Chapter 4

ARE THE PARTIES BEING SERVED? ENSURING A JUST PROCESS THROUGH EFFECTIVE COMMUNICATION

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Arbitrators are in the communication business. They need to ensure that the parties know that they have been heard. They need to ensure that the parties understand the reasons for their decisions. What barriers do arbitrators face in this regard and how can they be overcome?

Let us start with the hearing itself. Will the parties leave feeling that they have had a fair hearing? Do you demonstrate that you are listening? What are you listening for? What are you missing? What does your demeanor indicate? Is your posture and eye contact appropriate? If evidence is unclear, do you paraphrase what you have heard to ensure that you heard what the witness intended you to hear? Does your hearing behavior ever call your neutrality into question? Do you effectively control unruly witnesses and difficult counsel? Are your oral rulings clearly expressed? Will the grievor understand all aspects of the proceedings?

This paper will focus on effective written communication. Undoubtedly, the use of literary techniques or rhetorical devices that might turn a decision into a literary masterpiece can increase the elegance, the power, and the persuasiveness of a judgment. However, we would argue that good adjudication does not entail an attempt to write a great piece of literature. Although use of literary devices can occasionally increase the persuasive power of a decision, there are real dangers in trying to turn it into a piece of literature.

A great deal has been written, especially in the United States, about law and literature, narrative theory and story telling in legal

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discourse. It can safely be said that, at a very basic level, an arbitration case usually involves a clash of competing stories. The arbitrator is frequently a witness to a human drama, and must reflect this drama in reasons. The arbitrator must tell the story of the drama, usually select the better story, sort the relevant facts from the irrelevant ones, the more important from the less important. So, in writing about a grievance, an arbitrator is writing a piece of literature. Like the novelist or the poet, the arbitrator is engaged in expressing life's complexities in words. Or, in the poet Robert Frost's wonderful line, the arbitrator, like the poet, is attempting a "momentary stay against confusion."

However, arbitrators are also engaged in a very different task from the novelist or the poet. We must resolve a real-life dispute presented to us, where real lives, ongoing collective bargaining relationships, and real dollars are at stake—with the demands, restrictions, and expectations that go with that task. So, in your reasons, you must analyze the collective agreement interpretation and labor relations problems thrown up by the dispute, decide the dispute, explain your decision, and, yes, persuade your readers that you came to the right decision. Thus, writing reasons is a rhetorical exercise, an exercise in persuasion.

In our view, however, arbitrators will better persuade their readers of the tightness of a decision if they keep their eye not on writing great literature but on writing to give effect to the three characteristics, the three identifying badges, of a persuasive decision, indeed of what could be considered a great decision. Those three factors are:

1. The decision must be written in accessible language,
2. The decision must be accountable to the parties, and
3. The decision's reasoning must be transparent.

No literary techniques, no fancy devices of rhetoric are required to meet these obligations. If an arbitrator does fulfill these obligations, his or her decisions will be credible and thus persuasive. If an arbitrator does so over a period of time, the arbitrator will achieve a reputation as a credible and persuasive writer. Each of these three characteristics will be addressed in turn.

1. Accessible Language

Legal language has always had a certain magic to it. People through the ages have been mesmerized by law, even though they don't always understand it. Decisions can be a closed system of communication, with their jargon understood only by other arbitrators, legally trained advocates, and the courts. This view is marvelously captured by the Canadian writer, Austin Clarke, in his prize-winning novel *The Polished Hoe,* which begins when an elderly Caribbean woman confesses to a murder:

> The words they will hear, words from the Latin, and with a generous sprinkling of words from Greek classical literature, and from Shakespeare, are words they would not hear every day in their neighbourhoods, on the beach, in the fish market, or at a cricket game on the Pasture, on a Saturday afternoon; but they will like these words, although they do not know Latin, or Greek; or would not have read too much Shakespeare, they will fall in love with these words; and make them their own, by repeating them, even when their usage is not exactly relevant, or exact. . . . It does not matter. It is the word. And these men have always loved the word. And the sound of the word being spoken. For the word is God. And is like the Law. And like the Law, which is English, the word, too, is English. Yes. "'Talk-yuh-talk! Yes!"

But does this serve the parties? It is clear that it does not. Arbitrators must write in a way that is clear and understandable to all our audiences, specialized and nonspecialized, and that includes the grievor and the plant manager, as well as their advocates. If arbitrators are going to be persuasive, they must be clear and they must be understood.

Clarity is the prized virtue of any judgment. The writer Henry Stendhal, writing around 1840, put it this way: "I see but one rule: to be clear. If I am not clear, all my world crumbles to nothing."

But clarity is not a simple concept. It embraces two notions: substantive clarity, which means getting the legal analysis just right; and cognitive clarity, which means expressing the substantive point in a way that it can be read and understood by our many readers. These two notions of clarity require very different skills. Content cannot be divorced from language and style. An arbitrator may have a strong legal point, but if the arbitrator buries that point in dense, dull, turgid prose, then he or she risks being misunderstood.

An introduction, identifying what the case is all about and the issues to be resolved, reflects a simple principle of clear and persuasive writing: The writer must give the context before burdening the reader with the details. Context before details is essential for cognitive clarity. And cognitive clarity, as much as substantive clarity, is a critical ingredient of a persuasive judgment.

2. Accountability to the Parties

Reasons have to show the parties that the arbitrator heard, understood, and fairly considered their positions. The parties must feel that the arbitrator listened to their stories. Only then will the process seem fair, the decision acceptable, and the reasons persuasive. Kenneth Burke, a great rhetorician, put it this way: "You persuade a man only insofar as you can talk his language, by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his."

3. Transparent Reasoning

The third and perhaps most important quality of a persuasive decision is that the arbitrator's reasoning must be transparent. In their reasons, arbitrators must, in a word, say why. Conclusory reasoning is not acceptable. Arbitrators should put on paper the reasoning they presumably undertook in their head. If an arbitrator disbelieves a witness, the arbitrator has an obligation to tell that person why. The losing party—whom Chancellor Megarry, in a famous line, called the most important person in the courtroom—is entitled to know why he or she lost.

Should an arbitrator try to write a decision as literature? To be sure, literary rhetoric is almost inevitable in any decision, and it is not incompatible with responsible decision making. It may be especially useful where the arbitrator is trying to "sell" his or her opinion, where the burden of persuasion is high. There are Canadian judges who have used literary devices or literary references very effectively. Here are two examples.

The first is Justice Binnie's dissent in *R. v. Rose,* where the majority upheld as constitutional the *Criminal Code* mandated order of closing jury addresses. Justice Binnie is not just a towering intellect; he is surely one of Canada's finest and most powerful judicial writers. In his stirring dissent, he invokes Shakespeare to refute

the majority's proposition that the Crown's closing address is a mere summary of the evidence, and has little effect on the result:

> While it would be comforting to think that in a criminal trial facts speak for themselves, the reality is that "facts" emerge from evidence that is given shape by sometimes skilful advocacy into a coherent and compelling prosecution. The successful prosecutor downplays or disclaims the craftsmanship involved in shaping the story. Such modesty should be treated with skepticism. The rules of "prosecutorial" advocacy have not changed much since Shakespeare put a "just the facts" speech in the mouth of Mark Antony:
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> > For I have neither wit, nor words, nor worth, action, nor utterance, nor the power of speech to stir men's blood; I only speak right on. I tell you that which you yourselves do know, Show your sweet Caesar's wounds, poor poor dumb mouths, and bid them speak for me." *Julius Caesar*, Act III, Scene ii.

A second example is Justice LeBePs charming, almost Denningesque opening in a mundane intellectual property case:

> The friendly face of Caillou, with his round cheeks and expression of wide-eyed surprise, has delighted countless young children and won over their parents and grandparents. Today, this charming little character, a creation that sprang from the imagination and from the art of form and colour, is moving out of the world where he welcomes his new baby sister, or gets ready for kindergarten. Unintentionally, no doubt, he is now making a contribution to the development of commercial arbitration law in the field of intellectual property. What has happened is that the people who consider themselves to be his mothers are engaged in battle for him. The respondent claims exclusive maternity. The appellants believe it was a joint effort. The manner in which their dispute is to be resolved has itself become the subject of a major disagreement, and that is what is now before this Court.

These are passages that we are likely to remember, that are likely to stay with us. So what harm can there be in trying to write not just a judgment but a good or even great piece of literature?

The first potential problem is that the attempt is unlikely to be successful. Generally arbitrators overall write pretty well. Otherwise they would not be acceptable to the parties. However, attempts to employ literary and rhetorical devices are often unsuccessful.

Second, and perhaps more serious, the use of these devices to strengthen the persuasive power of a decision may mask flaws in logic or conceal a lack of clarity in legal analysis. This concern calls to mind the advice of George Orwell in his famous essay, "Politics and the English Language." He said, "what is above all needed is to let the meaning choose the word, and not the other

way about." Orwell believed that if a writer uses straightforward English, then if nothing else, "when you make a stupid remark, its stupidity will be obvious, even to yourself."

Especially insidious are the snappy, superficially attractive one-liners, or the initially seductive but careless metaphors. Even in Canada, we remember all too well Justice Potter Stewart's opinion on what constitutes hard-core pornography, and thus unprotected speech under the U.S. Constitution's First Amendment: "I shall not today attempt to further define it . . . but I know it when I see it." At heart, was this not an abdication of his judicial duty to try to define the boundary, however hard that may have been?

The third harm from trying to write literature is that the arbitrator who tries to do so will inevitably overwrite. In our view, overwriting is almost always to be avoided. Most cases do not have the grand themes of great novels and great poetry. Reasons for decision should not try to create the dramatic tension found in a great work of fiction. As previously noted, real lives, real relationships, and real fortunes are at stake in an arbitrator's decision. Indeed, in a practical sense, a decision is invariably more effective if instead of creating dramatic tension, its outcome is stated up front.

Moreover, arbitrators need to be modest about the task in front of them. They need to decide the case and resist the temptation to articulate grand pronouncements or write great literature. The unanticipated consequences of doing so may come back to haunt them or their colleagues in future cases. In the memorable phrase of Harvard law professor Cass Sunstein, arbitrators should be "judicial minimalists." Trying to write a piece of literature puts minimalism at risk.

Finally, trying to write great literature runs up against the pressures of time, of getting your decision out.

Arbitrators should not spend a whole lot of time savoring a line or phrase for its literary flourish. There is no English professor who might give it an A- instead of a B+. Parties are far less likely to be interested in your rhetoric than they are in your decisions. They want results so that they can get on with their lives. It is the fundamental duty of an arbitrator to serve the parties by delivering those results. Arbitrators serve the parties best if they communicate with them clearly, concisely, and quickly. To invoke Robert Frost once again, communicating effectively will perhaps allow arbitrators to provide a stay against confusion that is more than just momentary.