan v. College of Physicians & Surgeons (Ontario), ante.*

(xvii) REASONS

§190 Traditionally, the common law did not impose on statutory authorities a duty to provide reasons for decision,[1] perhaps because a tribunal should not bear an obligation that was not incumbent on the regular courts.[2] With a changing jurisprudence on the need for regular courts to provide reasons[3] comes a re-evaluation of the position of tribunals. Some authority suggests that providing reasons is a third limb of the rules of natural justice. Indeed, some Quebec decisions support a general obligation to provide reasons for decision, at least on the part of adjudicative tribunals.[4]

1. *Glendenning Motorways Inc. v. Royal Transportation Ltd.* (1975), 59 D.L.R. (3d) 89 (Man. C.A.); *Gal-Cab Investments Ltd. v. Liquor Licensing Board* (1986), 34 D.L.R. (4th) 363 (N.W.T.C.A.); *Supermarchés Jean Labrecque Inc. v. Quebec (Tribunal du travail)*, [1987] 2 S.C.R. 219; *Osmond v. Public Service Board (New South Wales)* (1986), 159 C.L.R. 656.

2. *Stoangi v. Law Society of Upper Canada* (1979), 25 O.R. (2d) 257 (Div. Ct.) (referring to position at that time that judges not obliged to provide reasons when sentencing in criminal cases).

3. *R. v. Barrett*, [1995] 1 S.C.R. 752; reversing (1993), 13 O.R. (3d) 587 (C.A.); *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656.

4. *Société des services Ozanam Inc. v. Quebec (Commission municipale)*, [1994] R.J.Q. 364 (S.C.); **see also** *Re Pacific Western Airlines* (1984), 9 Admin. L.R. 109 (Cdn. Transport Comm.) (commission imposing obligation to provide reasons on its own Air Transport Committee after considering common law).

§191 Either the common law or implications from statute now make it obligatory for a tribunal whose decisions are subject to a statutory right of appeal to provide reasons.[1] Reasons are necessary to effectuate the right of appeal.[2] The same may also hold where there is a statutory right to reconsideration of a decision or the ability to make a fresh or second application.[3] A similar justification regarding judicial review is arguable: without reasons, those affected by tribunal decision-making cannot effectively exercise their common law entitlement to seek judicial review, an entitlement that is at least partially a constitutional one in the case of jurisdictional error.[4] A general acceptance of the latter contention would mean a virtually universal entitlement to reasons.

1. *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 139 D.L.R. (3d) 168 (N.S.C.A.); *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.).

2. *Tung v. Canada (Minister of Employment & Immigration)* (1991), 124 N.R. 388 (Fed. C.A.) (applying same justification to availability of transcript); **but see** *Kandiah v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 42 (Fed. C.A.) (explicitly rejecting *Tung* and assuming that Charter applying to proceedings in issue); *Blagdon v. Canada (Public Service Commission Appeal Board)*, [1976] 1 F.C. 615 (C.A.); *Eastern Provincial Airways Ltd. v. Canada (Labour Relations Board)*, [1984] 1 F.C. 732 (C.A.); *Janitzki v. Canada (Health & Welfare)*, [1992] 1 F.C. 300 (C.A.); leave to appeal to S.C.C. refused (1992), 138 N.R. 405n (S.C.C.).

3. *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.).

4. *Société des services Ozanam Inc. v. Quebec (Commission municipale)*, [1994] R.J.Q. 364 (S.C.); **but see** *F.W.T.A.O. v. Ontario (Minister of Consumer & Commercial Relations)* (1984), 10 D.L.R. (4th) 255 (Ont. Div. Ct.).

§192 The duty to provide reasons may possibly form a component of the principles of fundamental justice whenever a person's right to life, liberty and security of the person is at stake.[1] The leading House of Lords authority supporting an entitlement to reasons to inter alia effectuate judicial review involves a ministerial decision on when a person serving a mandatory life sentence could apply for parole.[2] This clearly suggests a similar argument in Canada either using s. 7 of the Charter or a modified common law. When Charter interests are at stake, the case for enhanced procedural protections is that much stronger.[3] Thus the absence of an obligation to give reasons was one factor invalidating a regime for assigning practitioner numbers to doctors as contrary to the principles of fundamental justice.[4] However, the obligation

to provide reasons is not a necessary component of the "principles of fundamental justice" in professional disciplinary proceedings.[5]

1. Charter, s. 7.

2. *R. v. Secretary of State for the Home Department, Ex parte Doody*, [1994] A.C. 531 (H.L.).

3. **See also** Canadian Bill of Rights, ss. 1(*f*), 2(*e*).

4. *Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 at 195-97 (B.C.C.A.); leave to appeal to S.C.C. refused [1989] 3 W.W.R. lxxi (S.C.C.); **but see** *Re Khaliq-Kareemi* (1989), 57 D.L.R. (4th) 505 at 520 (N.S.C.A.); leave to appeal to S.C.C. refused (1989), 93 N.S.R. (2d) 269n (S.C.C.).

5. *Re Khaliq-Kareemi, ante.*

§193 Even where there is no obligation as such to provide reasons, failing to do so may influence the courts' exercise of its judicial review powers. If reasons are not provided, a tribunal's claim to judicial deference carries less weight, whether in judicial review proceedings or a statutory appeal.[1] An application which makes out a prima facie case of a lack of valid or legal reasons for a decision may lead the court to presume that there are no such reasons and set the decision aside in the absence of an explanation or answer from the decision-maker.[2]

1. *McGuire v. Royal College of Dental Surgeons (Ontario)* (1991), 49 Admin. L.R. 293 (Ont. Div. Ct.).

2. *Wrights' Canadian Ropes Ltd. v. Minister of National Revenue*, [1946] S.C.R. 139; affirmed [1947] A.C. 109 (P.C.); *Acro Pace Projects Ltd. v. British Columbia (Registrar of New Westminster Land Title District)* (1982), 133 D.L.R. (3d) 418 (B.C.S.C.); *Alkali Lake Indian Band v. Westcoast Transmission Co.* (1984), 8 D.L.R. (4th) 610; supplemented [1985] 3 W.W.R. 134 (B.C.C.A.); *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.).

§194 It is now common for statutes to impose on particular decision-makers an obligation to articulate reasons for their decisions. In Alberta,[1] all bodies designated by order in council that "exercise a statutory power so as to adversely affect the rights of a party" must furnish a written statement of decision which contains both the "findings of fact on which it based its decision"[2] and "the reasons for its decision". In Ontario,[3] virtually any decision-maker who exercises a "statutory power of decision" and is required by statute or the common law to hold an adjudicative style hearing must provide reasons in writing on request[4] from a party. The reasons become part of the decision-maker's record for judicial review purposes, whether provided voluntarily or on request.[5]

1. Alberta Administrative Procedures Act, s. 7.

2. Quaere whether this adds anything to the extent of the obligation: *Couillard v. Edmonton (City)* (1979), 103 D.L.R. (3d) 312 (Alta. C.A.) (interpreting bare duty to give reasons as including statement of facts found by tribunal).

3. Ontario Statutory Powers Procedure Act, s. 17 [am. 1993, c. 27, Sched.; 1994, c. 27, s. 56(33)].

4. *Stoangi v. Law Society of Upper Canada* (1979), 25 O.R. (2d) 257 (Div. Ct.) (failing to make timely request preventing entitlement from arising).

5. Ontario Statutory Powers Procedure Act, s. 20(*f*).

§195 As a general rule, a statutory or, presumably, common law obligation to provide reasons cannot be delegated. The designated decision-maker must retain responsibility both for making that decision and for formulating reasons.[1] Having a lawyer or one of the parties write the reasons is an impermissible delegation of authority and raises a reasonable apprehension of bias.[2] Even where a tribunal has staff assistance or retains independent counsel, there are limits on the extent to which the tribunal members may rely upon such services in the crafting of reasons. Essential responsibility for authorship must remain with the tribunal. Among the relevant factors in determining whether that requirement has been observed are the following:[3] (1) Did a member of the hearing panel assume responsibility for an initial draft of the reasons?; (2) Was the staff member or lawyer's role confined to revising or clarifying the draft or did that person write independently of that draft?; (3) Did the members of the panel independently review the staff or counsel assisted version before it was released?; and (4) Did the members of the hearing panel sign the final decision?

1. *Desai v. Brantford General Hospital* (1991), 13 Admin. L.R. (2d) 312 (Ont. Div. Ct.); **but see** *Armstrong v. Canada (Royal Canadian Mounted Police Commissioner)*, [1994] 2 F.C. 356 (T.D.) (approving quite extensive use of staff member by Commissioner in drafting reasons for appeal decision in disciplinary matter).

2. *Canadian Pacific Express Ltd. v. Ontario (Highway Transport Board)* (1979), 26 O.R. (2d) 193 (Div. Ct.); *Sawyer v. Ontario (Racing Commission)* (1979), 99 D.L.R. (3d) 561 (Ont. C.A.) (prosecuting counsel writing reasons); *Després v. Assn des Arpenteurs-géomètres du Nouveau-Brunswick* (1992), 8 Admin. L.R. (2d) 136 (N.B.C.A.).

3. *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 11 Admin. L.R. (2d) 147 (Ont. C.A.).

§196 None of these factors is necessarily decisive, and the weight each receives is influenced by the nature of the process in question. Thus, more independent authorship may be expected of members of a professional disciplinary tribunal[1] than of members of a multi-member regulatory agency engaged in economic regulation in the public interest. Moreover if a tribunal consisting of lay members is obliged to deal with complex questions of law, the drafting assistance of counsel is generally acceptable. Where a multi-member tribunal sits in different panels in various parts of the country, pre-release vetting of its decisions is justifiable, perhaps even on a compulsory basis.[2] A departure from the general rule that the members must write their own reasons may also be justifiable.[3]

1. *Spring v. Law Society of Upper Canada* (1988), 50 D.L.R. (4th) 523 (Ont. Div. Ct.); *Del Core v. College of Pharmacists (Ontario)* (1985), 19 D.L.R. (4th) 68 (Ont. C.A.).

2. *Weerasinge v. Canada (Minister of Employment & Immigration)*, [1994] 1 F.C. 330 (C.A.); *Bovbel v. Canada (Minister of Employment & Immigration)*, [1994] 2 F.C. 563 (C.A.); leave to appeal to S.C.C. refused (1994), 23 Admin. L.R. (2d) 320n (S.C.C.) (Immigration & Refugee Board).

3. *Komanov v. Canada (Minister of Employment & Immigration)* (1992), 7 Admin. L.R. (2d) 135 (Fed. C.A.); leave to appeal to S.C.C. refused (1992), 144 N.R. 242n (S.C.C.); *Kolarov v. Canada (Minister of Employment & Immigration)* (1992), 7 Admin. L.R. (2d) 138 (Fed. C.A.) (allowing panels of Immigration and Refugee Board to adopt as their own standard-form reasons prepared by staff).

§197 An obligation to provide reasons is not satisfied simply by stating a finding in the same terms as the relevant statutory provision[1] or by reciting the submissions and evidence of the parties followed by a conclusion.[2] The reasons "must be proper, adequate and intelligible, and must enable the losing party to assess whether there are grounds for appeal",[3] where that right exists, or judicial review. They should deal with the substantial issues raised in the proceedings[4] and be clear and unambiguous.[5] Beyond this, the statutory context is frequently decisive in assessing the adequacy of the reasons provided. The reasons for truly adjudicative functions should normally reveal an awareness of the matters at stake and set out the findings of fact[6] and provide an assessment of the submissions and arguments on which the principal conclusions are based. Where credibility is an issue, the reasons should usually contain the tribunal's reasons for its finding on credibility[7] and for rejecting a witness's evidence, particularly when it is uncontradicted by other testimony.[8] However, prolixity is not a requirement and the extent to which any tribunal is obliged to provide such detailed accounts depends upon the nature of the issue at stake, the tribunal's caseload, the status and qualifications of its members,[9] and the consequences of the decision in issue.

1. *Canada Metal Co. v. MacFarlane* (1973), 1 O.R. (2d) 577 (Div. Ct.); *Howatson v. Assiniboine Park Community Committee*, [1973] 4 W.W.R. 449 (Man. Q.B.); *DiNardo v. Ontario (Liquor Licence Board)* (1974), 5 O.R. (2d) 124 (H.C.); *Hannley v. Edmonton (City)* (1978), 7 Alta. L.R. (2d) 394 (C.A.); *Green, Michaels & Associates Ltd. v. Edmonton (City)*, [1979] 2 W.W.R. 481 (Alta. C.A.).

2. *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684; *Rafuse v. Stewart* (1980), 111 D.L.R. (3d) 266 (T.D.).

3. *Northwestern Utilities Ltd. v. Edmonton (City)*, *ante* (S.C.C. specifically approving this language); *Dome Petroleum Ltd. v. Alberta (Public Utilities Board)* (1976), 2 A.R. 453 at 472 (C.A.); affirmed [1977] 2 S.C.R. 822; **see also** *Canada (Minister of Employment & Immigration) v. Singh* (1987), 26 Admin. L.R. 278 (Fed. C.A.) (reasons provided by immigration officer sufficient to effectuate right of appeal to Immigration Appeal Board).

4. *Desai v. Brantford General Hospital* (1991), 13 Admin. L.R. (2d) 312 (Ont. Div. Ct.); *Poyser v. Mills' Arbitration*, [1964] 2 Q.B. 467.

5. *Blackburn v. Social Assistance Board (Nova Scotia)* (1987), 80 N.S.R. (2d) 30 (T.D.); *Spaans v. Halifax (County)* (1993), 121 N.S.R. (2d) 136 (T.D.).

6. Alberta Administrative Procedures Act, s. 7; *Blackburn v. Social Assistance Board (Nova Scotia), ante*.

7. *Mehta v. Mackay* (1990), 47 Admin. L.R. 254 (N.S.C.A.); *McDonald v. Canada (Employment & Immigration Commission)* (1991), 81 D.L.R. (4th) 736 at 742-44 (Fed. C.A.).

8. *Hilo v. Canada (Minister of Employment & Immigration)* (1991), 130 N.R. 236 (Fed. C.A.); *McDonald v. Canada (Employment & Immigration Commission), ante*.

9. *McDonald v. Canada (Employment & Immigration Commission), ante*; *Del Core v. College of Pharmacists (Ontario)* (1985), 15 Admin. L.R. 227 (Ont. C.A.) (finding some excuse for nature of reasons in qualifications of members of tribunal; *Islands Protection Society v. British Columbia (Environmental Appeal Board)* (1988), 34 Admin. L.R. 51 (B.C.S.C.) (board not obliged to provide explicit finding on each component of decision).

§198 While a failure to provide reasons is seldom if ever a mere technical irregularity or defect in form justifying the denial of relief[1] under common law remedial discretion principles or the statutory equivalent,[2] Canadian courts differ on the consequences of failing to give reasons. A statutory requirement may be mandatory and the relevant decision set aside or quashed for voidness or jurisdictional error.[3] Failing to fulfil a statutory obligation of that type may be an error of law on the face of the record and justify setting aside the decision.[4] Other authority distinguishes between a situation where the reasons must be contemporaneous with rendering the decision and one where reasons may be rendered after the decision is released. Failure to meet the obligation results in invalidity in the former case but not the latter.[5] Setting aside is presumably justifiable if the court concludes on the evidence before it that there could be no good reasons advanced for the decision reached.[6]

1. *Howatson v. Assiniboine Park Community Committee* (1973), 37 D.L.R. (3d) 584 (Man. Q.B.).

2. **E.g.**, Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 3.

3. *Spaans v. Halifax (County)* (1993), 121 N.S.R. (2d) 136 (T.D.) (de novo appeal to court); *Don Howson Chevrolet Oldsmobile Ltd. v. Ontario (Registrar of Motor Vehicle Dealers & Salesmen)* (1974), 6 O.R. (2d) 39 (Div. Ct.) (giving reasons forming condition of validity of decision; without reasons, no basis for exercising statutory right of appeal); *Morin v. Alberta (Provincial Planning Board)*, [1974] 6 W.W.R. 291 (Alta. T.D.) (failure to comply with obligation to provide reasons nullifying decision); *Northwestern Utilities v. Edmonton (City)*, [1979] 1 S.C.R. 684; *Control Data Canada Ltée v. Blanchard*, [1984] 2 S.C.R. 476 at 500, 501; *Canada (Minister of Employment & Immigration) v. Singh* (1987), 35 D.L.R. (4th) 680 at 683, 684 (Fed. C.A.).

4. *Rafuse v. Stewart* (1980), 111 D.L.R. (3d) 266 (T.D.); *Blackburn v. Social Assistance Board (Nova Scotia)* (1987), 80 N.S.R. (2d) 30 (T.D.); *Spaans v. Halifax (County)*, *ante*.

5. *Cardona v. Canada (Minister of Manpower & Immigration)* (1978), 89 D.L.R. (3d) 77 (Fed. C.A.); *Don Howson Chevrolet Oldsmobile Ltd. v. Ontario (Registrar of Motor Vehicle Dealers & Salesmen)*, *ante*.

6. *Wrights' Canadian Ropes Ltd. v. Minister of National Revenue*, [1947] A.C. 109 (P.C.); *Alkali Lake Indian Band v. Westcoast Transmission Co.* (1984), 8 D.L.R. (4th) 610 (B.C.C.A.).

§199 Rather than invalidating the decision, the proper remedial response to a failure to provide reasons may be a mandatory order directing the tribunal to fulfil its statutory duty[1] or, if the decision is quashed, remitting the matter for reconsideration or provision of the reasons. Unless the failure frustrates the effective exercise of appeal or judicial review rights, this is the generally preferable course of action. Consistent with the normal principle of judicial deference to the processes of legislatively-designated, expert decision-makers, courts should be very hesitant to conclude that an absence of reasons means that the tribunal reached its decision on grounds that cannot withstand scrutiny under the principles of judicial review. On the other hand, inadequacies in the reasons provided justify less deference in a statutory appeal.[2]

1. *Desai v. Brantford General Hospital* (1991), 13 Admin. L.R. (2d) 312 (Ont. Div. Ct.); *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.).

2. *Dome Petroleum Ltd. v. Grekul* (1983), 5 Admin. L.R. 252 (Alta. Q.B.).

(xviii) EQUALITY OF TREATMENT

§200 While the content of the audi alteram partem rule varies with the statutory and factual context, it is a breach of the rule to discriminate between persons of the same status with respect to the procedural decencies accorded.[1] However, it may be permissible to differentiate in the content of procedures applicable to persons of different classes, e.g., between parties and persons granted intervenor status at the discretion of the tribunal.[2]

1. *Woolworth Canada Inc. v. Newfoundland (Human Rights Commission)* (1994), 114 Nfld. & P.E.I.R. 315 (Nfld. T.D.); reversed in part (1995), 135 Nfld. & P.E.I.R. 45 (C.A.); *Manitoba (Attorney General) v. Canada (National Energy Board)*, [1974] 2 F.C. 502 (T.D.); *Scott v. Nova Scotia (Rent Review Commission)* (1977), 23 N.S.R. (2d) 504 (C.A.).

2. *S.I.U. v. Canadian National Railway*, [1976] 2 F.C. 369 (C.A.).

(xix) VOLUNTARY PROCEDURES

§201 A statutory decision-maker which voluntarily accords certain procedural decencies does not necessarily become obligated to follow a full