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## When Some Are Not Enough: Appealing Trial Judgments for Lack of Reasons



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Canadian Courts are generally reluctant to overturn a trial decision on the basis that the trial judge failed to provide adequate reasons. Not every finding or conclusion reached at trial needs to be explained. Instead, appellate Courts apply a “contextual approach”. They decide if the trial judge’s reasons allow for “meaningful appellate review”.

Despite the deference shown to reasons of a lower court, appeal Courts are inclined to overturn a decision where the foundation of the trial judge’s decision is not explained.

A recent decision of the Ontario Court of Appeal, *Dovbush v. Mouzitchka*, 2016 ONCA 381 (“*Dovbush*”) illustrates that a trial judge runs afoul of the duty to provide reasons where she only makes generic findings of credibility and fails to resolve key legal issues.

### The Trial in *Dovbush*

*Dovbush* involved a purchase by the plaintiff of the defendant’s cable network business. The plaintiffs

had orally agreed to purchase the defendant’s shares in the company. In support of the purchase, the plaintiffs provided the defendants with several payments totaling \$600,000.

After the exchange of many letters of intent, the relationship between the parties dissolved. The plaintiffs commenced an action against the defendants for the return of their \$600,000 after the relationship fell apart. The chief issue at trial was the correct characterization of the monies advanced by the plaintiffs during the parties’ dealings.

The plaintiffs argued that they sought the return of a refundable deposit, down payment or loan pending the completion of the transaction. They argued this amount was repayable by the defendants in the event of the non-completion of the transaction.

On the other hand, the defendants argued that the advances provided by the plaintiffs were non-refundable partial payments on account of the purchase price.

The trial judge dismissed the plaintiff's action. In so doing, he held that the chief issue between the parties was the correct characterization of the transaction. Ultimately, the Court of Appeal overturned this decision and held that the real issue at trial was not the correct characterization of the transaction, but the correct characterization of the monies advanced. The Court of Appeal held that a new trial had to be held on the basis of this error.

However, the Court of Appeal further held that a new trial had to be ordered on the basis that the trial judge's reasons did not permit the Court to engage in a "meaningful appellate review".

### What Amounts to "Meaningful Appellate Review"?

Adequate reasons for decision are essential for any trial judge. The Court of Appeal noted the rationales for adequate reasons:

The rationale is that reasons are necessary (i) to justify and explain the result; (ii) to tell the losing party why he or she lost; (iii) to provide public accountability and satisfy the public that justice has been done and is seen to have been done; and (iv) to permit effective appellate review.

The Court of Appeal began by noting that a trial judgment cannot be reserved merely because a trial judge did a poor job of expressing herself. The failure to give adequate

reasons for decision is not a free-standing basis for appeal.

However, where the trial judge's reasons preclude "meaningful appellate review", the appellate court may intervene.

In determining whether the reasons preclude meaningful appellate review, the Court adopts a "contextual and functional approach". The issue is whether the judge's reasons show "the path taken by the trial judge through confused and conflicting evidence".

Citing *R. v. Morriseey*, 1995 CalnLII 3498 (Ont. C.A.), the Court explained that the trial judge is required to explain how the "what" of the decision is connected to the "why":

...What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

This does not mean that the trial judge needs to set out every finding and conclusion that leads to the verdict. Rather, the trial judge is asked to "address troublesome principles of unsettled law or to resolve confused and contradictory evidence on a key issue".

In *Dovbush*, the trial judge's reasons failed to meet this standard for the reasons set out below.

### Confused and Contradictory Evidence Should Be Resolved

The Court of Appeal noted that there was "confused and contradictory evidence on a number of key issues", but no explanation on how the conflicts were resolved, if they were at all.

While each party submitted lengthy written submissions addressing these issues, the Court of Appeal held that the trial judge did not refer to them. According to the Court, the trial judge was required "to show that he at least applied his mind to, and come to grips with these various questions".

### Generic Boiler-Plate Findings of Credibility

The Court of Appeal further held that the trial judge's findings of credibility were "generic boiler-plate findings of credibility".

The trial judge's "entire consideration" of credibility issues, according to the Court, was as follows:

I found the [defendants] credible. On the contrary, I found [the plaintiff] and his brother...to be incredible. They (the brothers) made assertions of fact which simply made no sense in the normal course of business conduct. Where the evidence differs as between the brothers and the [defendants'], I prefer the latter.

The Court held that this statement did not amount to adequate findings of credibility for the purposes of a

trial. A trial judge “owes the losing party an explanation for rejecting the evidence of a key witness or witnesses (particularly when the key witnesses are, themselves, the losing parties), and while the absence of such an explanation is not necessarily dispositive, it may go a long way toward putting the reasons beyond the reach of meaningful appellate review”.

### **Key Legal Issues Should Be Addressed**

The Court of Appeal also noted that there was case law to support the position that a down payment is generally refundable, in the absence of evidence to the contrary. Moreover, even if the amount paid by the plaintiffs amounted to a non-refundable deposit, case law

also supported the position that where the sum of the deposit is out of proportion to the losses suffered, the Court can order the deposit returned.

The Court of Appeal held that these issues were not addressed by the trial judge. The appeal Court was uncertain how the principles relating to refundable and non-refundable down payments and deposits would have been interpreted on the record. On this basis, the reasons were inadequate. A new trial was ordered.

### **Conclusion**

The Court of Appeal’s decision in *Dovbush* illustrates that though difficult to prove, inadequate reasons at trial still amount to a worthy basis for appellate review.

Where an appellant can show the lack of relationship between the “what” and the “why” in the trial judge’s reasons, there are at least grounds for appellate scrutiny. Much will depend on whether the inadequate reasons amount to isolated instances within the context of the judgment as a whole.

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