March 6, 2015

A Remarkable, Plain Language Judgment from the Ontario Court of Justice

By: John-Paul Boyd

Case Commented On: *R v Armitage*, 2015 ONCJ 64 (CanLII)

A few weeks ago, Mr. Justice Nakatsuru of the Ontario Court of Justice released a remarkable judgment in the case of *R. v Jesse Armitage*. A flood of decisions in criminal matters are released every day, and in that sense Justice Nakatsuru's sentencing decision in *Armitage* was not exceptional. What sets the judgment apart are the judge's decisions to direct his opinion to the offender and to write that opinion entirely in plain language.

Here are the first five paragraphs of Justice Nakatsuru's judgment, in which he explains how and why he has chosen to write his judgment:

> [1] This case was heard in the Gladue court at Old City Hall in Toronto. Jesse Armitage is a troubled man of Aboriginal heritage who was sentenced by me a number of months ago. At the time I gave my decision, I said that I would draft and release a written decision. This is that decision.
>
> [2] Before I get to this, I would like to make two short comments. First of all, I want to say something about the style of this decision. For those who have read some of my past judgments, the reader may notice a change. For Jesse Armitage, I have tried to say what I wanted to say in very plain language. I believe that this is very important for judges to do in every decision. However, judges often do not do a good job of this. I would describe myself as one of the worst sinners. As lawyers first and then judges, we get used to using words that are long and complicated. This only muddies the message we are trying to say. That message is very important when it comes to passing a sentence on an offender. That the message is clear is even more important in the Gladue courtroom.
>
> [3] I say this because in the Gladue court at Old City Hall, accused persons who share a proud history of the first people who lived in this nation, not only have a right to be heard, but they also have a right to fully understand. Their voices are heard by the judges. And they must also know that we have heard them. I believe that the accused persons who have been in this court have had good experiences in this. This is something that they have come to appreciate. This is something they have a right to expect.
>
> [4] I know that all accused, whether they have any Aboriginal blood or not, should have this right. Judges struggle to make sure they do. However, when judges write their

> decisions, they are writing for different readers, different audiences. Judges write not only for the parties before them. Judges write to other readers of the law. Lawyers. Other judges. The community.
>
> [5] In this case, I am writing for Jesse Armitage.

What follows over the next 67 paragraphs is an eloquent discussion of the offender's past, the circumstances of the offence and the offender's hopes for the future, and an elegant explanation of the judge's rationale for the sentence imposed.

The marvellous compassion of the court aside, the relevance Justice Nakatsuru's decision has for those interested in access to justice lies in this statement:

> For Jesse Armitage, I have tried to say what I wanted to say in very plain language. I believe that this is very important for judges to do in every decision.

I have written about the importance of communicating in plain language in an earlier post on writing and sharing information on the law and in a post on writing for people who are not lawyers, and elsewhere on the difficulties presented by legislation that is not written in plain language.

In that last post, in fact, I frame the unintelligibility of legislation as a serious barrier to justice. Of course, statute law is only one source of the law; the other main source is case law. In our civil system of justice, case law not only articulates uncodified legal concepts, such as the doctrine of paramountcy, the principle of comity or the concept of unjust enrichment, quite frequently it serves to interpret statute law. As a result, the law applicable to a particular legal issue is more often than not an amalgam of the two sources of the law, and incomprehensible judicial decisions are just as much of a barrier to justice as incomprehensible legislation.

Regrettably, plain language writing requires effort and time, and our trial judges are often bereft of the latter. It can be challenging to express complicated legal concepts without slipping into legalese, and such explanations usually require far more words than you'd expect to achieve accuracy. (Lawyers understand, for example, the meaning of a*per stirpes* estate distribution merely by uttering the phrase. How many words are necessary to explain the concept in plain language?) As a result, writing in plain language is unquestionably burdensome, particularly when the burden of accuracy is encumbered by a wish to avoid being overturned on appeal.

Plain language writing, however, is also a skill which can be honed and refined merely by dint of repetition like any other skill, and I exhort all judges and lawyers to the effort. It is a foundational principle of the rule of law in civil democratic societies that the law be clear, comprehensible and certain, and we cannot continue to talk about the law in our secret language if we are to meaningfully improve access to justice.

For those interested, I have a number of resources on plain language I can provide upon request, and I recommend to judges the National Judicial Institute's excellent bench book, *Self-Represented Litigants and Self-Represented Accused*, which provides "suggested language" to express many common, complicated legal concepts to persons without counsel.

Here, by way of conclusion, are the articulate and touching final six paragraphs of Justice Nakatsuru's judgment:

> [67] There is a post-script to my decision. Mr. Armitage did not make it to his first attendance with me after his sentence. Within days he was again arrested for doing very much the same thing he has always done.
>
> [68] In writing this part of my decision, I first thought I would say that I was disappointed or that it was with sadness that I had to report this. However, I decided against writing this.
>
> [69] First of all, it was not unexpected to me. How could it be? I was only surprised how quickly this happened. I asked Mr. Armitage about that. He had no money. He had little to do. I don't think he really knows why. Even before I had passed sentence I sensed that Mr. Armitage's path along this journey would not be straightforward.
>
> [70] More importantly though is what happened when he came back before me on his conditional sentence breach. Mr. Armitage asked that 9 months of the remainder of his conditional sentence order be served in jail. He did this so that he could be sent to St. Lawrence Valley Treatment Center. He asked for this because he wanted to be sure he had enough time in custody to fully make use of the help available. This was not something that came from me or the Crown. It came from Jesse Armitage. I add that Ms. Kelly was very thoughtful and careful in her representation of him. This will be by far the longest jail term he will have done to date. To be frank, I would have considered something less.
>
> [71] Mr. Armitage asked for this because I believe he knew that there was no other way for him to get healthy. I believe that he had come to a point in his life where he was ready. Ready for a chance to change.
>
> [72] When an offender has come to this point, no matter how long, tortuous, or difficult the path taken to get there, there cannot be sadness or disappointment. There can only be hope.

This post originally appeared on Access to Justice in Canada.